Covid-19 and Constitutional Law

COVID-19 et droit constitutionnel

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COVID-19 AND CONSTITUTIONAL LAW

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AND CONSTITUTIONAL LAW

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CONTENTS

Preface IX

Préface XI

Prefacio XIII
José Ma. SERNA DE LA GARZA

AFRICA

Cameroon's Response to the COVID-19 Pandemic: Combating a Deadly Pandemic Within a Weak Rule of Law Framework 3
Charles MANGA FOMBAD
Gatsi TAZO

De quelques aspects constitutionnels lies a la pandemie du COVID-19 au Maroc 13
Abdelaziz LAMGHARI

Le droit constitutionnel à l'épreuve de la pandémie de la COVID-19: cas du Niger 21
Oumarou NAREY

AMERICA

When the Center Lies Outside the Figure: Republic, Imbalance of Powers and Emergencies 33
Pablo RIBERI

COVID-19 and the Brazilian Reaction 41
Marcelo FIGUEIREDO

COVID-19 and Constitutional Law: the Case of Mexico 53
José Ma. SERNA DE LA GARZA

Fundamental Rights During the Coronavirus Pandemic in Peru 63
César LANDA
COVID-19 and the US Constitution 69
Tom GINSBURG
Venezuela: COVID-19 + Dictatorship + Complex Humanitarian Emergency 75
Carlos AYALA CORAO

ASIA

COVID-19's Impact on Civil and Political Rights: Reflections from Hong Kong 91
Surya DEVA
COVID-19 and the Court in India 99
Uday SHANKAR
Constitutional Oversight Mechanism for Government Decision Making in an Era with COVID-19. 107
Akiko EJIMA
The Sri Lankan Experience with COVID-19: Strengthening Rule by Executive 115
Kumaravadivel GURUPARAN

EUROPE

Questions of Constitutional Law in the Belgian Fight against COVID-19 123
Toon MOONEN
COVID-19 and Constitutional Law in Denmark 131
Sune KLINGE
Helle KRUNKE
Annemette FALLENTIN NYBORG
Jens Elo RYTTER
La crise sanitaire: un revelateur de la crise de la democratie liberale. Reflexions sommaires a partir de la situation française 141
Bertrand MATHIEU

COVID-19 and Constitutional Law: the Case of Germany 149
Laura HERING
COVID-19 and The Responsiveness of the Hungarian Constitutional System 157
Fruzsina GÁRDOS-OROSZ
COVID-19 Regulation in Norway and State of Exception. 167
Hans Petter GRAVER
COVID-19 and Constitutional Law: the Case of Poland 175
Marek ZUBIK
Dominik ŁUKOWIAK
La experiencia de España en el Estado de alarma ante el coronavirus . 181
Javier GARCÍA ROCA
COVID-19 and Constitutional Law: Romania 191
Elena-Simina TANASESCU
COVID-19 and Constitutional Law in the United Kingdom 199
Merris AMOS

MIDDLE EAST

Impacts of the COVID-19 Pandamic on the Constitutional Rights in Turkey 209
Selin ESEN

OCEANIA

Australia – COVID-19 and Constitutional Law 223
Selena BATEMAN
Adrienne STONE
New Zealand, COVID-19 and the Constitution: an Effective Lockdown and Muted Rule of Law Concerns 233
Dean R. KNIGHT

PREFACE

The Institute of Legal Research of Mexico's National University, the International Association of Constitutional Law (IACL) and the Ibero-American Institute of Constitutional Law, agreed in March 2020 to work together in order to produce a testimony of how states of different parts of the world have responded to the COVID-19 crisis, from the constitutional point of view. The result of this common effort is this book: "COVID-19 and Constitutional Law".

The coronavirus disease pandemic (COVID-19) has affected many aspects of our lives, in many ways, all over the world. Public authorities in most countries have been taking a series of measures which they have deemed necessary to prevent or control the spread of the disease. Most of those measures correspond, not to the "normal" day-to-day management of public affairs, but to a situation of "emergency". In this way, the mobility of people has been severely restricted; in some instances, public force has been used to implement these and other restrictions; schools have had to suspend classes; some public health services seem to have reached such a critical point and overload that they did not have the capacity to treat and protect everybody; businesses have been ordered to suspend their activities until further notice; elections have been postponed; institutions for disaster management have been put at work; unemployment, food and water insecurity have raised. Moreover, the normal relationships and interactions between branches of government and between the different levels of government in federal and decentralized states have been altered. These and many other phenomena that are happening around the world in the middle of the pandemic crisis have constitutional implications.

The purpose of this book is to trace a very broad map of the different constitutional issues that are being debated in different parts of the world in the context of the pandemic. In view of this, scholars of 26 countries were invited to submit a short commentary on which constitutional issues are of concern in their part of the world, in the context of the COVID-19 crisis. The contributors to this book were required, not to submit an extensive and deep piece of research, but to produce a concise text explaining, very sche-

matically, the most important constitutional issues and debates concerning their country's response to the problems derived from the pandemic. This "mapping" will hopefully be the basis for conducting deeper analysis in future research projects in the field of comparative constitutional law, in connection with crisis derived from pandemics.

Following the guidelines of the International Association of Constitutional Law, contributors to this collective work were asked to write their texts in English or in French. However, since the book was edited and published in Mexico, and to allow a broader participation, contributions in Spanish were also welcomed.

The Editorial Board in charge of reviewing all the texts was formed by Helle Krunke (First Vice President of the IACL) Iris Nguyen Duy (Deputy Secretary General of the IACL) and by José Ma. Serna (member of the Executive Committee of the same association). Since the first steps of this project, the support and guidance of Adrienne Stone (President of the IACL), of Pedro Salazar (Director of the Institute of Legal Research of Mexico's National University) and of Diego Valadés (President of the Ibero-American Institute of Constitutional Law), was essential and invaluable. We thank them for this, in the same way as we thank all the scholars that responded positively and enthusiastically to our invitation to participate in this global academic project.

José Ma. Serna de la Garza
Coordinator

PRÉFACE

L'Institut de Recherche Juridique de l'Université Nationale du Mexique, l'Association Internationale de Droit Constitutionnel (AIDC), et l'Institut Ibéro-américain de Droit Constitutionnel, ont convenu en mars 2020 de travailler ensemble pour rassembler des témoignages sur la manière dont les États de différentes régions du monde ont réagi à la crise du COVID-19, d'un point de vue constitutionnel. Le résultat de cet effort commun est ce livre: "COVID-19 et Droit Constitutionnel".

La pandémie de coronavirus (COVID-19) a affecté de nombreux aspects de nos vies, partout dans le monde, et de nombreuses manières. Dans la plupart des pays, les pouvoirs publics ont pris une série de mesures qu'ils ont jugées nécessaires pour prévenir ou contrôler la propagation de la maladie. La plupart de ces mesures correspondent, non pas à la gestion quotidienne «normale» des affaires publiques, mais à une situation «d›urgence». De cette façon, la mobilité des personnes a été sévèrement restreinte; dans certains cas, la force publique a été utilisée pour appliquer ces restrictions et d›autres; les écoles ont dû suspendre les enseignements; certains services de santé publique ont semblé atteindre un seuil critique et une surcharge ne leur permettant pas de proteger et de traiter efficacement tout le monde; les entreprises ont dû suspendre leurs activités jusqu'à nouvel ordre; les élections ont été reportées; des institutions de gestion des catastrophes ont été mises en place; le chômage, l'insécurité alimentaire et le stress hydrique ont augmenté. En outre, les relations et interactions normales entre les branches du gouvernement et entre les différents niveaux de gouvernement dans les États fédéraux ou décentralisés ont été touchés. Ces événements et bien d'autres qui se produisent dans le monde au milieu de la crise sanitaire ont des implications constitutionnelles.

Le but de ce livre est de tracer une carte très large des différentes questions constitutionnelles qui sont débattues dans différentes parties du monde dans le contexte de la pandémie. Pour ce faire, des juristes de 26 pays ont été invités à soumettre un bref commentaire sur les questions constitutionnelles préoccupantes dans leur partie du monde, dans le contexte de la crise du COVID-19. Les contributeurs à ce livre étaient tenus, non pas de sou-

mettre une recherche vaste et approfondie, mais de produire un texte concis expliquant, de manière très schématique, les questions constitutionnelles et les débats les plus importants liés à la réponse de leur pays aux problèmes découlant de la pandémie. Cette «cartographie» devrait servir de base à une analyse plus approfondie dans le cadre de futurs projets de recherche dans le domaine du droit constitutionnel comparé face aux crises sanitaires.

Conformément aux directives de l'AIDC, les contributeurs à cet ouvrage collectif ont été invités à rédiger leurs textes en anglais ou en français. Cependant, puisque le livre a été édité et publié au Mexique, et pour permettre une participation plus large, les contributions en espagnol furent également bienvenues.

Le comité de rédaction chargé de réviser tous les textes a été formé par Helle Krunke (Première Vice-présidente de l'AIDC) Iris Nguyen Duy (Secrétaire Générale Adjointe de l'AIDC) et par José Ma. Serna (membre du Comité Exécutif de la même association). Dès les premières étapes de ce projet, le soutien et les conseils d'Adrienne Stone (Présidente de l'AIDC), de Pedro Salazar (Directeur de l'Institut de Recherche Juridique de l'Université Nationale du Mexique) et de Diego Valadés (Président de l'Institut ibéro-américain de Droit Constitutionnel), nous ont été essentiels et précieux. Nous les en remercions, de la même manière que nous remercions tous les chercheurs qui ont répondu positivement et avec enthousiasme à notre invitation à participer à ce projet académique mondial.

José Ma. Serna de la Garza
Coordinateur

PREFACIO

El Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, la Asociación Internacional de Derecho Constitucional (AIDC) y el Instituto Iberoamericano de Derecho Constitucional, acordaron en marzo de 2020 trabajar juntos para producir un testimonio acerca de cómo Estados de diferentes partes del mundo han respondido a la crisis del COVID-19, desde un punto de vista constitucional. El resultado de este esfuerzo común es el presente libro: "COVID-19 y Derecho Constitucional".

La pandemia del coronavirus (COVID-19) ha afectado muchos aspectos de nuestras vidas, alrededor de todo el mundo, y de maneras muy diversas. Las autoridades públicas de la mayoría de los países han tomado una serie de medidas que han considerado necesarias para prevenir o controlar la expansión de la enfermedad. La mayoría de esas medidas corresponden, no al manejo "normal" de los asuntos públicos, sino a situaciones de "emergencia". De esta manera, la movilidad de las personas ha sido limitada severamente; en algunos casos, la fuerza pública ha sido usada para implementar éstas y otras restricciones; las escuelas han tenido que suspender clases; algunos servicios de salud pública han alcanzado niveles críticos de saturación, al grado de correr el riesgo de que muchas personas podrían no ser atendidas; a miles de negocios se les ha ordenado suspender sus actividades hasta nuevo aviso; muchas procesos electorales han sido pospuestos; las instituciones para el manejo de desastres se han puesto en movimiento; el desempleo y la inseguridad alimentaria y de acceso al agua se han incrementado. Además, las relaciones e interacciones normales entre ramas de gobierno y entre órdenes de gobierno en los Estados federales o descentralizados se han alterado. Estos y muchos otros fenómenos que están ocurriendo en el mundo en medio de la crisis sanitaria tienen implicaciones constitucionales.

El propósito del presente libro es trazar un mapa muy amplio de los diferentes temas constitucionales que se han discutido en distintas partes del mundo en el contexto de la pandemia. En razón de lo anterior, juristas de 26 países fueron invitados a enviar un comentario breve sobre cuáles son los temas constitucionales que han sido de preocupación e interés en su país, en el

contexto de la crisis del COVID-19. Quienes participan en este libro fueron invitados, no a enviar una investigación extensa y profunda, sino a producir un texto conciso explicando, de manera muy esquemática, los temas constitucionales más importantes debatidos en su respectivo país, vinculados con las respuestas a los problemas que se han dado como consecuencia de la pandemia. La intención es que este "mapeo" sea una base para realizar análisis más profundos en futuros proyectos de investigación en el campo del derecho constitucional comparado, en relación con crisis derivadas de pandemias.

Siguiendo las directrices de la AIDC, a las y los autores que participan en este libro colectivo se les pidió escribir sus textos en inglés o en francés. Sin embargo, debido a que le libro se edita y publica en México, y para lograr una participación más amplia, las contribuciones en español también fueron bienvenidas.

El Comité Editorial encargado de revisar todos los trabajos estuvo formado por Helle Krunke (Primera Vicepresidenta de la AIDC), Iris Nguyen Duy (Secretaria General Adjunta de la AIDC), y por José Ma. Serna (miembro del Comité Ejecutivo de dicha asociación). Desde el inicio de este proyecto, el apoyo y la orientación de Adrienne Stone (Presidenta de la AIDC), de Pedro Salazar (Director del Instituto de Investigaciones Jurídicas de la UNAM) y de Diego Valadés (Presidente del Instituto Iberoamericano de Derecho Constitucional) resultó esencial e invaluable. Les agradecemos por ello, de la misma manera que agradecemos a todas y todos los juristas que respondieron de manera positiva y entusiasta a nuestra invitación para participar en este proyecto académico global.

José Ma. Serna de la Garza
Coordinador

AFRICA

CAMEROON'S RESPONSE TO THE COVID-19 PANDEMIC: COMBATING A DEADLY PANDEMIC WITHIN A WEAK RULE OF LAW FRAMEWORK

Charles MANGA FOMBAD*
Gatsi TAZO**

SUMMARY: I. *Introduction*. II. *The constitutional and regulatory framework for dealing with such emergencies*. III. *Measures taken to control the spread of Covid-19*. IV. *A critical review of the government response*. V. *Conclusion*.

I. INTRODUCTION

As the COVID-19 crisis deepens, with no obvious end in sight, the measures that African countries are taking to limit the spread of the virus increasingly comes into focus. This is mainly because it comes at a time that many countries on the continent are facing diverse economic and political challenges. This is particularly so with Cameroon, which since 2016 has been grappling with a crippling civilian armed conflict. The gravity of the impact of the pandemic on the country is underscored by the results of a recent study carried out by TV5Monde and published on their website, dated 14 July 2020, which shows that Cameroon is the third most affected country in Africa, behind South Africa and Nigeria.[1]

Cameroon, like most other countries must at one stage or another deal with emergency situations such as those posed by the COVID-19 virus. Providing for special powers to be exercised during these exceptional times is now a practice common to all states, whether democratic or not. The criti-

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[1] *https://information.tv5monde.com/afrique/coronavirus-en-afrique-quels-sont-les-pays-impactes-350968*.

cal issue with the exercise of emergency powers is not only to ensure that these are exercised in a manner that effectively deals with the crisis but also that the extraordinary powers usually vested on government are not abused. Prior to 1990, emergency powers in Cameroon had largely been used to perpetuate an authoritarian system noted for its regular violations of human rights. A new framework for regulating declarations of states of emergency was introduced in the revised Cameroonian Constitution of 1996. The responses to the COVID-19 pandemic gives us today an opportunity to assess whether these reforms succeeded. This raises two main issues. First, the effectiveness of legal framework for exercising emergency powers and secondly the effectiveness of their implementation.

In examining Cameroon's response to the pandemic, the next section of this chapter will provide a general overview of the constitutional and regulatory framework for dealing with such emergencies. This is followed by section 3, which examines some of the main measures put in place by the Government to control the spread of the virus. Section 4 takes a critical look at the Government's response. In concluding, it is contended that for a deadly pandemic like this, the weak measures put in place by the Cameroonian government have been compounded by the generally weak framework for constitutionalism and respect for the rule of law.

II. The constitutional and regulatory framework for dealing with such emergencies

The global COVID-19 pandemic is a perfect example of the emergency situations that states may face and which may therefore require recourse to the law of emergency. In Cameroon the legal framework for dealing with emergencies is spelt out in the 1996 Constitution and other subsidiary legislation. We will briefly look at the constitutional framework, followed by the regulatory framework and the oversight mechanisms provided for preventing any abuse of emergency powers.

1. *Constitutional framework*

Cameroon has a long history of declaring states of emergency. Before the 1990s this was the main instrument used for silencing critics of the regime and was enforced by a notorious law, the 1962 Ordinance to Repress Subversive Activities (Ordinance No. 62/OF/18 of 12 March 1962). The

repeal of this law and the constitutional entrenchment of a special regime to deal with states of emergency was one of the reforms carried out when the constitution was revised in 1996. The new regime dealing with states of emergency is provided for in article 9 of the 1996 Constitution, which states as follows:

> 1) 'The President of the Republic may, where circumstances so warrant, declare by decree a state of emergency which shall confer upon him such special powers as may be provided for by law.
>
> 2) In the event of a serious threat to the nation's territorial integrity or to its existence, its independence or institutions, the President of the Republic may declare a state of siege by decree and take any measures as he may deem necessary. He shall inform the Nation of his decision by message.

The question, however, is whether this provision reduces the considerable risks that declaration of states of emergency pose to human rights and progress towards a culture of constitutionalism and respect for the rule of law. This, will depend on the safeguards provided for by the constitution and relevant regulations for checking against any abuses. But before we consider these safeguards, we will briefly look at the relevant legislation implementing this regime of state of emergency.

2. *The regulatory framework*

The main regulatory instrument is Law No. 90/047 of 1990 Relating to the State of Emergency (hereinafter, 1990 Emergency Law), which gives more details on situations that can lead to the declaration of a state of emergency and regulates the powers of administrative authorities in the event of such a declaration. According to article 1 of this Law, a state of emergency may be proclaimed in the event of an occurrence which, by its nature and gravity, is considered a national disaster, or a series of disturbances undermining public order or the security of the state, or a foreign invasion.

Article 5 of the 1990 Emergency Law states that upon proclamation of a state of emergency, competent administrative authorities at national, regional and divisional level are given powers which enable them make certain orders that are immediately enforceable and these may, for example;

> a) subject the movement of persons and property to restriction, and, if necessary, to administrative authorisation;
>
> …

c) prohibit all meetings and publications that foster disorder;

d) prescribe areas of protection or of security within which the presence of human beings shall be subject to regulation;

e) call, in prescribed form, upon the military authorities for standing assistance in the maintenance of law and order;

…

g) order the detention of persons deemed dangerous to public security in any premises, including special prison cells for duration of 7 days by Senior Divisional Officers and 15 days by Governors.

In addition to the above powers given sub-regional authorities, the Minister in charge of Territorial Administration is empowered to, by ministerial orders, take measures such as ordering the closure as and when necessary, of entertainment halls, drinking and meeting places of any kind, disperse any assembly or suspend any association which may provoke armed demonstration.

Several other pieces of legislation of a general nature can be invoked to deal with emergency situations. These are laws that are provided for to ensure the maintenance of law and order and these laws can be enforced regardless of whether a formal state of emergency or a state of siege has been declared or not. Perhaps the most important of these is Law No. 90/054 of 1990 relating to the maintenance of public order which gives the administrative authorities the power to take measures such as limiting the movement of persons and goods, ordering the police or gendarmerie to act in order to restore peace and order. Besides this, a number of other laws give general powers to sub-regional authorities (governors at the level of the region, senior divisional officers (SDO) at the level of the division and divisional officer (DO), at the level of the sub-division) to take a variety of measures to ensure the maintenance of order within their administrative competence.

It is to the issue of the checks provided to ensure that these powers are not abused that we will now turn.

3. *Oversight mechanisms of the exercise of emergency powers*

The primary oversight institutions provided for checking against any governmental arbitrariness in the exercise of emergency powers in Cameroon are the legislature and the judiciary.

A. *Legislative oversight*

Article 9 of the Constitution confers almost absolute powers on the President of the Republic with respect to the declaration of a state of emergency. The only qualification to this is article 9 (2) which requires him, insofar as the state of siege is concerned to inform the nation by message. Any other limits depend on the law that Parliament enacted to implement article 9.

Generally, legislative oversight is exercised in at least two instances. Firstly, under article 3(b) of the 1990 Emergency Law, Parliament may only intervene after the declaration of a state of emergency in the event where the President of the Republic desires to extend it beyond six months. They may only intervene to extend it for a non-renewable period of three months. However, even the effectiveness of this is doubtful because the Law is vague and makes it clear that the President merely consults Parliament and not that Parliamentary approval is necessary for the extension. Secondly, although articles 34-35 of the Constitution provides various modalities for Parliament to hold the executive accountable, such as through a vote of no confidence, and oral and written questions, it must be noted that this does not apply to the President. It is only ministers and other administrative officials that can be subject to this.

What must be noted therefore is that there are no constitutional constraints on the measures that the president may take or the limitations on fundamental rights that he may impose, in spite of the fact that Cameroon is a party to the International Covenant on Civil and Political Rights (ICCPR). Ensuring that any declaration of a state of emergency does not threaten fundamental human rights, respect for the rule of law and constitutionalism therefore depends on judicial scrutiny.

B. *Judicial scrutiny of state of emergency*

In Cameroon, judicial scrutiny of the exercise of emergency powers should place on the basis of its role as guardian and enforcer of the constitution. There are two main possibilities, one by taking action for any measures that violate the constitution and the other, action against administrative authorities who abuse the powers conferred on them by the emergency laws.

There is no possibility of bringing an action for measures taken that violate the constitution in Cameroon because the main victims of abusive use of emergency powers, the ordinary citizens, under article 47(2) of the

Constitution, have no *locus standi* before the Constitutional Council that has exclusive jurisdiction over constitutional review. As explained below, excessive judicial deference to the executive has limited the effectiveness of taking action against administrative authorities for abuse of office.

III. Measures taken to control the spread of Covid-19

So far, the Cameroon Government has not declared a state of emergency to fight COVID-19, and there is no emergency legal framework peculiar to situations of health emergency either. Unlike other states, Cameroon has not enacted any specific legal regulations tailored to deal with the pandemic. It has instead relied on the existing legal framework. Again, unlike in most African countries where the presidents have come out and taken the lead in coordinating the different measures adopted to deal with the crisis, the Cameroonian president, Paul Biya, has hardly been seen since the start of the crisis. Occasionally, the Government-owned media makes announcements about instructions that are supposed to have been given by the President. The measures that have been adopted have been at the national and subnational level.

At the national level, a series of measures were said to have been prescribed by the President of the Republic and made public by the Prime Minister. The measures, taken on the basis of a document referred to as, Government Strategic Response to the Coronavirus Pandemic, included the closure of borders; the closure of schools and universities; the ban on gatherings of more than 50 people; the closure of drinking spots, restaurants and other places of leisure as from 6 p.m.; and the restriction of urban and inter-urban movements.[2] A broadcast press release of 18 March 2020, signed by the Secretary General of the Prime Minister announced additional measures again said to be under the instructions of the President of the Republic.[3] After pressure from the international community, a presidential decree of 15 April 2020 commuted the prison sentences of certain prisoners and provided for the release of others.

[2] See the Government Response Strategy to the Coronavirus Pandemic published on *https://www.prc.cm/en/multimedia/documents/8228-government-response-strategy-to-the-coronavirus-pandemic-covid-19* made public on the 17th March 2020 and its supplement of the 9th April 2020.

[3] *https://www.cabri-sbo.org/uploads/files/Covid19BudgetDocuments/COMMUNIQUEZRADIOZ-ZAPPLICATIONZDESZMESURESZDEZRISPOSTEZCONTREZZL_1.pdf.*

As part of the Government Strategic Response to the Coronavirus Pandemic, the Prime Minister published a series of economic measures aimed at cushioning the effects of the pandemic on businesses, trade unions, and households. These measures included the suspensions for the second quarter of 2020 of general accounting audits; the postponement of the deadline for filing statistical and tax declarations; the granting of moratoria and deferrals of payment to companies directly affected by the crisis; the cancellation of penalties for the late payment of social security contributions due to the National Social Insurance Fund and the increase of family allowance from CFA 2800 francs to CFA 4500 francs.

In announcing the measures, the Prime Minister referred to consultation with an Inter-Ministerial Committee Responsible for Monitoring and Evaluating the Implementation of the Government Response Strategy Against the COVID-19 Pandemic, which is said to have been meeting weekly. However, there is little information as to the date of its creation, its composition and its meetings.

As the sub-national level, the regional Governors, the SDOs and DOs in different parts of the country have taken diverse and sometimes conflicting measures, acting under their mandate to maintain public order in order to arrest the spread of the virus in their administrative areas.

IV. A CRITICAL REVIEW OF THE GOVERNMENT RESPONSE

Four major problems have had a negative impact on the ability of the Cameroon government to deal effectively with the COVID-19 crisis, first, the weak and uncertain legal framework, secondly the lack of a clear and coordinated policy and thirdly, the absence of effective oversight and finally, the frequent abuses of the wide ranging powers assumed to deal with the pandemic.

1. *The weak and uncertain legal framework*

As pointed out earlier, no state of emergency was ever declared nor has any specific law been enacted by Parliament to deal with the crisis. Although the Prime Minister and other members of the executive have the powers under articles 27 and 28 of the Constitution to make rules and regulations, the document relied upon is the so-called Government Strategic Response to the Coronavirus Pandemic, which at best, is a policy document and thus not strictly binding. In spite of this, law enforcement officers

have strictly enforced the restrictions contained in this document at huge cost in some instances to citizens. For example, a minister ordered a private clinic to be closed for violating an order that created special centres for treating all COVID-19 cases, yet the order did not prohibit private clinics from admitting these patients.

As a result of not formally declaring a state of emergency or enacting a specific law to deal with the crisis, the Government has been able to implement measures that are only compatible with the declaration of a state of emergency without complying with the basic requirements, such as notification of the other state parties to the ICCPR on the derogating measures it has taken.[4] In this way, it has avoided international scrutiny for its actions. Furthermore, it has left a legal predicament in which each administrative authority, as is shown below, more or less takes such measures as it thinks fit.

2. *Lack of clear and coordinated policy*

Although statements from the Prime Minister's office suggest that there was an inter-ministerial coordination committee, it is doubtful whether this is so or if so, whether it helped in planning and coordinating policies. On several occasions, there were conflicting policies not only between the central government and sub-national units but also between the different sub-national units. For example, the SDOs of two divisions, Menoua and Menchum, prohibited the entry or movement of all corpses regardless of the causes of death in their divisions. It was only after widespread public protest that this was limited to corpses of people who died from COVID-19. It nevertheless caused serious hardship to those transiting through these divisions. Another example occurred in the Littoral region where the Governor imposed more restrictive measures on the consumption of alcohol in his region than those imposed by the Prime Minister. Although the Prime Ministerial measures as the *lex superior* law take precedence over the Governor's, this did not prevent the local law enforcement officials enforcing the Governor's more restrictive measures.

3. *Lack of effective oversight measures*

Besides the problem of limited access to challenge constitutional violations, the fact that under article 37 of the Constitution, the President of the Republic has the powers to appoint, dismiss and transfer judges, has re-

[4] See, article 4(3) of the ICCPR.

sulted in considerable judicial deference to the executive leading to a weak system of respect for the rule of law. As a result of this, the Cameroonian judiciary has been unable to exercise any effective oversight over executive excesses.

At the best of times, because of electoral manipulations, Parliament is dominated by the ruling party and has therefore hardly exercised any effective oversight over executive actions. Unsurprisingly, although a parliamentary session ended in June, not only were no specific laws adopted but the ravaging effects of the pandemic on the country was not even discussed!

4. *Abuse of powers*

On the whole, as in the pre-1990 period, perhaps with the difference that no state of emergency was declared, the government at central and sub-national level have used the pretext of maintaining law and order to violate the human rights of citizens on numerous occasions. Many individuals have been arrested and detained by the police, cars impounded and in many instances, bribes extorted from citizens based on restrictions whose legal force, as pointed out above, is questionable. Some of the regulations have been used to settle political scores. For example, the fundraising efforts of the opposition party, the Cameroon Renaissance Movement (CRM), designed to assist those affected by the pandemic, was arbitrarily stopped by the Minister of Territorial Administration because it was seen as a challenge to the Special Coronavirus Fund created by the President.

V. Conclusion

Although like most African countries, Cameroon tried to improve the constitutional and legal framework for dealing with emergencies, the manner in which the Government has acted in dealing with the COVID shows that the scope for abuse of emergency powers remains a major obstacle to entrenching a culture of constitutionalism, good governance, and respect human rights and the rule of law. Perhaps the main problem is the fact that there is no clear and comprehensive national legal framework, nor is there a national plan. This has resulted in conflicting policies and regulations at national and sub-national level.

It is therefore not surprising that in spite of its relatively small population, Cameroon now has the third highest number of infections in Africa. It

is clear evidence, not only of its weak and ineffective regulatory framework but also of the confused and uncoordinated measures that the government has taken so far. The virus is not likely to disappear any time soon. Unless the Government gets its act together, the situation in the country is likely to get worse.

DE QUELQUES ASPECTS CONSTITUTIONNELS LIES A LA PANDEMIE DU COVID-19 AU MAROC

Abdelaziz LAMGHARI*

RÉSUMÉ: I. *Introduction*. II. *Volet juridique: base constitutionnelle et traduction législative*. III. *Volet institutionnel: le cas de la session de printemps du Parlement*. IV. *Volet jurisprudentiel: quel rapport à l'urgence sanitaire?*

I. INTRODUCTION

L'annonce mondiale de la pandémie ainsi que sa reconnaissance dans les différents Etats, ont ouvert la voie, dans ces derniers, à une mobilisation du droit, spécialement des dispositions constitutionnelles, en vue d'y faire face. Il fallait, en effet, adapter aux conditions particulières de la pandémie plusieurs pans du fonctionnement de ces Etats, de leurs institutions et de leur administration, tout en réaménageant des règles et des procédures, plus spécifiquement celles qui concernent les droits et les libertés publiques. Dans ce mouvement général d'adaptation, le cas du Maroc peut être décliné en trois volets : juridique, institutionnel et jurisprudentiel, renvoyant respectivement, en la matière, au fondement juridique (constitutionnel) permettant d'adopter des mesures législatives dans le contexte de la crise du Covid19, à l'ouverture et à l'organisation de la session parlementaire et au contrôle constitutionnel de la bonne application de la procédure législative.

II. VOLET JURIDIQUE: BASE CONSTITUTIONNELLE ET TRADUCTION LÉGISLATIVE

Au moment de la reconnaissance mondiale de la pandémie du covid19, l'Etat marocain a commencé par prendre des mesures concrètes de prévention.

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Immédiatement après, furent précisées les mesures juridiques pour gérer les effets de cette pandémie.

1. *Au niveau constitutionnel: trouver la base juridique adéquate*

Il n'est pas inutile de donner à cet égard, une idée relative au débat entre constitutionnalistes nationaux, dans la presse en particulier, sur les dispositions de la Constitution marocaine mobilisables à cet effet. Deux de ses articles portent sur les circonstances exceptionnelles et les pouvoirs de crise: l'article 59 sur l'état d'exception et l'article 74 sur l'état de siège. Le premier article n'a été nullement évoqué et ne pouvait dès lors qu'être totalement ignoré. Les conditions de fond de sa mise en œuvre et l'exercice du pouvoir qui en résulte n'ont rien à voir avec les exigences de la gestion institutionnelle de la pandémie. En effet, la menace à l'intégrité territoriale et au fonctionnement des institutions constitutionnelles, puis en conséquence l'habilitation du Roi à prendre les mesures qu'imposent ces deux conditions, vont au-delà de la nature et du palier de la gestion en question. Le deuxième article a été envisagé par une minorité de constitutionnalistes comme le cadre adéquat pour une telle gestion. Non défini par la Constitution, l'état de siège en permettant en général, légalement, un réaménagement des pouvoirs de police administrative et une possible intervention des juridictions militaires, paraît également excessif pour ladite gestion et n'a pas, dès lors, été retenu dans le cas marocain.

Un article a fini par servir de support constitutionnel à la mise en forme juridique de la gestion nationale de la pandémie. Il s'agit de l'article 21 dont le deuxième alinéa a constitué le cadre de ce support, en prévoyant que «*Les pouvoirs publics assurent la sécurité des populations et du territoire national, dans le respect des libertés et des droits fondamentaux garantis à tous*».[1] Cependant, comparativement aux articles 59 et 74 précités, il n'indique pas explicitement quel support juridique est utilisable pour la mise en œuvre de ses dispositions, ni non plus le moment et les conditions de cette dernière. L'article 59 attribue au dahir (acte juridique royal) la proclamation de l'état d'exception, tout en en indiquant les conditions. L'article 74 retient également le dahir pour la déclaration de l'état de siège, puis la loi pour sa prorogation, sans explicitation des conditions pour y recourir. Force cependant est d'admettre que l'article 21, en limitant la fonction qu'il définit par le respect des libertés et

[1] Faute de place, signalons simplement que la comparaison peut être faite avec des dispositions plus ou moins similaires dans les Constitutions étrangères.

droits fondamentaux relevant constitutionnellement du domaine de la loi, ne peut être mis en œuvre que par cette dernière.

2. *Dans le volet législatif, le recours à l'article 21 fut donc la solution idoine*

En vue de l'acte juridique apte à prendre en charge l'état d'urgence sanitaire, les dispositions de cet article offrent ainsi le meilleur support. Elles rattachent en effet l'obligation d'assurer la sécurité aussi bien des populations que du territoire national, au respect des libertés et des droits fondamentaux. Il y ainsi l'urgence à édicter l'acte en question, mais dans l'obligation d'éviter des écarts par rapport au dit respect.

Parallèlement à l'urgence sanitaire, le gouvernement a usé de l'urgence procédurale, en actionnant la possibilité offerte par l'article 81 de a Constitution : prendre, dans l'intervalle des sessions, avec l'accord des commissions concernées du Parlement, des décrets-lois soumis obligatoirement à ratification lors de la session parlementaire suivante. Fut ainsi pris, puis ratifié par la suite, le décret-loi du 23 mars 2020 *édictant des dispositions particulières à l'état d'urgence sanitaire et les mesures de sa déclaration*. Sur le fond, en six articles, le texte traite successivement concernant cette urgence, de l'aspect territorial, des autorités compétentes, de la nature, de l'étendue et des limites des mesures exigées, des infractions et des sanctions, des mesures spécifiques d'ordre économique, financier, social ou environnemental revêtant un caractère urgent, et enfin de la suspension de tous les délais prévus par les textes législatifs et réglementaires en vigueur pendant la période de l'état d'urgence sanitaire.

Par rapport notamment aux droits et libertés consacrés, mais aussi par rapport à l'ordre constitutionnel en général, l'examen de ce contenu est du ressort de la doctrine, des parlementaires eux-mêmes et partant, si elle est saisie, de la Cour constitutionnelle. En l'absence pour le moment de travaux de fond ou de jurisprudence par rapport au repère droits et libertés, seul l'ordre constitutionnel se trouve concerné partiellement, tel que cela ressort des deux paragraphes suivants.

III. Volet institutionnel: le cas de la session de printemps du Parlement

La problématique posée, pour cette institution, a été celle d'adapter l'ouverture et le déroulement de la session dans le respect des dispositions du décret-loi susmentionné et du décret pris pour son application. Il s'agit pour

l'essentiel ici des mesures imposées aussi bien aux individus qu'au sein des groupes et des institutions en vue de prévenir et de se protéger mutuellement contre toute propagation du virus. Pour les deux Chambres du Parlement, le problème n'a pas été tant de reprendre les travaux avec la session en question, que d'assurer cette reprise dans les conditions et les modalités qui font le compromis entre l'observation des mesures arrêtées et le respect des dispositions de la Constitution et des règlements intérieurs, afférentes au travail parlementaire. Par rapport aux obligations posées par le décret-loi sur l'urgence sanitaire, ratifiée par le Parlement, celui-ci est au fond, comme toute autre institution constitutionnelle, tenu par ce que prévoit l'article 6 de la Constitution : *la soumission de tous, y compris les pouvoirs publics, à la loi, expression suprême de la volonté de la Nation*.

La problématique du compromis évoqué peut être vue concrètement à travers la note émanant du Bureau de la Chambre des représentants, après concertation entre lui, le Gouvernement et la Chambre des conseillers. Hormis les mesures matérielles de protection du coronavirus, trois éléments se dégagent de cette note : - la réduction au minimum nécessaire de la présence des représentants à l'ouverture de la session, à la séance mensuelle des questions, aux séances de législation et de contrôle et aux réunions des commissions ; - la priorité donnée à la législation en rapport avec les contraintes dues à la pandémie ; - enfin, un élément non évoqué explicitement, celui du vote au vu de la présence réduite telle que retenue dans la note.

-Concernant la présence réduite, et en l'absence de l'organisation du vote à distance, on a eu recours, par consensus, aux entités groupes et groupements parlementaires comme référence pour la mise en œuvre de la présence en question. Malgré le nombre des députés, différent d'un groupe ou groupement à l'autre, la règle de la proportionnalité n'a pas été retenue à la place de l'égalité pour fixer la présence au même nombre pour tous les groupes et groupements de la Chambre, qu'ils soient de la majorité ou de l'opposition. Il s'agit en effet, constitutionnellement, de droits identiques pour tous les députés, celui de la présence (maintenant réduite) et du vote (réaménagée suite à cette réduction).[2]

[2] La note de la Chambre a retenu la représentation suivante: pour chaque groupe ou groupement (un seul existe au sein de la Chambre), sont présents le président ou son remplaçant, en plus de deux des membres qui les composent. Les non affiliés, au nombre de 7 à la Chambre des représentants, pouvaient également user de ce droit de présence, dont deux en particulier, d'une coalition de gauche, qui l'ont mis à profit pour débattre, interpeller et voter. Comparativement, à la Chambre des conseillers (chambre haute), le 3ème groupe, celui du PJD (islamiste qui conduit le gouvernement), a eu gain de cause en obtenant, politiquement, la mise en œuvre, pour la présence réaménagée, du principe de la proportionnalité.

Par référence aux mesures relatives à l'urgence sanitaire, il est nécessaire cependant de discuter de la cohérence de la présence réduite par rapport aux dispositions en la matière de la Constitution, et partant du règlement intérieur de la Chambre. L'article 69 en particulier de la Constitution impose aux règlements de fixer «*l'obligation de participation effective des membres aux travaux des commissions et des séances plénières, y compris les sanctions applicables en cas d'absence*». La question serait alors : conclure à l'inconstitutionnalité ou admettre une exception à celle-ci, fondée à partir des mesures en question, sur une autre qualification juridique?

-Par rapport à l'élément législation prioritaire dans le contexte de la pandémie, aucun problème de constitutionnalité ne peut en principe lui être lié, dans la mesure où c'est une question qui relève du rapport politique et de l'appréciation de sa gestion dans le contexte en question. Qui dit, cependant, législation dit ipso facto vote qui sanctionne en dernier cette fonction.

-Troisième élément évoqué, le vote des parlementaires est prévu par une disposition forte de la Constitution. L'article 60 de celle-ci affirme en effet que les membres des deux Chambres «*tiennent leur mandat de la Nation. Leur droit de vote est personnel et ne peut être délégué*». En s'accordant sur une présence minimale des députés, la note de la Chambre des représentants n'a pas soufflé mot sur le vote. Il en ressort dès lors que, par consensus (implicite), le vote est assuré dans le cadre du nombre qui a été fixé et que l'absence des autres députés est justifiée implicitement par les contraintes et les mesures liées au contexte pandémique, sans nécessairement évoquer son explication par le phénomène des absences habituelles aux séances parlementaires. Certes, durant toute la période de l'urgence sanitaire (jusqu'à maintenant), ne s'est présenté aucun cas de vote qui requiert une majorité qualifiée, dans le cadre de chaque Chambre, ou exceptionnellement dans le cadre d'une séance commune obligatoire des deux Chambres. Mais même dans l'hypothèse de tels cas, le contexte de la pandémie et les mesures juridiques contraignantes qui l'accompagnent, auraient sans doute dicté des modalités de délibération et de vote devant aboutir nécessairement à un «réaménagement» ou une «suspension» de ce qui est strictement prévu par la Constitution et les règlements intérieurs. Le débat en la matière a été ouvert et contradictoire.[3]

En revanche, 1er groupe à la Chambre basse, il n'a pas pu frayer de chemin pour le passage à ce principe dans le cadre de la note en question.

À préciser que le règlement intérieur de la Chambre des représentants fixe le nombre minimum pour la constitution d'un groupe ou groupement à respectivement 20 et 4 membres.

[3] Mentionnons ici juste la possibilité d'avancer, au regard du contenu de la note, des exemples dans la vie parlementaire comparée.

IV. Volet jurisprudentiel: quel rapport à l'urgence sanitaire?

Il convient de le souligner dès le départ : ni la saisine, ni la décision de la Cour constitutionnelle qui lui correspond, seules disponibles dans le contexte du moment, n'ont permis de soulever et d'examiner la question importante des libertés et des droits fondamentaux dans le cadre de l'urgence sanitaire, telle que conçue et appliquée. La décision exposée ici (106-20 du 4/6/2020) s'est contentée de répondre à une saisine de la part de 81 députés, relative principalement à la constitutionnalité de la procédure d'adoption par la Chambre des représentants d'une loi de ratification d'un décret-loi relatif au déplafonnement des emprunts extérieurs de l'Etat, dans les conditions de l'urgence en question. Le sens de la jurisprudence qui en résulte peut être apprécié à travers les griefs soulevés, la décision de la Cour et l'appréciation de la doctrine.

-Concernant les griefs, la saisine relève que le procès-verbal de la séance est contraire à la Constitution et au règlement intérieur de la Chambre, en se contentant de mentionner la seule adoption du projet de loi à la majorité. N'y sont ainsi indiqués, conformément audit règlement, ni le nombre des présents, ni celui des votants par oui et par non, ni non plus celui des abstentions. En soumettant en renfort le support audio-visuel indiquant que l'adoption a eu lieu à l'unanimité moins une voix, la saisine relève qu'au vu du nombre réduit des présents, tel qu'arrêté par la note de la Chambre, la règle interdisant la délégation du droit de vote, posée par l'article 60 de la Constitution, n'a pas été respectée. Par ricochet, la saisine estime que le vice de procédure, ainsi aggravé, a porté atteinte aux droits de l'opposition, tels que prévus par l'article 10 de la Constitution, qu'il a eu aussi son impact sur le fonctionnement des règles relatives à la navette entre les deux Chambres, et que la note en question, contestée aussi, a occasionné ces dysfonctionnements, en réduisant au maximum la présence des députés.

-S'agissant de la décision, la Cour estime sur la base de l'article 60 de la Constitution et des dispositions du règlement intérieur qui en font application, que le vote dans le cas du texte examiné ne requiert aucune majorité donnée de votants et donc de membres présents, et que dans le procès-verbal de la séance, la seule indication que le texte est voté à la majorité ne constitue pas une irrégularité, dans la mesure où il n'est fait mention, sur la base des dispositions dudit règlement qui le permettent, d'aucune demande tendant à expliciter le détail du vote, à préciser le nombre des membres présents ou absents. Le vote à la majorité ainsi décrit et consigné, n'établit ni délégation du droit de vote, ni interdiction à la présence des membres, ni atteinte à la participation de l'opposition.

Par ailleurs, la Cour estime que la non-concordance entre le contenu du procès-verbal et celui du support audio-visuel, ne constitue pas, au vu des dispositions pertinentes de la Constitution et du règlement intérieur, un moyen pouvant établir l'inconstitutionnalité en raison des éléments suivants : d'une part, seuls ont force de preuve pour la régularité de la procédure, les procès-verbaux établis par les secrétaires de la Chambre, et nullement les supports audio-visuels, simple outil complémentaire, sachant que ce qui est établi en définitive dans les deux documents, est l'approbation du texte à la majorité ; d'autre part, l'existence d'un décalage, à supposer qu'il existe, entre le nombre des votants et le celui des membres présents, ne constitue pas à lui seul un motif d'inconstitutionnalité, à moins que parmi ces derniers des contestations fondées aient été soulevées et consignées, aboutissant à changer le résultat du vote.

Quant au grief concernant la note émise par la Chambre à la veille de l'ouverture de la session, au motif de son inconstitutionnalité et de ses écarts par rapport à ce que prévoit le règlement intérieur, la Cour estime que cette note, dont elle ne contrôle que les effets, justifiée par les circonstances particulières de la pandémie et les mesures de précaution exigées, n'a eu en réduisant au strict minimum le nombre des membres présents, aucune conséquence sur la régularité de la procédure du vote et le respect des droits qui lui sont liés.[4]

-Quelle a été l'évaluation par la doctrine de la décision de la Cour?

A partir notamment du fait que la saisine examinée ne constitue pas un procès entre deux parties, l'évaluation en question a estimé dans l'ensemble que le juge constitutionnel n'est pas lié par la règle de l'*ultra petita* lui imposant de ne statuer que sur ce qui lui est soumis formellement comme motifs. Trois éléments en ressortent.[5]

[4] Sous l'angle du contrôle de la procédure de l'adoption de la loi, la décision en question peut être comparée à la décision du Conseil constitutionnel français, n° 800 du 11/5/2020: p. 2, *Sur la procédure d'adoption,* notamment son paragraphe 6.

[5] «*Quand la Cour constitutionnelle se tait, elle sème des incertitudes*», article de Mohammed Amine Benabdallah, publié sous forme de tribune in *L'Economiste*, quotidien, Edition N° 5780 du 11/06/2020. Notons que les aspects constitutionnels et juridiques en général, mais aussi politiques, des retombées nationales de la pandémie ont constitué sur les réseaux sociaux, presque exclusivement en langue arabe, la matière d'un véritable forum ouvert entre divers universitaires, acteurs sociaux et politiques. De facture plus ou moins élaborée, comme c'est le cas sur ces réseaux, les contributions ont porté aussi sur la décision en question de la Cour constitutionnelle. Lesdits réseaux ont même constitué l'espace d'une critique politique virulente et inédite à l'adresse de la Cour de la part de la partie auteur de la saisine, avant et après la publication de la décision. La Cour a même dû y réagir par la publication, via la MAP, agence officielle d'information, d'une mise au point ayant pour support exclusif la

L'urgence sanitaire ne justifie pas de ne pas examiner la constitutionnalité du décret-loi en même temps que celle du projet de loi de ratification. A l'appui, une décision de 1974 du Conseil constitutionnel a été citée. Elle posait comme règle qu'un décret-loi et le projet de loi de ratification constituent un tout. Pourtant, pouvons-nous remarquer, dans ce cas, le Conseil de l'époque n'avait examiné ni l'un ni l'autre, se contentant de censurer le décret-loi sur un simple vice de forme.

L'urgence sanitaire n'interdisait pas à la Cour de se prononcer sur la modification apportée à la loi de finances par le décret-loi sur le déplafonnement des emprunts extérieurs, et non par une loi rectificative, comme l'exige l'article 4 de la loi organique relative à la loi de finances. Cet article dispose, en effet, que «*Seules les lois de finances rectificatives peuvent en cours d'année modifier les dispositions de la loi de finances de l'année*». Dès lors, la loi rectificative est soumise à la même procédure que la loi de finances, tel que prévu dans la même loi organique. Le risque de ce silence serait ainsi de considérer que la Cour aurait implicitement admis que la modification de la loi de finances peut désormais avoir lieu sans loi rectificative.

L'urgence sanitaire aurait dû permettre à la Cour de construire pour l'avenir une jurisprudence des circonstances propres à cette urgence (et même à d'autres circonstances similaires) qui aurait permis de fonder le recours exceptionnel au raccourci juridique du décret-loi en vue de modifier la loi de finances. Cependant, l'on pourrait aussi considérer (de notre part) que par le silence évoqué la Cour a voulu peut-être éviter de faire de la jurisprudence en question la voie ouverte à l'avenir pour l'Exécutif de procéder à des modifications de la loi de finances par de simples lois, non soumises à l'examen de constitutionnalité que sur saisine facultative.[6]

Constitution et la loi organique qui se rapporte à son organisation et à ses compétences. A lui seul, cet échange peut constituer la matière d'une analyse constitutionnelle à part.

[6] La Loi organique sur l'exception d'inconstitutionnalité n'a pas encore été adoptée, avec la précision que le contrôle a posteriori qu'elle pose n'est soulevé que si les libertés et droits garantis par la Constitution sont concernés dans la loi visée par le recours.

LE DROIT CONSTITUTIONNEL À L'ÉPREUVE DE LA PANDÉMIE DE LA COVID-19: CAS DU NIGER

Oumarou NAREY*

RÉSUMÉ: I. *Introduction*. II. *L'instauration d'une législation de crise*. III. *Le processus électoral impacté*.

I. INTRODUCTION

L'an deux mille vingt a été marqué par la survenance de la maladie à coronavirus ou Covid-19 dans le monde entier. Très rapidement cette maladie est devenue une crise sanitaire mondiale sans précédent qui a affecté l'ensemble des Etats de la planète. Cette situation inédite a provoqué un bouleversement dans la vie normale des institutions étatiques. Et de ce fait, presque tous les Etats ont dû adapter leur législation pour contenir la pandémie.

A l'instar des autres Etats du continent africain, le Niger n'a pas été épargné par cette pandémie. Ainsi, dès l'apparition du premier cas le 19 mars 2020[1],le gouvernement a adopté une batterie de mesures pour endiguer la propagation du virus conformément à son devoir de protection qui lui incombe en vertu de la Constitution qui dispose que «*La personne humaine est sacrée. L'Etat a l'obligation de la protéger*».[2] Pour asseoir une base légale à toutes ces mesures prises, l'état d'urgence consacré par l'article 68 de la Constitution[3] a été décrété sur l'ensemble du territoire national et il a été entériné par le parlement nigérien. Cet état d'urgence est encadré par la loi n° 98-24

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1 Article 1er de la loi n° 98-24 du 11 août 1998, portant règlementation de l'état d'urgence.

2 Article 10 de la Constitution nigérienne du 25 novembre 2010.

3 L'article 68 de la Constitution dispose: «Le Président de la République, après délibération du Conseil des ministres, proclame l'Etat d'urgence dans les conditions déterminées par la loi».

du 11 Août 1998 qui dispose en son article premier que: «*L'état d'urgence peut être déclaré sur toute ou partie du territoire national, soit en cas de péril imminent résultant d'atteintes graves à l'indépendance de la Nation, l'intégrité du territoire et à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique*».[4] En se fondant sur cette disposition, l'exécutif a estimé que la pandémie liée à la Covid-19 revêt «*le caractère de calamité publique*» parce qu'affectant un domaine sensible qu'est la santé de la population dans son ensemble. Ainsi, le gouvernement a décidé de prendre une panoplie de décisions de mise en œuvre des mesures pour contenir cette pandémie.

Les différentes mesures prises dans ce cadre ont eu des conséquences drastiques sur non seulement les activités sociaux-économiques du pays mais aussi politiques qui ne sont d'ailleurs pas des moindres au moment où le pays a amorcé un processus électoral devant conduire à terme à la tenue des élections locales, présidentielles et législatives.

Au regard de l'ampleur de la crise sanitaire, l'on peut s'interroger sur son impact sur les règles relevant du droit constitutionnel au Niger, étant entendu qu'il s'agit d'un droit qui étudie justement les règles inscrites dans la Constitution s'imposant à toutes les forces politiques participant à la compétition de l'exercice du pouvoir et sa dévolution.[5] Parmi ces règles, on retrouve celles ayant trait aux droits et libertés qui ont été éprouvés avec l'instauration d'une véritable législation de crise (II). Celle-ci a également eu un impact évident sur le processus de la compétition à l'exercice du pouvoir (III).

II. L'instauration d'une législation de crise

La réaction à la crise sanitaire de la Covid-19 a conduit les pouvoirs publics à limiter les droits et libertés des citoyens ; d'où un régime d'exception qui a mis à rude épreuve l'effectivité de ces droits et libertés (A), mais a également bouleversé le fonctionnement régulier des institutions (B).

1. *L'effectivité des droits et libertés éprouvée*

Le régime juridique d'exception a pour but d'accroitre les pouvoirs des autorités administratives pour faire face à des situations particulières. C'est ainsi que le 11 Avril 2020, le parlement a adopté une loi portant proroga-

[4] Loi n° 98-24 du 11 août 1998, portant règlementation de l'état d'urgence.
[5] PACTET (P), Droit_constitutionnel, Paris, Sirey, 26 édition, 2007, p. 2.

tion de l'état d'urgence sur toute l'étendue du territoire. En effet, au-delà de quinze (15) jours, l'état d'urgence ne peut être autorisé que par une loi pour une durée de trois (3) mois renouvelable.[6] Cette loi vise à donner au gouvernement les moyens nécessaires pour face à l'urgence sanitaire que constitue la pandémie du coronavirus dans un cadre juridique renforcé et adapté. Même si ces mesures sont justifiées, elles ont indéniablement eu des répercussions sur certaines libertés garanties par la Constitution nigérienne. Aux termes de l'article 32, la Constitution dispose que «*L'Etat reconnaît et garantit la liberté d'aller et venir, les libertés d'association, de réunion, de cortège et de manifestation dans les conditions définies par la loi*». Parmi les droits et libertés fondamentales qui ont été restreintes, on peut retenir l'interdiction des rassemblements et manifestions (lieux publics et privés), la fermeture des lieux de culte ayant conduit à des heurts dans certaines collectivités, l'instauration d'un couvre-feu, la mise en quarantaine, voire même l'isolement de la ville de Niamey. Ces mesures, jugées extrêmement liberticides ou attentatoires aux droits et libertés publiques, ont soulevé parfois des questions de proportionnalités entre atteintes des droits et libertés publiques et sauvegarde de la santé publique dans un Etat de droit[7], espace au sein duquel la liberté doit être le principe et la restriction, l'exception.

La liberté d'aller et venir est, par exemple, sans doute la plus affectée avec l'instauration du couvre-feu de 19 heures à 6 heures dans la ville de Niamey, alors que la ville n'était pas totalement confinée ; ce qui semblait disproportionné d'autant plus que les mesures barrières respectées dans la journée pouvaient aussi l'être dans la nuit. De même, il faut dire et admettre que l'isolement sanitaire de toute la ville a porté un coup dur à la liberté d'aller et venir alors qu'on pouvait effectuer des tests de dépistage à l'entrée et à la sortie de la ville. Mieux, la fermeture des frontières terrestres et aériennes a également réduit la jouissance de cette liberté d'aller. Celle-ci s'est aussi trouvée réduite avec la suspension du transport interurbain. Une des restrictions les plus significatives porte sur la liberté de religion, en ce sens que les prières collectives ont été interdites avec comme pour conséquences la fermeture totale des mosquées et des lieux de culte, l'interdiction des cérémonies religieuses.

Au regard des restrictions ainsi instaurées, la crise sanitaire est donc devenue une sorte de guillotine des droits et libertés, alors qu'une conciliation entre mesures préventives et libertés était possible. L'autorité compétente doit prendre des mesures adaptées au risque pour éviter les abus. C'est, par

[6] Article 2 alinéa 2 de la Loi n° 2015-07 du 10 avril 2015 modifiant et complétant la loi n° 98-24 du 11 août 1998, portant réglementation de l'état d'urgence.

[7] L'article 8 de la Constitution dispose : «La République du Niger est un Etat de droit».

exemple ce qu'a fait le juge des référés du Conseil d'Etat français qui, saisi d'une interdiction de manifestation, l'a suspendue au motif que «*l'interdiction de manifester n'est pas justifiée par la situation sanitaire actuelle lorsque les mesures barrières peuvent être respectées*».[8]

Force est de constater bien qu'il n'y a pas eu de confinement de la population au Niger, mais plutôt un confinement des droits et libertés fondamentales en se fondant sur l'urgence sanitaire appliquée aux dispositions de la Constitution. Or, en examinant de très près le cadre juridique préexistant, l'on se rend vite compte qu'il est plus protecteur et mieux adapté pour contrecarrer la pandémie. En effet, on aurait dû faire une application des pouvoirs de police administrative, pouvoirs dont disposent les autorités à différents niveaux pour prévenir les atteintes à l'ordre public sanitaire, car en période normale, le Ministre de la santé publique dispose des pouvoirs de police sanitaires lui permettant de prendre toutes les mesures nécessaires, pour lutter contre les épidémies. Les autorités compétentes au niveau des collectivités territoriales à savoir, le gouverneur et le maire peuvent en faire autant en vertu des pouvoirs de police générales dont ils disposent. Mais, il importe également de clarifier, délimiter et surtout réglementer toutes les compétences dévolues aux autorités chargées de la gestion de cette crise sanitaire (le Premier ministre, le ministre de la santé, le ministre délégué à la sécurité publique et les autorités décentralisées).

Au-delà des restrictions des droits et libertés publiques, la gestion de cette crise sanitaire a mis aussi les institutions dans une situation d'exception, bouleversant ainsi leur mode de fonctionnement quotidien.

2. *Le fonctionnement régulier des institutions bouleversé*

La survenance de la pandémie a façonné le mode de fonctionnement de toute l'administration et des institutions de la République, notamment le parlement dans le cadre de la mise en œuvre des réponses à la pandémie de la Covid-19. La question était de savoir comment assurer le fonctionnement effectif des institutions avec des mesures barrières édictées par le gouvernement tels que la distanciation sociale, l'interdiction des rassemblements de plus 50 personnes, le port de bavette, le lavage des mains au savon et l'utilisation du gel hydro-alcoolique, etc. Ainsi, il a été relevé que dans le cadre de la lutte contre la propagation de la Covid-19 d'importantes mesures ont été prises, ce qui a affecté le fonctionnement normal ou régulier des institutions

[8] Ordonnance en référé du 13 juin 2020 du Conseil d'Etat français.

de l'Etat. Par exemple, il a été décidé de réduire le nombre du personnel au strict minimum dans divers services, d'interdire la tenue des ateliers et séminaires, de réaménager les horaires de travail[9], de restreindre les visites des usagers du service public. Cela a eu un impact considérable sur l'accès des citoyens au service public – un droit fondamental – qui a été notamment remis en cause avec la suspension de l'établissement de certains actes indispensables à la vie civile au niveau des juridictions.

Sans prétendre faire une analyse approfondie du dysfonctionnement constaté au sein de l'ensemble des institutions, l'attention particulière doit être portée sur le fonctionnement du parlement[10] durant cette pandémie de la Covid-19. L'ouverture de sa première session qui a coïncidé avec la crise sanitaire, a conduit l'Assemblée nationale à adapter le mode de son fonctionnement et de son organisation à cette circonstance exceptionnelle. En effet, en prélude à la 2ème session parlementaire, Monsieur le Président de l'Assemblée nationale a saisi la Cour constitutionnelle

> …conformément aux articles 120 et 133 de la Constitution, pour demander un avis interprétatif des articles 91,93 et 94 de ladite Constitution, et ce, en prélude à une rentrée parlementaire qui aura lieu dans un contexte sanitaire particulier qui a justifié des mesures solennelles annoncées par le Président de la République. Ces mesures ayant un impact sur le fonctionnement de l'Assemblée nationale, le Président de l'Assemblée nationale souhaite savoir comment les articles 91, 93, et 94 de la Constitution en tant qu'ils déterminent les conditions d'organisation et de fonctionnement de l'institution, peuvent-ils s'articuler avec les nouveaux mécanismes d'organisation et de fonctionnement qu'il envisage imprimer à celle-ci, notamment:
>
> — La limitation du nombre de députés dans l'hémicycle grâce au recours aux procurations et également à un système de rotation des différents députés;
> — Le recours au huis clos permanent, jusqu'à nouvel ordre.[11]

[9] Voir article 1er de l'arrêté n° 0488/MFP/RA du 27 mars 2020 par lequel le Ministre par intérim de la fonction publique et de la Réforme administrative, qui dispose : «Par dérogation aux dispositions de l'article 2 de l'arrêté n° 0742/MFP/T du 30 juin 2010, déterminant l'organisation de la journée de travail continu dans les administrations publiques, les collectivités territoriales, entreprises et établissements publics, la durée hebdomadaire de travail dans les administrations publiques, les collectivités territoriales, entreprises et établissements publics, pendant la durée de la pandémie du Covid-19, est organisée comme suit: du lundi au vendredi : de 8 heures à 14 heures sans interruption».

[10] Le parlement nigérien est composé d'une seule chambre dénommée Assemblée nationale ; elle se réunit deux (2) fois par an en session ordinaire.

[11] Cour constitutionnelle, avis n° 08/CC du 30 avril 2020 disponible sur *www.cour-constitutionnelle-niger.org* (consulté le 2/07/2020).

En réponse à la demande d'avis ainsi formulé, la Cour a réconforté le Président de l'Assemblée nationale en émettant l'avis suivant : «*L'Assemblée nationale peut prendre des mesures adaptées à cette nouvelle situation et notamment la limitation du nombre de députés dans l'hémicycle en recourant au besoin à un système plus souple de délivrance des procurations et de rotation des différents députés ainsi que le recours au huis clos jusqu'à la levée de l'Etat d'urgence sanitaire*».[12]

Cet avis du juge constitutionnel suscite néanmoins certaines interrogations à savoir si les mesures prises par l'exécutif pour enrayer la pandémie de la Covid-19 combinées à l'avis ainsi émis peuvent suffire à justifier la conduite des travaux de l'Assemblée sans faire référence à la mise entre parenthèses des dispositions du Règlement intérieur prévu par l'article 94 de la Constitution de 2010.

L'Assemblée nationale et l'administration étatique ont certes été affectées à travers leur fonctionnement régulier, mais il faut surtout relever que cette pandémie de la Covid-19 a aussi eu un effet négatif sur le calendrier électoral établi par la Commission Electorale Nationale Indépendante (CENI).[13]

III. Le processus électoral impacté

La pandémie de la Covid-19 a eu des effets néfastes sérieux sur le processus électoral, ayant entrainé la suspension du processus d'enrôlement biométrique. L'interruption de ce processus dû à l'avènement de la Covid-19 a soulevé certaines préoccupations liées au difficile respect des délais constitutionnels impartis (A); ce qui a conduit le Premier ministre a sollicité l'intervention du juge constitutionnel (B) afin qu'il se prononce sur la question de savoir si la pandémie du Covid-19 constitue un cas de force majeure qui peut justifier une dérogation au Code électoral dans ses dispositions relatives au fichier électoral national biométrique.

1. *Le difficile respect des délais constitutionnels impartis*

Le Niger a amorcé depuis quelques années l'élaboration d'un fichier électoral biométrique en vue des échéances électorales prochaines. Dans ce cadre, la loi n° 2019-38 du 18 juillet 2019 portant code électoral prévoit

[12] *Ibid*.

[13] L'article 6 alinéa 2 de la Constitution dispose: «Une Commission électorale nationale indépendante (CENI) est chargée de l'organisation, du déroulement et de la supervision des opérations de vote. Elle en proclame les résultats provisoires».

que la Commission Electorale Nationale Indépendante (CENI) est chargée, d'une part du recensement électoral, de l'élaboration et de la gestion du fichier électoral biométrique, d'autre part de l'organisation, du déroulement et de la supervision des opérations électorales et référendaires.[14] Pour ce faire, la CENI a établi un chronogramme selon lequel le fichier électoral biométrique devrait être disponible le 19 Août 2020 et les élections locales devraient se tenir le 1er novembre et pour la présidentielle 1er tour en décembre 2020. Or, la CENI, ayant été freinée dans l'exécution de son calendrier électoral par la pandémie de la Covid-19, a d'ores et déjà annoncé que le fichier électoral biométrique ne sera pas disponible à la date initialement prévue à cause de l'insécurité et de cette pandémie de la Covid-19. Ce qui a eu pour conséquence immédiate, d'une part, la modification de la loi organique n° 2012-35 du 19 juin 2012 déterminant l'organisation, le fonctionnement de la Cour constitutionnelle et la procédure suivie devant elle pour tenir compte des délais constitutionnels en ce qui concerne les élections législatives et présidentielles. En effet, celles-ci sont enfermées dans des délais qui ne peuvent faire l'objet d'aucune dérogation. Ainsi, l'article 47 alinéa 2 de la Constitution dispose : «*En aucun cas, nul ne peut exercer plus de deux (2) mandats présidentiels ou proroger le mandat pour quelque motif que ce soit*». Il en résulte que même la force majeure ne peut être invoquée pour proroger le deuxième et dernier mandat du Président en exercice. La convocation du corps électoral doit se faire aux moins 90 jours avant le scrutin pour l'élection présidentielle et de 100 jours pour les élections législatives.[15]

En modifiant la loi sur la Cour constitutionnelle en cette période de pandémie, le législateur cherche en fait à harmoniser cette loi avec les nouveaux délais cumulés portant sur les recours en matière de contentieux électoraux induits par la loi organique n° 2019-38 du 18 juillet 2019 portant Code électoral.

D'autre part, la conséquence née de la pandémie du Covid-19 concernant les élections locales, est leur report éventuel pour la simple raison qu'il n'y a en réalité pas de difficulté pour proroger les mandats des élus locaux. En effet, le Code des collectivités territoriales modifié et complété par la loi du 8 octobre 2016 prévoit qu'«*en cas de nécessitée mandat peut être prorogé de six(6) mois, renouvelables par décret pris en conseil des ministres, sans que la durée cumulée des prorogations ne dépasse celle d'un mandat*». Il s'ensuit que le législateur a laissé la porte de sortie permettant de proroger le mandat des élus des collectivités territoriales, en cas de force majeure ; ce qui n'est pas le cas de l'élection pré-

[14] Article 10 du Code électoral nigérien.
[15] Article 62 du Code électoral.

sidentielle et des élections législatives. D'où la sollicitation de l'intervention du juge constitutionnel face à la Covid-19.

2. *L'intervention sollicitée du juge constitutionnel face à la Covid-19*

Parmi les mesures prises dans le cadre de la lutte contre la Covid-19, la fermeture des frontières aériennes et terrestres et la suspension des missions à l'extérieur sont des contraintes liées à la prévention et la lutte contre la pandémie du Covid qui constitue un danger public ayant le plus affecté le processus de l'enrôlement biométrique des électeurs. En effet, la fermeture des frontières des pays retenus a rendu matériellement impossible l'enrôlement des Nigériens établis à l'étranger qui constitue la 9ème région du Niger. Cette impossibilité nourrit les craintes d'une probable exclusion de la diaspora de la liste électorale alors qu'aux termes de l'article 7 du Code électoral nigérien : «*Nul ne peut voter s'il n'est inscrit sur la liste électorale de la circonscription électorale de son domicile ou de sa résidence, sauf dans les conditions prévues aux articles 65, 66 et 67 […]*». La possibilité d'un éventuel vote par témoignage est écartée. C'est pourquoi la question de la participation des Nigériens vivant à l'étranger a été longuement débattue au sein du Conseil National de Dialogue Politique (CNDP).[16] Pour lever tout doute, le Premier ministre, président dudit conseil a annoncé la saisine de la Cour constitutionnelle pour avis sur la question de savoir si la pandémie du Covid-19 constitue un cas de force majeure qui oblige à suspendre les opérations d'enrôlement, plus particulièrement de la diaspora.

En effet, le Premier ministre, saisissant la Cour constitutionnelle aux fins d'interprétation de l'article 7 de la Constitution[17] en lien avec l'article 37 alinéa 1er du Code électoral,[18] a sollicité de la Haute Juridiction qu'elle se prononce sur:

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16 Le Conseil national de dialogue politique (CNDP) est un cadre permanent de prévention, de règlement des Conflits politiques et de concertation entre ses membres autour de questions d'intérêt national.

17 L'article 7 de la Constitution dispose : «Le suffrage est direct ou indirect. Il est universel, libre, égal et secret».

Sont électeurs, dans les conditions déterminées par la loi, les Nigériens des deux (2) sexes, âgés de dix-huit (18) ans accomplis au jour du scrutin ou mineurs émancipés, jouissant de leurs droits civils et politiques».

18 L'article 37 du Code électoral dispose : «Le fichier électoral est unique et national. Il est le produit de l'ensemble des listes des régions, des ambassades et/ou des consulats».

> - la question de savoir si la situation actuelle (fermeture des frontières nigériennes aériennes et terrestres, suspension des missions à l'extérieur et fermeture des frontières des pays retenus) résultant des contraintes liées à la pandémie du covid-19 constitue un cas de force majeure qui oblige à suspendre les opérations d'enrôlement, plus particulièrement de la diaspora;
> - le point de savoir si cette situation de blocage entrainant un retard dans le recensement des citoyens de la diaspora pourrait constituer un cas de force majeure susceptible de justifier une dérogation à la loi sur le code électoral concernant le fichier électoral national biométrique;
> - la conformité à la Constitution d'un fichier électoral établi sans les électeurs de la diaspora dans les conditions ci-dessus;
> - Enfin, si la Cour constate que cette situation est constitutive d'un cas de force majeure, donner acte à la CENI qu'elle s'engage à reprendre les activités d'enrôlement des citoyens de la 9èmerégion dès que les circonstances le permettront en temps utile.[19]

Le juge constitutionnel a d'abord considéré que la pandémie du Covid-19 étant «imprévisible à la date de la confection du chronogramme de l'enrôlement des électeurs, et surtout à la date de l'adoption de la loi portant Code électoral»,[20] constitue un cas de force majeure qui

> …est un évènement imprévisible, irrésistible et extérieur, donc indépendant de la volonté de celui qui l'invoque pour justifier ou expliquer une défaillance ; qu'elle suppose la réunion des éléments suivants:
> — Un évènement échappant au contrôle de celui qui l'invoque;
> — Qui ne pouvait être raisonnablement prévu;
> — Qui empêche celui qui l'invoque d'exécuter sa mission ou son obligation.[21]

Sur ce point, le juge a donc conclu que la Covid-19 est un cas de force majeure qui justifie la suspension de l'enrôlement des Nigériens de la diaspora au fichier électoral national biométrique.

Ensuite, la Cour s'est penchée sur la validité du fichier électoral national biométrique établi sans listes des ambassades et/ou consulats du fait du Covid-19. Dans ce cas, la Cour a démontré que «*une dérogation temporaire à la mise en œuvre de l'article 37 alinéa 1er du Code électoral relativement au fichier électoral*

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19 Cour constitutionnelle, Arrêt n° 04/CC/MC du 15 juin 2020, disponible sur le site: *www.cour-constitutionnelle-niger.org* (consulté le 02/07/2020).

20 *Ibid*.

21 *Ibid*.

national biométrique, en ce qui concerne l'enrôlement des Nigériens de la diaspora n'est pas contraire à la Constitution».[22]

Enfin, la Cour s'est prononcée sur l'éventualité de la reprise des opérations d'enrôlement des électeurs de la 9ème région par la CENI. A ce niveau, la Cour a décidé qu'il ne lui revient pas de donner acte à la CENI de son engagement de reprise des activités d'enrôlement des électeurs qui relèvent de sa mission conformément aux textes en vigueur.

Au regard des développements faits par la Cour et de la décision qu'elle a prise en l'espèce, il y a lieu de relever que si le juge constitutionnel dispose d'une marge de manœuvre pour un avis allant dans le sens de l'exclusion de la diaspora de l'enrôlement biométrique au nom d'un cas de force majeure constitué par la Covid-19, l'on peut s'interroger sur les termes de l'article 41 du Code électoral qui dispose: «*L'inscription sur les listes électorales biométriques est un droit pour tout citoyen nigérien remplissant les conditions requises par la loi*». Ce droit n'est-il pas d'ordre public? De plus, en se fondant sur le Protocole de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO) sur la bonne gouvernance et la démocratie, il est impossible de réviser le Code électoral à moins de six (6) mois des élections. Il y a lieu dès lors de prendre acte que la solution ne se trouve peut-être pas dans le droit constitutionnel lui-même mais plutôt dans la recherche d'un large consensus entre les acteurs politiques, consensus qui pourrait être entériné par le juge constitutionnel.

22 *Ibid*.

AMERICA

WHEN THE CENTER LIES OUTSIDE THE FIGURE: REPUBLIC, IMBALANCE OF POWERS AND EMERGENCIES

Pablo RIBERI*

SUMMARY: I. *Foreword*. II. *Comparative Constitutional Law*. III. *Emergencies within the Argentine constitutional order*. IV. *Final Remarks: In case of emergency: break glass!*

"If one is frightened, everything makes a noise"

Sophocles, *Acrisius,* Chorus: 61

I. FOREWORD

No normative system is as capable of controlling human behavior as Law. In this context, transboundary law has become a necessary, rational, and sensible feature for civilized life. Here and now, we are immersed in complex settings where Law is permeates and indeed attributes meaning to multiple relationships in civil societies. Law spreads to every corner of the world while vigilant States are overzealous and willing to regulate all aspects of human life. We live within Law-saturated societies.[1]

A fundamental question in constitutional theory, then, is whether there are actual limits to Law.[2] In other words, does Law encompass everything? Can the rules of law foresee and regulate every extraordinary event?

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[1] See Rodotà, Stefano, *La Vida y las Reglas,* p.25, Editorial Trotta, Madrid, 2010.

[2] This is what Engish calls "*Die Rechtsfreie Raum*". See Engish, Karl, *El Ambito de lo No Jurídico*, Ediciones de la Universidad Nacional de Córdoba, 1960.

1. *Basic statements*

A. My first insight is that the concept of emergency and all implied institutes, procedures, and rules –whether they are regulated by the Constitution or not- are normative in nature. This means that even if we refer to an extraordinary and global event –such as the COVID-19 pandemic-, an emergency should not be reported as a factual category. It has to be construed under a normative perspective. Although emergencies are related to extreme circumstances, we must not strait-forwardly infer that their recognition is not driven by an underlying constitutional source.

Accordingly, it is essential to appreciate the difference between 'emergency' and 'exception'.[3] Despite linguistic uses, while the former can only be understood in constitutional terms, the latter, instead, relies on 'extra-constitutional' circumstances upon which, the only certainty is the absence of authority or a legitimate norm that may solve a terminal conflict.

"*Sovereign is he who decides on the exception"* according to Schmitt.[4] This statement, therefore, reveals that only in situations of extreme civic unrest is it possible to challenge or ratify the ultimate authority of a disputed political power.

B. In democratic-republican terms –particularly in countries like Argentina-, my second basic insight is that the study of emergency –such as the current pandemic- requires focusing on institutional aspects concerning the performance of the State's branches of government.

Consequently, either by spelling out institutes, procedures and/or rules in terms of constitutional design or by exploring the actual behavior of political bodies created in the organic part of the Constitution, the justice and efficacy of said outcomes do not really depend on civic culture, Executive's goodwill, judges' boldness, or, let alone, on the sophisticated rhetoric of those rights enshrined in the dogmatic part of the Constitution. In line with Gargarella, my grasp is that we better go down into the dark basement and focus on the Constitution's "engine room" rather than helplessly ramble on the shiny deck of rights.[5]

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[3] Riberi, Pablo, "*Assessing Republican Wariness in Time of Hazard and Turmoil"*, edited by Eberhard,, Lachmayer, Ribarov, & Tallinger, *Constitutional Limits to Security*, Nomos-Facultas, 2009. Also, RiberiI,Pablo, *La Emergencia como Remedio Constitucional, ¿o Viceversa?*, EL DERECHO (Jurisprudence and doctrine Law journal), Año XLIII, Nro. 11349, Buenos Aires, September 3, 2005.

[4] See Schmitt, Carl, *Political Theology*, p. 5. M.I.T. Press.

[5] See, Gargarella, Roberto, *"Latin American Constitutionalism and the Engine Room of the Constitution",* in Riberi,, Pablo & Lachmayer, Konrad, pp. 97-115, Nomos-Facultas, 2014.

2. *The last boundaries of normalcy*

Every Constitution provides a concrete power structure. As the Greeks rightly stated, a Constitution means "laying foundations καταβολη".[6] And on top of that, a legitimate Constitution, faithful to Enlightenment´s legacy, must promote human rights' protections. If this is the case, hence, "emergency" can only be deemed as a normative concept.[7] And incidentally, the extraordinary powers enabled by an emergency, performatively, must also be read within specific attributive mechanisms based upon constitutional constraints. The emergency can never be a lever that opens the gates for reckless human's rights violations.

The Freedom/Power constitutional equation turns to be altered during constitutional emergencies. In the face of overwhelming global challenges concerning individuals' inequality and vulnerability, it is however right to be reluctant toward subtle bio-political mechanisms of monitoring and surveillance of the people. Even in an emergency, from the republican point of view, it looks sensible that constitutional design foresees institutional mechanisms and incentives for swiftly normalizing full-enjoyment of individuals' rights. My concern is that every emergency purports a limited range of possibilities. As Schauer claims, "*the existence of an interpreter holding restricted powers is a consequence arising from the very same idea of rule or a system of rules".*[8]

II. Comparative Constitutional Law

Since there are normative provisions and atavistic practices involved in different constitutional systems, it is enlightening to make a clear-cut distinction between "regulated emergencies" and "non-regulated emergencies".[9]

Concerning constitutional design, for example, the Roman Republic created the '*senatus consultus ultimun*' whose enactment brought about the exceptional institution of dictatorship. When a roman citizen was empowered

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[6] Emergency institutes, such as the state of siege, are entrenched within the constitution to avoid what the greeks called "*Stasis*" –civil war-.

[7] Hobbes claimed: "*(...)Where there is no common power, the law does not exist; where there is no law, there is no justice...* See, Hobbes, Thomas, *Leviatán*, Volume I, Chapter. XIII, p. 138, Madrid, 1984.

[8] Ver Schauer, Frederick, *Las Reglas en Juego,* p.293, Marcial Pons, Madrid, 2004.

[9] See Gross, O., "*Constitutions and emergency regimes",* pp. 334-339, -edited by Ginsburg, Tom & Dixon, Rosalind, *Comparative Constitutional law,* Edward Elgar, 2011.

as a dictator, the legal framework provided for broadest powers without any substantive limitation. The goal was to preserve the Republic's integrity. Once the dictator was holding office -none other magistracies being suspended-, he exercised wide-ranging discretional competences for a fixed period unless one of the consul´s term expired before.

1. *Regulated models*

There have been several attempts to entrench operative emergency provisions in the constitutional document. For example, like the Roman Republic, Machiavelli understood that, although restricted by proper incentives, new power allocation should be regulated *ex–ante*.[10] The State of Siege, accordingly, was introduced in France on July 10, 1791. And many constitutions, such as Germany or Portugal's provide a gradual alternative pattern of potential emergency responses. This is the case of the Spanish Constitution which regulates three different kinds of emergency. Likewise, Brazil makes a difference between the traditional State of Siege and an intermediate "state of defense" which has to be declared by the president following the approval of a specific advisory council.

It is important to acknowledge a key historical experience. It is worth noting the devastating effects caused by the implementation of the famous section 48.2 of Weimar's Constitution. This provision prescribed that when the President saw fit, he was only required to give notice to the Bundestag of any declaration of an emergency.[11] Before the advent of National Socialism, a prequel of uncontrolled enforcement of emergency decisions –throughout 250 emergencies-, perhaps, may help to explain why the current German Constitutional Court´s doctrine has made it clear that emergencies have to be declared with an unequivocal aim. And this goal is no other than *preserving or re-establishing the integrity of normalcy of the constitutional order*.[12]

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[10] Referring to the unity of action, Machiavelli shrewdly claims *"...[habitual republican responses to emergencies move slowly… and since reaching timely agreements is difficult, medicine looks dangerous when it has to cure something that cannot wait. …Thus, republics must have among their provisions swift and adequate means"*. See. Maquiavelo, N, *Discursos sobre la primera década de Tito Livio*, pp.138-139, Editorial Lozada, Buenos Aires, 2004.

[11] Riberi, Pablo, *"Jeinseits von Weimar (Más allá de Weimar): El constitucionalismo moderno asediado*, pp. 158-190,in –edited by Seleme, Hugo-, *Instituciones Públicas y Moralidad Política*, Ediciones de la Universidad Nacional de Córdoba, 2015.

[12] According to Böckenforde, the basic notes of such doctrine provide a. An emergency is a political-constitutional mechanism to preserve or restore, constitutional normalcy. b. Its validity cannot replace a Law, let alone the Constitution. c. During an emergency, special

Finally, it is worth highlighting the political-procedural proposal defended by Bruce Ackerman, which is based on section 37 (2) of the South African Constitution. According to this rule, the declaration and continuity of an emergency rely on increasing democratic support from the Legislative branch.[13] The so-called *escalating cascade of supermajorities* requires more cumbersome agreements to keep emergency powers in place which, by the way, also means a more watchful commitment on the part of the opposition.[14]

2. *Non-regulated models of emergency*

Emergencies have not been regulated in ever country's Constitution. The United States, the UK, Switzerland, Japan, and Belgium, to mention just some, have not established provisions enabling extraordinary powers to the Executive nor have they enshrined specific restrictions to individuals' freedom in case of emergencies. The Swiss and the UK's constitutions deserve the utmost attention. In the former, said declaration has been associated with what is called "state of survival". And, naturally, all emergency decrees have been upheld by a long-lasting tradition of engaged political practices.[15]

Emergencies have barely been addressed in the USA's Constitution with laconism. The Constitution only provides the habeas corpus suspension. Be that as it may, the lack of such regulation has not prevented the USSC from resorting to a steep normative standard.As regards UK's emergency powers, the privileges of Government together with Common Law´s principles have together been fit to Parliament's sovereignty.[16]

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regulation labeled as "measures" can be enforced. d. Measures are valid for a limited period of time. See Böckenforde, E.W., *Constitutional and Political Theory –selected writings-*, pp. 117-118, Oxford University Press, 2017.

[13] See Ackerman, Bruce, "*The Emergency Constitution*", 113 YLJ 1029, *Yale Law Journal*, March 2004.

[14] There is some bold criticism against Ackerman´s approach. For example, Dyzenhaus openly rejects Ackerman's take on this. See Dyzenhaus, David, *Schmitt v Dicey: Are states of emergency inside or outside the legal order*? Hernández, Antonio Ma., -Paper submitted by the author to the IACL-AIDC round table held in Córdoba On June 24/25 2005.

[15] Böckernforde,E.W., *Constitutional and Political Theory –selected writings-*, pp. 124-125,Oxford University Press, 2017.

[16] Böckernforde, E.W., *Constitutional and Political Theory –selected writings-*, pp. 121-123,Oxford University Press, 2017.

III. Emergencies within the Argentine constitutional order

Argentina has undergone political turmoil throughout its history. In addition to many coup d´états, random cycles of economic crisis brought about disarray and dismay among the population. For example, the XXth century witnessed how emergency legislation passed by Congress thwarted the principle of contractual freedom or the principle of the non-retroactive nature of law. Accordingly, 'extraordinary police powers' ended up undermining property rights while case-law, for example, upheld mortgage deferments or rental contracts freezing.Backsliding this trend, there were even rulings endorsing the seizure of private deposits, interest rates haircuts, or deferment of maturities.[17]

The Argentine constitutional order has become a distorted model of separation of powers. Given the remarkable hyper-presidentialism ruling Argentina -and other countries in the region-, it is important to understand that even under normal circumstances, the Executive's powers look excessive and overwhelmingly plethoric.[18]

The emergency has thoroughly been regulated within the Argentine Constitution. Beyond the declaration of war –article 75, subsection 25-, the key provision dealing with emergencies is the *state of siege* –articles 23; 75 subsection 29; 99 subsection 16 and 61-. As regards to the Executive legislative competences during emergency times, the Constitution has exceptionally allowed the president to issue executive orders labeled as "necessary and urgent decrees" –DNU: article 99 subsection 3- and it also authorizes him to issue delegated decrees when Congress has specifically granted such delegation in the field of administration or as a result of a declared emergency (DD: article 76). In terms of legal argumentation, resorting to "*force majeure*", "*fait accompli*", "the normative strength of facts" have become commonplaces dogmatically avowed to remove any normative constraints to Executive´s power expansion.[19]

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[17] Some case-law examples: "Ercolano v. Lantieri" (Fallos: 136:131); "Horta v. Harguindeguy" (Fallos: 137:47, 1922); "Cine Callao" (Fallos: 247:121, 1960); "Mango v. Traba" (Fallos: 144:219, 1925); "Avico v. De la Pesa" (Fallos: 172:21); "Prattico Carmelo v. Basso y Cía" (Fallos: 246:345); "Peralta, Luis v. Estado Nacional" (LL., 1991-C, p.140).

[18] For instance, a large number of Executive Decrees (DNU) have been issued ever since Argentina's democratic off-spring. Eg: Alfonsin 10; Menem 545; De la Rua 89; Duhalde 158; Nestor Kirchner 270 and Cristina Fernández de Kirchner 81; Macri 69. Alberto Fernández has issued more than 50 to date.

[19] See Gargarella, R & Roa-Roa, J, *Diálogo Democrático y Emergencia en América Latina,* MPIL Research Paper No 2020-21.

Emergency in Argentina under COVID-19

Although in terms of health policies the government has been pretty successful, the current pandemic is yielding devastating consequences in economic and social terms. If one ever thinks about the "cost of rights" -as Holms did-, strictly speaking, it is not easy to assess how the bill will look like.[20]

A wide array of Executive powers were granted by the 27.541 Act passed –before the pandemic-. Now the country has been witnessing an Olympic festival of Executive orders. This trend became more plausible after the "compulsive and preventive social isolation decree -297/20 (ASPO)-" was issued on March 19, 2020. On top of that, a cascade of more than 60 executive decrees ('DNU' and 'DD') had been issued until now. Despite the legitimacy and reasonableness of the early governmental measures, little by little, the president is somehow becoming a sort of croupier. The metaphor is intended to depict someone who is unilaterally allocating benefits and burdens among the population. Emergency legislation, in short, has hastened several Executive decrees whose 'necessity' and 'urgency' are unlikely to meet the required threshold of constitutionality stated by article 99 subsection 3 of the Constitution.[21]

IV. Final Remarks: In case of emergency: break glass!

Charles Tilly stresses republican state-building has always been devoted to a concrete history of violence controlling.[22] Not even in this global pandemic or when national security is threatened can constitutional limitations and basic controlling institutions be foregone. A republican stance relies on government responsiveness and political accountability within a framework of constitutional rules and practices. Both, in normal and in emergency times, constitutional remedies must never be deployed to worsen individuals' rights enjoyment.

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[20] HOLMES, S & SUNSTEIN, C., *The Costs of Rights,* pp. 49-ss, W.W. Norton & Co, NY, 2009.

[21] See Hernández, Antonio Ma., *"Las Emergencias por COVID-19 en Argentina"*, in –edited by González, Nuria & Valadés, Diego-, *Emergencia Sanitaria por COVID-19 –Derecho Comparado-*, pp. 23-39, Universidad Nacional Autónoma de México, 2020.

[22] Tilly, Charles, *Las Revoluciones Europeas 1492-1992*, Editorial Crítica, Barcelona, 2000.

Whenever political, economic, or social disorders unleash State's emergency responses, ordinary people should never be considered as 'aliens' or 'guest participants' of a constitutional drama. It is plain to see that during emergency times, the strength of civil liberties could be somehow undermined and that new power limits could be set for the sake of people's future well-being.

Yet, emergency legislation deserves further reflection in countries like Argentina. Many of these measures often foster what might be called "self-inflicted emergencies". What does this mean? It means that the Executive´s enlargement of powers as a response of a crisis –such as the pandemic-, is the efficient cause of wrong public policies which, in turn, trigger steeper emergencies for which the Executive demands new and broader powers to redress its own mistakes. In other words, the cure is worse than the disease.

To summarize, let me stress some final normative remarks.

1) Although most constitutions authorize the circumstantial delegation of powers to the Executive, it is nevertheless sensible to know in advance prior conditions and controlling mechanisms over such delegations.
2) It is also a fact that constitutional regulation of such delegations must never allow the very same power -whose competencies are being enlarged-, to unilaterally decide on the opportunity and the scope of such delegation.
3) Finally, even though it is true there might be special protections for office-holders this does not mean that emergencies may open the gates for the Executive to do as it wishes.

In short, the emergency may not be used to obliterate the very same Constitution which enables those exceptional powers. It is preposterous that the conclusion of a syllogism might become a means to finish off its supporting premises. Quoting Ernesto Garzón Valdés, it would be crucial for a catastrophe such as the present pandemic to not become a calamity.[23] Catastrophes are due to forces of nature, while calamities are caused by ill human agency.

[23] See Garzón Valdés,Ernesto, *Calamidades,* Gedisa, Barcelona, 2009.

COVID-19 AND THE BRAZILIAN REACTION

Marcelo FIGUEIREDO

SUMMARY: I. *Introduction*. II. *The federative powers and the National Law no. 13.979/2020*. III. *The international experience of the WHO and its regulations*. IV. *The legal, economic and social problems brought about by COVID-19*. V. *The main legal and political conflicts between the powers in Brazil in confronting the pandemic*. VI. *Conclusion*.

I. INTRODUCTION

The objective of this text is to briefly address the most relevant constitutional and legal issues involving the COVID-19 pandemic, especially the measures adopted by the authorities and powers constituted in Brazil to face this enormous public health challenge.

Brazil is a Federative Republic formed by the indissoluble union of three autonomous spheres, the Federal Power, the Member States and the Municipalities. The 1988 Constitution is currently in force with 106 amendments promulgated until the month of February 2020.

First of all, it should be warned that Brazilian law does not have any specific legal rules affecting pandemics in the 1988 Federal Constitution.

The concepts of *state of exception*, such as the state of defense and state of siege (articles 136 to 139 of the Brazilian Constitution) are considered situations of defense of the State and democratic institutions, without relation to problems involving public health.

They are, in fact, norms for the restoration of public order or social peace threatened by serious institutional instabilities or hit by major natural calamities.

Both *states* admit some restrictions of rights (meeting, secrecy of correspondence, communications, obligation to stay at a certain place, detention, suspension of freedom of assembly, search and seizure at home and intervention in public services, for example).

In Brazil, it is the President of the Republic's competence to decree both states (of defense and of siege), submitting them to the National Congress.

Very few voices have advocated these states to be enacted with the coming of the pandemic to the Brazilian territory. In fact, in our opinion, it is not even the case of its application, except for a complicated and unwanted hermeneutic acrobatics of the constitutional text.

Nevertheless, as a member of the United Nations (UN), World Health Organization (WHO) and other international and regional organizations, Brazil maintains constant international contact (good institutional relationship) with such entities for the defense of peace, life and human health, having a human rights friendly Constitution, as the so-called *citizen Constitution* of 1988 is known.

It is important to point out that several Constitutions of the 1980s, as well as the Brazilian one, reinstalled the democratic life in different Latin American countries, in general, after long periods of dictatorship and authoritarianism that lasted on average twenty years.

II. The federative powers and the National Law no. 13.979/2020

On the other hand, the Brazilian Constitution naturally covers several rules involving health and its protection, besides a complex system of competencies involving the Federal Power, the Member States[1] and the Municipalities.

Essentially, Brazil has a cooperative federalism with many asymmetries, but, in this regard, articles 21, XVIII (competence of the Federal Power to face and plan the permanent defense against public calamities), article 22, XXVIII (national mobilization), article 23 (everyone's common competence), II (health) and article 24, XII (health common legislative competence, with general federal norms, §§ 1 to 4), all of the Brazilian Constitution should be brought to mind.

It is also worth mentioning, in the same statute, the existence of a complex regulation regarding the right to social security, health and social assistance in articles 194, 195, 196 to 200, 203 and 204.

Before COVID-19 there was no comprehensive legal standard to deal with such serious situations. One can recall Law no. 6,259, of October

[1] In the State of São Paulo, the Governor issued Decree no. 64,881 of March 22, 2020, decreeing the quarantine in the territory of the State, in the context of the COVID-19 pandemic and made other provisions.

30, 1975 (national), but which provides for the organization of epidemiological surveillance actions, on the National Immunization Program, establishes rules regarding compulsory notification of diseases, and makes other provisions. It was not made for an epidemic like the one we experience today.

With the advent of the epidemic, the National Congress hastened to approve Law No. 13,979, sanctioned by the President of the Republic on February 6, 2020, which provides for measures to address the public health emergency of international importance due to the coronavirus, responsible for the 2019 outbreak.

In eight articles, the law provides for measures that may be adopted to address the pandemic, giving the Minister of Health jurisdiction over the duration of the public health emergency mentioned therein and linking it to that one declared", stating that it may not be greater than that one indicated by the World Organization in question.

It also seeks to define "isolation" and "quarantine" (Article 2):

> Isolation: separation of sick or contaminated persons, or baggage, means of transport, goods or postal parcels affected, from others in order to avoid contamination or spread of the coronavirus.
>
> Quarantine: restriction of activities or separation of persons suspected of being contaminated from persons who are not sick, or from luggage, containers, animals, means of transport or goods suspected of being contaminated, in order to prevent possible contamination or spread of the coronavirus.

III. The international experience of the WHO and its regulations

The definitions laid down in Article 1 of the International Health Regulations, contained in the Annex to Decree no. 10.212 of January 30, 2020, apply in Law No. 13.979/2020.[2]

That is to say, the Law and the Decree incorporated the revised text of the International Health Regulations, agreed at the 58th General Assembly of the World Health Organization on May 23, 2005. In turn, the Brazilian National Congress had already approved the revised text of these Sanitary Regulations by means of Decree-Law no. 395 of July 9, 2009.

[2] Decree no. 10,282 of March 20, 2020 regulated Law no. 13,979 of February 6, 2020 to define public services and essential activities.

With this, practically all the international experience accumulated by WHO enters the Brazilian legal system, which seems to be a great virtue of Law 13.979/2020.

Important aspects such as definitions, information and numerous public health measures, recommendations, special provisions on travelers, goods, health documents, with strong international cooperation and technical assistance from WHO are thus incorporated into the Brazilian law, greatly facilitating the dialogue between national and foreign authorities.

IV. The legal, economic and social problems brought about by COVID-19

The pandemic caused by the coronavirus hit Brazil hard, virtually paralyzing all non-essential sectors.

The United Nations Conference on Trade and Development (UNCTAD), held in March 2020, predicted that the pandemic could cost the global economy up to $2 trillion this year. And it is estimated that the impact on countries that supply and sell raw materials, such as Brazil, will be even more aggressive, one of the reasons that gave rise to the official projection of the Brazilian government in the percentage of growth around 0.02% of GDP. General estimates indicate that the setback in the economy could be 4.4%.

Except for essential public services of health, of course, security, communications, armed forces, transportation, food supply and distribution, supply, everything else remained closed by determination of the federal, state or municipal authority, according to the scope of incidence of the norm and the regulated activity.

Developing countries like Brazil have enormous social needs, strong unequal distribution and income concentration, and a gigantic market of self-employed agents - workers without formal employment ties, or on their own. These segments were undoubtedly the hardest hit because they face the terrible dilemma of being exposed to the deadly virus when they leave their "homes" or dwellings - often with more than one family in each "home".

It is to say, for hundreds of thousands of people, there is no way to respect quarantine and survive, all this added to an economic scenario of depression and slow evolution of the Brazilian economy that, at the beginning of the pandemic, began a slow recovery.

In addition, one of the major challenges brought about by the pandemic was to control the provision of health care in peripheral locations, slums and in very poor regions.

The so-called "outskirts" is conceptualized as hybrid and heterogeneous places of a daily life shared by individuals who live in adversity and in search of social justice, social rights and rights over the city - such as access to decent housing, health, transportation, education and cultural consumption - that interact and blend with the normatized, rational, "legitimized" city, overcoming old moral notions of guilt and poverty or territory of risk, which may suggest stigmatized meanings of criminalization of poverty.

On the other hand, as in several countries, Brazil has also suspended classes throughout the country's public and private networks, from primary to higher education.

As is well known, the measure serves to avoid agglomeration and displacement. According to health authorities, one of the best ways to stop the transmission of cases of the disease is to maintain social isolation. Without classes, educational institutions have adopted distance education (ODL), through the use of computers and complementary activities, to give continuity to learning in general. However, not all students in the country have access to quality computers and the Internet.

Another problem is keeping the concentration - especially of children - while the parents also work at home. According to the United Nations Children's Fund (UNICEF),[3] 154 million students are or have been without classes in Latin America and the Caribbean. The entity warns that the situation could extend leading to the risk of definitive school dropouts.

The apostles of ultraliberal economicism relativize the deaths of workers in favor of the productivist maintenance of the market, which cannot be interrupted. However, more than ever, it is a fact that the world is not in an optimal situation, and thus it is urgent that humanitarian interests prevail over the stock market and over the business aspirations of the most aggressive capitalism.

In Brazil, some segments irritated with the loss of capital make movements in large cities to call on the population to disobey the sanitary resolutions of social isolation and return to their jobs, under the justification that only then will there be no problems of lack of goods and food supply.

The profit motive should be left aside in situations where life is threatened. Of course, we must follow science and its recommendations in the face of a pandemic and not listen to segments that only move by financial accumulation and profit-making logic.

It is not the case to list all the measures taken by governments (federal, state and municipal) and it would not be possible. But we can state that in

[3] Fiocruz institutional repository. Available at: *www.arca.fiocruz.br*. Access on: June 04, 2020.

the face of total paralysis of the economy, it was necessary to cancel, extend or renegotiate obligations and payments (debts) of public and private suppliers in various economic segments.

Numerous aid programs (including financial), especially for the poorest and neediest sections of the population, have been triggered by the federal government, which has more resources to deal with difficulties of this nature (family grants and other aid to individuals).

The fact is that the moment is one of volatility as much for the virus as for the economic chaos, what forced governments of the whole world - and, in Brazil, it was not different - to abandon their tax austerity guidelines and low intervention of the State in the economy, to inject billions in aid for companies and citizens.

Among the various measures adopted by the federal government (Federal Power) to confront COVID-19, we highlight: *a)* the decree of the occurrence of the state of public calamity through Legislative Decree no. 06/2020[4] (The President of the Republic requests the Congress) waiving the achievement of the fiscal results previously established, observing the directing of voluminous resources for actions aimed at confronting the crisis beyond issues and concerns in the area of health; *b)* measures to encourage the economy, such as increasing assistance policies, creating new rules for private, labor and tax relations, financial aid to self-employed workers, extension of deadlines for payment of taxes and for employers in general to pay loans and financing from bank resources, public or private; *c)* reduction of interest rates and reference rates; suspension or postponement of payment of installments of loans from official banks; *d)* enactment of legislative measures by the Executive Branch (called Provisional Measures) to stimulate economic activity with the social protection of the most vulnerable, directly or indirectly, including even direct contribution of resources to private initiative; *e)* reduction of tax rates and social contributions; *f)* release of extraordinary credit for several Federal Government Ministries.

V. The main legal and political conflicts between the powers in Brazil in confronting the pandemic

The coronavirus pandemic has once again raised the question of the responsibilities of each entity of the Brazilian federation in the search for solutions

[4] Effective until December 31, 2020, including for the purposes of article 65 of the Fiscal Responsibility Act.

to the biggest health problem of the 21st century. There is no doubt that the effective fight against the pandemic is necessarily done through the articulation between the federal entities guided by the Federal Power, with action and implementation plans defined by the managers at regional (state) and local (municipalities) scales.

With the enactment of the 1988 Constitution, Brazil experienced a new wave of appreciation of subnational entities, which guaranteed the municipalities the position of a federative entity with responsibilities on matters of local interest.

One of the great problems of Brazilian federalism - which is complex - and oscillates with periods of centralization and decentralization - is that financial capacities have not accompanied the process of increasing attributions to such entities (state and municipal - especially municipal), in themes such as education, health, basic sanitation and mobility. More responsibilities were attributed to these entities without the necessary public revenue (financial autonomy) to meet such expenditures.

The debate is complex. It is affirmed, on the other hand, that with almost six thousand cities, Brazil was mistaken in granting federative autonomy to the Cities, because the great majority of them would not have minimum conditions of survival except for the federal and municipal aid and transfers. It is to say, there are hundreds of Cities that should be incorporated to neighboring and near entities so that they effectively have some strength and autonomy. It is obvious that the so-called "municipalists" do not accept these arguments, opposing the historical reality of the initial cells of the cities, the Municipality and the proximity to solve the problems of their inhabitants, as the best form of federative organization.

The fact is that the so-called Brazilian federal pact has always been prone to political bargaining and to a lack of clarity in relation to the political-institutional design established in 1988, which made possible a progressive recentralization of the role of the Federal Power (central power) over the years.

Moreover, there are serious problems of political-territorial coordination that manifest themselves in three different dimensions: *a)* the institutional dimension and in the order of Brazil's political system, characterized by a federative pact that is fairly centralized and unclear in the definition of the limits of competencies; *b)* party-political conflicts that affect the governance of the system; *c)* the design of the actions and political choices adopted. There is a lot of political-institutional tension resulting in arrangements and accommodations for conflict management.

The Federal Power, for its part, complains that despite the fact that it holds most of the resources from direct and indirect public revenue from the country's wealth, it has many compulsory expenses linked under the Constitution. What it has left is a very small percentage for investments and cooperative and federative aid for the entire national territory.

The coronavirus came at a time when we have an elected President (Jair Bolsonaro) who has established a great distance from the National Congress and the majority of the Brazilian society.

The President's ability to generate conflict is immense. In addition, he has discriminated against regional groups supposedly opposed or competing. He has a very rudimentary and crude discourse and apparently has not the slightest capacity to govern, as well as encourage hate speech and scorn political and cultural minorities.

In this tense climate, several political conflicts flow into the Judiciary Branch. The latter, in view of being the Constitution of the country analytical and generous in terms of fundamental and human rights, opens and accepts a series of demands that in principle could be resolved in the public arena, especially through the extensive constitutionality control that exists in Brazil (*judicial review*).

To exemplify this picture, it became common, after the advancement of the pandemic, a dispute of federative competence over which authority is the most legitimate or appropriate to determine the opening of trade in the state capitals, as in the Municipality of Rio de Janeiro, which is also the capital of the State of Rio de Janeiro: whether it would be the President of the Republic, the State Governor or the Municipal Mayor.

On this occasion, the President of the Republic granted a press interview against the Decrees enacted by the Government of the State of Rio de Janeiro that established isolation and trade closure measures. The Mayor of Rio de Janeiro allowed their reopening, but then the governor intervened and revoked the decrees. Legal chaos ensued and the population, until a later court decision, did not know what to do.

The same occurred in relation to the closure of airports and roads throughout the country. Many state governors were trying to isolate their respective territories and prevent the circulation of people from places with high levels of virus infection.

Other governors went to the Judiciary to create a health barrier for travelers from other parts of the country. All these conflicts reached the Supreme Court, the highest court in the country, which over the months decided numerous cases, either through its Justices (preliminary decisions) or through its full body (collegiate). In general, in cases of opening of bars,

restaurants and other types of commercial establishments, the decision would fall to the municipalities (local government) and not the central government.

With regard to road, port and airport transportation, at least one of the Justices of the Supreme Court has decided that everyone, in principle, can legislate and regulate the matter to different degrees and effects.

In general, it is worth remembering the following court decisions during the pandemic:

> a) ADPF (Action of Non-compliance with Fundamental Precept) 672-DF-Applicant: Federal Council of the Brazilian Bar Association; Interested Party: President of the Republic, in which the personal performance of the latter was highlighted in contrast to the guidelines recommended by the health authorities of the world and of Brazil; it points out several constitutional provisions violated or not applied and requires the President to refrain from acts that go against the recommendations of the WHO and the Ministry of Health.

In the decision, the Federal Supreme Court Justice Alexandre de Moraes, after long considerations, states that the competence in the case is common between the Federal Power, the States and the Municipalities and that it is not up to the Federal Executive Branch to unilaterally remove the decisions of the state, district and municipal governments, without prejudice to the general competence of the Federal Power (general rules).

a) Cautionary Measure in the Direct Action for Unconstitutionality 6,341-DF, Applicant Labor Democratic Party (PDT). Interested: President of the Republic.

In this action, the PDT challenged the Provisional Measure no. 926/2020 that dealt with the isolation, quarantine and circulation restriction measures in the country. The Federal Supreme Court Justice Marco Aurélio, rapporteur of the case, explained the concurrent competence of the matter between the Federal Power, States and Municipalities in terms of health. The Provisional Measure, on the other hand, was not considered unconstitutional.

b) In Complaint no. 39,790-Espírito Santo, being Justice Luiz Fux of the Supreme Court the rapporteur of the case, dealt with a conflict between State Decree and Municipal Decree involving the opening of retail trade in veterinary products and animal nutrition.

A constitutional complaint was filed, with a request for urgent injunctive relief proposed by the Municipality of Pedro Canário, in the State of Espírito Santo, against the decision of the Single Circuit Court, issued in the writ of mandamus, for alleged affront to the contents of Binding Precedent no. 30 of the Federal Supreme Court.

Municipal Decree no. 71/2020 determined the closing of trade for 15 days (the first time) due to the pandemic. It was alleged to be illegal because it went against State Decree no. 4.605-R-2020, which authorized the operation of animal care and agricultural inputs businesses.

The Complainant, the Municipality, claims that the Supreme Court had already established the Binding Precedent no. 38, establishing the municipal competence to legislate on the opening hours of commercial establishments. It was understood that no normative conflict had occurred because the Binding Precedent was not conceived to face a pandemic.

In this case, Article 23, I and II of the 1988 Constitution shall apply, conferring common competence among the Federal Power, States and Municipalities to deal with public health.

The competence of the state to legislate on public health at the time of the pandemic would be justified, according to the rapporteur. The controversy was concluded with the understanding that the decision of the magistrate of first instance was correct in determining the opening of that type of trade and that there was no conflict between the state and municipal regulations.

The Supreme Court ruled:

> Thus, considering that it is obvious the direct relationship between pets and the mental health of people that intensively worsens in a situation of home isolation, it shows its unreasonable nature - especially when there is no basis to indicate that at the municipal level it is diverging from the state guidance - and therefore it justifies the preliminary award of the *writ*, the restriction on the operation of the claimant commercial establishment foreseen in the administrative act in the statement of claim. I grant the injunction to authorize the opening and operation of the commercial establishment pursuant to State Decree no. 4605.

VI. Conclusion

Finally, it is worth remembering that despite the problems we have experienced because of the coronavirus, so far the Brazilian institutions have functioned properly, despite the political misuse of the way to face it caused in

part by the authorities of the Federal Power, and the member states of the Brazilian federation.

The 1988 Constitution has prevailed as a fundamental framework, the rule of law seems solid - despite the erratic behavior of the current President of the Republic - and fundamental and human rights in general have been reasonably respected.

It is to say, despite acute and occasional problems in some member states of the Brazilian federation allusive to the provision of health services, especially public (lack of vacancies, respirators and doctors), etc. it cannot be said that on a large scale there has not been, until now, reasonable compliance with the Syracuse Principles, adopted by the Economic and Social Council of the UN in 1984, and the general comments of the UN Human Rights Committee on the state of emergency or similar concept (of public calamity by pandemic); moreover, the freedom of movement of people in national territory has been guaranteed.

The economic and social effects of the pandemic in the future in Latin America seem to be cruel, since the region, even before it was hit by COVID-19, already suffered from the concentration of income, its poor and unfair distribution and the poor performance of its growth.

COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF MEXICO

José Ma. Serna de la Garza*

Summary: I. *Introduction*. II. *The Principle of the Separation of Powers*. III. *The Powers of the Ministery of Health and the Board of General Health*. IV. *The Restriction of Human Rights*. V. *Democracy and Elections*. VI. *Constitutional Litigation During the Pandemic*. VII. *Health Crisis and the Crisis of Public Security*. VIII. *Final Reflection*.

I. Introduction

In this brief essay I will discuss six issues that demonstrate the ways in which the institutions, authorities and mechanisms contemplated in the Mexican Constitution have acted and reacted in the context of the COVID-19 pandemic, which emerged at the end of 2019 and began to impact Mexico in March of 2020. These issues are related to the principle of the separation of powers; to the powers of the federal Ministry of Health and the Board of General Health; to the measures which have restricted human rights in order to deal with the pandemic; to the postposition of elections; to legal cases which have been constitutionally litigated during the pandemic, and to the use of the army to carry out public safety tasks.

II. The Principle of the Separation of Powers

The pandemic has contributed to centralizing power around the federal executive branch, in a system that even before the health crisis was already

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centered on the President of the Republic. The President's party has a majority in both chambers of Congress, which stopped meeting since the end of March, 2020. This has meant that health measures –as well as measures related to the mitigation of the economic impacts of the pandemic– have been adopted by the President of the Republic and the Ministry of Health in a vertical manner, almost without deliberation.

Particularly controversial was the proposal that the President of the Republic sent to Congress on April 23, 2020, which sought to give him the power to "reorient resources assigned in the expenditures budget and direct them to maintain the completion of the projects and actions declared priorities by the public federal administration and foment economic activity in the country, attend to health emergencies, and programs that benefit society" in the case of "economic emergencies in the country".

This proposal was not discussed in Congress, in part because of the difficulties regarding face to face meetings, but also because of the fact that it was presented seven days before the end of the ordinary sessions of the federal Congress, which runs from February 1st to April 30th every year. Regardless, the proposal represented an attempt to absorb a power that is exclusively held by the Chamber of Deputies of the Congress of the Union, which is responsible for the approval of the expenditures budget of the federation. In addition, it is worth noting that the proposal to declare an "economic emergency" was left totally to the President's discretion.

We can also see how the pandemic has impacted the integration of a state agency that is particularly important in Mexico –the National Electoral Institute (its acronym in Spanish is INE)– which is in charge of the organization of elections at the national and state level. The direction of this agency is in the hands of a general council composed of 11 people; the term of four members ended in March of 2020. The designation of new council members is done by the Chamber of Deputies, but they decided to suspend the proceedings to choose the four new councillors "until the necessary conditions are met", and so the General Council of the INE worked with only seven members, until the new councillors were finally designated by the end of July 2020.

Additionally, since the end of March, Federal and State Courts stopped functioning in a regular manner. Those that have the technological possibility and the capacity to continue functioning virtually have done so in a limited manner, which is the case of the Federal Courts. But there are courts at the state level that have been shut for months. Some lawyers have even presented legal cases against the closure of the courts and in favor of gradual reopening, with whatever health measures are required to do so safely.

III. The Powers of the Ministery of Health and the Board of General Health

Article 73.XVI of the Mexican Constitution contemplates two authorities that have the power to make decisions during a health crisis: the Ministry of Public Health (Secretaría de Salud) and the Board of General Health (Consejo de Salubridad General). Their constitutional powers are defined as follows:

> 1a. The Board of General Health shall report directly to the President of the Republic, without intervention of any Ministry. Its orders and provisions shall be compulsory for the whole country.
> 2a. In the event of serious epidemic or risk of invasion of exotic diseases, the Ministry of Public Health shall issue immediately the appropriate preventive measures, subject to being approved later by the President of the Republic.
> 3a. The Sanitation Authority [Ministry of Health] shall be an executive organ; its orders, regulations, measures and provisions shall be observed by the administrative authorities throughout the country.

Because of the COVID-19 pandemic, and in exercise of the constitutional powers described above, on March 30, 2020, the Board of General Health emitted an accord through which the epidemic of illness generated by SARS-CoV2 (COVID-19) was declared a health emergency of *force majeur*. One day later, on March 31st, the Ministery of Health also emitted an accord establishing extraordinary actions to attend to the health emergency generated by SARS-CoV2.[1]

Various criticisms have been levied on the Board of General Health and its actions in the context of the pandemic. First is the criticism of its late response, as evidence that the crisis was coming began to appear in March of 2020, and it wasn't until the end of that month that the Board declared an emergency. A second criticism was that despite the collegiate structure of the Board, which, without entering in great detail, brings together high level public servants (at the federal and state levels) and leaders from aca-

[1] Among other things, the accord of the Ministry of Health established, in its first article, as an extraordinary action, that to attend to the health emergency related to the SARS-COV2 virus, the public, social, and private sectors must implement various measures, including the "immediate suspension, from March 30 to April 30, 2020, of non-essential activities, with the goal of mitigating the spread and transmission of the SARS-CoV2 virus in the community, to lower levels of illness, complications emerging from it, including death, among the population residing in the national territory.

demic institutions (experts), in practice, decisions are made by the head of the Ministry of Health. And third, it has been observed that neither the General Health Law nor the Internal Regulations of the Board of General Health include a procedure that regulates the expedition of a declaration of a health emergency, which implies that the only way to emit it is at the discretion of the head of the Health Ministry, who is a subordinate of the President of the Republic.

It is also notable that there has been a lack of communication between the federal Health Ministry and state governments. The issue of "general health" is concurrent between the federal and state governments. In the case of pandemics like COVID-19, the Ministry of Health can adopt "extraordinary actions" in regards to health, and state governments are obliged to follow federal guidelines. However, what we have seen during the entire crisis are a series of conflicts, disagreements and failed encounters between federal and state authorities with regards to: the moment to declare a health emergency; the kinds of health security measures that should be adopted; the moment that the public should return to activities given the necessity of reopening the national economy; and the pace of said reopening. This is due in large part to the non-existance of an institutionalized agency that ensures communication and the harmonization of public policy between the President of the Republic and the state governors.

IV. The Restriction of Human Rights

The Mexican Constitution contemplates the possible suspension or restriction of certain human rights, as decreed by the President of the Republic with approval from the Congress of the Union, to deal with "cases of invasion, serious perturbation of public peace or of any other kind that puts society in great danger or conflict". This constitutional mechanism has not been used to deal with the COVID-19 crisis in Mexico.

On the other hand, Article 11 of the Mexican Constitution establishes free movement, but it also contemplates the possibility that emigration, immigration or general health laws can establish limitations on this right.

As I mentioned previously, public health is a concurrent issue between the federation and the federal entities. Authorities of both levels of government have the power to take measures regarding public health, including decreeing quarantines or the isolation of people during a pandemic.

Regardless, federal policies have not been based in implementing obligatory confinement, rather it has been voluntary. The population has been asked to "stay at home". That said, some governors have taken more restric-

tive measures and have decreed "obligatory confinement", which has led to charges of unconstitutionality. For example on April 20, 2020, the governor of the State of Michoacán emitted a decree which declared mandatory isolation because of the SARS-COV2 (COVID-19) pandemic, based on which harsh restrictions to movement were introduced, along with penalties for those who infringe those restrictions.

That decree was challenged by a group of professors in the Law Faculty at the Nicolaíta University of Michoacán. The district judge (the Seventh Judge of the District of Michoacán) conceded a provisional suspension of the decree. The decision was reviewed and revoked by a collegiate circuit court (the Second Collegiate Circuit Court in Labor and Administrative Issues), which invoked the Law on *Amparo*, according to which the suspension cannot be granted if social interest would be impacted, which would have happened in this case, as it would have impeded the carrying out of measures to fight the spread of the pandemic.

On the other hand, there have been cases of municipal authorities who, in an unconstitutional and illegal manner and without the powers to do so, established severe restrictions to the free movement of people. For example, there is the case of a couple, Maria Elena L. S. and José Luis S. V., who left their community in order to work, but when they tried to return they found that the municipal authorities had decided not to allow anyone into the community so as to avoid the spread of coronavirus.

Given this situation, the couple sought constitutional protection, which was denied by the Tenth District Court Judge in Oaxaca, arguing that municipal authorities had acted to protect the social interest of residents. But the couple appealed the decision and finally, the Collegiate Tribunal in Civil and Administrative Issues of the 13th Circuit reversed the district judge's decision and granted the suspension of the decision, as the municipal authorities were not allowed, according to the Constitution, to suspend or restrict human rights, in addition the restriction of the freedom of movement in this case affected other rights, like those of the couple's youngest son not to be separated from his parents (the best interest of the child).[2]

V. Democracy and Elections

There were legislative and municipal elections scheduled in the states of Coahuila and Hidalgo on June 7th, 2020. However, the state of the health

[2] These events occured in the community of Concepción Las Mesas, Mesones Hidalgo, Putla de Guerrero, Oaxaca State.

emergency made it clear that the basic conditions for carrying out the corresponding electoral processes were not in place. Carrying out the elections would have put the health and lives of millions of citizens and electoral workers who participated at risk. Given these circumstances, it was asked: What is the Constitutional means to satisfactorily solve this extraordinary situation?

The Constitutional means to solve this problem was found in Article 41, Numeral V, second paragraph, subhead c) of the Mexican Constitution, which allows the General Council of the INE to "Bring to its knowledge any matter competence of the local electoral organs when its transcendence or importance requires so or when the matter shall be used to establish an interpretation criterion". It is worth clarifying that this power of the INE was the product of a political-electoral Constitutional reform on February 10th, 2014, which established a system of concurrence with regards to the organization of state elections. Under this system, the INE and the Local Public Branches (known as OPLES) share powers and responsibilities in the organization of electoral processes in the states, and the possibility was left open, through the rule quoted above, for the INE to exercise the "power of attraction" and absorb the functions of the OPLES.

This disposition in Article 41 of the Mexican Constitution, together with the agreement through which a health emergency caused by a force majeur was declared with regards to the epidemic generated by SARS-CoV2 (COVID-19), and the "Declaration of a Health Emergency" by the Health Board, published in the Official Journal of the Federation on March 30, 2020, were the constitutional and legal basis for the agreement through which the General Council of the INE postponed the elections in Coahuila and Hidalgo until health conditions allow them to proceed.

In essence, what the INE did was postpone the steps and the activities that were to come (including election day), so as to reschedule them when the health conditions to carry them out exist, with the full guarantees of political rights, but also keeping in mind the right to the protection of health as described in Article 4 of the Mexican Constitution and in various international agreements which the Mexican government has ratified.[3]

In the case of the state of Hidalgo, the postponed elections were related to the selection of new municipal authorities, who were slated to take office

[3] Resolution INE/CG83/2020 of the General Council of the INE, through which the exercise of the power of attraction is approved, leading to the temporary suspension of local electoral processes in Coahuila and Hidalgo because of the COVID-19 pandemic, caused by SARS-COV2. April 1, 2020.

on September 5, 2020. As this will not take place because of the pandemic, what will occur is that which is laid out in the subnational Constitution of Hidalgo, which allows the state congress to provisionally designate municipal councillors in each municipality until there are conditions to carry out elections. In the case of the state of Coahuila, in which it is the state congress elections at issue, the new representatives are scheduled to take office on January 1, 2021. Because there is more time, it appears that it may still be possible to organize the respective electoral process.

The constitutional solution that the General Council of the INE devised was the best available, but in reality, constitutional and legal norms regarding the issue of elections do not contain directions directly applicable to an extraordinary circumstance such as that which we are living; a situation which has sidelined something in a way that has never occurred in the democratic life of the country: the postponement of electoral processes.

VI. Constitutional Litigation During the Pandemic

Though in a limited fashion, Federal Courts have continued working through the writ of *Amparo* decisions, which is the principal instrument that people who live in Mexico can use to defend their constitutional rights, invoking protection before a federal district judge. These cases can proceed for actions as well as for omissions which imply a violation of human rights by federal and state authorities, as enshrined in the Constitution and in international treaties.

Additionally, within the writ of *Amparo* proceeding, there is an injunction that is called a "suspension", which has the effect of ordering an authority to stop the actions or omissions that are potentially violations of human rights until the matter is resolved. This also allows the district judge to order the responsible authority to act in a particular way. The writ of *Amparo* proceedings for constitutional protection can last for months, but a suspension can be decreed the moment that constitutional protection is sought. In the context of the COVID-19 pandemic, many district judges have ordered suspensions in order to protect the right to live and the protection of the health of the plaintiffs, as will be described in what follows.

There are cases of doctors and nurses who have sought and obtained protection via federal justice through the writ of *Amparo*, in order to force the authorities in the health institutions where they are employed to provide them with the equipment they need in order to work safely and minimize

their risk of infection, in addition to providing them with the training to use said equipment in a safe manner. Additionally, there have been cases of medical personnel who have obtained legal protection from working in a hospital where there are patients who are ill from COVID-19 until the authorities provide them with the protective equipment they require to work safely. Others still have obtained protection so as not to have to work in a hospital, because they have a chronic illness (asthma, high blood pressure, diabetes) which makes them particularly susceptible to fatal consequences were they to become infected with COVID-19.

Another case that was widely discussed in the media was the collective protection case brought by members of the Maya Ch'ol nation (based in the municipalities of Palenque, Ocosingo and Salto del Agua), against the continuation of the megaproject known as the "Tren Maya". In this case, the district judge who heard the case determined that the federal government should abstain from continuing the construction of said project in the aforementioned municipalities during the pandemic, as continuing construction could put at risk the health and lives of the population that lives there.

Constitutional protection through the writ of *Amparo* was also sought by a group of deaf people who lacked accessible information about the current situation with the pandemic and the measures that should be taken. In this case, the district judge ordered the federal authorities to use Mexican Sign Language (LSM) in all official communication as well as establishing support services for communication in health centers, via certified sign language interpreters.

It is also worth mentioning the protection sought by Indigenous Tsotsil, Tzeltal, Zoque and Chol peoples, to demand access to information regarding health measures and actions resulting from the COVID-19 pandemic be made available in their languages. In this case, the district judge ordered the authorities to provide the information in these languages, and in addition that it be shared over mass media (audiovisual, oral and graphic) "respecting the cultural specificities of each people".

Various writ of *Amparo* cases have also been brought with reference to people who are imprisoned in jails. For example, in one case, the district judge in the city of Tuxtla Gutiérrez (State of Chiapas) ordered state authorities to define the preventative measures and actions necessary to contain and avoid the spread of the virus, to guarantee the right to health and life, and also that studies and analysis be carried out to see if prisoners have the virus. In Mexico City, another district judge ordered local authorities to follow health and prevention protocols inside the prisons; to

institute effective general health measures; to carry out actions to detect cases of COVID-19 in prisons; to guarantee prisoners can have communication with the outside world; and to guarantee prisoners and their families with access to information on the health emergency.

Other constitutional protection cases are in reference to migrants. Such is the case in which the First District Judge in Administrative Material in Mexico City ordered federal migration authorities to free all of the people who were in transit (migrants) who were detained in stations or shelters of the National Institute of Migration, so as to avoid outbreaks of COVID-19. The protection granted by the same judge obliged the federal government to design and implement the protocols and measures required to guarantee the life, the safety and the health of migrants expelled from the United States of America to Mexico during the COVID-19 health crisis.

VII. Health Crisis and the Crisis of Public Security

The health crisis in Mexico is taking place in the midst of a crisis of insecurity and violence. This situation, which is related in large part to disputes between drug cartels, has been produced over many years and is related to the inefficiency and corruption that exists in the justice system and in federal, state and municipal police departments.

In this context, the President of the Republic published an Accord on May 11, 2020, which opens the door for the armed forces, which is to say, the army and the marines, to carry out activities related to public security. This accord is based in a Constitutional reform in 2018, which created a civil police force called the National Guard, while admitting that while that force was created, the executive branch could order the armed forces to carry out public security duties "in an extraordinary, regulated, audited, subordinated and complimentary manner".

This created a controversy in public opinion, which led to a legal challenge against the accord presented by the president of the Chamber of Deputies. Basically, the legal challenge alleges that it is up to the Congress of the Union to define, though a law (and not to the executive branch via an accord) how the intervention of the armed forces in security activities would be realized in an extraordinary, regulated, audited, subordinated and complimentary manner. The Supreme Court of Mexico accepted the case, though it will take months before it makes a decision about the constitutionality or the inconstitutionality of the accord.

It is worth mentioning that part of the crisis of insecurity that Mexico is experiencing is concerning especially with regards to increasing violence against women, who are particularly vulnerable when they are required to stay at home or quarantine. This remains true even though the Congress of the Union approved the General Law for Women to Access a Life without Violence in 2007.

VIII. Final Reflection

Constitutionalists are used to reflecting on and providing opinions on constitutional processes and issues in a context of normality. Regardless, I believe that the COVID-19 pandemic has imposed upon us a pending duty: design institutions, procedures and mechanisms so that the democratic and constitutional state can react in the face of emergencies of this kind with the least possible alteration of its founding principles: human rights, the separation of powers, and democracy.

FUNDAMENTAL RIGHTS DURING THE CORONAVIRUS PANDEMIC IN PERU

César LANDA*

SUMMARY: I. *Introduction*. II. *Right to liberty*. III. *Social rights*.

I. INTRODUCTION

On March 6, 2020, it was publicly announced "patient zero" in Peru's coronavirus outbreak—a traveler who had recently returned from Europe—had been identified. In response, the president of the republic decreed a health emergency just days before the World Health Organization declared that COVID-19 had officially become a pandemic due to its worldwide spread. The Peruvian government then suspended the recommencement of all grade school, high school, and university classes; prohibited gatherings of more than 300 people; and imposed a mandatory quarantine on travelers coming from countries in Asia and Europe with known hotspots.

Following an exponential increase in the number of patients with symptoms of COVID-19, the government issued Supreme Decree (Decreto Supremo) 044-2020-PCM on March 15, declaring a nationwide fifteen-day state of emergency due to the public health disaster. This decree suspended the right to personal freedom, freedom of movement, inviolability of the home, and the right to assembly, in accordance with Section 137-1 of the Constitution. The decree has since been extended multiple times, with the current, fifth extension lasting through June 30, given that there is still no vaccine and the spread of coronavirus has not been successfully contained.

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As a result of these initial measures, Peru closed all of its borders—by air, land, and sea—on March 19, and halted interprovincial travel, thus making for a quick, although relative, start to social isolation. Two days later, a curfew was imposed, which remains in force to date. Citizens were prohibited from leaving their homes between 8 p.m. and 5 a.m.—although these hours have been adjusted depending on the degree to which different regions have been hit—except for those essential workers who play an important role in containing the spread of COVID-19 or in the production and supply of basic goods such as food and medicine.

Ever since, daily life in the country has been radically transformed: the exercise of our rights—not only personal freedoms, but social rights, too—has been limited and restricted by the authorities' decisions, as well as the actions of the police and military, as we will see below.

II. Right to liberty

With the stay-at-home order, the daytime restriction of freedom of movement, and the prohibition of freedom of movement after curfew, law enforcement has begun to issue warnings and order "passersby" to return to their homes. Some offenders have even been ordered to perform community service, while *rondas campesinas* (autonomous peasant patrols) in the north of the country have sometimes taken matters into their own hands and meted out corporal punishment. Police arrested over 51,000 offenders during the first month of quarantine.

This highlighted two issues: First of all, the fact that thousands of citizens refused to comply with the social isolation rules required to break the chain of transmission. They justified this, in most cases, by their need to work in the street because of their involvement in the informal economy as their only means of survival. Secondly, it revealed the ease with which the forces of law and order have stopped people, detained them, and searched their households, sometimes with an arbitrary and/or disproportionate use of force.

While those held until they can be identified and/or detained for twenty-four hours are eventually let go, the government attempted to dissuade citizens from disobeying the emergency orders by imposing monetary fines ranging from 86 to 430 soles (about US$ 25 to US$ 130). The public responded dramatically to this curtailment of their freedom of movement, turning grocery shopping into an escape from social isolation and making many of the most popular markets around the country into

potent hotspots for the transmission of coronavirus that are now practically beyond control.

There have also been cases involving the misuse of permits that allow their holders to go to work or drive personal or public transportation vehicles. As a result, workers have congregated in large groups at bus stops, creating hotspots of transmission despite military vehicle patrols and police fines for violations of work and driver's permits, further feeding into the sense of confusion and social chaos.

This situation has been additionally complicated by the 28,000 Peruvians who were stranded in different countries due to the cancellation of their flights following the national emergency decree and the closing of Peru's borders. In response, the government coordinated "state-to-state flights" with the respective foreign affairs offices for the exchange of repatriated citizens. This allowed more than 13,000 Peruvians to return from abroad in exercise of their freedom of movement and residence in our country, although they were placed in quarantine upon their arrival in five-star hotels in Lima, with their stays paid for by the government.

There is also the case of thousands of individuals and families from elsewhere in the country who happened to be in Lima when the state of emergency was declared. After the decree was successively extended, they found themselves without economic resources or the ability to work so that they could pay for their daily living expenses. In response, they started marches to return to their hometowns, gathering in parks and along avenues and highways and creating further transmission hotspots for the pandemic. The executive branch then began working with the regional governments to register over 20,000 people and provide humanitarian transportation for thousands of them, with mandatory coronavirus checks when leaving Lima and upon arrival in their home cities in the country's interior, although they have not always been warmly received there.

III. Social rights

The right that has been most directly affected by the pandemic is the fundamental right to health, given that the exponential spread of COVID-19 calls for a public health system that Peru has historically lacked, as made clear by the fact that the government spends just 3.3% of its gross domestic product on health. Despite this, the government has made financial efforts to inject extraordinary funds into the current public budget to improve, expand, and bolster hospitals; buy millions of COVID-19 tests; and hire health personnel to prevent the pandemic's deadly effects from worsening.

This has nevertheless proved insufficient, given the lack of solidarity from private clinics, which charge 10,000 soles per day (over US$ 3,000) on average for a bed in one of their intensive care units; and the monopoly control held by pharmacy chains and producers of medical oxygen tanks, leading to an exponential rise in the price of medicines and oxygen necessary to alleviate the effects of coronavirus.

While the fundamental rights that have been restricted under the declaration of a state of emergency, with the goal of stopping the spread of coronavirus, are the rights to liberty and security of person, freedom of movement, inviolability of the home, and the right of assembly, in practice these limitations have led to a de facto overlap with the consequent negative impact on the exercise and enjoyment of the social right to health, which must be protected for vulnerable groups, at the very least, when facing crisis situations (Bilchiz, 2017, p. 15).

In terms of indirect effects, the right to work has also been restricted to those supply chain production and service activities that are necessary to prevent the country from grinding to a complete halt, and to keep supplies flowing to the public and ensure people's protection. For all other businesses, however, the government has authorized the "full suspension of the employment relationship," as requested by companies for over 200,000 workers. This has led many employers to commit labor law offenses that need to be investigated and, where applicable, punished by the labor authority. Regulations have also been issued regarding remote work, which larger companies are now permitted to implement using the technological resources and equipment they are providing to their employees so they can work from home.

In the case of workers and self-employed individuals in the informal economy, efforts have been made to keep them from becoming a focal point for the spread of coronavirus, given the fact that their jobs typically require them to move around a great deal while they sell their wares in the street. To this end, the government has approved and disbursed four different subsidies of approximately US$ 110 each to help citizens cover their expenses during the state of emergency: the "Bono yo me quedo en casa" ("Stay-at-Home Subsidy") for those living below the poverty line; the "Bono independiente" ("Self-Employed Subsidy") for workers in the informal economy; the "Bono rural" ("Rural Subsidy") for peasant farmers; and the "Bono familiar universal" ("Universal Family Subsidy") for anyone who does not qualify for the previous three subsidies. However, because the government does not have a nationwide records system able to register all of these vulnerable populations, and also suffers from inefficient management, only

about 75% of the budgeted amounts have been executed. Meanwhile, the subsidies have proven to be insufficient as an incentive to keep workers from gathering around markets, in the streets, and near hospitals, where street vendors continue to do business.

The right to education has also been suspended with regard to in-person classes for all levels and forms of education. This has made it necessary to begin the implementation of the "Aprendo en Casa" ("Home Learning") remote education system for grade school and high school students, with the help of public television and radio outlets and the support of private television broadcasters for one hour each day. However, only about a third of school-age children have the computers and internet they need for online learning. In response, the government has ordered 840,000 tablets with mobile internet for students, especially those in rural areas.

The pandemic has not prevented private schools from providing educational services online. However, after parents complained that the costs for such services are not the same as those for in-person education, the government announced possible changes to school tuitions in light of the lower costs of online education and/or transport to public schools. Online education options have also been offered to students at public universities, with budgetary help from the government. For their part, private universities are using public credit to continue their operations, while offering discounts and/or payment plans to students during the state of emergency.

While freedoms and their related rights may be legally limited during a state of emergency decreed in response to a public health disaster, these freedoms and rights cannot be rendered null and void, and they certainly cannot be violated. In order for any restriction of freedoms and rights to qualify as constitutional, it must be based on specific legal grounds and serve a legitimate purpose. Such restrictions must also be necessary, meaning that there is no less restrictive option available to achieve the goals being sought, and they must be strictly proportional in their intensity, i.e., the number of human beings who will be affected and the duration of these restrictions.

In the event of any violation of and/or disproportionate effects on citizens' rights and freedoms during a state of emergency, proceedings for the protection of fundamental rights such as habeas corpus and *amparo* actions are the most appropriate procedural channels for a constitutional court judge to issue a ruling on any detrimental acts, although not on the reasons given for the declaration of the reduction of freedoms and rights, according to Section 200 *in fine* of the Constitution.

There is no question that the members of Congress who were elected on January 26 and took office on March 16 have the democratic power to

perform any acts of political control they deem opportune and necessary. But only the efficient constitutional and democratic handling of the public health crisis and the collective efforts of a people who are aware of their rights will ensure a staggered return, in stages to be approved by the government for progressive implementation over the course of 2020, to a state of constitutional normality for all, so that people can exercise all of the freedoms and rights that are currently restricted. We must remember, after all, that there can be no individual liberty or wellbeing if it is not, at the same time, collective.

Even in spite of the foregoing, it is clear that our rights and freedoms will never fully return to the way they were before the public health emergency. The pandemic has exposed structural failures in the health system that have made it extremely difficult to successfully control the spread of COVID-19 and its deadly consequences for people's lives and health. It is now clear that the return to a "new normal" must be founded on social, economic, and political freedoms and their associated rights.

It no longer seems so utopian to demand the urgent rethinking of structural reforms to the constitutional state in Peru, implemented through constitutional reforms. This would make it possible, in turn, for the constitution to include provisions on health emergencies, along with a new list of social and economic rights, with special protections for our most vulnerable citizens.

COVID-19 AND THE US CONSTITUTION

Tom GINSBURG*

The COVID response in the United States has been extremely poor from a public health perspective. The country has the highest number of deaths in the world, and after Chile is the large country with the most cases per capita, as of this writing. The President has pointedly decided not to wear a mask in public, joining such luminaries as Jair Bolsonaro and Alexander Lukashenko who are coronavirus deniers. State and local governments have in many cases undermined mask-wearing, which is widely accepted as a prophylactic measure. And American citizens successfully pressured their governments to reopen quickly, leading to a major spiked in cases. Surely this is an enormous governmental failure on a scale rarely seen in democratic countries.

Yet from a constitutional and democratic perspective, the failure may not be so great. While we can say with confidence that early lockdowns would have prevented spread of the pandemic, once the virus arrived on a mass scale, it is not clear what the universally optimal policy is, in terms of the severity of a lockdown. Surely a complete and total lockdown such as occurred in Wuhan would be good for eliminating the virus, but it also had significant costs in terms of the associated economic shutdown and in restrictions on civil liberties. Quarantines also create their own risks and put pressure on mental health. A pandemic response has to balance public health, economic, and libertarian considerations, with lots of complicated tradeoffs. In a democracy, the balance should be determined by political processes, informed by technical information.

Despite all its messiness, and its poor policy outcome, the coronavirus response in the United States has been successful in responding to the preferences of the public. This public is highly misinformed and distrustful of expertise. It important to remember that the United States is in something of an epistemic crisis, in which large segment of the population believes in

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conspiracy theories and distrusts science as a matter of course. We also have a longstanding libertarian tradition distrustful of all government as a matter of principle. From a public health perspective these people should be ignored. But from a democratic perspective they should not. The United States has had an extended constitutional conversation, involving state governments, courts at both states and the federal level, legislatures, and the public itself, about the response, and it surely is not a very good advertisement.

From a comparative perspective, the United States Constitution, drafted in 1787, is one of a small number without any provision for a state of emergency. The drafters of the document were skeptical about such provisions, and thought law could do little to regulate crises. Indeed, they feared that executives might use the emergency provisions to consolidate power, a phenomenon that has come to pass in many other constitutional systems. The absence of clear provisions on emergency has meant that the ordinary rules of governance have remained in place during the COVID-19 pandemic.

In the federal system of the United States, the "police power" is primarily located at the states, giving them the authority and duty to protect and regulate health and safety. These powers are limited by federal constitutional rights, as well as acts of Congress within the sphere of its own authority. All states have emergency statutes that allow the Governor, the chief executive of the state, to call an emergency and to take extraordinary steps thereafter for a limited period of time. These actors were the primary determiners of policy response in the COVID-19 pandemic, and their solutions varied a good deal. In highly urban states like California, the response was early and strong. In some southern states, the response was anemic. These states have become the primary locus of the second wave of the virus.

Once governors began to impose lockdowns, a dialogue followed about the nature of the response. Owners of gun shops challenged the application of general lockdown orders to their businesses, claiming that the constitutional right to bear arms contained in the Second Amendment meant that they should have special protection in this regard. Faced with this argument, many cities and states reclassified gun shops as "essential businesses" that could remain open. Another challenge was to certain state laws that discriminated against out-of-state travelers, such as Rhode Island Governor's order to stop all cars with New York license plates. The next major set of challenges came from religious groups, which claimed that bans on gatherings of more than ten people, for example, infringed on freedoms of worship. In

one case, a governor refused to allow an Easter service in which worshipers would remain in their cars, prompting a lawsuit. The Sixth Circuit Court of Appeals ruled that lockdowns that singled out religious services without comparable restrictions on secular activities violated the First Amendment rights to free exercise of religion.

The Federal government's role in pandemic response is most apparent when it comes to outward facing policies like immigration controls, as well as coordination with international organizations. The Trump administration instituted travel bans, fairly early on. Using several statutory authorities, the Department of Health and Human Services declared a state of emergency on January 31, allowing expanded telemedicine and the release of national stockpiles of masks and other personal protective equipment. President Trump invoked the Defense Production Act, which allows the government to order private firms to prioritize its own orders and to control distribution. In March he declared an emergency under a statute, allowing the Federal Emergency Management Agency to get involved.

As the lockdowns dragged on and the economic carnage became apparent, protestors began to chafe under the restrictions, and demonstrations emerged. Most came from the political right, especially in rural areas who faced little real risk of the virus, but some came from the so-called "anti-vaxxers" on the political left, who oppose the taking of vaccines. Some lawsuits were filed in April but courts were generally unwilling to question the decisions of the elected representatives. As time went on and the economic costs mounted, the President announced that the pandemic response had to end and the economy had to re-open. Of course, under the federal system this was not his decision. Governors seemed to ignore the President: Republicans like Georgia's Brian Kemp re-opened even before Trump gave the green light; Democrats like New York's Andrew Cuomo and California's Gavin Newsom kept restrictions in place, and as a second wave of the virus hit in June, ramped up some restrictions again.

As a practical matter, the lockdown restrictions on large assemblies became impossible to enforce after the emergence of mass demonstrations in May, prompted by the killing of a black man named George Floyd by police in Minneapolis. As these protests spread around the country, police found themselves unable to enforce restrictions on mass gatherings. Indeed, the presence of the lockdown demonstrators, only a month earlier, may have made the government less able to respond to the anti-policing protests. After all, the First Amendment prohibits the government from favoring one type of speech over another. Indeed, a Federal District Court in New York enjoined the state from enforcing prohibitions against religious services, point-

ing out the Mayor Bill de Blasio appeared without a mask at a demonstration that far exceeded the 25-person limit imposed by state law.[1]

Politically, many Americans seemed to have a strong aversion to the wearing of masks, a simple step that would do much to prevent the spread of the disease. The Governor of Nebraska threatened to withhold funds from any counties that *did* require masks. Judges began to get involved in calibrating the response: a federal judge in Michigan, for example, held that there was no rational basis for keeping gyms closed, and ordered the Governor to reopen them. But this order was stayed by the Sixth Circuit Court of Appeals.

Most of the state statutes allowing Governors to take emergency measures have temporal limitations, typically 30 days. After the initial period expired, most governors extended the lockdowns by unilateral order. Some lawsuits challenged these decisions but none to my knowledge has been successful. The standard of judicial review for all these matters was whether or not the government had a "rational basis" for its decision, which is a very easy standard for the government to meet.

A special issue arose with regard to elections, a challenge faced by many countries around the world. By my count, the majority of countries with elections scheduled during the pandemic decided to postpone them, but some went ahead. A major conflict arose in the State of Wisconsin, which has been ground zero for Republican efforts to lock in their power. Having drawn the lines for electoral districts, the Republicans hold 65% of the seats in the State Assembly despite obtaining a minority of the vote. They have also captured the State Supreme Court, which is elected on a partisan basis, as its true of many American states. The elections scheduled for May 2020 included a primary for the presidential election, and also a vacant state supreme court seat. With trouble find poll workers, the state's Governor Tony Evers, a Democrat, sought to postpone the election. But the legislature, controlled by Republicans, disagreed. There were major technical problems with absentee ballots not being mailed in time. A federal district judge allowed the Governor to extend the period by which absentee ballots could be postmarked, but the Republican party challenged this decision. In an extraordinary intervention, the US Supreme Court by a vote of five to four overturned the District Court decision, saying the election had to go on just as scheduled. People stood in long lines to vote, and several dozen caught coronavirus as a result of the election, but it led to the defeat of the Republican candidate for the supreme court.

[1] Soos v. Cuomo, 1:20-cv-651, (S.D.N.Y. 2020).

The pandemic has involved judges deeply in election law, leading them to engage in robust review. One major development is that they seem to be affirmatively requiring states to be more active in guaranteeing participation as if that is a positive right rather thena a right to be free from government interfereneces As Rick Pildes has noted, courts are thus saying that laws that would be constituitonal in normal times are unconstitutional during the pandemic.[2] Federal and state courts, he documents, have ordered state election officials to change deadlines,to hold elections which they had decided to cancel, and to allow all voters to cast absentee voting in states in which thiose ballots were limited. This is a very inusual development because normally American court do not consider government omissions to be a source of constitutional violations. For example, the Sixth Circuit held the rules requiring a certain number of signatures to appear on a state ballot were now a significant burden on the right to vote. Virginia's requirement that an absentee ballot be signed by a witness would not be a burden in normal times, but in light of the pandemic became a burden.[3] These are significant changes, and potentially important given the difficulties that will accompany the November 2020 presidential election. That election is likely to be extremely messy, and if it close, may end up turning on a court decision involving technical issues of election law in one or another state. This will be a moment of great risk for our constitutional democracy, which otherwise has survived the challenges of the Trump years fairly well.

The best way to characterize the American constitutional response to the coronavirus pandemic is as one of a dialogue among governmental institutions. The primary actors have been state governors, and they have generally been very popular during this period. Loud and vocal groups have challenged them, mainly about the duration and extent of lockdowns. Freedom of assembly was in great evidence throughout the period of the coronavirus pandemic, as was freedom of speech. Various coronavirus deniers were allowed to promulgate their views, which seem to be popular among a large portion of the electorate.

Courts have been active in monitoring governmental measures, and in some cases have stepped in to ensure the protection of constitutional rights. In some states, legislatures have pushed back against the governors, channeling popular discontent. This presumably informed the decisions to grad-

[2] Richard H. Pildes, The Constitutional Emergency Powers of Federal Courts (manuscript).

[3] *League of Women Voters of Va. v. Va. State Bd. Of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020).

ually lift the lockdowns, but the exact rules vary widely across the fifty states. This is of course appropriate in a large and diverse country.

The response has been very politicized, in keeping with the current state of the American polity. A large and powerful minority is deeply distrustful of science, experts and government. So while the constitution has shown its efficacy in allowing a response that reflects the popular views, that response has also led to massive number of needless deaths. For this, we cannot blame the Constitution, but rather ourselves in the current state of the polity.

VENEZUELA: COVID-19 + DICTATORSHIP + COMPLEX HUMANITARIAN EMERGENCY

Carlos Ayala Corao*

SUMMARY: I. *Introduction*. II. *State of alarm decree regulations*. III. *State of alarm decree flaws and constitutional violations*. IV. *The paralysis of justice*. V. *The de facto state of emergency is arbitrary and violates human rights*. VI. *Venezuela: the pandemic of all pandemics*.

I. Introduction

In the wake of the COVID-19 pandemic, Venezuela's Nicolás Maduro issued decree No. 4.160 on March 13, 2020 (Official Gazette No. 6.519 of March 13, 2020) declaring a state of alarm, one of three different states of emergency provided for in the Venezuelan Constitution. This state of alarm has been renewed successively every thirty days since it went into effect.

The Venezuelan Constitution provides that states of emergency, may be declared by the President of the Republic in Council of Ministers (National Executive), when social, economic, political, natural or ecological circumstances occur that seriously affect the security of the Nation, its institutions and citizens, and the institutional capacity to deal with these circumstances is insufficient (art. 337). In states of emergency the Constitution empowers the National Executive to temporarily restrict constitutional guarantees, except those concerning the rights to life, prohibition of incommunicado detention or torture, due process, free access to information, and "other intangible human rights" (art. 337). In any case, state of emergency decrees must comply with the requirements, principles, and guarantees enshrined in

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the International Covenant on Civil and Political Rights and in the American Convention on Human Rights (art. 339).

State of emergency decrees may be extended for a period of time equal to that for which they were originally issued. The National Executive or the National Assembly (or its Delegate Commission) may revoke these decrees before their expiration, when the reasons for enacting the state of emergency cease to exist (art. 339).

These state of emergency decrees are subject to two levels of review, by the parliament and the judiciary. When it comes to parliamentary review, these decrees and their extensions must be submitted to the National Assembly for consideration and approval within eight days of being issued (arts. 338 final section, 339). As for judicial review, these decrees must be submitted within the period previously indicated, to the Constitutional Chamber of the Supreme Court of Justice so that it may rule on their constitutionality (art. 339).

Pursuant to the constitutional mandate contained in the final section of article 338, states of emergency are regulated in the Organic Law on States of Exception (Official Gazette No. 37.261 of August 15, 2001).

The state of alarm is a state of emergency to deal with "catastrophes, public calamities or other similar events that seriously endanger the security of the Nation or its citizens." This type of state of emergency can last for thirty days and may be extended for up to an additional thirty days (art. 338).

Currently, Venezuela is simultaneously subject to two states of emergency: a state of alarm and a state of economic emergency. In effect, the new state of alarm in response to COVID-19 was added to the state of economic emergency that the Maduro regime decreed in 2018 and that is still in force. This state of economic emergency has been intermittently used to issue executive orders on economic matters, despite the fact that this is one of the subject matters and competencies constitutionally reserved for the National Assembly.

II. State of alarm decree regulations

The state of alarm decree issued in response to the COVID-19 pandemic establishes a series of measures to restrict activities and rights, and delegates the authority for adopting further measures. The most relevant measures are the following:

a) The suspension of activities: (i) school and academic (art. 11); (ii) public shows, exhibitions, concerts, conferences, sporting events, and in general, any type of public gathering that involves an agglomeration of people (art. 12); (iii) limitations on establishments dedicated to the sale of food and beverages (arts. 12, 13); and finally, (iv) the closure of all public and private parks, beaches and spas (art. 14).
b) The regulation of people, consisting of quarantine or temporary isolation measures for those: (i) suspected of having contracted the Coronavirus (ii) who have been confirmed to have contracted the Coronavirus; and (iii) who have been exposed to patients suspected or confirmed to have contracted the Coronavirus (arts. 23-29).
c) The inspection of establishments, persons or vehicles: public security bodies are authorized to carry out any inspections they deem necessary in establishments and of persons or vehicles, when they have a well-founded suspicion that the provisions of this decree have been violated. These security bodies are authorized to "take immediate measures that guarantee the mitigation or disappearance of any risk of spread or contagion of the Coronavirus, COVID-19" (art. 28).

Although not explicitly mentioned in the state of alarm decree, these measures restrict a wide variety of constitutional and treaty rights such as the rights to free movement, public assembly, demonstrate and protest, education, free entry and exit from the national territory, entertainment, access to public spaces, and work and the freedom of religion and worship and to conduct economic activities.

III. State of alarm decree flaws and constitutional violations

The state of alarm decrees issued in response to the COVID-19 pandemic contain a series of constitutional violations, such as: the absence of regulations of rights that are not explicitly enumerated, but which have been restricted; the presidential self-authorization of legislative powers; the delegation of regulatory powers to ministers; and the breach of the duty to submit decrees to the National Assembly for its consideration (approval or disapproval). Even before the publication of the first decree in the official gazette, some of the measures restricting the movement of people and international flights had been adopted.

1. *The failure to comply with the duty to submit decrees to the National Assembly for approval*

During states of emergency the effective operation of governmental authorities that provide checks and balances on Executive Power—the Legislature and Judiciary— is more important than ever. The Constitution of Venezuela itself explicitly provides that "the declaration of a state of emergency does not interrupt the functioning of bodies of Governmental Authority" (emphasis added) (Art. 339).

Ever since parties in opposition to Nicolás Maduro's regime won the majority of the National Assembly (NA) in Venezuela's December 2015 parliamentary elections, the Maduro regime has subjected the NA to an unconstitutional "siege" that affects the body's operations and the exercise of its powers. This siege has been carried out through more than 150 decisions handed down by the Supreme Court of Justice, especially through its Constitutional Chamber (CC). These judicial decisions usurped the NA's constitutional power to control acts of the National Executive, including approving budgets, contracts of national interest and even the President's annual message to the Republic, and reassigned this power to the CC. The NA's constitutional powers were also usurped through the unconstitutional convocation, election, and installation of a National Constituent Assembly (NCA) in 2017. Not only did the NCA commandeer the NA's constitutional powers to legislate and control the Executive Power, it also dismissed and then unconstitutionally appointed new senior government officials such as the Attorney General of the Republic. Since 2018 Nicolás Maduro has also issued a series of executive orders based on the state of economic emergency that encroach on the NA's legislative powers.

Compounding this ruptured constitutional order, the state of alarm decree only provides for its referral to the CC of the Supreme Court of Justice, and not to the NA (Eleventh Provision), violating the express constitutional duty to send the state of emergency (alarm) decree to the NA for its consideration within eight days after it is issued (art. 339). The successive decrees to extend the state of alarm have also failed to require their referral to the NA for parliamentary review, as is expressly required by the Constitution (art. 338).

Ultimately, the National Executive's non-referral of the state of alarm decree and its extensions to the NA invalidates said decrees, making them unconstitutional.

2. *Defects in the content of the decree and adopted measures*

The state of alarm and measures adopted in response to the emergency contain a series of substantive and procedural defects about which the Academy of Political and Social Sciences, amongst others, warned and which are summarized below:

A. *Even before the decree was published measures were adopted to restrict flights and the movement of people*

The Maduro regime began to adopt measures related to the restriction of free movement and suspension of work activities on Friday, March 13, 2020, even before the official publication of the state of alarm decree. The Official Gazette No. 6.519 dated March 13, 2020 was not publicly disclosed until March 17, 2020.

The duty to publish emergency decrees prior to the adoption of measures for their execution was breached. Therefore, the acts were adopted without any legal basis and therefore unlawful and arbitrary.

In addition to the above, de facto restrictions were imposed on the right to movement within certain areas or geographic zones, as well as entry and exit from these zones, without the National Executive having issued decrees published in the Official Gazette or having provided for alternative measures to allow for the circulation of vehicles or pedestrians in cases of emergency. These unlawful, arbitrary measures in no way contribute to overcoming the current crisis.

B. *Delegation to the Vice President of the power to suspend "other activities"*

The decree delegates the power to order the suspension of "other activities" beyond those it expressly enumerates to the Executive Vice President of the Republic (in consultation with the Ministers of People's Power with competence in the matter). This rule contradicts the one contained in article eight of the same decree, which establishes that it is the President of the Republic—not the Vice President—who may order the suspension of activities in certain zones or geographic areas.

This delegation of power to the Executive Vice-president itself is also unconstitutional. In effect, article 337 of the Constitution establishes that it

is the President of the Republic in the Council of Ministers who may decree states of emergency and that said decree must contain regulations corresponding to the exercise of the right being restricted (art. 339). According to this constitutional reading and in line with the provisions of the Organic Law of States of Emergency (OLSE), it is the President of the Republic in Council of Ministers who is responsible for issuing the "measures" that regulate states of emergency. Therefore, once the state of emergency and its regulatory measures have been decreed, in accordance with the OLSE, the only thing that the President of the Republic can delegate is the decree's "execution" to the authorities designated by the National Executive (art. 16), not the adoption of the measures themselves. In any case, the delegation of powers, in circumstances permitted by the legal system, must follow the necessary requirements, guidelines and parameters, which is not the case here.

C. *The decree gives law enforcement agencies a "blank check"*

The decree puts the inspection of people, establishments and vehicles in the hands of law enforcement agencies without providing justification or objective parameters for conducting these inspections. Law enforcement officials must simply consider there to be a well-founded suspicion that a provision of the decree has been violated in order to justify conducting a search. The aim of this rule is to authorize law enforcement to take immediate measures to guarantee the mitigation or disappearance of the risk of spread or contagion of the Coronavirus without any protocols for action (Art. 28).

The decree constitutes a blanket, excessive empowerment of law enforcement officials. It also puts police officers at risk of contracting infections arising from the activities they carry out without having established the appropriate personal protection protocols.

D. *The president empowers himself to enact other "convenient" measures*

In the decree the president gave himself the power to enact other measures that he deems "convenient" (First Final Provision). However, the extraordinary measures that can be enacted in a state of emergency are only those strictly "necessary and suitable" in the face of social, economic, political, natural or ecological circumstances that seriously affect the Nation, its

institutions and citizens, when "the powers available to them to deal with such situations are insufficient" (art. 337, Constitution).

Therefore, a restrictive executive measure that is simply "convenient", but is not "necessary" and least of all suitable, does not meet the constitutional threshold required for a measure to be issued through an executive decree during a state of emergency.

E. *The suspension of administrative procedures*

The decree establishes that the suspension or interruption of an administrative procedure as a consequence of enacted measures suspending activities or restricting movement may not be considered a cause attributable to the party concerned, and may not be invoked to justify either a failure or delay in the fulfillment of governmental obligations (Sixth Final Provision).

This provision should be more precise, indicating which administrative procedures and limitation or prescription periods it is justifiable to suspend or interrupt and which are not, for example, due to urgency or in the interest of the individuals' rights.

Furthermore, the decree has had to take into account other situations of legal uncertainty, such as labor and tax related issues, that Venezuelans are confronting due to the serious situation posed by the Coronavirus pandemic and the decree's extraordinary measures restricting such activities and the freedom of movement.

IV. The paralysis of justice

The Venezuelan judiciary lacks independence and impartiality according to all the United Nations and Organization of American States (OAS) reports. In this context, the Supreme Court of Justice (SCJ) ordered that from March 13, 2020 no court in the country could perform any judicial activities ("despache") until May 13, 2020. This resolution has been extended successively.

The SCJ resolved that during the pandemic all cases will remain on hold and procedural terms would not run, which, according to the resolution, would not prevent urgent actions from being handled to ensure the rights of the parties. The courts that handle criminal matters will only deal with "urgent" matters, although the term "urgent" has not been precisely defined. When it comes to matters of constitutional rights' protection ("amparo"), the courts are considered authorized and obliged to process and

decide cases, although the resolution does not specifically indicate which courts are in charge of this task. In the remaining courts, the presiding judges should adopt appropriate measures to guarantee access to justice. In regards to the operation of the SCJ, the resolution provides that the Constitutional and Electoral Chambers will continue to function during the state of emergency, but not the Court's other chambers (Civil Cassation and Criminal and Social Cassation).

To date, the country's courts remain largely paralyzed and measures have not been taken to prevent the suspension of the administration of justice.

The information regarding the operation of criminal courts is contradictory, but it seems that what currently exists is a rotation of "on call" courts that attend to "urgent matters." As previously noted, it is unclear what issues qualify as "urgent." The courts on duty only hear flagrante delicto cases and prosecutors are filing charges within legal deadlines to avoid freeing detained persons. In addition, courts are accepting petitions from parties, but these are only resolved when the respective court is on call.

Overall, the operation of criminal courts is very limited. There are no rulings in cases that are in the second and third phases of proceedings and the intermediate and trial phases are not taking place. In this regard, it is notable that the first section of Article 156 of the Organic Code of Criminal Procedure (OCCP) provides that "the administration of criminal justice is a permanent function of the State, consequently, it may not be interrupted by collective vacations or any other measure that affects compliance with procedural periods...".

The SCJ announced that a "Pilot Program" would be initiated in flagrante delicto cases through the implementation of "virtual hearings" and "electronic filing." However, that same announcement indicates that for now the first stage of the Pilot Program will only consist of basic connectivity tests. Therefore, at present hearings must take place in person, observing social distancing and using physical files. Despite various resolutions adopted in previous years and announcements regarding the possibility of electronic procedures and digitized files, these have not been implemented.

In conclusion, the effective operation of the Venezuelan justice system has not been guaranteed during the pandemic, and the internet-based modalities that do not require physical presence and are currently being adopted in other countries face serious obstacles in Venezuela, starting with the connectivity of government telecommunication company CANTV's internet service.

V. The de facto state of emergency is arbitrary and violates human rights

On April 9, 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, expressed her concern that "certain countries [have adopted] emergency powers that are unlimited and not subject to review" which has meant that in some cases "the epidemic is being used to justify repressive changes to regular legislation, which will remain in force long after the emergency is over". In relation to Venezuela, ten UN Rapporteurs warned on April 30, 2020 that the health emergency is not an excuse to continue restricting human rights. These independent UN experts expressed their alarm at the increase in threats, attacks and charges against journalists, health workers and others in Venezuela, which could discourage those working to safeguard human rights.

Venezuela's authoritarian regime has adopted a series of *arbitrary measures during the state of emergency* such as the detention of journalists and doctors, for sharing information or opinions concerning the pandemic in Venezuela. All of these are clear violations of rights such as those to personal freedom and freedom of expression, which according to Venezuelan law, cannot be restricted even during states of emergency. In any case, these measures are not legally justified, necessary, reasonable or proportional. The following are examples of the arbitrary measures that violate human rights:

- According to the NGO Provea, between March 4 and April 7, 2020 within the framework of the state of alarm, 34 arbitrary arrests were registered, at least 7 medical professionals were jailed and the list continues to grow.
- According to information from the NGO Foro Penal Venezolano, by March 2020 when the state of alarm was decreed, there were 362 political prisoners and from March 13, 2020 to May of same year, a total of 99 people had been arbitrarily detained and 16 persons forcibly disappeared. Many of these arrests have been carried out against opposition politicians, social leaders, and citizens in popular sectors that protested the suspension of public water or electricity services and the restriction of the gasoline supply.
- According to data from the National Union of Press Workers and from the NGO Espacio Público, under the state of alarm, between March 16 and May 3, 2020, there were 22 arbitrary arrests of jour-

nalists and photojournalists, 21 cases of attacks and 9 acts of censorship with the closure of 6 media outlets.

In light of this situation, journalist Delvalle Canelón, General Secretary of the National College of Journalists, stated that "the Government seeks to instill fear in journalists so that the media censors itself." Indeed, since the end of February 2020, information about the pandemic has been restricted, and opinions about the spread of the Coronavirus in Venezuela have generated reprisals, threats and intimidation. Furthermore, reports of potential Coronavirus cases were met with attacks and insults meant to discredit journalists' work.

The Maduro government and other authoritarian regimes have used the COVID-19 pandemic as a pretext to declare de facto states of exception and emergencies in order to introduce arbitrary measures that threaten human rights. For this reason, several international human rights bodies, including the United Nations High Commissioner for Human Rights, the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and the Council of Europe have issued alerts, have begun to work on specialized human rights standards and have created special monitoring groups.

Scientific investigations

Through the joint Resolution issued by the Ministry of Health and Ministry of Science and Technology on April 16 (Official Gazette No. 41.863 of April 21, 2020), under the guise of addressing the COVID-19 pandemic, essential rights associated with the freedom of scientific research were unnecessarily and disproportionately restricted in violation of the Constitution and human rights treaties.

Under the pretext of the state of alarm, these state agencies were given powers that they do not possess to restrict the freedom to seek, receive, and disseminate information and ideas of all kinds. Article 3 of this Resolution provides that any scientific research project related to COVID-19 must have a government "registry" to which "all the requested information must be provided". The nature of information that must be provided is not known with certainty and is not indicated in the Resolution. In addition, COVID-19 research must be approved by the research Ethics Committees (although these committees specialize in evaluating projects specifically focused on human and animal experimentation).

VI. Venezuela: the pandemic of all pandemics

The COVID-19 pandemic has reached Venezuela at the worst moment in its contemporary history: when the country has no rule of law or democracy. Abuses of power in Venezuela are unchecked, and the separation of powers, judicial independence and guarantee of rights are nonexistent.

1. *The Complex Humanitarian Emergency*

Venezuela suffers from a complex humanitarian emergency that has had dramatic consequences for the vast majority of its population and is characterized by: extremely high levels of malnutrition; lack of medical attention due to a crisis in public health services; shortage of medicines and basic foods; and the prolonged absence, suspensions and interruptions of basic public services such as water and electricity. In short, the Venezuela of today is a picture of poverty and exclusion. The responsibility of the State and specifically of the regime in causing this complex humanitarian emergency, as well as its lack of adequate responses to the emergency, is evident. Despite the government's democratic illegitimacy, it has an obligation to adopt urgent, effective and necessary measures to protect and preserve of the health of Venezuelans, guarantee the timely, effective and efficient care of the affected individuals, all while respecting fundamental rights.

On April 2, 2020, the Academy of Physical, Mathematical and Natural Sciences of Venezuela warned that the National Institute of Hygiene was the only laboratory authorized to process the tests of patients suspected of having contracted COVID-19, despite the fact that other labs across the country also had capacity to conduct and process these tests. The Academy viewed this as not only causing an excessive focus and burden on one laboratory, but also as elevating the risk for the distortion of information. The public health system in Venezuela has collapsed. Most of the country's hospitals are not equipped to deal with COVID-19—they lack water, disinfectants and protective medical equipment. The existing capacity of intensive care units barely reached 84 hospital beds in the entire country. Malnutrition and food insecurity in large sectors of the population place them in a highly vulnerable situation. Most of the population does not have the economic capacity to accumulate food for several days, making

it impossible for them to abide by the quarantine rules, as they must live day-to-day and frequent markets. There are also serious restrictions on the supply of drinking water—only 11% of the population has an uninterrupted supply—, which makes it difficult and at times impossible to follow the World Health Organization's recommended hygiene standards.

Although Venezuela has been one of the most important oil producing countries in the world, in the last 20 years its oil industry has been destroyed to the point of going from the production of approximately 3.5 million barrels per day to about 600,000. Internally, the situation is also extremely serious, and Venezuelans are suffering from an extreme shortage of gasoline due to the irresponsible management of PDVSA, the state-owned oil company, and the progressive destruction of its refineries in the last two decades. These gasoline shortages affect not only the movement of people, transportation, and access to health services, but also the production of goods and the transport and distribution of food. This situation puts the country at risk of complete paralysis. According to the Academy of Physical Sciences, the supply of gasoline has been reduced by 99%, 87% of food markets have reported shortages of supplies, and medical and hospital staff have had difficulties, including at times being unable to travel to and from their workplaces.

2. *Limited internet connectivity*

In response to the pandemic, Venezuelans have had to resort to teleworking and other means of working virtually by using the internet. In Venezuela, internet connectivity is extremely limited and of poor quality. This affects the exercise of rights such as those to education, justice and political participation. According to a recent study by Speedtest Global Index, a portal that measures the speed of the internet around the world, connectivity in Venezuelan homes is abysmal. The study covers 176 countries and Venezuela ranks second-to-last in the world: 175th with 3.67 Mbps, with the world average download speed being 74.64 Mbps (*https://www.speedtest.net/global-index*). Even considering the global impact of COVID-19 on internet connectivity, with an average of -2% drop in Mbps as of April 27, 2020, in the case of Venezuela it has reached -17% in fixed broadband and on cellphones. (Tracking COVID-19's Impact on Global Internet Performance (Updated April 27): *https://www.speedtest.net/global-index*).

3. *Prisoners in general and political prisoners*

Prisoners in general have become one of the most vulnerable groups in the pandemic due to the risks of contagion in places of detention. According to reports from the IACHR and the UN, Venezuelan prisons are among the most violent in the world. In the middle of the Coronavirus, a massacre took place on May 1, 2020 in the "Los llanos" Penitentiary Center in Guanare, in the state of Cojedes. The massacre left at least 46 dead and hundreds injured. Conditions of detention in Venezuela are also appalling due in part to overcrowding, unsanitary conditions, and a lack of medical services, food, and internal security. In the midst of the critical situation caused by the pandemic, both regional bodies (the IACHR and IACtHR) and the UN's Office of the High Commissioner for Human Rights have required States to adopt special measures to guarantee the health and lives of persons deprived of liberty, including instituting reasonable advanced release policies. In Venezuela, some early releases have been carried out, albeit on a sporadic basis.

Among those in Venezuela who suffer from these extreme conditions in detention and vulnerability during the COVID-19 pandemic are 362 political prisoners. In this regard, the UN High Commissioner for Human Rights Bachelet on March 2020 reiterated her "call for the unconditional release of all those detained for political reasons." However, with some exceptions, political prisoners in Venezuela remain unjustifiably detained and at great risk of contracting the Coronavirus.

4. *Forced migration, refugees, and returns*

Due to the pandemic and the complex humanitarian emergency described above, the Venezuelan population has been forced to migrate abroad in search of subsistence, food, and medicine. This forced migration represents approximately 17% of the country's population, equivalent to more than five million people.

This Venezuelan migrant population has become a vulnerable group in destination countries which are mainly in Latin America. As the pandemic has hit Latin American countries hard, the Venezuelan migrant population has been particularly affected, losing their means of subsistence and in some cases having to return to Venezuela. Venezuelans who return home have been stigmatized by the regime, which has referred to them as "biological weapons". Upon their return to Venezuela, these individuals,

including minors, are subject to prolonged arbitrary detention and detention under inadequate conditions.

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The measures that the Maduro regime has enacted in order to deal with COVID-19 are primarily aimed at controlling the activity of the population, not at improving health and epidemiological systems, quality and non-interruption of essential public utilities, including water, electricity and gasoline, or removing obstacles to the production, importation and distribution of food, all of which are essential and important in minimizing the fatal effects of COVID-19. To be clear, these measures are mostly arbitrary and designed to control the population, not to effectively confront the causes of COVID-19 or the effects of the pandemic.

In Venezuela, the coincidence of the COVID-19 pandemic, the complex humanitarian emergency and the authoritarian policies of the regime have had catastrophic consequences for and put the Venezuelan population in imminent danger. As the Secretary General of the UN, Antonio Guterres warned, the COVID-19 health crisis "is rapidly turning into a human rights crisis".

Ultimately, the only way to effectively deal with the COVID-19 pandemic is through the rule of law and democracy, so that public policies and measures that are issued respect, guarantee, and protect the human rights of the population.

ASIA

COVID-19'S IMPACT ON CIVIL AND POLITICAL RIGHTS: REFLECTIONS FROM HONG KONG

Surya DEVA*

SUMMARY: I. *The context*. II. *Coexistence of conflicting mask wearing regulations*. III. *Social distancing and the civic space to protest*. IV. *Conclusion*.

I. THE CONTEXT

Covid-19 and the government responses to it – e.g., social distancing or quarantine norms, mandatory mask wearing rules and compulsory lockdowns – have raised a range of constitutional questions all over the world.[1] China is no exception. However, these questions are unlikely to enter courts (or even public discourse) in mainland China for three reasons. First, the 1982 Constitution of the People's Republic of China has no direct effect: despite the Constitution containing a long list of fundamental rights, no citizen could rely on these – in the absence of a law – in court proceedings to challenge a government action or inaction. Second, Chinese courts do not enjoy the power of judicial review. Third, the Chinese government strictly controls discussion about politically sensitive issues, and issues surrounding Covid-19 falls into this category.

However, under the 'one country, two systems' principle, the situation in the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) has been different, at least until the recent enactment of a wide-ranging and ambiguous National Security Law (NSL).[2] Under

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[1] See, e.g., 'Social Rights During and After COVID-19', *https://blog-iacl-aidc.org/social-rights*; 'COVID 19 and States of Emergency', *https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/*.

[2] For an excellent context for this law, see P Y Lo, 'Constitutional "Vaccination": China's National Security Law-Making for Hong Kong', Int'l J. Const. L. Blog (30 June 2020),

Hong Kong's Basic Law, labelled as mini-constitution, Hong Kong courts enjoy independence, and the power of judicial review to test government policies and decisions for constitutionality.[3] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are applicable to Hong Kong. The former has been implemented in Hong Kong by the Bill of Rights Ordinance.

Against this backdrop, this short piece will provide critical reflections on two issues concerning civil and political rights. First, human rights implications of the Hong Kong government's regulation to wear mask,[4] while the earlier regulation – introduced as a response to (violent) protests that took place in the second half of 2019 – not to wear masks is still in force.[5] Second, the selective use of social distancing norms to curtail the civic space to protest peacefully, including against the NSL's enactment. Like elsewhere, the Hong Kong government's Covid-19-related measures have also impacted socio-economic rights (e.g., the livelihood of individuals). However, due to space constraints, this piece will examine the impact of these measures only on selected civil and political rights.

II. Coexistence of conflicting mask wearing regulations

On 4 October 2019, the Chief Executive in Council issued the Prohibition on Face Covering Regulation (Mask Regulation) using powers under an antique colonial legislation, the Emergency Regulations Ordinance (ERO). Section 3 of the Mask Regulation criminalises the use of 'any facial covering that is likely to prevent identification while the person' is at an unlawful or unauthorized assembly, a public meeting, or a public procession. It will be a defence to the offence under Section 3 if the person had 'lawful authority or reasonable excuse for using a facial covering', e.g., the facial covering is for religious reasons or for a pre-existing medical or health reason (Section 4). Police officers have a power to require removal of face covering in

http://www.iconnectblog.com/2020/06/constitutional-"vaccination":-china's-national-security-law-making-for-hong-kong.

[3] Article 158 of the Basic Law though vests the power of final interpretation in the Standing Committee of the National People's Congress.

[4] See 'Latest legislative amendments and specifications under Prevention and Control of Disease Ordinance gazetted', *https://www.info.gov.hk/gia/general/202007/22/P2020072200750.htm?fontSize=1*.

[5] Prohibition on Face Covering Regulation, *https://www.elegislation.gov.hk/hk/cap241K*.

a public place and a failure to comply with this requirement will constitute an offence (Section 5).

The constitutionality of the ERO as well as the Mask Regulation was challenged on several ground.[6] The Court of First Instance held that the ERO insofar as it empowers the Chief Executive 'to make regulations on any occasion of public danger' is incompatible with the Basic Law and that the Mask Regulation imposes unproportional restrictions on fundamental rights.[7]

This court decision attracted a sharp reaction from Chinese authorities: an unprecedented claim was made that Hong Kong courts have no authority to judge and decide whether laws are consistent with the Basic Law.[8] Subsequently, the Court of Appeal upheld the constitutionality of the ERO as well as the Chief Executive's wide powers to act in situations of 'public danger'.[9] The Court also ruled the government ban on wearing masks at unlawful assemblies to be constitutional, though it found the ban on facial coverings during lawful public gatherings as well as the power given to police officers to remove masks unconstitutional.

The Mask Regulation, which was an attempt to discourage and deter protestors from covering their face while committing violent acts, remains in force, though hardly any protests are now taking place because of social distancing restrictions related to Covid-19. At the same time, the Hong Kong government introduced regulation to obligate wearing of masks from 15 July 2020:[10] people were initially required to wear masks only while using public transport; this was later extended to include all indoor public places such as shopping malls, markets, shops and building lobbies; and finally, mask wearing was made mandatory in all indoor and outdoor public places, including public transport.

Government regulations to both obligate people to wear or not wear masks can restrict certain human rights, and people have been protesting

6 *Kwok Wing Hang v Chief Executive in Council* [2019] HKCFI 2820, para 11.

7 *Ibid*, para 193.

8 "No other authority has right to make judgments': China slams Hong Kong court's ruling on anti-mask law as unconstitutional' (19 November 2019), *https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body*.

9 'Court rules mask ban was partially unconstitutional' (9 April 2020), *https://news.rthk.hk/rthk/en/component/k2/1519807-20200409.htm*.

10 'Press Release: Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation and the Prevention and Control of Disease (Wearing of Mask) (Public Transport) Regulation gazetted' (14 July 2020), *https://www.info.gov.hk/gia/general/202007/14/P2020071400037.htm*.

in several countries about this issue. However, as not many human rights are absolute, regulations restricting rights could be justified if they (i) seek to serve a legitimate aim, (ii) are rationally connected to the aim, (iii) are no more than necessary in attaining the said aim, and (iv) strike a reasonable balance between the societal benefits gained and the inroads made into the protected rights.[11] The restrictions should also be applied in a non-discriminatory manner.

While dealing with the constitutionality of the Mask Regulation, the Court of Appeal tried to strike a reasonable balance. However, the real problem lies with very wide discretion enjoyed by police to approve or reject applications to organise public meetings or marches. If the Hong Kong police is perceived by public to be taking into account political considerations while exercising their discretion, even legitimate peaceful public assemblies would end up becoming 'unauthorised' and/or 'unlawful' and thus fall foul of the Mask Regulation. The same could be said about the existence of emergency powers under the ERO. What is problematic is not the mere existence of this power, but the exercise of such power by the Chief Executive without effective checks and balances, especially if she acts with Beijing's blessings.

In short, during the pandemic, the Hong Kong government's regulations about both wearing and non-wearing of masks have the potential to undermine human rights, if the power is exercised for politically motivated considerations, rather than for bona fide public interest. The risks become more real when both the executive and the legislature are not elected by universal suffrage, steps are taken to undermine the independence of courts and the media, and civic space is suppressed systematically (as discussed below).

III. Social distancing and the civic space to protest

Since February 2020, the Hong Kong government has issued and relaxed or tightened social distancing measures to regulate public gatherings. Most stringent measures were introduced with effect from 29 July: no public gatherings of more than two persons and complete prohibition on dine-in service in restaurants. It is interesting, however, that public transport – including

[11] *Hysan Development Co Ltd v Town Planning Board* [2016] 9 HKCFAR 372; *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2017] 5 HKC 242.

Mass Transit Railway (MTR) which is used by thousands of people at any given point of time – is excluded from this prohibition. Group gatherings to perform any governmental function are also exempted from this ban on public gatherings.

In recent years, Hong Kong has seen a range of political protests, so much so that the title of a prominent book labels Hong Kong as the 'City of Protest'.[12] The most recent saga of protests began in June 2019 as an 'opposition to a proposed extradition law that would have allowed the transfer of fugitives to mainland China'.[13] This then evolved and escalated into a wider anti-government protest, with increasing use of violence on the part of protestors as well as disproportionate use of force and exercise of arbitrary powers by the police.

However, it appears that the Hong Kong government has used the social distancing measures as a pretext to *close* at least three 'protest windows' during June-July 2020. Two of these windows have become an annual protest feature in Hong Kong: the June 4 vigil to honour the victims of the Tiananmen Square massacre, and the July 1 march to mark the handover of sovereignty over Hong Kong to China. The third window was created by the process of enacting the NSL by the National People's Congress and its Standing Committee in June without any consultation with the people of Hong Kong.[14]

On 1 June 2020, the Hong Kong police 'prohibited for the first time the annual June 4 vigil to honor victims of the pro-democracy Tiananmen Square protests in 1989'.[15] Although the pandemic situation in Hong Kong was generally under control during mid-April to mid-June with no (or only a few) new local Covid-19 cases being reported,[16] the police used the pandemic and social distancing norms to deny permission for this annual candlelight gathering. Nevertheless, thousands of people defied

[12] Antony Dapiran, *City of Protest: A Recent History of Dissent in Hong Kong* (Penguin, 2017). See also Antony Dapiran, *City on Fire: The Fight for Hong Kong* (Scribe, 2020).

[13] See 'Hong Kong Protests', *https://www.scmp.com/topics/hong-kong-protests*.

[14] See 'NPCSC Releases Some Details of Draft Hong Kong National Security Law, But Withholds Information on Criminal Provisions' (20 June 2020), *https://npcobserver.com/2020/06/20/npcsc-releases-some-details-of-the-draft-hong-kong-national-security-law-but-withholds-information-on-criminal-provisions/*.

[15] Austin Ramzy, 'Hong Kong Bans Tiananmen Vigil for 1st Time, in New Challenge to Protests' (4 June 2020), *https://www.nytimes.com/2020/06/01/world/asia/Hong-kong-Tiananmen-vigil-banned.html*.

[16] 'Latest situation of cases of COVID-19 (as of 28 July 2020)', Figures 2 and 3, *https://www.chp.gov.hk/files/pdf/local_situation_covid19_en.pdf*. See also *https://www.worldometers.info/coronavirus/country/china-hong-kong-sar/*.

the police ban and joined the vigil. The police subsequently charged 13 prominent opposition leaders for inciting people to take part in an unauthorised assembly on 4 June 2020.[17] This police action received wide condemnation globally.

On 27 June 2020, the Hong Kong police also denied permission to the Civil Human Rights Front to hold an annual march on the 1st July, including to protest against the enactment of the NSL.[18] The police cited the social distancing rule which prohibited gatherings of more than 50 people as one of the reasons behind its decision. Despite the ban, thousands of people who came out on streets to protest were met with aggressive police tactics to disperse the crowd, including arrests under the newly implemented NSL.[19]

In between these two annual protest windows, the Hong Kong government ensured that no plans to organise protests against the then proposed NSL materialised. The social distancing measures related to Covid-19 again proved handy in this regard. It was perhaps intentional that the Chinese government used the pandemic as an opportunity to move at an unprecedented pace to enact the NSL[20] and consequently managed dissenting voices much better.

A few examples of regulatory incoherence and selectivity on the part of Hong Kong government are worth noting here. While the 1st July march was banned despite the organisers willing to take proactive measures to guard against the potential spread of coronavirus, a cocktail reception and the flag-raising ceremony involving hundreds of people were held on the same day to celebrate 'the 23rd anniversary of Hong Kong's return from British to Chinese rule'.[21] Moreover, it is worth noting that the Hong Kong government did not put any restrictions on people using public transport (including

[17] Brian Wong, 'Hong Kong media tycoon Jimmy Lai and 12 others face incitement charges over June 4 Tiananmen vigil' (13 July 2020), *https://www.scmp.com/news/hong-kong/law-and-crime/article/3092957/hong-kong-media-tycoon-jimmy-lai-and-12-others-face*.

[18] 'Hong Kong national security law: police ban July 1 march planned to protest against legislation' (27 June 2020), *https://www.scmp.com/news/hong-kong/politics/article/3090848/hong-kong-national-security-law-police-ban-july-1-march*.

[19] Helen Regan and Joshua Berlinger, 'Protests break out in Hong Kong as first arrest made under new security law' (2 July 2020), *https://edition.cnn.com/2020/07/01/china/hong-kong-national-security-law-july-1-intl-hnk/index.html*.

[20] See '2020 NPC Session: NPC's Decision on National Security in Hong Kong Explained (Updated)' (28 May 2020), *https://npcobserver.com/2020/05/22/2020-npc-session-npcs-imminent-decision-on-national-security-in-hong-kong-explained/*.

[21] Tony Cheung et al, 'Hong Kong national security law: Carrie Lam says peace will return to city and vows to restore its battered reputation' (1 July 2020), *https://www.scmp.com/news/hong-kong/politics/article/3091294/hong-kong-leader-carrie-lam-attends-flag-raising-ceremony*.

MTR) – even wearing of masks in public transport was made mandatory only with effect from 15 July 2020.

Such selective crafting of exceptions raises questions about the politics behind such exceptions: if the Cvoid-19 situation in Hong Kong is serious enough, then these blanket exemptions for public transport or government functions do not make sense. Conversely, if people are allowed to use MTR or attend government functions on wearing masks, the same treatment could have been afforded to people proposing to participate in protests organised by pro-democracy groups.

In late July 2020, it was reported that the government was considering to postpone the Legislative Council elections scheduled for early September 2020 due to the Covid-19 situation.[22] Doing so will be quite controversial and problematic, not least because this would amount to using the Covid-19 as an excuse to shield pro-establishment political parties from suffering likely defeat in elections.

IV. Conclusion

The analysis in this piece shows that like many other governments, the Chinese government as well as the Hong Kong government have used the Covid-19 pandemic as an opportunity to curtail legitimate constitutional rights guaranteed under the Basic Law as well as the Bill of Rights Ordinance. It is yet to be seen whether these restrictions on human rights will become the 'new normal' for Hong Kong, especially because of the NSL. There are some early indications that going forward the freedoms enjoyed by Hong Kong people, pro-democracy political parties, civil society organisations, students, teachers and scholars, and the media will be curtailed in the post-Covid-19 era.

[22] Gary Cheung and Kimmy Chung, 'Hong Kong elections: will Legislative Council polls be postponed, and who stands to gain?' (29 July 2020), *https://www.scmp.com/news/hong-kong/politics/article/3095018/hong-kong-elections-will-legislative-council-polls-be*.

COVID-19 AND THE COURT IN INDIA

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SUMMARY: I. *Introduction*. II. *Accessibility to the Higher Judiciary during Pandemic: A Flashback into the Recent Past*. III. *Interventions by the Judiciary – Selected Issues*. IV. *Conclusion*.

I. INTRODUCTION

Thus far, in India, the contribution made by the Supreme Court for the promotion and protection of human rights for underprivileged and marginalized sections of the society has been phenomenal. The creativity displayed by the Apex Court in relaxing the rule of locus *standi* has resulted into better access to justice and broadened the scope of the human rights.[1] Amidst a wide range of the benefits arising out of judicial activism, Public Interest Litigation is the most prominent one, which enables the public spirited citizens to knock at the door of the higher judiciary of the country against the violation of their rights.[2]

The unprecedented global pandemic caused by COVID-19 has exposed the vulnerability of the health care infrastructure across the globe.

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[1] The Supreme Court has recognised a set of socio-economic rights within the ambit of 'right to life' under Article 21 of the Constitution.

[2] The term 'higher judiciary' has been used for both the Supreme Court and the High Courts as they are entrusted with the jurisdictions to entertain the petition for the breach of fundamental rights under Articles 32 and 226, respectively. India follows hierarchical judicial structure comprising of the Supreme Court at the top, High Courts at mid-level (25 High Court – either geographically dedicated to one or more than one state), and Subordinate Courts at the lowest level (at the district level). Public Interest Litigation evolved in mid-1980s when the Supreme Court relaxed the rule of *locus standi* and allowed the public-spirited citizens to approach the court against the violation of the rights of the marginalized sections of the society.

The challenge faced by India, perhaps, even more daunting comparing to any other countries as because of large population its governance model is under severe stress ever since the lockdown has been imposed.[3] Therefore, to avoid fallacies of governance and for lessening the sufferings of the poor people, the hope is pinned down on the higher judiciary. The jurisdictions of both high courts and the Supreme Court are being repeatedly invoked by the public spirited citizens. Also, the courts on its own motion are often questioning the decision-making process of the government. Either on the petition of the public-spirited citizens or on-its-own motion, the jurisdictions of the Supreme Court and the High Courts were invoked to assail the decision-making process, to mitigate the sufferings or to ensure accountability of the government.

The chapter builds on the intervention made by the judiciary on the issues surfaced during the time of pandemic that affected the general public. It enquires into the response on the selected issues during the global pandemic. In conclusion, it brings out the significance of access to the judicial forum and the court's promptness to intervene in issues of public importance to save the institutional credibility.

II. Accessibility to the Higher Judiciary during Pandemic: A Flashback into the Recent Past

Indian Legal Database, *Manupatra*, has been popularly surveyed to identify the number of order/judgment passed by the Supreme Court and the high courts. The search pattern during the period of lockdown revealed that researchers were more eager to mine information related to pandemic comparing to any other issue. From the last week of March up to July 2020, the terminology that was searched in the data base was 'COVID 19'. So far, 99 hits have come for the Supreme Court and 719 hits for the high courts. For the purpose of the present work, the cases filed by the public-spirited citizens in the form of Public Interest Litigation (PIL) or *suo-moto* action taken by the courts have been considered. The Supreme Court had entertained 20 PILs or *suo-moto* petitions on diversified issues connected to COVID 19. More precisely, the oldest High Courts of the country, in Delhi, Madras, Kolkata and Bombay, had witnessed a considerable number of PILs during lockdown on

[3] Though, currently the country is going through the process of un-lockdown, the discipline that the public is expected to display, is grossly missing. This is forcing the government, both at central and local level, to reevaluate strategies to fight COVID pandemic time after time.

the issues related to the COVID 19. Interestingly, the High Courts of the states, such as Bihar, Jharkhand, Odisha and Chhattisgarh, which lack the robust health care infrastructure and have the presence of large number of migrant workers, were spared. The extraordinary jurisdiction, under which the action like PIL is traditionally entertained by the higher judiciary in India is a practice unparalleled to any other country. The popularity of this legal avenue has stayed in its course since the time of its emergence in India during 1980s. The data, therefore, reveals a curious trend, that indicates towards an inconsistency in the behavior of the populace. This further intrigues us when we look at the concurring jurisdictions of the Supreme Court and the high courts. Even that had failed to pursue the right-seekers. Hitherto, in some states they have displayed a strange indifference when it comes to take the matter to the nearest available judicial forum while in some parts of the country people on the similar issues are aggressively questioning the government actions before the appropriate courts.

However, notwithstanding the asymmetry in the interventions made by the various high courts, the trend in general exhibits the ease of accessibility to the judicial institutions during the torrid time of pandemic.

III. Interventions by the Judiciary – Selected Issues

1. *'Migrant' Workers*

Due to the notification of the lockdown issued by the central government under the National Disaster Management Act, 2005, every industrial activity was shut down in the first few months on account of the fear of spreading of deadly virus. But the notification made it amply clear that an employer should pay wages to workers during the period of lockdown. In pursuant to the notification, the government issued advisory to the employer to continue to pay the wages during the period of lockdown.

Even after this sensible instruction given by the government, thousands of workers at different parts of the country started to feel vulnerable because of the apathy shown by their employers. They started to return to their native places which, unfortunately in most of the cases were far away from their place of employment. The journey was perilous and often undertaken by the workers under the extreme adverse conditions. As public transport remained grounded, these workers were found walking miles on foot, desperate to get back to their native places.

Regardless of their fundamental right available under Article 19(1) to move freely, reside, and carry on trade, occupation, and profession in any part of the territory, the workers were branded as 'migrant' in their own country. The door of the Supreme Court was knocked by Alakh Alok Srivastava for these migrant workers, demanding a relief package from the government. But the Court had refused to pass any specific directions. The court's intervention was also sought to impose the liability on the central and state governments to to pay the wages. However, the Apex Court again agreed with the government's decision that principally had put the burden on the employers for such payment.

The sordid scene of thousands of workers walking on the roads and heading towards their native place in inhuman conditions attracted the attention of electronic, print, and social media. The arrangements made by the governments were more seen on the paper than on the ground. The appalling conditions of the workers had finally shaken the conscience of the judges of the Supreme Court. Addressing the significant criticism of civil society, the Supreme Court, exercising its inherent power as the custodian of the rights, took a *suo-moto* petition to provide a remedy migrant workers (*In re: Problems and Miseries of Migrant Workers*). The government was directed to arrange the transport for the workers who were heading towards the home without charging any cost of travel from these people. Further, it was seen that the poor people were subjected to criminal action for the violation of the order of lockdown, resulting in the filing of First Information Report against them at various places across the country. The Court had passed order to withdraw the criminal complaints made against them. The court truly realized the role of *sentinel qui vive* by making a timely intervention and restored its dignity in the eyes of the poor people for whom the institution matters the most. On a petition to bring in respite to the migrant workers, the Court advised the governments to look into the feasibility of the implementation of 'One Nation One Ration Card Scheme' whereby poor people would be entitled to have food grains under the public distribution scheme regardless of the place of the issuance of the card (*Reepak Kansal v. Union of India*). On the issue of payment of wages to the workers, the Court realized the employers' hardships on account of the closure of the business. It suggested that both the employers and the employees should sort out their differences through negotiations (*Ficus Pax Pvt. Ltd. v. Union of India*).

Notably, the Delhi High Court lauded the effort of the Government of Delhi and accepted the plea of resource scarcity when a petition was filed to establish community kitchen where migrant workers stayed so that food could be made available to them on the production of the ration card or any

valid document (*National Campaign Committee for Eradication of Bonded Labour India News Communications Ltd. v. Govt. of NCT of Delhi*).

2. *Health Care*

The COVID crisis has particularly exposed the vulnerability of the health care infrastructure of the country. The absence of a vaccine and the dire need to undertake preventive measures to minimize the casualties have put enormous pressure on the limited resources available in the hospitals managed by the government. A plea was made before the Supreme Court to nationalize all the health facilities, and the COVID test shall be available free of cost in government as well as private hospitals (*Amit Dwivedi v. Union of India*). The Court refused to pass an order of nationalization but directed not to charge any cost to conduct the test in all the hospitals. The order has burdened the private hospitals and compelled them to stop cooperating with the government to fight the epidemic. The hour's need was to augment all the resources available with a reasonable approach to recover the cost of the clinical support. In *Jerryl Banait v. Union of India*, the Supreme Court's attention was attracted to the shortage of personal protection equipment to medical personnel and the harassment suffered by them from the relatives of the patients or in their neighborhood due to fear of contagious nature of the disease that made people paranoid towards usual social norms.. The Court had directed to augment the resources to procure the equipment and initiate criminal action against any obstruction caused to the hospital staff in performance of their duties. In another petition, the Court was asked to direct the government to formulate a comprehensive policy for the welfare and the safety of the healthcare workers (*United Nurses Association v. Union of India*). The Court refrained from issuing the detailed guidelines and gave the petitioner liberty to approach if the order issued earlier was not followed.

Further, the intervention was sought to make changes in the treatment guidelines for seriously ill COVID-19 patients based on the reports that appeared in the United States and Canada. The Court aptly refused to issue any directions in this regard. In a *suo-moto* matter, the Court was not satisfied with the monitoring mechanism to supervise the functioning of the hospitals. Expert Committee comprising of bureaucrats and medical professionals was constituted to oversee the steps taken by the government. It was also suggested to form similar committee at the state level (*In re: The Proper Treatment of Covid 19 Patients and Dignifying Handling of Dead Bodies in the Hospitals etc*).

Besides the Supreme Court, the high courts were also approached to strengthen the health care infrastructure for the welfare of the population. Delhi HC again directed the Government of Delhi to follow a timeline for the pathological result of the sample collected and to inform the status on daily basis to the general public. On a *suo-moto* petition, Madras High Court had invoked the spirit of 'the right to life' to guarantee a dignified burial to the dead person. Madras High Court had also approved the plan to use the carriages for isolation ward while rejecting the request to pool in the private hospitals to treat the patients of the corona. The Court had acceded to the private hospitals' exploitative tendencies towards the poor people and expressed confidence in the government's system.

3. *Justice Delivery System*

The crisis has presented an opportunity for the judiciary to internalize the use of technology in its day-to-day functioning. In *suo-moto* matter of *Contagion COVID 19 Virus in Prisons,* the Supreme Court advised all the courts to aggressively use the video conferencing facilities to record the statement of under trial prisoners and also directed to the state governments to constitute a high-powered committee comprising of the high officials of the prison. The Court in addition to arrest the spread of disease directed the governments to suggest guidelines how some prisoners might be released from the overcrowded prisons to avoid congestion. The government was asked to arrange the stay of the released prisoners in the shelter homes during the lockdown. Consequently, Karnataka High Court had agreed with the state governments' steps to decongest the prisons by releasing the prisoners who have been put behind bar for more than 10 years (*People Unity for Civil Liberties and Human Rights Forum v. State of Karnataka*).

Considering the significance of the access to justice for the litigants, in another *suo-moto* matter, the Court has issued guidelines for hearing the matters through video conferencing throughout the country.

IV. Conclusion

Overall, apart from little inhibition shown by people in some parts of the country, the large number of PILs filed on the issues related to COVID-19 reflects the alertness of the citizenry. After a slow start judiciary started to warm up to the task and the respect of the judiciary in the eyes of the common

man was mostly restored. The diverse issues that courts patiently head so far, for example, the administration of traditional medicines to the patients, preparing a robust plan to treat other severe diseases, formulating guidelines for media on reporting of the positive cases of corona, withdrawal of the toll collection on highways, financial assistance to the lawyers, make one this clear – the purity of the higher judiciary is still intact in this country Perhaps, among all cases, the most laudable efforts made by the Supreme Court are the directions issued to mitigate the sufferings of the migrant workers and health professionals. It reminds us that judges, especially those at the highest Court of the country are not insulated from social upheaval and ready to walk extra mile to place India's justice delivery system at a pedestal from where vision of new India may be seamlessly realized.

CONSTITUTIONAL OVERSIGHT MECHANISM FOR GOVERNMENT DECISION MAKING IN AN ERA WITH COVID-19

Akiko EJIMA*

SUMMARY: I. *Introduction: Time to Compare Decision-making by Governments*. II. *Background*. III. *Legislative Response*. IV. *Oversight Mechanism*. V. *Conclusion*.

I. INTRODUCTION: TIME TO COMPARE DECISION-MAKING BY GOVERNMENTS

Since COVID-19 pandemic spread all over the world, we frequently compare countries by number of infections and deaths. Why did some countries manage to keep the virus under control and others not? Moreover, why did some governments respond to the situation swiftly and effectively, and others not? Why did some governments take more drastic measures and others not? The decision-makings by governments is a result produced from a particular constitutional mechanism. It is time to compare not only decision-makings but also constitutional mechanisms in which government decisions are made.

In the present situation two things are clear. First, the virus will not disappear in the near future and continue to remain a problem until we discover vaccines and treatments. It takes time for everyone to get a vaccine. Therefore, the rhetoric of "emergency" (particularly states of emergency) needs to be revisited from perspective of human rights, democracy and rule of law. It is more difficult for the government to persuade people by saying that this is a state of emergency and if we can endure it together, we may return to the normal situation.

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Second, the countries who were initially reluctant to take measures promptly to cope with COVID-19 are more likely to be badly affected. The risk is real. The WHO had warned the world at the end of January (public health emergency of international concern), but very few countries immediately reacted. Many people cannot stop questioning if the government had taken certain measures earlier, we could have saved more lives. We need to constitutionally evaluate what the national governments have done so far.

Now the world is facing either an unstoppable incessant increase in infections or a clear sign of a second wave of pandemic, it is time to examine how far the existing constitutional mechanism can oversight the government and make the government accountable for their actions or not taking actions. This short article aims to explore the measures taken or not taken by the Japanese government as a case study in order to emphasize the importance of constitutional oversight and scrutiny mechanism for government decision-making in an era with COVID-19. Japan seems to deal with the first wave of COVID-19 quite effectively as the rate of infections and deaths in relation to the population (126 million) is relatively low in the world. However, it is not the result of the well-planned policy nor its effective implementation but a result of the people's voluntary efforts to stay at home and probably some lucky factors which are not scientifically proven yet. If the government had taken more drastic measures earlier, could more lives have been saved and the duration of a state of emergency could have been shorter (less economic impact) or even a state of emergency would have been unnecessary? Japan is presently facing a risk of the second wave of spread of the virus. The government seems to fall into the similar pattern as the previous one: waiting until a real danger (a sign of collapse of the medical institutions) re-appears. It is time to explore what Japan could have learned from the previous lesson (the first wave) if it had had an appropriate oversight mechanism.

II. Background

1. *The First Wave*

The first case of COVID-19 in Japan was confirmed on 16 January 2020. On 30 January, the Japanese government set up the COVID-19 Countermeasures Headquarters. It published emergency countermeasures policy against COVID-19 on 13 February and presented Basic Policies for Coronavirus Disease Control on 25 February. In the meantime, a quarantine of an inter-

national cruise ship began on 4 February at Yokohama Port (712 people (appeared as "Other" in the WHO Situation Report) were confirmed positive).

The number of confirmed cases has steadily increased, but not dramatically as in other countries in Europe and North America. When Northern Italian cities started a lockdown on 21 February, there were only 93 cases in Japan. When several states in the U.S. introduced severe restrictions in mid-March, there were about 800 cases in Japan. The Japanese government repeatedly explained that it was not necessary for Japan to take drastic measures, like a lockdown, until the decision of postponement of the Tokyo Olympic and Paralympic Games was announced on 24 March. The very next day, the Tokyo Governor strongly asked residents to avoid non-essential outings in order to avoid a surge in infections. She even put pressure on the central government by suggesting the possibility of a lockdown of Tokyo. However, the central government did not declare a state of emergency until 7 April, when the number of confirmed cases reached 3,906. Furthermore, the initial declaration only applied to the seven most affected prefectures including Tokyo. It was finally widened to cover the whole nation on 16 April when the number reached 8,582. However, the declaration is based on the New Influenza Special Measures Act 2012 (NISMA, Act No.31 of May 2012) which does not have a power to introduce strict restrictions such as a lockdown. On 15 May, the government lifted the declaration of the state of emergency for 39 prefectures (except for major eight prefectures) two weeks earlier than the original duration. A week later the government lifted the declaration for three prefectures. On 25 May, the government lifted the declaration for remaining five prefectures including Tokyo when 31 new confirmed cases and 10 new deaths were reported.

2. *The Second Wave?*

After a month the new confirmed cases started to increase. On 24 June, new 966 cases (per day), which is the all-time highest number, was reported. The total confirmed cases reached 29,382 and 996 (as of 26 June). The number of infections soars in Tokyo particularly: almost every day 200-300 cases have been reported since 9 July. When the state of emergency was lifted most prefectures (except for Tokyo and a few big cities) reported no new cases. However, infections started to spread again all over Japan. Now 35 prefectures among 47 reported new cases on 26 June. However, the government keeps the position that it is not necessary to declare a state of emergency by arguing that the hospitals have enough capacity to deal with critically ill patients.

It is unclear that the government makes a decision on what conditions. It seems that the government takes a similar attitude which it showed at the peak of the first wave. It was the initiative of the experts who strongly warned the general public who took the alert seriously and closed the shops and facilities and change the lifestyle dramatically under a declaration of a state of emergency without legal penalty.

III. Legislative Response

1. *Reluctance of the Diet to Legislate*

The only new legislation adopted since the outbreak of COVID-19 is the amendment of the New Influenza Special Measures Act 2012 (NISMA, Act No. 4 of 13 March 2020) to include COVID-19 under the category of "new influenza etc" which, other than budgetary measures, needs legislative approval. The bill was submitted to the Diet (Japanese legislature) on 10 March, passed on 13 March 2020, and came into effect on 14 March. However, it took more than three weeks for the government to announce the declaration based on the NISMA despite the fact that it had set up the Government Countermeasures Headquarters based on the NISMA on 26 March. In the Prime Minister's speech upon the declaration of a state of emergency, he asked people to refrain from going out in order to achieve a 70 to 80 percent decrease of opportunities for person to person contact, and to follow social distancing policy of avoiding the "3-Cs" (closed spaces, crowded places and close contact with people) for a period of one month.

By the declaration of a state of emergency, the prefectural governors can clarify which facility should be closed under the declaration and request to close. After the declaration of a state of emergency the Tokyo governor consulted with the central government and announced a list of facilities to be closed, and requested for them to do so. However, the request is still without legal penalty. There exists ambiguity and resistance. Most shops and facilities obeyed the request but some pachinko parlours (pachinko is a Japanese gambling machine) stayed open despite the request for their closure. The only action that governors can take is to give instruction for measures and publicize the name of the parlours if they do not follow the instruction. In fact some parlours which ignored the request and whose names were publicized by the Osaka governor received more customers than usual as other parlours were closed. Supermarkets which were allowed to open in

order to supply daily goods and food became the popular place for families and couples as there were no other places to go together. Beaches and mountains became crowded with people. Furthermore, the fundamental problem is that many office workers could not work at home because of technical deficiency and work culture although there were some progress. Therefore, the goal to decrease direct personal contact by 80 percent, which was strongly recommended by the expert group in order to avoid an explosive increase in infections which would burden the medical care beyond capacity, has not been achieved.

The only successful closure has been those of schools based on Art. 20 of the School Health Safety Act 1958 (Act No. 56 of 10 April 1958). On 28 February, temporary closure of all elementary schools, junior high schools, and high schools was suddenly announced and they were all closed on 2 March. This created chaos for working parents. Most of the public schools re-opened from June but many universities in the major cities closed the campus and provide online teaching from April which is the beginning of the new academic year.

Presently faced with a new crisis (the second wave), the government set out to extend the existing legal instruments without undertaking legislative changes. The government is thinking to utilize the existing laws: e.g. the police power to do onsite-inspection at night clubs under the Act on Control and Improvement of Entertainment Business (Act No. 122 of 10 July 1948) and the power of the public health centre to do onsite-inspection at restaurants under the Food Sanitation Act (Act No. 24 December 1947).

2. *Budgetary measures*

Another measure to persuade the people to stay at home is financial support. The Diet (Japanese legislature) passed the supplementary budget twice. The first one amounts to 25 trillion yen (250 billion US$), half of which is distributed to every resident (including foreign resident registered in local resident register). Each resident can obtain 100,000 yen on request. One third is used to support small companies and tourism industry. The second supplementary budget amounts to 32 trillion yen mainly for helping smally companies, workers, and hospitals. Local governments also introduced their own subsidy to support residents and companies. However, it is doubtful that they can continue to provide the similar support for the second wave.

IV. Oversight Mechanism

1. *Legislative Oversight*

The regular session of the Diet ended on 17 June despite the opposition parties requested the Diet to keep open. Therefore, the role of the Diet in scrutiny and oversight of the government is limited. It was agreed that the examination during the closing session will be held once a week, but it is unclear how it works now. Prime Minister Abe has not attended the above examination during the closing session.

During the Diet session, Prime Minister had to answer all kinds of questions by members of the Diet related to the policy and implementation of the measures for COVID-19. However, since 18 June, the press conference of Prime Minister has not been held despite that there are many issues to be questioned. For example, why has the implementation of specific measures such as sustainable support money for small companies and individual specific subsidies been delayed? Should the promotion measure for tourism (the individual can obtain travel subsidy (upper limit is 80,000 yen) from the government) should be implemented as it was planned (from 22 July) when a new risk of the second wave is arising? After all, the second supplementary budget included 10 trillion yen for the reserve fund (Contingency funds for the COVID-19). Who can scrutiny the use of the reserve fund?

2. *Judicial Oversight*

The role of the judiciary for oversight of the government is limited in Japan. First, at present there is no adjudication directly related to the issue caused by the COVID-19. Even if someone bring a case to the court, how far the Japanese judiciary can admit the obligation of the central and local governments remains to be seen. As many Japanese measures are based on non-binding request without penalty, it may not be easy to make a justiciable case.

3. *Independent Oversight*

Since the outbreak of COVID-19 and particularly the infections in the Diamond Princess were reported, expert views of infectious disease specialist have been widely reported and relied on. In fact, it was the initiative of

the medical experts of the expert meeting who pushed the government to declare a state of emergency because of the fear of medical collapse. The problem is that it is unclear that who took the responsibility for a declaration of a state of emergency. Moreover, who should have taken the responsibility? According to the principle of democracy it should be the government not the disease specialist. However, the government made an impression that it was the expert meeting board who made a decision because the government constantly relied on the views of the expert meeting although the expert meeting was just an advisory body for the Government Countermeasures Headquarters for COVID-19 and did not have legal backing. Due to the criticism, on 7 July the government abruptly reorganized the expert meeting to establish a new panel under the government's COVID-19 advisory council, which is based on the NIMSA. The membership of the new panel is extended to include not only the existing infectious disease experts but also wider experts including economists, a lawyer, a journalist and a local governor. To widen the membership is useful as it is necessary to take a balance between the medical concern and other economic and social concerns. However, the disappearance of the previous expert meeting seems to create a situation where the general public can hear only the conclusion of the decision by the government but not the explanation based on the scientific evidence. Formerly when the government declared a state of emergency, the head of the expert meeting provided the supplementary explanation from the perspective of a scientist. There is a concern with the relationship between the government and experts that a scientific (and more objective) approach based on standards set in advance may be compromised by other economic considerations.

The first wave was a completely new incident nobody expected nor experienced. However, for the second (and future more) waves, there are more experiences from which we can collect good practices. The relationship between the government and the experts continue to be explored further. It will be helpful to establish an independent body to oversight and scrutinize the decisions afterwards with the cooperation of international institutions and academia (*international oversight*).

V. Conclusion

Until every country set up a mechanism to be able to put the virus under control, we continue to see the world *with* COVID-19 not the world *after* COVID-19 because our world is globalised. Therefore, it is time for com-

parative constitutional and international lawyers and academics to share comparative and international experiences related to countermeasures against COVID-19 in order to explore a possibility to set up an efficient and effective mechanism. The more comparative study on the constitutional oversight mechanism is necessary.

THE SRI LANKAN EXPERIENCE WITH COVID-19: STRENGTHENING RULE BY EXECUTIVE

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SUMMARY: I. *Introduction*. II. *Rule by 'Taskforces' and military*. III. *The illegality of the curfew, lack of a public discourse and the acculturalization of a no-rules emergency*. IV. *The dispensability of Parliament*. V. *Conclusion*.

I. INTRODUCTION

Sri Lanka's constitutional governance in the post-war context was already taking an authoritarian turn when COVID 19 stuck in February 2020. The country had just elected its war-time Defence Secretary, Gotabaya Rajapaksa, a former army soldier as its President in November 2019. President Rajapaksa came into power promising to repeal reforms enacted in 2015 that took away some powers from the disproportionately powerful Executive Presidency and to make the Presidency strong again. The Government that came into power in 2015 promised to abolish the Executive Presidency but settled for a reformed Presidency unable and unwilling to muster support for a wholesome reform effort. President Rajapaksa has very conveniently instrumentalised the COVID19 pandemic to justify and further expand the powers of the Executive at the expense of the other two forms of Government. This short article will focus on three aspects of how COVID19 has impacted on matters relating to constitutional governance: Firstly, the impact of the military-run, non-statutory, arguably extra-legal authorities on constitutional governance. Secondly, the extra-legal nature of the curfew imposed by the Government, the lack of public debate about its illegality and its impact on a public culture supportive of the rule of law and finally the side-lining of the Parliament and the re-emergence of the centrality of the Executive in constitutional discourse and practice.

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II. Rule by 'Taskforces' and military

Two Government entities were created and tasked with coordinating the Sri Lankan Government's response to COVID-19, The 'National Operation Centre for Prevention of COVID-19 Outbreak' headed by Lt. Gen. Shavendra Silva, the Commander of the Sri Lankan Armed Forces; and The Presidential Task Force established to direct, coordinate and monitor the delivery of continuous services and for the sustenance of overall community life headed by the President and Prime Minister's brother Basil Rajapaksa.[1]

The President through a gazette notification gave an expansive mandate to the Operation Centre and the Task Force. The Taskforce was given powers that are already vested with statutory bodies.[2] The establishment of Presidential Task Forces usurping and replacing the powers of statutory bodies accountable only to the President is a major challenge that Sri Lanka faces in the post-war context in derogation of the principle of Separation of Powers. The pandemic has provided additional reasons for the Executive to justify its arrogation of powers and the side lining of statutory bodies. This rule by committees and taskforces is becoming a permanent feature of Sri Lanka's constitutional governance.

On top of this 'rule by task forces' is the fact that the running of these task forces are being entrusted with current military leadership or retired military leaders.[3] Rather than placing public health officials in charge of running those establishments created, the Government has entrusted the work to the Sri Lankan Armed Forces. The incumbent Army Commander faces credible allegations of war crimes committed during the last phase of the civil war and has been travel sanctioned by the US Government. The move to involve the military is seen as part of the overall agenda of militarising governance in Sri Lanka, a move that the country's minorities fear would entrench majoritarianism.

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[1] This section draws heavily from this briefing note co-authored by this author: Adayaalam Centre for Policy Research, 'Sri Lanka's militarised response poses grave threats to human rights' (30 April 2020) <*http://adayaalam.org/situation-brief-no-3-covid-19-sri-lankas-militarised-response-poses-grave-threats-to-human-rights/*>.

[2] See further: Centre for Policy Alternatives, 'Brief Guide III: Structures to deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force' (April 2020) accessed at: <*https://www.cpalanka.org/wp-content/uploads/2020/04/FINAL-Presidential-Task-Force-on-COVID19-April-2020-copy.pdf*>.

[3] See further: International Truth and Justice Project, 'Sri Lanka's Militarisation of COVID-19 Response' (8 April 2020) accessed at: <*https://itjpsl.com/assets/press/English-ITJP_COVID-19-press-release-Merged-copy.pdf*>.

The primary justification for militarisation of Sri Lanka's Governance structure during COVID 19 has been mounted on the premise of efficiency of delivery. The perception that the ordinary organs of Government are inefficient and their perceived lack of capacity to respond to immediate and urgent concerns has been used by the Government to justify the increased involvement of the military in the Governance in the country. The contrary is however true. Sri Lanka despite its troubled history has a vibrant health service well networked through its public health inspector system. Future studies will have to establish this, but it will not be wrong to suggest that this well networked public health system is the primary reason that Sri Lanka contained COVID19.

III. The illegality of the curfew, lack of a public discourse and the acculturalization of a no-rules emergency

On 20 March 2020, the Government announced an island-wide three-day curfew with less than 12 hours' notice. The curfew has been described largely as 'police curfew' in notifications by the police.[4] The curfew is justified by the Police as being 'necessary to prevent violations of provisions and regulations of the Quarantine and Prevention of Diseases Ordinance'.[5] The Army Commander has described the curfew as a ''Quarantine Curfew'.[6] A major concern about the curfew is that the Government has not provided any real legal basis for it nor does it seem to feel the need to articulate one, implying that the law can be dispensed with in matters of urgency. The laws of Sri Lanka do not provide for a 'police curfew'. No curfew has been declared under the Public Security Ordinance (PSO), neither has a 'state of disaster' been declared under the Disaster Management Act. The Government has likely been reluctant to declare a curfew under the PSO because to declare a curfew longer than a month it needs Parliament's approval. This was rendered impossible owing to the President's decision to dissolve the Parliament and his refusal to reconvene it (See next section for further details).

[4] Ministry of Foreign Affairs, 'Declaration of Police Curfew Island Wide' (20 March 2020) accessed at: <*https://www.mfa.gov.lk/declaration-of-police-curfew-island-wide/*>.

[5] *Ibid*.

[6] 'Heed the advice of health professionals to eliminate the virus – Army Commander' (12 April 2020) *Sunday Observer* accessed at: <*http://www.sundayobserver.lk/2020/04/12/news-features/heed-advice-health-professionals-eliminate-virus-%E2%80%93-army-commander*>.

Even the Opposition failed to raise questions about the legality of the curfew, afraid that the public will misconstrue it for encouraging the violation of the rules imposed, leading to a spike in infections. But the lack of public debate on legality and scrutiny helps build a culture where rule of law becomes a disposable community during times of emergency.

IV. The dispensability of Parliament

President Gotabaya Rajapaksa dissolved Parliament on 02 March 2020. The Sri Lankan Constitution empowers a President to dissolve parliament after 4 ½ years of it being elected.[7] The length of a Parliament's term is 5 years. Given that the Parliament was controlled by the party opposite, from the day he was elected to office President Rajapaksa had always wanted to go for fresh elections. But because of the fixed term limitation he had to wait till the 02nd of March. However it can be argued that when he dissolved Parliament it was clear that COVID 19 had stuck Sri Lanka and that holding elections within the three months time framework as required by the Constitution[8] would not have been possible. The President hence while being well within his Constitutional powers in dissolving Parliament however probably did so knowing that holding the elections within a three-month framework because of the spread of COVID19 would be difficult. The President also refused to invoke the Constitutional provision that provides for recalling Parliament even if it was dissolved for emergency purposes.[9] The Election Commission wrote to President Rajapaksa suggesting a joint referral to the Supreme Court seeking its advice on whether it can postpone elections given the extraordinary nature of the situation but President Rajapaksa refused. The Election Commission then went on to postpone the elections beyond the three months frame stating that there was no normalcy to conduct the polls. A number of political parties, a think tank and private individuals approached court seeking an order directing the President to reconvene parliament and postpone the elections. But the Supreme Court after a 10-day consecutive day hearing declined to hear the case (refused leave to proceed) without even providing reasons.

The President and his party's public messaging around the issue sought to portray opposition parties as being afraid of facing elections and hence anti-democratic. The Opposition on the other hand claimed that the Presi-

7 Article 70 (1) of the Constitution of Sri Lanka.
8 Article 70 (5) (b) of the Constitution of Sri Lanka.
9 Article 70 (7) of the Constitution of Sri Lanka.

dent by refusing to reconvene Parliament was undermining a key organ of Constitutional Democracy - Parliament.

The President's handling of COVID19 – draconian measures enforced by the Sri Lankan Armed Forces – did have its desired effect of preventing the further spread of the virus. In fact the Senior Additional Solicitor General produced a document on the detailed use of the intelligence apparatus in COVID19 tracing to the Supreme Court to substantiate her claim that the Government has done well in containing COVID 19 in the case referred to above. The impact of the President's approach and the Supreme Court's order strengthens the political power of the Executive Presidency.

In 2009 when the war was brought to a brutal end then President Mahinda Rajapaksa (the current President's elder brother and currently Prime Minister) brought in far reaching constitutional amendments to the Constitution[10] including the elimination of the two term limit on a person holding the office of President. I have elsewhere described the end of the war as a 'Constitutional moment' that rallied forces in favour of entrenched centralisation to argue the case for retaining and furthering a strong Executive.[11] In 2015 Mahinda Rajapaksa was defeated and the electoral theme of the incoming President Maithripala Sirisena was the repeal of the Executive Presidential system. Reforms were brought in far short of a complete abolition, but the Prime Minister accountable to the Parliament gained more powers in the amendments passed in 2015.[12] The Easter Sunday attacks of 2018 swung the pendulum back and provided the impetus for those in favour of a strong executive and now COVID 19 has further helped sustain that swing towards a strong executive. This time around the additional factor has been the increased acceptance of the role of the military in Executive led governance.

V. Conclusion

The Sri Lankan experience with COVID 19 from a constitutional law perspective serves as a reminder of the extent to which constitutional democracies are vulnerable in times of emergencies. The impact of COVID 19 in Sri Lanka as this short article has argued has served to strengthen the role of the

[10] The 18th Amendment to the Constitution of Sri Lanka.

[11] Guruparan, K., 18 May 2009 as a Constitutional Moment: Development and Devolution in the Post War Constitutional Discourse in Sri Lanka', *2010 Junior Bar Law Review,* pp. 41-51.

[12] 19th Amendment to the Constitution of Sri Lanka.

Executive over and above the other two organs particularly to the detriment of the Parliament. This is not a unique Sri Lankan phenomena but is part of a global trend in which populist movements are capturing democratic space and producing strong man autocratic regimes. The executive led response to COVID 19 is helping to further this agenda.

EUROPE

QUESTIONS OF CONSTITUTIONAL LAW IN THE BELGIAN FIGHT AGAINST COVID-19

Toon MOONEN*

SUMMARY: I. *Introduction*. II. *Fundamental rights: confinement measures*. III. *Democratic control: special powers*. IV. *Federalism: consultation and coordination*. V. *Conclusion*.

I. INTRODUCTION

As anywhere else, Belgium recently witnessed the outbreak of a virus the like of which the world had not seen in a long time.[1] When the epicenter of the crisis moved to Europe, Belgium was not spared. On 30 June 2020, a total of 61,427 cases of COVID-19 had been reported. 17,759 people had been hospitalized while 9,747 patients had died.[2] Measures to fight the crisis and its consequences took many forms, including legally. In this overview, the focus is on three constitutionally relevant concerns: (II) confinement measures and

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[1] An earlier version of this overview, co-authored with J. Riemslagh, was published on *Verfassungsblog* and is available here: *https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-belgium/*. Elsewhere in the blogosphere, for example F. Bouhon, A. Jousten, X. Miny and E. Slautsky, "States' Reactions to COVID-19 Pandemic: An Overview of the Belgian Case", *Int'l J. Const. L. Blog*, 14 April 2020, available here: *http://www.iconnectblog.com/2020/04/states-reactions-to-covid-19-pandemic-an-overview-of-the-belgian-case/;* J. Clarenne and C. Romainville, "Le droit constitutionnel belge à l'épreuve du covid-19", *Jus Politicum Blog*, 23 April 2020, available here: *http://blog.juspoliticum.com/2020/04/23/le-droit-constitutionnel-belge-a-lepreuve-du-covid-19-1-2-par-julian-clarenne-et-celine-romainville/*; P. Popelier, "The impact of the Covid-19 crisis on the federal dynamics in Belgium", *UACES Territorial Politics Blog*, 5 May 2020, available here: *https://uacesterrpol.wordpress.com/2020/05/05/the-impact-of-the-covid-19-crisis-on-the-federal-dynamics-in-belgium/*.

[2] See the epidemiological bulletin of 30 June 2020, available here: *https://covid-19.sciensano.be/sites/default/files/Covid19/COVID-19_Daily%20report_20200630%20-%20NL.pdf*.

their impact on fundamental rights; (III) the granting of 'special powers' to the executive and its impact on democratic control; and (IV) the distribution of powers between the federal state and the federated entities. I conclude that these seem to correspond to concerns raised elsewhere, even if some features of the Belgian architecture may have complicated matters more than necessary (V).

II. Fundamental rights: confinement measures

After some hesitation when the virus reached Europe, stringent measures were taken to reduce new infections in Belgium. On 13 March 2020, the federal Minister of the Interior declared the "federal phase" of the national emergency plan. This was immediately followed by a Ministerial Decree imposing measures to slow down the spread of COVID-19.[3] Most cultural, recreational and sportive activities were prohibited. Bars and restaurants were closed, as were most non-food stores and malls. Classes were cancelled, although schools remained open for children without care alternatives. The governments of the Communities (a form of federated entities) adopted measures reorganizing or limiting school and youth activities, and limited physical access to care centers who work with seniors and vulnerable people.

As the virus spread, the Minister restricted those measures further. Physical distancing was introduced, access to super markets was regulated, telework for all 'non-essential' businesses and services was imposed. Non-essential businesses and services for which telework and distancing proved impossible were closed. Public transportation was reorganized. Colleges and universities switched to distance learning. Non-essential travelling from Belgium was prohibited. Note, however, that the government never imposed a 'lockdown' in the strictest sense of the word. Even at the height of the pandemic, people were allowed to do basic shopping, walk or sport outdoors.

In a later stage, those measures were gradually loosened.[4] Nevertheless, they raised multiple concerns in view of fundamental rights. Two questions related to the legality principle. Firstly, it was unclear whether the (pre-ex-

[3] The Ministerial Decree was based, among other grounds, on the Law of 15 May 2007 concerning Civilian Safety, available here: *http://www.ejustice.just.fgov.be/eli/wet/2007/05/15/2007000663/justel*.

[4] The currently applicable Ministerial Decree of 30 June 2020, replacing the previous regulations, is available here: *http://www.ejustice.just.fgov.be/eli/besluit/2020/06/30/2020042036/justel*.

isting) delegation of authority to the Minister of the Interior to adopt the restrictions was clear enough and whether it could allow measures of such a scale in the first place. This is because in principle, limitations of fundamental rights have to be adopted by the legislature, curtailing the options to delegate such powers to the King (i.e. the Cabinet), let alone to an individual minister, and notwithstanding that the confinement decrees were taken after deliberation in the full Council of Ministers. In this respect, the Constitution goes beyond what the European Convention on Human Rights requires. Secondly, when police services started to enforce the measures with increasing intensity, it appeared that a number of confinement measures lacked clarity. The Ministerial Decree, which was repeatedly amended as the crisis unfolded, was supplemented by online guidelines to the general public. Well-intended as they were, certain types of confinement behavior were touted in those "FAQ"[5] as legally obligatory, whereas the text of the Decree provided no basis for that, leading to confusion among the public and within police forces. As time went on, legal certainty suffered and criticism of the unsatisfactory drafting of the Decree and the status given to the FAQ increased. Some cases, to the extent people took the risk to reject a fine given in dubious circumstances, may still find their way to court. Finally, when the numbers of new infections started to fall, unequal enforcement of clear violations of the rules caused some outcry as well.

Beyond those concerns, agreement existed that the goal pursued by the confinement measures – protecting public health for the time the crisis lasted – was legitimate. The question was whether they were proportionate, notably in view of the freedom of movement and assembly, the right to property, the free exercise of religion, the right to privacy, and the right to equality. Remarkably, during the first stage of the crisis, the confinement measures did not cause a lot of litigation. There seemed to be a general willingness to abide, or at least to not go to court, even though technically any judge president could have issued injunctions.[6] This changed somewhat when the government decided to relax some confinement measures. People and businesses who could not benefit from regained freedom, whereas others could, argued that the equality principle was violated. Nevertheless, the Council of State, as the competent administrative court, accepted the Minister's piecemeal approach and ruled that "in light of the urgent fight against an unseen

[5] This frequently asked questions section (which itself changed frequently) of the Belgian government's COVID-19 website is available here: *https://www.info-coronavirus.be/en/faq/*.

[6] More recently, at least one judge in Brussels was asked to roll back the confinement measures. He refused in scathing terms (as reported for example here: *https://www.vrt.be/vrtnws/nl/2020/07/03/zaak-hoeyberghs-en-co-intellectuele-armoede/*).

and most serious (international) health crisis that Belgium faces", he could claim "the most discretionary powers of appreciation".[7] Other claims (including based on the right to free exercise of religion) failed for procedural reasons[8] or were moot before the Council could decide.[9] Interestingly, the crisis put a spotlight on science-based legislation and regulation. As the Minister's measures were to a large extent driven by the advice provided by experts,[10] their findings were also crucial for the Council of State to assess their pertinence.

III. Democratic control: special powers

In addition to the health crisis, political leaders feared a socio-economic backlash. Although the Constitution does not contain an emergency clause, Belgian constitutional law provides an instrument called 'special powers' legislation. Based on an expansive reading of Article 105 of the Constitution,[11] those allow unusually wide delegations of legislative powers to the Cabinet. They typically include the power to abolish, complement, amend or replace laws adopted by Parliament. Special powers are remembered mostly as an instrument used to fight the economic and financial turmoil of the 1980s and to guide Belgium into the Eurozone in the 1990s. They have not been properly put to use since then. As the COVID-19 crisis unfolded, they quickly became the center of political attention again.

Special powers legislation needs to meet a number of requirements. First, the presence of a 'crisis' or 'exceptional circumstances' is required. Notably, in 2009, legislation resembling special powers was adopted to fight

[7] Council of State 27 April 2020, n° 247.452, nv Andreas Stihl and another, available here: *http://www.raadvanstate.be/arr.php?nr=247452*.

[8] Council of State 28 May 2020, n° 247.674, Suenens and others, available here: *http://www.raadvanstate.be/arr.php?nr=247674*; see also Council of State 9 July 2020, n° 248.039, vzw Internationale Vakbeurs van het Meubel Brussel and another, available here: *http://www.raadvanstate.be/arr.php?nr=248039*.

[9] Council of State 26 May 2020, n° 247.620, X and others, available here: *http://www.raadvanstate.be/arr.php?nr=247620*.

[10] The crisis measures are discussed within the National Security Council (including several federal cabinet members), which is itself supported by a Risk Assessment Group, a Risk Management Group and a scientific committee. The details about the coordination of these bodies are available here: *https://crisiscentrum.be/nl*.

[11] An English version of the Belgian Constitution is available here: *https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf*.

the H1N1-influenza outbreak.[12] Second, special powers can only be granted for a limited period. Third, the goal and object of the special powers have to be narrowly defined. Fourth, special powers legislation does not allow the government to violate higher norms, including the Constitution. If special powers touch upon matters that are constitutionally reserved for Parliament, finally, the decrees adopted in application thereof are subject to ratification by Parliament. It can also subject special powers to other conditions, such as reporting.

Special powers are to be dealt with carefully in a parliamentary democracy. Until the current crisis broke, Belgium's federated entities (Communities and Regions) had never made use of special powers. On 17 March 2020, however, the Parliament of the Walloon Region granted sweeping special powers.[13] In order to guarantee the continuity of public services, it even granted powers in case it would be adjourned because of COVID-19. Remarkably, the Walloon framework allowed the government to skip requesting legal advice from the Council of State, which in principle is mandatory. In the following days, the Walloon government took budgetary measures, suspended home evictions and temporarily transferred powers from the municipal councils to the municipal executives. At the latest one year from their adoption, Parliament will have to ratify those decisions. Other federated entities adopted special powers legislation as well.

On the federal level, granting special powers was delayed for political reasons. Until 19 March 2020, the federal government was a caretaker government. This means that the first, far-reaching confinement measures (cf. *supra*) were actually taken by a caretaker Minister. Whereas a caretaker government's powers are in principle limited, they include taking 'urgent' measures, so there was little doubt that the confinement rules fell within his power. Nevertheless, the government did not command a majority in Parliament. It had remained in power since the 2019 elections, following which the formation of a new cabinet had failed. In light of the country's deteriorating health situation, after tumultuous negotiations, a majority of members of Parliament agreed to adopt a motion of confidence, elevating the Cabinet to standard operating capacities. Politically, it agreed however to limit itself to dealing with the COVID-19 crisis. Minority cabinets are

[12] Law of 16 October 2009 providing powers to the King in case of an influenza epidemic or pandemic, available here: *http://www.ejustice.just.fgov.be/eli/wet/2009/10/16/2009024377/justel*. Interestingly, however, this law was adopted retroactively.

[13] Federate Law of 17 March 2020 providing special powers to the Walloon government with regard to the COVID-19 health crisis, available here: *http://www.ejustice.just.fgov.be/eli/decret/2020/03/17/2020040687/justel*.

a highly unusual phenomenon in Belgian institutional history. Eventually, special powers bills were adopted on the federal level as well.[14] The federal government, too, would be able to forego the advice of the Council of State, but only for measures directed at halting the spread of the virus. Here as well, all special powers decrees are subject to ratification by Parliament within one year of their coming into force.

Unsurprisingly, a minority cabinet with reluctant parliamentary support which resorted to a crisis technique that had fallen into disuse caused skepticism. The Council of State aired criticism with regard to the precise wording and delimitation of the special powers, but accepted that this was a time that could warrant their use.[15] On the suggestion of the Council, Parliament better framed the scope of measures that would allow tinkering with judicial proceedings. To somewhat compensate for the lack of democratic support for the Cabinet, a parliamentary committee was asked to monitor the Cabinet's usage of the special powers.[16] More importantly, the political parties who had supported the special powers set up an informal weekly deliberation for the core members of the Cabinet and opposition party leaders. This body (for which there was no constitutional basis) emphasized how Belgium is, politically speaking, a partitocracy.

Given that the most urgent confinement measures were already taken before granting special powers and given the speed by which the (nowadays largely single chamber) Parliament can operate if the need arises, it is fair to wonder whether the special powers, which ended on 29 June 2020, were necessary at all. Indeed, although a number of measures were taken by special powers decree, after a couple of weeks the Cabinet also started introducing bills following the ordinary legislative procedure. To some extent, this was even necessary, as the special powers law restricted the Cabinet's options to change tax and social security laws. At the same time, it is understandable that at the start of an unprecedented crisis, the Cabinet wanted to

[14] Laws of 27 March 2020 authorizing the King to take measures in the fight against the spread of the COVID-19 coronavirus, available here: *http://www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040937/justel* (I) and here: *http://www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040938/justel* (II).

[15] Advice of the Council of State of 25 March 2020 concerning a bill delegating powers to the King to fight the spread of the coronavirus Covid-19, available here: *http://www.raadvst-consetat.be/dbx/adviezen/67142.pdf*.

[16] The report of its first meeting is available here: *https://www.dekamer.be/doc/CCRI/pdf/55/ic145.pdf*. Note that the functioning of the parliaments during the crisis was a matter of constitutional attention, too. For example, the federal Parliament amended its rules and procedures to enable electronic (distance) voting. Even during plenary sessions, only a small number of MPs was allowed in the hemicycle.

secure substantial room for maneuvering. If Parliament's role had been limited to merely approve the Cabinet's proposed legislative measures without a meaningful debate, the added democratic value of following the normal legislative process would have been limited in any case.

IV. Federalism: consultation and coordination

Belgium is a federal country. Although the initial response to the COVID-19 crisis had a federal origin, this was not the case for many of the following (socio-economic) measures. The complex distribution of competences, which under normal circumstances regularly gives cause for debate and litigation, now lead to some confusion and coordination problems. Belgian federalism is based on the idea of exclusivity and the absence of hierarchy, meaning that in principle, only one level of government can be competent to adopt a specific policy measure. In practice, this ideal has been nuanced, among other things, by the fact that many general policy areas are *shared* exclusive, meaning that some parts are taken care of by the federal government and others by the federated entities (in this case, the Communities). Notably, regarding health care, the federal government is competent for public health (including hospitals), but the Communities are responsible for other care institutions (including elderly homes) and a number of other aspects of healthy policy (including prevention).[17] At the same time, the federal government remains competent for civil security and, more generally, for maintaining public order. This has enabled it to take measures which deeply impact matters that are, by themselves, community turf. For example, the Minister of the Interior ordered the schools to close, even if education is not a federal matter. Interestingly, however, he adopted such confinement measures based upon the conclusions of the National Security Council, where consultation had taken place with the governments of the federated entities. Under normal circumstances, consultation or cooperation between the different levels of the federal state is not spontaneous, but dependent on complicated rules.

Despite all efforts to consult, the distribution of competences itself, which some claim is overly complicated, was also a source of problems. On

[17] See article 5, § 1, I of the special law on the reform of the institutions, available here: *http://www.ejustice.just.fgov.be/eli/wet/1980/08/08/1980080801/justel*. The 'special' in 'special law' refers to a supermajority requirement and is not to be confused with special powers legislation as discussed above.

the one hand, coordination was an issue. For example, it appears that considerable time was lost in determining which level would purchase medical mouth masks and for whom. On the other, sometimes it appeared more fundamentally obscure which level of government was competent to adopt certain measures. For example, the development of a tracing system at the federal level was stalled after criticism by the Council of State, which considered that also to be a matter for the Communities.[18] At the height of the pandemic, some pleaded for a simplification of the federal structure, although there was no consensus whether that would mean concentrating powers back on the federal level or allocating them all to the Communities. In a way, those discussions reflected the pre-existing debate about the direction Belgian federalism should take.

V. Conclusion

The constitutional questions the COVID-19 crisis sparked in Belgium are similar to what we have seen in other countries: the concerns are about fundamental rights, democratic control and, where applicable, the efficiency of federalism. During the crisis, some regrettable features of the Belgian political system, which reflect on the constitutional architecture, were however overexposed: unstable federal politics, the dominance of the executive branch and the political parties, an all too complicated competence distribution.

On the federal level, a parliamentary committee has been tasked to examine the way government(s) took care of the COVID-19 crisis. It will focus on preparation, financing of the health care sector, communication, coordination, and other issues.[19] How governments performed is subject to disagreement, and it was also a matter of debate whether this commission should have been granted special investigative powers. That would have allowed it to proceed with quasi-judicial competences. Whatever the need for those, hopefully its conclusions will help the country to prepare for future challenges.

[18] As reported for example here: *https://www.hln.be/de-krant/raad-van-state-stuurt-ook-lancering-tracing-app-in-de-war~a8be092e/*.

[19] See the press release by Parliament of 10 July 2020, available here: *https://www.dekamer.be/kvvcr/pdf_sections/news/0000012309/20200710_covid19-comm.pdf*.

COVID-19 AND CONSTITUTIONAL LAW IN DENMARK

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SUMMARY: I. *Emergency law in general in Denmark*. II. *Constitutional law: Institutions*. III. *Fundamental rights in COVID-19*. IV. *Conclusion*.

I. EMERGENCY LAW IN GENERAL IN DENMARK

Constitutional necessity

Unlike other Western European constitutions, the Danish constitution does not have a general constitutional provision on the state of emergency and only one special Article on state of emergency namely Art. 23, which allows the government to issue provisional Acts if it is not possible to convene Parliament. Such provisional Acts may not violate the Constitution and they must be submitted for Parliament's approval or rejection as soon as Parliament are able to convene again. Exceptional (and unconstitutional) measures can be enacted without formally proclaiming a state of emergency under the concept of constitutional necessity. Constitutional necessity is recognized in constitutional scholarship and in case law e.g. from the legal aftermath after the German occupation of Denmark under World War II.

While the Danish authorities reacted promptly after the first Danish COVID-19 case with restrictions on fundamental rights, in particular the freedom of assembly, the constitutional civil and political rights were con-

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sidered sufficiently flexible to accommodate for the measures taken in response to the COVID-19 crisis. This may be why the Danish government apparently never considered to invoke constitutional necessity.

II. Constitutional law: Institutions

1. *Political discretion or public safety aim*

In June 2020, the Prime Minister (PM) of Denmark was called into a Parliamentary hearing to explain the government's decision to shut down Denmark on the press conference on March 11, 2020. In the reasoning for the closure, the PM justified the closure with the following: *"it is the authorities' recommendation that we close all unnecessary activity down in those areas for a period of time"*.[1]

The PM had to explain before the Parliamentary hearing which authorities' recommendations the government had used as the basis for the shutdown. In Denmark, the emergency management is carried out by The Emergency Management Agency ('Beredskabsstyrelsen')[2] and together with the Danish Health Authority form part of the emergency preparedness in case of state of alert.

The two governmental bodies work together with other public authorities, and are led by The National Operational Staff[3] under the Danish National Police, which has the overall operational responsibility for preparing and carrying out the contingency plans.

The Parliamentary hearing focussed on what grounds the PM decided to close Denmark. In answering, the Prime Minister stated that it was a political decision: 'We receive advices and recommendations on how to get the situation under control. But deciding if, how and how much were to be shut down was a political decision'. The recommendations was not prepared in writing, since the Government found that there was no time to waste.[4] The

[1] *https://www.ft.dk/udvalg/udvalgene/UFO/kalender/49317/samraad.htm*, 9 June 2020.

[2] *https://brs.dk/beredskab/idk/myndighedernes_krisehaandtering/Pages/KrisestyringiDanmark.aspx*; *https://www.sst.dk/da/opgaver/beredskab/nationalt-beredskab*; *https://politi.dk/samarbejde/den-nationale-operative-stab-nost*.

[3] *https://brs.dk/eng/Pages/dema.aspx*.

[4] *https://www.dr.dk/nyheder/politik/mette-frederiksen-paa-samraad-der-er-ikke-et-skriftligt-grundlag-nedlukning*. The PM reminded the political parties of the opposition what characterized the situation when Denmark was closed down on March 11. 'It was life and death. We sat down to consider whether we had enough respirators after about a ten-fold increase in the number of infected in a short period of time'.

government applied a precautionary principle, and decided that it would rather act too soon than too late.

2. *Emergency legislation with far-reaching delegation*

The Danish Constitution sets out the rules for passing laws in Art. 41 (2), which stipulates that, no legislative proposal can be adopted until it has been read three times in the Parliament (Folketing). If the proposal is adopted, it must be ratified and announced, before it becomes applicable law. According to Art. 11-13 of the Standing Orders of Parliament, the ordinary duration for adopting a bill is 30 days and at least two days must pass between each reading. However, if it is a matter of urgency Parliament can according to Art. 42 deviate from the ordinary procedure in Art. 11-13 and accelerate the adoption of a bill. This requires that at least three out of four of the voting members of Parliament vote in favour of the deviation from the ordinary procedure.[5]

The expedited procedure respects Article 41 (2), since it includes three readings of the bill. Furthermore, it respects the Standing Orders since they allow for an expedited procedure under urgent circumstances. Nevertheless, the balance between prompt reaction and fundamental values such as a democratic and inclusive decision-making process with room for thorough debate in Parliament and society and a hearing process before a bill is adopted and rule of law are at stake.[6]

Under the expedited procedure, democratic values were set aside. Prior to adoption, bills were presented as emergency bills and rushed through Parliament without the usual thorough debate and hearing process. The expedited procedure was applied to approximately 27 bills.[7] This has also been criticised by the Danish Bar and Law Society and the Danish Institute for Human Rights.[8]

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[5] The Parliament's Standing Orders (BEK no 9444 of 23/05/2019).

[6] For further information on the Danish legislation process, see Helle Krunke, Legislation in Denmark, in Ulrich Karpen and Helen Xanhaki (eds.): Legislation in Europe - a Country by Country Guide, Hart Publishing, 2020.

[7] See L133, L134, L135, L140, L141, L142, L143, L144, L145, L153, L154, L157, L158, L161, L168 (L168A and L168B), L169, L171, L172, L175, L181, L190, L191, L195, L198, L199, L200 and L201. Furthermore, L192 was adopted with a short hearing process compared to the ordinary legislation process.

[8] *https://www.humanrights.dk/our-work/covid-19-human-rights*, and in a joint publication accessible only in Danish: *https://menneskeret.dk/udgivelser/covid-19-tiltag-danmark-retssikkerheds-maessige-menneskeretlige-konsekvenser*.

Furthermore, the revised Epidemic Act, article 1(2) comprised far-reaching centralisation of authority to restrict fundamental rights etc. in order to contain epidemics. Prior to the COVID-19 crisis, these competences were assigned to regional epidemic commissions. After the amendment, the Minister of Health and the Elderly is solely authorized to act, and he can also assign or delegate powers to other authorities, including the epidemic commissions.

In the revised Epidemic Act,[9] the legislator included a sunset clause stipulating that the Epidemic Act as such is automatically repealed on 1 March 2021. The date was set under consideration of the facts, that the law ought to be applied throughout the COVID-19 outbreak taking into account that the law can be applied throughout fall 2020 and the winter 2020/21, since unfortunately there is a likelihood of a second wave of COVID-19. Consequently, the government has scheduled a review of the Act for November 2020.[10] The review must assess the effects and consequences of the Act in light of legal certainty.[11]

A. *Penal code and Aliens' Act amendments*

As part of the COVID-19 measures, the Danish Penal Code was temporarily amended to allow for (much) harsher sentencing if crime is found to be related to the COVID-19 situation.

The level of sentencing in such cases may be twice or, in the case of fraud with government aid packages, four times as high as normal.[12] For foreigners, an extra layer was added at the request of the most right-wing parties in Parliament: Any unconditional prison sentence under the new COVID-19 clause would lead to repatriation. [13] Left wing parties criticized this as an unnecessary "symbolic" measure, unrelated to the original purpose of the proposal.[14]

In a letter to the Minster of Justice, before the proposal's adoption the chairperson of the Danish Association of Judges warned against regulat-

9 Act No. 208 of 17 March 2020.

10 Cf. the preparatory works to bill no. 133/2019, published by the Health and Elderly Committee, Folketing, 12 March 2020, Annex 1, Question 2.

11 Preparatory works to bill no. 133/2019 (first reading of article 2), cf. Section 2.7.9., p. 106 found at: *https://lovkvalitet.dk/ In*, the Danish Ministry of Justice's guidelines on legislative quality, it is highlighted, that the use of sunset clauses can create uncertainty for the effected parties concerning the legal status after the end of the period of validity.

12 Act no..349 of 2 April 2020 and Art. 81 (d) of the Danish Penal Code.

13 Art. 22, no 9, of the Danish Aliens' Act.

14 *https://www.ft.dk/ripdf/samling/20191/lovforslag/l157/20191_l157_betaenkning.pdf*, p. 2-4.

ing in such detail the level of sentencing, arguing that this is the domain of judges, not politicians, challenging the separation of powers.[15]

B. *Right to justice and separation of powers*

Under the lock-down, The Danish Courts, like other public authorities, initiated emergency preparedness in order to carry out the critical tasks, especially cases with legally set deadlines or cases that were particularly intrusive to the parties. A non-exhaustive list of critical cases include constitutional hearings, time extensions, and criminal proceedings with custodians that could not be postponed due to the principle of proportionality or the scope.[16] The Danish Courts reopened on April 27 and resumed physical court hearings complying with COVID-19 restrictions.

Overall, the Danish Court Administration estimates that the COVID-19 situation will affect the courts' activities in the rest of 2020.[17] In order to reduce case piles that occurred during the COVID-19 shutdown, The Government has decided to allocate funds.[18]

Danish courts are independent of the political institutions according to Art. 64 of the Constitution. This also follows from the principle of separation of powers in Art. 3. The courts' administration is handled by an independent agency 'Domstolsstyrelsen'. Apparently, the Ministry of Justice has communicated quite detailed information and requests to the courts on how to administer the courts during the crisis for instance as regards which types of cases to handle, which cases not to process, and when to reopen the courts. This has raised concern among several scholars and some judges.[19]

III. Fundamental rights in COVID-19

1. *Freedom of Assembly – restrictions on number of people gathering*

The revised Epidemic Act,[20] Art. 6, originally provided for the prohibition of "larger assemblies" ("assemblies of some size") – both outdoor and in-

15 *https://dommerforeningen.dk/meddelelser/2020/brev-til-justitsministeren-i-forbindelse-med-coronarelateret-hastelov/.*

16 *https://domstol.dk/aktuelt/2020/4/haandtering-af-corona-ved-danmarks-domstole/.*

17 *https://www.ft.dk/samling/20191/almdel/reu/spm/1207/svar/1653873/2182735/index.htm.*

18 *https://domstol.dk/aktuelt/2020/6/7-mio-til-bunkebekaempelse-i-2020/.*

19 *https://www.avisen.dk/-untitled_606211.aspx.*

20 Act No. 208 of 17 March 2020.

door, private and public – if necessary to prevent or contain the spreading of contagious diseases. This new provision was immediately used by the Minister of Health as a basis for restricting assemblies to maximum 10 people.[21]

Subsequently, Art. 6 was amended, so that it now allows for prohibiting "the presence of several persons in the same place".[22] According to the preparatory works this allows for prohibitions of assembly of more than 2 people. So far, this more restrictive regime has not been applied by the authorities.

While the restriction generally applies to outdoor as well as indoor assemblies, it follows from the preparatory works that purely private indoor gatherings are as a rule exempted, thus taking into account the respect for private and family life, cf. ECHR Art. 8.

Even more importantly, protest and other forms of assembly for the purpose of expressing opinions are exempted altogether from the restriction. This is a vital concession to freedom of assembly, as it serves to preserve the essence/core of this freedom.

Art. 79 of the Danish Constitution on freedom of assembly protects all kinds of peaceful assembly, including assemblies without a purpose of collectively expressing opinions. According to the provision: 'an outdoor assembly may be prohibited if it may endanger public peace'. Prima facie, this formula does not seem to allow for restrictions on other grounds such as public health, or for restrictions on indoor assemblies. On the other hand, the wording of Art. 79 deals only with outright prohibitions of assembly, not less far-reaching restrictions.

The Danish Supreme Court in a 1999 judgment seemed to accept a broader interpretation of Art. 79, according to which restrictions are allowed on outdoor as well as indoor assemblies, provided the restrictions are not aimed at the core of the freedom of assembly, i.e. 'the opinions expressed by the assembly', and 'serve to protect other weighty interests, including the life and health of others', and are necessary and proportionate to that aim.[23] Based on this judgment, the Danish legislature has regarded the restrictions under Art. 6 of the Epidemic Act as compatible with Section Art. of the Constitution.

On July 8 the Government increased the maximum number of people gathering from 10 to 50.

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21 Regulation No. 224 of 17 March 2020.

22 Act. No. 353 of 4 April 2020.

23 Danish Law Weekly Journal 1999, pages 1798 et seq.

2. *Freedom of religion – closing places of worship and restrictions on religious assemblies*

With Art. 12B of the revised Epidemic Act, the Government may prohibit or restrict access to facilities that any legal and physical person have at their disposal and to which there is general public access. This includes churches, synagogues, mosques and other places of worship with general public access. This new provision served as a basis for closing any religious community.[24] Even with funerals, burials, marriage ceremonies, baptisms and other religious acts being exempt from the regulation, the regulation still interfered with the freedom to exercise one's religion.

Art. 67 of the Danish Constitution protects freedom to practice one's religion as long as it is not 'contrary to good morals or public order'. The right to practice one's religion can thus be subject to limitations and restrictions, provided the restrictions are not aimed at limiting the religious freedoms but is incidental to the general regulation's pursuit of a legitimate aim e.g. public order.

Thus, it may be argued that because the temporary shutdown of religious buildings had the aim of containing dissemination and not hindering freedom of religious, the restriction is within the scope of Art. 67.

In addition, the abovementioned Art. 6 of the Epidemic Act also applies to religious assemblies. Thus, besides funerals and burials being exempt from the regulation, any other religious rituals and practices were basically restricted to a maximum of 10 participants.

The closure of the National Church, other churches, synagogues, mosques and other places of worship with general public access was in force until 18 May 2020; on the same date these places also enjoyed a specific relaxation on the restrictions on assemblies as they reopened.[25]

3. *Personal freedom – shutoff and curfew*

So far, Danish authorities have not resorted to what is perhaps the ultimate measure of contagion control: a general or local curfew, effectively amounting to a deprivation of liberty.

The revised Epidemic Act arguably provides a legal basis for at least local curfews. Art. 7 of the Act provides that the Minister of Health may

[24] Regulation no. 370 of 4 April 2020.
[25] Act no. 630 of 17 May 2020.

'cordon/shut off an area' if a contagious disease is present. In addition, the Minister may make rules on 'restrictions for persons who live and stay in the area' that has been cordoned off.

According to the preparatory works, this formula implies that 'the minister can make rules as to how, when and to what extent persons living in the cordoned-off area may move around in the area'. If indeed this amounts to a basis for at least local curfews, it may be questioned whether it accords with the rule of law to provide for such sweeping powers in such a discrete way.

In any event, cordoning off areas and even subjecting individuals to a curfew to protect the public health is not problematic under the Danish Constitution. Art. 71 on deprivation of liberty contains few substantial limits, prohibiting only deprivations of liberty on grounds of political or religious conviction or descent. What is more, as traditionally interpreted, Art. 71 does not even require that deprivations of liberty must be necessary and proportionate to be constitutional. As regards less intrusive restrictions on freedom of movement than deprivation of liberty, the Danish Constitution provides no protection at all. Any substantial rights protection as regards deprivation of liberty of other restrictions must instead be sought in ECHR article 5 and its Additional Protocol 4, Art. 2.

4. *Right to property – restrictions on free trade etc.*

Art. 27 of the revised Epidemic Act empowers the Minister of Health to make deprivations of private property, if necessary. If so, the owner must be paid full compensation for his loss.

An obvious case of compulsory acquisition under Danish Constitutional Law would be if the authorities took possession of private medical or protective equipment etc. Those cases aside, encroachments on the right to property would mostly take the form of general restrictions on freedom of trade – mandatory closing of shops, restaurants etc.

Art. 73 of the Danish Constitution on the right to property requires that any deprivation of property be 'required by the public good' and that full compensation be paid. The preparatory works assume that, due to their general nature and compelling reasons, COVID-19 restrictions will generally not amount to deprivations of property, while in concrete cases the intensity and effect might be such as to reach a different conclusion.

IV. Conclusion

Compared to many countries around the globe, the Danish COVID-19 measures might seem quite reasonable and proportional (despite the amendments to the penal code and the Aliens Act). Interestingly, constitutional necessity was not invoked. Never-the-less, certain fundamental rights were restricted, special competences were delegated to the government, the expedited legislation procedure was applied for the adoption of several Acts and quite detailed information and requests were sent from the Ministry of Justice to the courts on how to administer courts during the crisis. Some of these measures have been criticised by scholars, the Association of Danish Judges, the Danish Bar and Law Society and the Danish Institute for Human Rights.

LA CRISE SANITAIRE: UN REVELATEUR DE LA CRISE DE LA DEMOCRATIE LIBERALE. REFLEXIONS SOMMAIRES A PARTIR DE LA SITUATION FRANÇAISE

Bertrand MATHIEU*

RÉSUMÉ: I. *La démocratie confrontée à une crise de confiance*. II. *Prévalence des impératifs collectifs et désordre dans les droits fondamentaux*. III. *La répartition des compétences en situation d'urgence*. IV. *Le retour à l'Etat dans ses frontières et les incertitudes affectant le rôle de l'Union européenne*.

Examiner les incidences de la crise sanitaire sur le système politique français, conduit à prendre en compte certaines spécificités, mais aussi des éléments de contexte qui concernent l'ensemble des démocraties libérales.

I. LA DÉMOCRATIE CONFRONTÉE À UNE CRISE DE CONFIANCE

Si un pouvoir autoritaire repose sur la force, un pouvoir démocratique repose sur la confiance. Or il est manifeste que nombre de démocraties occidentales, et tout particulièrement la France, sont affectées d'une crise de confiance. Les causes en sont multiples, notamment l'absence d'efficience du pouvoir politique. La crise sanitaire a rendu particulièrement visible cette pathologie de la démocratie. L'information a été souvent désordonnée, rassurante et inquiétante à la fois, et les recommandations sanitaires (en tout premier lieu celles relatives au port du masque) ont parfois «masquées» des insuffisances logistiques.

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1. *Le rôle des experts*

Il est une tendance lourde de nos sociétés démocratiques qui consiste pour le pouvoir politique à se défausser sur les experts pour exercer leur pouvoir de décision. Cette évolution conduit à un système de pouvoir concurrent du pouvoir démocratique, que l'on a pu désigner sous le terme d'«épistocratie».[1]

Le président de la République s'est entouré d'un Conseil scientifique dirigé par le président du Comité consultatif national d'éthique. Certes il est parfaitement logique que, s'agissant d'une crise de nature sanitaire, le pouvoir politique s'appuie sur des données médicales. Il n'en reste moins que l'on peut considérer comme symptomatique d'un chevauchement des fonctions politiques, de décision, et des fonctions scientifiques, de conseil, l'affirmation du président de la République en mars 2020 fondant sur l'avis de ce conseil scientifique le maintien du premier tour des élections municipales.

La compétence qui légitime la décision n'est en réalité pas indemne de présupposés idéologiques et de rapports de force qui échappent très largement non seulement à la volonté populaire, mais aussi tout simplement à la compréhension. Ainsi, la notion de «bon gouvernement»[2] s'appuie essentiellement sur la compétence et place au second plan le débat démocratique dans le choix des solutions.

2. *La responsabilité des dirigeants politiques*

L'une des questions mise en exergue par cette crise sanitaire est celle de la responsabilité des dirigeants politiques. En effet si nombre de décisions résultent d'une expertise, il n'en reste pas moins que le titulaire du pouvoir de décision est juridiquement le «responsable politique». A nouveau c'est le contexte général dans lequel évolue la question de la responsabilité politique qu'il convient de prendre en compte.

La démocratie représentative exige l'existence de mécanismes propres à permettre une éventuelle mise en cause de la responsabilité des représentants. La responsabilité du gouvernement devant le Parlement est une responsabilité politique devant un organe politique. Or, notamment en raison du fait majoritaire, cette responsabilité ne fonctionne plus réellement, ni en

[1] Cf. Viala, A. (s.d.), *Demain, l'épistocratie?* Mare et Martin, France, 2020.
[2] Cf. P. Rosanvallon, Le bon gouvernement, Le Seuil, 2015.

France, ni dans la plupart des régimes parlementaires comparables et voit se développer, comme substitut, la responsabilité pénale.

Dès le début de la crise sanitaire un certain nombre d'actions pénales ont été engagées contre des membres du gouvernement. C'est à l'occasion du débat sur la loi du 11 mai 2020 prolongeant l'état d'urgence sanitaire et prévoyant les conditions dans lesquelles pourraient avoir lieu la reprise partielle des activités économiques et sociales que l'inquiétude des élus, et notamment des maires, s'est manifestée. Une disposition dépourvue de portée normative a été intégrée dans la loi pour rappeler les limites de la responsabilité pénale des élus (cf. décision 2020-800 DC du Conseil constitutionnel). Pour autant ce débat est révélateur de la tension entre l'inquiétude des responsables politiques et la crainte de donner à l'opinion un sentiment d'auto-amnistie.

II. Prévalence des impératifs collectifs et désordre dans les droits fondamentaux

Dans le contexte de la crise sanitaire, c'est l'idée même d'un état d'urgence qui est contesté en ce qu'il porte, au nom de considérations d'intérêt général, une possibilité d'attenter, de manière générale à de nombreuses libertés. Il est relevé à juste titre qu'à l'état d'urgence justifié par le terrorisme ou des calamités naturelles, s'ajoute l'état d'urgence sanitaire et peut être demain l'état d'urgence environnemental … la liste n'est pas limitative. Le recours à l'Etat d'urgence s'inscrit dans le cadre de l'État de droit. Il convient cependant de s'interroger sur le recours de plus en plus fréquent à cet état de crise. Je voudrais de ce point de vue évoquer un élément d'explication, probablement partiel et qui demanderait à être analysé plus avant. Le droit positif des temps ordinaires intègre de moins en moins les considérations relatives à l'intérêt général. S'inscrivant dans un contexte d'hypertrophie des droits individuels,[3] dont il se borne à tenter de réguler les rapports, ce droit s'avère impuissant à faire prévaloir des considérations propres à la protection de la Nation. Alors que les menaces se diversifient, pour chacune d'elles, il convient alors de créer un droit d'exception dont l'objet et de rétablir un équilibre entre considérations relevant de l'intérêt commun et droits et libertés individuels. De ce point de vue, les craintes selon lesquelles certaines mesures prises sous couvert de l'urgence pourraient être pérennisées ne sont pas totalement infondées. Appliquées à des considérations spécifiques de

[3] Cf. Mathieu, B., *Le droit contre la démocratie?*, Lextenso, France, 2017.

crise nombre de microdécisions restrictives des libertés pourraient, à faible bruit, s'agglomérer faisant glisser une société libérale vers une société de surveillance. La réponse aux déséquilibres résultant de l'hypertrophie des droits individuels et à l'effacement des intérêts nationaux résulterait alors d'un enchaînement pervers et non d'un choix démocratiquement formulé.

Par ailleurs, alors que d'aucuns s'insurgent contre l'intrusion de l'État et des pouvoirs publics dans l'exercice des libertés individuelles, au nom de l'urgence sanitaire, les mêmes demandent à l'État d'être le bras armé et le défenseur d'une certaine conception de ces droits. C'est ainsi l'État qui décide qui doit naître et qui peut ne pas naître, qui peut mourir et qui doit être soigné, ce que l'on doit penser et ce qu'il est interdit de dire… Comme le relève Pierre Manent[4] «il y a longtemps que nous nous en sommes remis à l'État, que nous lui avons accordé souveraineté sur nos vies». Sous-couvert du respect des droits fondamentaux c'est un totalitarisme mou qui peut subrepticement s'installer.

Enfin, il convient de relever qu'au-delà des contestations doctrinales, ces limitations des droits et libertés sont assez bien acceptées, par ceux là mêmes qui font de leur autonomie d'individu détaché de toute contrainte et libéré de tout attachement, leur règle de vie et leur raison d'être. Cette situation pourrait surprendre, elle ne manque pas d'inquiéter. Deux phénomènes semblent jouer en ce sens. D'une part une méfiance généralisée envers les autorités publiques mêlée de technophobie, de ce point de vue, l'hypothétique mise en place d'une application susceptible de détecter la propagation du virus suscite une défiance de la part de nombre de ceux qui confient leur vie privée, non seulement à leur téléphone, mais aussi et surtout à Facebook ou à d'autres réseaux sociaux. D'autre part dans un contexte d'inquiétude (justifiée) sur un avenir à bien des égards incertains et dans une société où l'émotionnel remplace le spirituel, le droit à la sécurité l'emporte sur toute autre considération et fait accepter le sacrifice des libertés non pas sur l'autel de la Patrie mais sur celui de la sécurité individuelle de chacun. Le succès du principe de précaution en témoigne.

III. La répartition des compétences en situation d'urgence

La situation d'urgence sanitaire va également modifier la répartition des compétences au sein de l'État.

[4] *Le Figaro*, 23 avril 2020.

1. *Le constituant, le législateur et le gouvernement*

S'agissant des relations entre le législateur et le gouvernement, on relèvera que le parlement a considérablement réduit son activité de contrôle de l'exécutif et a accepté de discuter et voter – rapidement, en seulement cinq jours - la loi du 23 mars 2020 sur l'état d'urgence sanitaire. Par ailleurs, le Conseil constitutionnel a rappelé que dans le cadre du contrôle par le Parlement de l'activité du gouvernement, la loi ne pouvait exiger du gouvernement qu'il transmette immédiatement copie des chacune des mesures d'application qu'elle prévoyait, sauf à méconnaître le principe de séparation des pouvoirs (décis. 2020-800 DC). Le Parlement a aussi délégué au Gouvernement le soin de prendre des mesures par voie d'ordonnance pour adapter notre système juridique à la situation de crise.

On peut également s'interroger sur la nécessité d'intervention du parlement au regard des pouvoirs qui sont reconnus au Premier ministre pour faire face à la crise par le Conseil d'Etat. Ainsi, dans sa décision du 22 mars 2020, n° 436974, et conformément à une jurisprudence traditionnelle, le Conseil rappelle que «le Premier ministre peut, en vertu de ses pouvoirs propres, édicter des mesures de police applicables à l'ensemble du territoire, en particulier en cas de circonstances exceptionnelles, telle une épidémie avérée, comme celle de covid-19 que connaît actuellement la France». En réalité l'intervention du législateur constitue pour l'essentiel un système d'autorisation permettant au gouvernement de prendre des mesures plus étendues par leur portée et leur durée.

De manière, plus subsidiaire, la question de la place de la Constitution en situation d'urgence s'est posée, sous deux aspects.

Le premier concerne la faculté pour le législateur de déroger à la Constitution en situation d'urgence. Dans sa décision 2019-799 DC, le Conseil constitutionnel a jugé à propos de l'examen d'une disposition d'une loi organique prorogeant les délais relatifs à l'examen des questions prioritaires de constitutionnalité que «compte tenu des circonstances particulières de l'espèce, il n'y a pas lieu de juger que cette loi organique a été adoptée en violation des règles de procédure prévues à l'article 46 de la Constitution».[5] Par cette formulation extrêmement concise, le Conseil couvre l'inconstitutionnalité commise par le législateur.

Le second porte sur l'opportunité d'inscrire dans la Constitution les dispositions relatives à l'état d'urgence. Cette proposition qui s'inscrit dans une

[5] Il s'agissait du non-respect du délai entre le dépôt du projet de loi et la délibération par la première assemblée saisie, fixé par cet article.

logique de méfiance vis-à-vis du pouvoir politique, toujours soupçonné de projets liberticides, présenterait le grand inconvénient d'enfermer dans le carcan constitutionnel des situations qui, par nature sont imprévisibles et peuvent exiger l'édiction de dispositions dont la nature et la portée dépend de ces circonstances.

2. *L'Etat et les collectivités territoriales*

L'examen en référé de certaines mesures prises par des maires dans le cadre de l'état d'urgence sanitaire a conduit le Conseil d'Etat à mettre en exergue le rôle des autorités étatiques et le caractère subsidiaire des interventions des autorités locales. Cette jurisprudence restreint dans cette hypothèse, les pouvoirs de police des maires (Ordonnance du Conseil d'Etat du 22 avril 2020, n° 440009).

3. *Les pouvoirs du juge administratif dans le cadre de l'état d'urgence sanitaire*

Les dispositions prises par le gouvernement dans le cadre de l'état d'urgence sanitaire ont été l'occasion pour nombre de justiciables de demander au juge administratif soit de censurer certaines des dispositions prises, soit d'ordonner au gouvernement de prendre certaines mesures, afin d'obtenir du juge ce qu'ils n'ont pu obtenir du gouvernement. C'est ainsi, d'une certaine manière le juge-administrateur qui est sollicité, surtout lorsque c'est la carence de l'autorité administrative qu'il est demandé au juge de palier. On a reproché au Conseil d'Etat de se montrer trop respectueux des décisions gouvernementales. En réalité, il est difficile pour le juge de ne pas tenir compte des contraintes que rencontre l'administration sauf à user de «coups d'épée dans l'eau» qui ne feraient que compromettre son autorité. Par ailleurs, le juge ne se contente pas d'encadrer la compétence de l'autorité publique en recourant à ses moyens d'action habituels (injonction, réserve), il use en réalité d'outils plus souples. Ainsi, au cours des audiences, un dialogue s'établit entre les requérants et les autorités publiques auteurs des actes contestés, il peut conduire l'administration à s'engager pour l'avenir, et si cet engagement est dépourvu de valeur juridique, il pourra constituer un élément d'appréciation pour le juge ultérieurement saisi au fond.

IV. Le retour à l'Etat dans ses frontières et les incertitudes affectant le rôle de l'Union européenne

La démocratie est en réalité un mode de légitimation du pouvoir qui ne peut fonctionner que dans un cadre étatique.[6]

1. *La place centrale de l'Etat face à la crise sanitaire*

Le rôle central de l'Etat dans la lutte contre l'épidémie s'est manifesté de plusieurs manières.

D'abord, la logistique de même que les mesures de police nécessaires n'ont pu être organisées qu'au niveau étatique. D'autre part, la nécessité de disposer de médicaments, de masques, mais aussi de composants industriels a démontré les dangers d'une perte de souveraineté dans l'approvisionnement en matériels de première nécessité. Par ailleurs, alors que dans un premier temps, pour des raisons idéologiques, la question des frontières a été esquivée dans le choix des mesures de lutte contre la pandémie, dans un second temps une réalité s'est imposée : les frontières protègent. Ont été ainsi, pour l'essentiel, fermées les frontières de l'Union européenne, mais encore la libre circulation au sein de l'espace de Schengen a été (provisoirement) mise entre parenthèse. Le terme de souveraineté est revenu dans la bouche de ceux qui inscrivaient leur action dans un monde ouvert, dont les frontières s'effaçaient, régulé par les lois du marché et censé ordonné par les seules valeurs liées à la protection des droits de l'individu, dont la qualité de citoyen tendait à s'effacer.

2. *Les faiblesses de l'intervention de l'Union européenne*

Ces faiblesses peuvent être appréhendées à plusieurs niveaux. D'emblée, il convient de relever que les compétences de l'Union en matière sanitaire sont réduites, ce qui explique et justifie que les États aient été en première ligne. Il n'en reste pas moins que la solidarité entre les États européens, dont les citoyens se sont vus reconnaître également celle de citoyens européens, ne s'est guère manifestée. La concurrence dans l'accès à certains produits, comme les masques, a tenu lieu de mutualisation. Chaque pays a pris ses

[6] Cf. Mathieu, B., *Le droit contre la démocratie?*, Lextenso, France, 2017.

propres mesures de quarantaine, de régulation des trafics de passagers, de réponse hospitalière.

C'est sur le terrain économique et financier que l'Europe est attendue pour faire face à la très grave crise qui se dessine. Or, sans préjuger de l'avenir, à la solidarité s'est substitué un clivage entre certains pays du Nord (Allemagne, Pays-Bas) et ceux du Sud à l'économie plus fragilisée, dont la France. Le refus d'une mutualisation des dettes fait prévaloir l'intérêt national sur l'intérêt commun. Par ailleurs, la décision de la Cour constitutionnelle allemande[7] s'opposant à une décision de la Cour de justice de l'Union européenne et visant à réduire les capacités d'intervention de la Banque centrale européenne est un acte de souveraineté. De ce point de vue cette crise constitue un enjeu majeur pour la construction européenne et la monnaie commune.

[7] Jugement du 5 mai 2020, 2 BvR 895/15, 2 BvR 980/16, 2BvR 2006/15, 2 BvR 1651/15.

COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF GERMANY

Laura HERING*

SUMMARY: I. *Introduction*. II. *The Allocation of Powers in a Federalist System*. III. *The Functioning of the Legislature under Epidemic Circumstances*. IV. *Legal basis of enacted measures*. V. *Proportionality*.

I. INTRODUCTION

The Coronavirus SARS-CoV-2 first appeared in Germany in Bavaria in late January. To date, there have been approximately 300,000 confirmed infections and about 9,500 Covid-19 related deaths.[1] Initially, German authorities were reluctant to take action. However, as the crisis progressed and turned into probably the most serious health emergency since the establishment of the Federal Republic in 1949, far-reaching measures were enacted in mid-March that considerably affected public life and severely encroached on fundamental rights. They included contact restrictions, bans on leaving the house, the closure of schools, child-care facilities, universities, businesses, restaurants, and shops, and bans on events and assemblies, as well as restrictions on visits. However, no nationwide curfews were put in place. Compared to the rest of the world, in Germany the crisis has been quite mild to date, the death rates have remained relatively low, and the capacities of the health care system have been far from overstretched.

Four main constitutional issues emerged during the first weeks of the pandemic: the Federalist system, the functioning of parliament under epidemic circumstances, the adequacy of the adopted measures' legal basis, and their

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[1] As of October 2020, see *https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Fallzahlen.html*.

proportionality. Besides these specific constitutional issues, which will be discussed below, the first weeks of the pandemic also revealed much about German constitutional culture as a whole. This phase demonstrated that German society has great respect for constitutional law, using it as a medium of reflection and a means of solving societal problems. The public debate regarding the Covid-19 measures was conducted in a highly legalistic manner and employed the categories of constitutional law, which is not a matter of course. For the most part, these debates were carried out in the major daily newspapers as well as in online platforms such as the "Verfassungsblog".[2] Nevertheless, this mode of reflection was not formalistic but extremely considered and responsive, impacting the choice of concrete measures. It allowed politicians to develop solutions that they would not have been able to reach without this reflection process. Consequently, the crisis has also revealed the degree to which constitutional law guides political processes in Germany. This close interaction with German constitutional law has contributed significantly to the successful management of the first weeks of the pandemic in Germany.

II. The Allocation of Powers in a Federalist System

Federalism has shaped the management of the Covid-19 pandemic in Germany. The Infection Protection Act (*Infektionsschutzgesetz*, IfSG) of 20.07.2000 provides the ordinary legislative basis in the field of contagious diseases. As prescribed by the German federal system, this Act is a federal law that is executed by the states (*Länder)*. Therefore, the states were the main actors in the crisis and responsible for taking the appropriate measures. At the beginning of the crisis, these measures therefore differed from one another. The federal government did not have the power to issue directives but could only make recommendations to the states. Art. 35 para. 3 of the German Basic Law (*Grundgesetz*, GG) grants the federal government emergency powers in the event of a natural disaster or accident that involves the territory of several states. However, this rule, which has never been applied to date, presupposes that the states are unable to cope with the situation and does not give the federal government a substitute power.

Yet German cooperative executive federalism has not proved detrimental to the fight against Covid-19, because the federal and state governments worked well together and were able to agree on comprehensive measures to combat the virus. There are many coordinating bodies between the states

[2] *https://verfassungsblog.de/*.

and the federal government, such as the conference of health ministers (which includes the state and federal health ministers) or the conference of prime ministers (where the presidents of the states and the Federal Chancellor come together). Furthermore, there is a joint federal and state situation center. Scholars have underlined the positive effects of federalism in combatting the crisis,[3] emphasizing in particular that federalism promotes differentiated and flexible solutions rather than rigid and uniform action. It allows for open political debate and a more nuanced consideration of variations in regional circumstances.

Be that as it may, critics still identified the decentralized competences as the weak link of the crisis management. They argued that the heterogeneity resulting from the various restrictions in different states created the impression of chaos and generated uncertainty concerning the applicable regulations.[4] In response to these criticisms, § 5 IfSG was revised to allow the federal authorities more coordinating powers during epidemics. This revision entailed a centralization of powers under the Federal Ministry of Health in the event that the *Bundestag* declares a national epidemic emergency. The Ministry of Health, acting on advice from the *Robert Koch Institute*, can then make recommendations to enable a coordinated approach within the Federal Republic. This power is not linked to the states' inability to deal with the emergency, as is provided in Art. 35 GG in case of a natural disaster. However, critics considered it highly problematic that the Federal Minister of Health could now deviate from legal regulations by means of a statutory instrument, arguing that this change shifted parliamentary powers to the executive beyond what is constitutionally permissible.[5]

III. The Functioning of the Legislature under Epidemic Circumstances

During the pandemic, the *Bundestag* and *Bundesrat* continually passed new laws to combat the virus and mitigate its consequences. However, the members of

[3] *L. Munaretto*, Die Wiederentdeckung des Möglichkeitshorizonts, VerfBlog 30.3.2020, *https://verfassungsblog.de/die-wiederentdeckung-des-moeglichkeitshorizonts/*.

[4] The measures were described as a "federal patchwork rug" (föderaler Flickenteppich), see for example *T. Holl*, Geschlossen handeln im Kampf gegen das Virus, FAZ, 10.3.2020, *https://www.faz.net/aktuell/gesellschaft/gesundheit/coronavirus/coronavirus-warum-es-keinen-foederalen-flickenteppich-geben-darf-16672721.html*.

[5] *S. Schönberger*, Die Stunde der Politik, VerfBlog, 29.3.2020, *https://verfassungsblog.de/die-stunde-der-politik/*.

these houses were exposed to the risk of infection with the Sars-CoV-2 virus, and many were quarantined. These circumstances spurred discussions regarding digital plenary and committee meetings using modern technology or online voting[6] and also raised the question of the relevant parliamentary quorum.

The German Basic Law does not contain provisions that would safeguard the *Bundestag*'s ability to work in the event of an *internal emergency*. Instead, the legislature relies on informal agreements, such as the so-called "pairing" procedure. This procedure is rooted in British parliamentary history, following a system requiring that for each absent member of the government, one member of the opposition must be absent as well. The only emergency situation defined in the German Basic Law is an *external emergency*. This situation arises in case of a state of defence (the so-called *Verteidigungsfall*). Here, according to Art. 53a GG, a small joint committee can take over the position of the *Bundestag* and *Bundesrat*, thereby allowing the legislature to act more effectively and flexibly. But there is general consensus that it would be far-fetched to classify the virus as a weapon attacking the Federal Republic.

The problem of maintaining a functioning legislature during the pandemic was solved by temporarily altering the rules regarding the quorum of the Bundestag. According to § 45 para. 1 of the rules of procedure of the *Bundestag* (*Geschäftsordnung Bundestag*, GO-BT), the *Bundestag* is quorate if more than half of its members are present (although this quorum must be verified for the lack thereof to condition any legal effects). When deciding the extraordinary measures to combat the epidemic in plenary session, the *Bundestag* agreed very pragmatically that one out of every two Members of Parliament would be in the Chamber. On March 25, 2020, the Members of Parliament amended the GO-BT by adding, for a limited period until September 30, 2020, a new § 126a. In its paragraph 1, this amendment reduces the quorum of the plenary session to one quarter of the Bundestag members.[7] Since the Bundestag currently has 709 members, 178 are still required for a quorum. These rules were considered to be in accordance with democratic principles, as each individual member still had the right to attend the sittings. A further proposal suggested anchoring the "pairing"

[6] For the debate on digitization in Corona-times see *C. Hagenah*, Das Corona-Virus und das Parlament – Die Stunde der Digitalisierung?, JuWissBlog Nr. 37/2020 v. 26.3.2020, *https://www.juwiss.de/37-2020/*.

[7] Bundestag-Drucksache Nr. 19/18126.

procedure in the constitution in order to ensure the *Bundestag*'s working ability in the event of a crisis.[8]

IV. Legal basis of enacted measures

The IfSG entitles the authorities to adopt a series of different measures in order to prevent and control infectious diseases. The Act distinguishes between three orders of action: measures concerning the surveillance (§§ 6 et seq IfSG), prevention (§§ 16 et seq IfSG), and control (§§ 24 et seq IfSG) of infectious diseases. The measures must address not only those who have fallen ill but also those suspected to be ill, namely persons who do not appear sick but whose exposure to pathogens can be assumed as well as persons who secrete pathogens and can therefore be a source of infection for the general public without showing signs of illness. Moreover, some measures may be addressed to the general public: According to § 30, the authorities can order quarantines, ban professional activities (§ 31), and shut down care facilities for minors (§ 33). One provision, which served as the basis for several restrictive measures and so became central during the crisis as well as the subject of much debate, was § 28 IfSG. It was particularly controversial whether this article could be used as a basis for *bans on leaving the house*.

According to the previous version of § 28 para. 1 sentence 2 IfSG, the competent authorities could "restrict or prohibit events or other gatherings of a large number of people" and could also "oblige persons not to leave the place where they are located or enter designated places until necessary protective measures have been taken". The majority of legal scholars argued that this provision could not serve as a basis for bans on leaving the house.[9] They held that the provision was intended to cover only short-term measures, such as an order not to leave an aircraft until the authorities have isolated potentially infected persons, as indicated by the wording "until the necessary protective measures have been taken". Yet the courts did not agree with this criticism, instead allowing the provision to be used as a legal basis.[10]

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[8] *P. Thielbörger/ B. Behlert*, COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze, VerfBlog, 30.3.2020, *https://verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/*.

[9] For example *A. Kießling*, Rechtssicherheit und Rechtsklarheit bei Ausgangssperren & Co?, JuWissBlog Nr. 33/2020, 24.3.2020, *https://www.juwiss.de/33-2020/*.

[10] OVG Berlin-Brandenburg, 23.03.2020 – OVG 11 S 12/20, DVBl. 2020, p. 775, 776, para. 9; VG Freiburg, 25.3.2020, 4 K 1246/20, COVuR 2020, p. 156, para. 16 et seq.

§ 28 para. 1 sentence 1 IfSG contains a general clause that allows the competent authorities to take "necessary measures". When introducing the provision, the legislature argued that it was important to include a general basis of authorization in the law so as "to be prepared for all eventualities".[11] However, legal scholars were skeptical whether this general clause authorizing only the adoption of unspecified "necessary measures" could act as an appropriate legal basis for measures as intrusive as the ban on leaving the house. Instead, scholars demanded the creation of a specific basis of authorization.[12] Furthermore, many doubted whether the provision satisfied the constitutional requirements, especially with regard to the principle of legal certainty (the so-called *Bestimmtheitsgrundsatz*) and the theory of "legislative reservation" (the so-called *Wesentlichkeitstheorie*).[13] Finally, the ban on leaving the house not only interfered with the freedom of the person (Art. 2 para. 2 sentence 2 GG) but also with the freedom of movement (Art. 11 para. 1 GG). However, § 28 para. 4 IfSG did not cite Art. 11 para. 1 GG as a restrictable fundamental right, even though Art. 19 para 1 sentence 2 GG (the so-called *Zitiergebot*) requires this citation.

Thus, in great haste, the *Bundestag* and *Bundesrat* passed the "Act for the Protection of the Population in the Event of an Epidemic Situation of National Significance", also amending § 28 para. 1 IfSG.[14] The general clause in § 28 para. 1 sentence 1 IfSG remained unaltered. However, a second part was added, enabling the competent authorities to oblige persons not to leave their current location. The elimination of the restriction "until the necessary protective measures have been taken" extended the norm's scope of application to long-term measures, such as bans on leaving the house. Yet some observers held that even this new regulation was not sufficient to legitimize bans on leaving the house because it did not fulfil the requirements of the principle of legal certainty. Instead, legal scholars demanded that measures such as bans on leaving the house be explicitly governed by a separate provision.[15] Finally, § 28 para. 1 sentence 4 IfSG now also mentions Art. 11

[11] Bundestag-Drucksache Nr. 8/2468, p. 27.

[12] *A. Klafki*, Corona-Pandemie: Ausgangssperre bald auch in Deutschland?, JuWissBlog Nr. 27/2020, 18.3.2020, *https://www.juwiss.de/27-2020/*.

[13] *A. Edenharter*, Freiheitsrechte ade?: Die Rechtswidrigkeit der Ausgangssperre in der oberpfälzischen Stadt Mitterteich, VerfBlog, 19.3.2020.

[14] Federal Law Gazette 2020 I p. 587.

[15] *A. Klafki*, Neue Rechtsgrundlagen im Kampf gegen Covid-19: Der Gesetzesentwurf zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, VerfBlog, 25.3.2020, *https://verfassungsblog.de/neue-rechtsgrundlagen-im-kampf-gegen-covid-19/*.

GG as a restrictable fundamental right, thus addressing the constitutional issues raised by the *Zitiergebot*.

V. Proportionality

Another fundamental rights issue that emerged during the pandemic was the proportionality of state intervention in fundamental rights on the basis of the IfSG. This matter arose in particular because measures in the field of containment or control of the pandemic often intensely affected fundamental rights, in some cases even completely suspending their exercise to an extent hitherto unknown. Furthermore, the question of proportionality gained considerable importance because the IfSG provides for the possibility of taking measures against persons who present no threat to the public and because violation of the measures can be punished as an administrative or even criminal offence.

The case law reveals a common narrative: Initially, the courts recognized the pandemic's serious, sometimes even irreversible impact on fundamental rights for a large number of people. After balanced consideration, they decided in favour of the right to life and physical integrity.[16] They argued that this was possible because the measures were only temporary.[17] Then this trend was reversed, following efforts to recall the importance of fundamental rights other than life and health. This development was particularly evident with regard to the *freedom of assembly*. Initially, the courts gave *a priori* precedence to the protection of human life and health over the right of assembly,[18] even concerning an assembly of only two persons.[19] They argued that other forms of protest were possible, for example through social media channels.[20] In a highly symbolic decision on April 15, 2020, the Federal Constitutional Court lifted a ban on assembly and underlined the freedom of assembly as an outstanding feature in a democracy – even in times of pandemic.[21] This heralded a new phase, in which more and more admin-

[16] See for example BVerfG, 7.4.2020, 1 BvR 755/20, para. 11 with regard to the ban to leave the house.

[17] With regard to the freedom of assembly VG Hannover, 27.3.2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30.3.2020, 6 L 212/20, p. 12; with regard to the freedom of religion BVerfG, 10.4.2020, 1 BvQ 28/20, para. 14.

[18] VG Hannover, 27.3.2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30.3.2020, 6 L 212/20, p. 12; VG Hamburg, 2.4.2020, 2 E 1550/20, p. 6 et seq.

[19] VG Neustadt (Weinstraße), 2.4.2020, 5 L 333/20.NW, juris.

[20] VG Dresden, 30.3.2020, 6 L 212/20, p. 13.

[21] BVerfG, 15.4.2020, 1 BvR 828/20.

istrative court decisions allowed assemblies.[22] The situation was similar in the area of *freedom of religion*. Initially, the courts affirmed the proportionality of prohibitions of worship and rejected the applications of religious associations and churchgoers against these prohibitions.[23] They argued that there were other possibilities to exercise the freedom of religion, such as church services broadcast on radio or television.[24] On April 29, 2020, however, this trend was reversed when the Constitutional Court lifted a ban on the opening of mosques based on the regulations of Lower Saxony, arguing that the exercise of fundamental rights could be permitted despite the pandemic, provided certain contextually adequate conditions were met.[25]

[22] VG Hamburg, 16.4.2020, 17 E 1648/20; VG Halle, 17.4.2020, 5 B 190/20 HAL; OVG Sachsen-Anhalt, 18.4.2020, 3 M 60/20; VG Hannover, 16.4.2020, 10 B 2232/20.

[23] For example BayVGH, 9.4.2020, 20 NE 20.704, juris; BayVGH, 9.4.2020, 20 NE 20.738, juris; OVG Thüringen, 9.4.2020, 3 EN 238/20, juris; BVerfG, 10.4.2020, 1 BvQ 28/20, para. 14.

[24] VG Berlin, 7.4.2020, 14 L 32/20, juris, para. 22; confirmed by OVG Berlin-Brandenburg, 8.4.2020, OVG 11 S 21/20, juris, para. 12.

[25] BVerfG, 29.4.2020, 1 BvQ 44/20, para. 9 and 14 et seq.

COVID-19 AND THE RESPONSIVENESS OF THE HUNGARIAN CONSTITUTIONAL SYSTEM

Fruzsina GÁRDOS-OROSZ*

SUMMARY: I. *Introduction*. II. *Governmental Declaration of the State of Danger – the limits of constitutional interpretation*. III. *The unlimited Parliament authorisation of the Government to rule further by decrees*. IV. *The role of the Constitutional Court*. V. *On the wide list of emergency situations in and outside the Fundamental Law, on the effect of the exceptional legal regimes on constitutional democracy*. VI. *The quality of the governing with decrees and legal security*. VII. *Substantive questions of rights protection: free movement, speech rights and the operation of the courts*. VIII. *Conclusion*.

I. INTRODUCTION

This report analyses the constitutional framework of the Hungarian government's use of emergency powers to control the COVID-19 pandemic. I will focus here on the most debated issues of public law. This account summarizes the results of the related projects of the Institute for Legal Studies.[1]

The findings bellow are based mostly on a database on all related Government Decrees, developed by the Institute and four related papers[2]

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[1] The responsiveness of the Hungarian Legal System 2010-2020 supported by the National Research, Development and Innovation Office (FK 129018)" project (Principal investigator: Fruzsina Gárdos-Orosz) and the Center for Social Sciences' 'EpiLaw' project (prinicpal investigators Fruzsina Gárdos-Orosz and Viktor Lőrincz).

[2] Győry, Csaba – Nyasha Weinberg: "Emergency Powers in a Hybrid Regime. The Case of Hungary" *Theory and Practice of Legislation*, accepted, forthcoming in 2020. Balázs, István – István Hoffman: "Közigazgatás koronavírus idején, A közigazgatási jog rezilienciája" (Administrative law in times of corona virus – the resilience of the administrative law) *MTA Law Working Paper* 2020/21. *https://jog.tk.mta.hu/mtalwp/kozigazgatas-koronavirus-idejen-a-kozigazgatasi-jog-rezilienciaja*. Drinóczi, Tímea, "Hungarian Abuse of Emergency Regimes, also in the

and several blog posts[3] that have been published in the project so far. In response to the Covid19 pandemic, a "*State of Danger*" (one of the six) constitutional emergency regime was applied in Hungary according to the Fundamental Law adopted in 2011. A "*State of Danger*" (Art 53.) is declared by the Government and it empowers the Government to issue decrees suspending the application of certain parliamentary acts or completing them, creating new decrees with the effect of an act of Parliament in order to tackle the situation of danger. Natural disasters and industrial accidents are named in this paragraph of the Fundamental Law as Danger. Under the Fundamental Law a cardinal act (meaning its enactment requires the vote of 2/3 of the MPs present) defines further extraordinary measures. This is the Catastrophe Defense Act. The list of such measures include, among others, changing administrative procedure rules, asking businesses to enter into contracts, such as the delivery of essential services, bringing privately owned businesses under the government's control, restricting of transportation, gatherings, movements to facilitate defence.[4]

The "state of extreme danger" (Art. 53) was declared on March 11th.[5] The Hungarian case is unique in international comparison, because already in March and April publications qualified the situation a "constitutional coup"[6] and a "power grab",[7] and described Hungary as "on the verge of dictatorship".[8] The Hungarian rules were criticised on domestic, European and international fora for the following constitutional matters.

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light of Covid 19 Crisis, *MTA Law Working Papers* 2020/13. *https://jog.tk.mta.hu/mtalwp/hungarian-abuse-of-constitutional-emergency-regimes-also-in-the-light-of-the-covid-19-crisis*; Szente, Zoltán. "A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái" (Constitutional problems related to the emergency situation declared on the 11 March 2020), *MTA LAW Working Papers* 2020/9. The database on the analysis of the Government decrees issue in the period of emergency was designed by senior research fellows of the Project and was built primarily by Lilla Rácz junior research fellow.

3 Covid19 Related Challenges and the Law Blog Series of the Institute for Legal Studies (partly in English) *https://jog.tk.mta.hu/blog*.

4 Act Nr. 128/2011, Sections 47-49.

5 40/2020. (III.11) Korm.rend. a veszélyhelyzet kihirdetéséről (Government Decree Nr. 40/2020 on the declaration of the state of danger)

6 Baer, Daniel "The Shocking 'Coronavirus Coup' in Hungary was a Wake-up Call", *Foreign Policy*, 31 March 2020 <*https://foreignpolicy.com/2020/03/31/viktor-orban-hungary-coronavirus-coup/*>.

7 Editorial, 'The Guardian View of Hungary's Coronavirus Law – Orban's Power Grab, *The Guardian*, 29 March 2020 <*https://www.theguardian.com/commentisfree/2020/mar/29/the-guardian-view-on-hungarys-coronavirus-law-orbans-power-grab*>.

8 Scheppele, Kim Lane "Orban's Emergency", *Verfassungsblog*, 29 March 2020 <*https://verfassungsblog.de/orbans-emergency/*>.

II. Governmental Declaration of the State of Danger – the limits of constitutional interpretation

The constitutionality of the declaration of the state of danger by the Government was immediately criticised by constitutional scholars, because the Fundamental Law in Art. 53. did not mention the pandemic. The pandemic is not the natural disaster which is mentioned in this paragraph and although there were no heated debates in Parliament or in the media about this interpretation of the words of the constitution, some scholars warned about the dangers of this "purposive interpretation" or rather unconstitutionality.[9] As in Hungary the Government majority has a constitution making two thirds majority in Parliament, in case, the Government wished to revoke the State of Danger exceptional legal order, they could have changed the wording of the Fundamental Law by an amendment procedure to avoid this *de facto* constitutional amendment by Governmental interpretation. In sum, the very first constitutional dilemma was a genuine one about the limits of constitutional interpretation.

The second question was, whether it is necessary to declare the State of Danger at all, because the government has the authority anyway, under Act on Public Health,[10] to impose restrictions in order to contain the spread of the epidemic. Under this law, the chief public health officer can order compulsory testing[11] and quarantine[12] for anyone infected or suspected to be infected during an epidemic, and the detainment of people suspected to be infected for testing and quarantine.[13]

The overlap between the government's emergency powers in a state of Danger and the authority of the Chief Public Health Officer to impose restrictions during an epidemic was made apparent by the fact that the latter used this authority to reimpose restrictions initially imposed by government emergency decree.[14] This was also interesting from a competence point of view, which I will explain later, but here it shows the uncertainty of whether this extraordinary legal order was necessary at all to be declared in Hungary.

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9 Szente op.cit.

10 Act Nr. 154 of 1997

11 Section 59 of the Act Nr. 154 of 1997.

12 Sections 65-69 of the Act Nr. 154 of 1997.

13 Section 70/A of the Act Nr. 154 of 1997

14 Order of the Chief Public Health Officer of 26th March 2020. *https://koronavirus.gov.hu/cikkek/az-orszagos-tisztifoorvos-tilto-es-kotelezo-hatarozata-jarvanyugyi-helyzetre-tekintettel*.

III. The unlimited Parliament authorisation of the Government to rule further by decrees

The government submitted a bill, which was voted in by a two-thirds majority on Monday 30th March and entered into force as the Coronavirus Defence Act on April 1st (also known as the Authorization Act).[15]

The adopted legislation grants the Government unlimited authorisation, though revocable by Parliament, to rule by decree after 15 days in order to handle all legislative problems of any nature caused by or under Covid 19, without further temporal or other thematic restrictions, aside from those limits enshrined in the Fundamental Law protecting certain basic rights in this exceptional constitutional order equally.

Some argued that the authorization given by Parliament is so broad that the act turned the country into a dictatorship.[16] The bill has also been deemed the "Enabling Act" in reference to the Ermächtigungsgesetz, the (unconstitutional) law that created the legal base for Nazism.[17]

The blanket authorization certainly limits parliamentary oversight. The question is if such an authorisation runs contrary to the principles of the constitution, especially to the separation of powers and more specifically to the goal of this very provision to provide for parliamentary oversight even if the authorisation is duly constructed in a formal legislative sense.[18]

A counterargument can be made that the Authorisation Act allows Parliament to revoke the authorization at any time,[19] but critics mentioned that the Parliament can simply be not convened, prevented from sitting and in that case there is no operating parliament that could decide about the end of this authorisation. So this provision in its final assessment offers no legally enforceable guarantees.

IV. The role of the Constitutional Court

The Act stipulates that the Constitutional Court shall remain in session, following the constitutional provision that the Constitutional Court cannot be sus-

15 Act Nr. 12. Of 2020 on the Defence Against Coronavirus

16 Scheppele op. cit.

17 Halmai, Gabor "How Covid Unveils the True Autocrats: Orbán's Ermächtigungsgesetz" *iConnectBlog*, 1 April 2020 *http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/*.

18 Szente op.cit.; Győry – Winberg. op. cit.

19 Section 3 (2) of the Authorization Act

pended in any state of exception (Art 54 (2)). The Constitutional Court, thus, is allowed to rule on the constitutionality of government decrees or that of the Authorisation Act. Whether this control is effective is unclear and debated, because the Constitutional Court is widely known as being deferential to the Government, especially in extraordinary situations such as the financial crisis etc.[20]

So far, the Constitutional Court did not bring such decisions that would have qualified any of the Government's acts unconstitutional. It has, however, stated that the Government should have according to the Fundamental Law the competence to decide on the necessity of some regulative measures and the Constitutional Court is often not qualified to review it in the substance. The newest case was about a government decree classifying as of national strategic importance the merge of the Central European Press and Media Foundation. This exceptionally protected merge of "strategic importance" was claimed to be against the plural media communication by the motion, but the Constitutional Court declared that it is not in conflict with the Fundamental Law. The Constitutional Court referred to its deference in this question of the qualification of the national strategic importance.[21]

V. On the wide list of emergency situations in and outside the Fundamental Law, on the effect of the exceptional legal regimes on constitutional democracy

The emergency powers granted to the government in Art. 53. of the Fundamental Law are very broad compared to international examples. Constitutional discussions touch upon the question of the nature of this emergency regime in general in Hungary, whether it is too broad, whether it gives too much space to the Government and whether it is just a problem of the codification or an intentional wording. In Hungary there are different kinds of extraordinary regimes regulated in the Fundamental Law and also outside of that, in legislative acts.[22]

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[20] Szente, Zoltán– Fruzsina Gárdos-Orosz: *New challenges to Constitutional Adjudication in Europe*. London: Routledge 2018.

[21] *https://hunconcourt.hu/announcement/the-government-decree-classifying-as-of-national-strategic-importance-the-intention-to-extend-the-central-european-press-and-media-foundation-is-not-in-conflict-with-the-fundamental-law*.

[22] E.g. emergency situation caused by mass migration in the 2007. LXXX. Act on migration or the new pandemic danger situation declared in the Act. LVIII. of 2020 after the State of danger ended.

In these regimes, however, the nature of democracy transforms, because the constitution itself creates a prerogative state instead of the normative constitutionalism. It is a prerogative state created by the constitution, but in case it is too wide, the exception can become a rule.[23]

Theoretically, they could be abused easily, as they offer a legal basis for a more overtly authoritarian state. They face the challenge of defining formal legality, and whether this exercise of power is still constitutional in a material sense. One set of theories: "*abusive constitutionalism*",[24] "*illiberal constitutionalism*", [25] and "*authoritarian constitutionalism*"[26] all stress that Hungary adhere to formal constitutional requirements and formally proper legal rules for the exercise of power. "Autocratic legality" makes difference between formal and substantive legality arguing that such regimes do not hold up to the substantive understandings of constitutionalism. There is a lot of scholarly debate about how to place this Covid19 period into these theoretical concepts, but all agree that the Government received almost unlimited power to rule in the months of Covid19, but it used this unlimited authorisation finally moderately.[27]

VI. The quality of the governing with decrees and legal security

In Hungary mostly Government decrees were adopted to rule the situation although in some cases the Chief Medical Officer of the State also had an important role as a regulative authority.

As to the Government Decrees issued in this period, the constitutional question was mostly focused on the quantity, quality and the content. Finally there was over 200 decrees issued in this period between 11 March 2020 and 17 June 2020, the end of the State of Danger.

The analysis shows that although the number is high, not all of the decrees are original legislation; many are amendments of earlier decrees, some of which needed to be amended because of the evolving situation (tightening and then easing the curfew, for example), while others simply

[23] Győry –Weinberg op.cit.

[24] Landau, David (2013): Abusive Constitutionalism. U.C. Law Review.

[25] Drinóczi, Tímea – Bień-Kacała, Agnieszka "Illiberal Constitutionalism: The Case of Hungary and Poland." *German Law Journal, 20*.8 (2019) 1140-1166. doi:10.1017/glj.2019.83.

[26] Tushnet, Mark (2018): Authoritarian Constitutionalism. Cornell Law Review, 397-461. *https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4654&context=clr*.

[27] Drinóczi op.cit. Győri-Weinberg op.cit.

corrected drafting mistakes. The quality of these decrees varies. Some are extremely poorly drafted, which can be attributed to the urgency of the situation and to the large amount of legal change required to respond to the crisis. Often it appears that "a political decision has been made and decrees reflect the legal repercussions of the decision requiring a flurry of legislation to patch holes in other decrees". Most decrees issued under the authorisation act are clearly relevant to assess the legal impacts on Covid-19.[28] In sum, in relation to the Government Decrees the constitutional question was rather about the necessary content, related to Covid19 and if the relation of the parliamentary law making that was ongoing in this period is hurt by the governmental competence.

As to the normative order of the Chief State Medical Officer, one interesting constitutional insight could be given here that also did not get much publicity. As the first 15 days of the Government decree issuing the State of Danger expired some days before the Government received the Authorisation from the Parliament to extend the temporal effect of the situation, the Hungarian legal order reacted with a normative order to the CSMO that kept in force all emergency measures. This again shows the flexibility of understanding law in Hungary in these times, and is another example of how, after the declaration of the State of Danger, the actions taken by the state authorities were only possible with a very broad understanding of legality, overstepping the textual interpretation of the constitution or of the laws in order to create a stable legal situation, legal certainty.[29] However, this practical understanding of the applicable rules is highly debatable.

VII. Substantive questions of rights protection: free movement, speech rights and the operation of the courts

In Hungary, like in many other countries, there were measures to enforce social distancing, restricting the right to free movement. Measures included closing schools and universities, bars, bans on gatherings and attending sports events etc.[30] A limited curfew was introduced through a ban on leaving home for all but essential reasons, such as receiving medical care, shopping,excercise etc. The borders were closed for all cross-border traffic

28 See for further analysis, Győry-Weinberg op.cit.

29 Balázs and Hoffman op.cit.

30 Decrees Nr. 41/2020 (III.11), Nr. 45/2020 (III.14.) and Nr. 46/2020 (III.16.).

except for freight, and an entry ban was introduced for all but Hungarian citizens and legal residents.

The decrees included a 14-day quarantine on those infected with Covid-19, alongside anyone in contact with an infected person[31]. A new amendment to the Criminal Code was introduced to sanction those who breached the quarantine, the status of which was not very clear in criminal law.[32] Fortunately, in practice, there was a great degree of obeyance to the rules,[33] so the new provision was not debated greatly in public.

Specific rules on the operation of the justice system were on the other hand more echoed in scholarship. The government imposed an extraordinary 'justice break' on 15 March.[34] A 'justice break' is a period when courts do not sit, apart from adjudicating urgent matters such as emergency injunctions or pre-trial detentions. The decree ordering the break due to Covid-19 failed to include precise rules. This left it unclear how the break affected deadlines of filing motions and other work and caused a great uncertainty in the first times concerning the access to justice. Finally, the head of the National Office of the Judiciary issued norms regulating these issues,[35] but under Hungarian law organisational norms only bind justice personnel, but not ordinary citizens. The government acted only two weeks later in the form of the longest and most exhaustive decrees.[36]

One of the most debated issue, however, was about scare mongering, where the Government introduced a new provision to the Criminal Code. The law which criminalises scare-mongering during an epidemic applies to anyone equally who knowingly spreads false information. The Constitutional Court upheld the regulation. The appeal submitted to the court claimed that the law carrying a five-year prison sentence restricted the freedom of speech and was ill-defined, with the risk that it may be applied arbitrarily. The Constitutional Court said that it was necessary and proportionate to put limits on speech if there was an overriding social interest in doing so, therefore the provision is constitutional.[37]

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31 Decree Nr. 81/2020 (IV.1.).

32 Miklós Hollán, "Bolyongás a járvány büntetőjogi fogalma körül" *MTA Law Working Papers*, 2020/8. *https://jog.tk.mta.hu/mtalwp/bolyongas-a-jarvany-buntetojogi-fogalma-korul*.

33 Balázs Fekete "Az emberekből előbukkant az empátia (The people care)" *MTA Law Working Paper* 2020/18. *https://jog.tk.mta.hu/mtalwp/az-emberekbol-elobukkant-az-empatia-mikro-antropologiai-kutatas-a-tarsadalmi-tavolsagtartas-szabalyainak-mukodeserol*.

34 Decree Nr. 45. of 2020. Section (1).

35 Orders of the Head of the National Office of the Judiciary Nrs. 35 (III.15), 36 (III.16.), 37 (III.17.), 38 (III.17.), 40(III.24.), 42 (III.26), 47(IV.1.) of 2020.

36 In more detail, see Győri and Weinberg, Decree Nr. 74. of 2020.

37 IV/00699/2020 CC Decision.

VIII. Conclusion

Questions of substantive constitutionality could be further listed with regard to the intrusion to private contractual relationships, with regard to tax questions, unemployment, social rights and social aid, the state overtake of the lead of certain companies etc. Referring to the constraints of this report I would summarize that the related constitutional questions are partly substantive, partly procedural and worth to be examined in detail respectively to be able to learn more about the nature of the emergency situations. In case the analysis shows grey or black holes in the constitutional protection in international comparison, it is better to reconsider the concept of the exceptional legal orders in constitutional theory as well. The Hungarian example certainly calls for it.

COVID-19 REGULATION IN NORWAY AND STATE OF EXCEPTION

Hans Petter GRAVER*

SUMMARY: I. *Covid-19 and the Norwegian Constitution*. II. *The State of Emergency*. III. *The Element of the Unregulated*. IV. *Control of exceptional powers*.

I. COVID-19 AND THE NORWEGIAN CONSTITUTION

Norwegian Prime Minister Erna Solberg held a press conference on March 12, 2020. Here she announced, "the strongest and most comprehensive measures we have had in Norway in peacetime".[1] This, and subsequent measures to deal with the pandemic, challenged the basic constitutional rules of Norway on the state's exercise of authority in several ways. The decision to shut down the country on March 12, 2020 was formally taken by the Norwegian Directorate of Health and overlooked the Constitution's requirement that it is the cabinet that must make such decisions. The rules of the Disease Prevention Act (1995) were subsequently stretched to the extreme, both by state and local authorities. A Corona Act was prepared in secrecy. The bill proposed a transfer of authority to the government, which at best was at the very edge of what the Constitution allows, with scant provision for parliamentary and judicial control. Use by the authorities of both legal regulation and recommendations and advice, partly in regulatory form, for example on social gatherings and social distancing, created uncertainty about the state of the law. The authorities later proposed rules on the detention and quarantine of the sick and infected, with a reach far beyond the corona situation, and with far-reaching implications for the disease prevention policy that has been implemented to date.

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1 Pressemelding se *https://www.regjeringen.no/no/aktuelt/nye-tiltak/id2693327/*.

Such exceptional measures represent challenges to the existing legal order. First, there is always a danger in the situation itself. In the case of extraordinary threats to important interests, it is easy to shift the perspective so that fighting these threats dominates all other considerations. Thus, there is a danger that other considerations and interests are set aside to a greater extent than is necessary. The danger is reinforced by the fact that the authorizations often make exceptions to the usual rules and forms of preparation of laws and regulations. Lack of proper preparation and public consultation will often lead to that affected rights and interests are ignored.

Secondly, the exception to ordinary legislative procedure in Parliament means that the democratic legitimacy of the measures is diminished. It shifts the balance of power between the parliament and the government. The fact that the rules are excluded from treatment in the parliament also reinforces the effect of a lack of investigation and consultation.

In addition, thirdly, it is a common opinion that the courts should exercise restraint in examining the authorities' assessment of the measures necessary to deal with emergency situations. That the courts should be restrained in their review is said to lie in the special nature of the emergency and in the fact that the rules of state of emergency are imprecise, and that the courts should exercise moderation in setting their standards instead of those of the government.[2] This view is not specific to Norway and Norwegian law. US Judge Richard Posner believes that courts should exercise restraint because they lack insight into how to fight crises, and because they should allow the measures that the legislative and executive powers take against unknown dangers to be tried before they are possibly set aside.[3]

II. The State of Emergency

The state of emergency is not something that Norwegian lawyers or Norwegian society is familiar with. Most people view the state of emergency as something that happens in other countries, or as an interesting theoretical problem with little current significance for Norway. The state of emergency is not a term in the Norwegian constitution, and there is no provision for

[2] See Ola Rambjør Heide, *Konstitusjonell nødrett: sett i lys av Den europeiske menneskerettighets konvensjon artikkel 15*, Oslo 1998 s. 70-74.

[3] Richard A. Posner, Not a Suicide Pact. The Constitution in a Time of National Emergency, Oxford 2006 s. 36–37.

the state of exception.[4] Only a handful of times in Norwegian constitutional history have there been anything resembling of a state of emergency.[5] This contrasts with, for example, the United States, which has been in an almost permanent series of state of emergency since the Great Depression of the 1930s.[6]

The state of emergency raises the tension between, on the one hand, the notion of right as universal, formal and rationally coherent and, on the other, the need of the state and the authorities to be able to implement effective measures without having to distinguish other than efficiency and goal achievement. The state of exception is usually characterised by three elements: a formal authority to act independently of the ordinary rules of judicial competence, a possibility to suspend rights and derogate from the law, and an acceptance of not being bound by the ordinary forms of law.[7] During the pandemic we have seen examples of all three. The initial measures to shut down the country were adopted independently of the Constitution's requirement that important issues must be dealt with by the government. Both the Disease Prevention Act and the Coronal Act provided for the restriction of rights, which was done in accordance with both laws. The Corona Act itself, and a number of legislative and regulatory decisions, were made without regard to the usual rules of consultation and preparation of legislative decisions.

The state of exception is a contentious concept in the philosophy of law. A well-known and influential perspective on the state of exception is the theory of German state and legal theorist Carl Schmitt. For Schmitt, the state of exception is the state in which the law suspends itself, and in which the ruler proves to be sovereign. "Sovereign is he who decides on the exception," he says in a famous quote.[8] A different view has been taken by the US judge and theorist Richard A. Posner, who writes that the government's power to take measures to protect national security is the other side of indi-

[4] In Europe Norway is in the company with Denmark, Luxemburg, Sverige, Switzerland and Austria, see European Commission for Democracy through Law (Venice Commission) Emergency Powers, Strasbourg 1995, *https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e*.

[5] See Dag Michalsen, Unntakstilstand og forfatning: En introduksjon i Dag Michalsen (red), *Unntakstilstand og forfatning. Brudd og kontinuitet i konstitusjonell rett*, Oslo 2013 s. 21–38.

[6] Kim Lane Scheppele, «Small Emergencies», *Georgia Law Review* 40, no. 3 (Spring 2006): 835–862.

[7] See Jørgen Stubberud, Hva er unntakstilstand i Dag Michalsen (red), *Unntakstilstand og forfatning. Brudd og kontinuitet i konstitusjonell rett*, Oslo 2013 s. 94.

[8] Schmitt, Carl, 1922. *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität, München und Leipzig: Verlag von Duncker & Humblot; translated as Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab (trans.), Chicago: The University of Chicago Press, 2005 p. 5.

viduals' right to freedom and privacy.[9] The state of exception changes the scope, not the existence of rights according to Posner.[10] Thus, while Schmitt believes that the state of exception abrogates all rights, Posner believes that it modifies them without revoking them.

Schmitt's point is that it is not possible to regulate the conditions for when an extreme emergency exists, nor can it be substantively determined what will happen in such cases. There always comes a point where the sovereign has to act against the unforeseen, and in these cases the sovereign acts outside of the law, and thereby determines it. What the sovereign decides cannot be supported by the law, but it becomes law because the sovereign has power.

Logically, Schmitt has an unassailable point. A rule cannot specify the criteria for assessing a situation that is outside the rule. Therefore, when a situation arises that the rule does not cover, someone must step in and decide, unbound by the rule. However, Schmitt's approach presupposes a specific view of the law as a formal and closed system of rules. If the law is seen as open and created through the application of norms, either on the basis of principles or on the basis of pragmatic considerations, then no logical situation needs to arise outside of the law. Whether such a situation arises will then be a political question and not a question of logic. As demonstrated by Douglas Hofstadter in his wonderful book on self-referencing systems, *Gödel, Escher, Bach: An Eternal Golden Braid*, this will be the case where both the president and the Supreme Court claim to have the final say. In such situations, it is only the power to force their will through which determines who is right.[11] Such a power struggle has rarely come to the forefront in Norwegian constitutional history, and certainly not during the 2020 pandemic.

Carl Schmitt's theory is interesting as a theory of the content and boundaries of the rule of law, but it is not relevant to the analysis of exceptions and constitutional emergency law in Norway. Schmitt himself says that "not every extraordinary power of attorney, not every police action for an emergency or any regulation in such an emergency is an automatic state of emergency. Such a condition belongs much more to an essentially unlimited power of attorney, that is, the suspension of the entire existing order".[12]

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9 Richard A. Posner, Not a Suicide Pact. The Constitution in a Time of National Emergency, Oxford 2006 s. 8.

10 Op. cit. s. 23.

11 Douglas Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid*, Harmondsworth 1979, se s. 692.

12 Sitert fra Rune Slagstad, *Carl Schmitt. Politikk og rett et antiliberalt tema med variasjoner*, Oslo 2020 s. 208.

With such a starting point, it is perhaps only the decisions of the Norwegian Government in exile during the Second World War that can be characterized as an example of state of emergency in Norwegian history. The events in Norway, and in most other countries, during the pandemic were not at all a state of emergency in Carl Schmitt's sense, regardless of whether or not a formal state of emergency was declared.[13]

III. The Element of the Unregulated

Nevertheless, an important acknowledgment to Schmitt's theory lies in the fact that there is always an element of the unregulated in the content and the exercise of extraordinary powers. It is also correct that who decides when an extraordinary situation exists, and what measures to take, is a key point. In our legal order, this can be either the executive, the parliament or the courts. Schmitt's point is not that the executive power is necessarily sovereign in a state of emergency, only that whoever decides it, is sovereign. The sovereignty in this sense can lie with each of the three powers of government. The key question is whether sovereignty can also be shared between them, in that none of them can exercise it uncontrolled by the others. It just cannot be normatively regulated in advance; the exception requires a decision that is unbound by general norms. This does not, however, necessarily lead down the road to dictatorship.

American sociologist and law theorist Kim Lane Scheppele distinguishes between three situations where the state of emergency is triggered.[14] First, there are those cases where the rulers themselves control the situation that triggers the state of emergency. Such state of emergency kills the rule of law. Scheppele uses the Nazis' exploitation of the fire in the Reichstag in 1933 as an example. Then we have the situation where the power-holders deliberately exploit a real threat to take measures that exceed what is necessary to fight the danger. Such state of emergency harms the rule of law. She uses the Bush administration's "war on terror" after September 11 as an ex-

[13] In this respect it is interesting that Schmitt never mentioned the influeza pandemic of 1918-1919, even though he developed his theory during this period, and was well aware of the state measures taken to combat the pandemic, see Mehring, Reinhard: Carl Schmitt und die Pandemie. Teil I, VerfBlog, 2020/5/11, *https://verfassungsblog.de/carl-schmitt-und-die-pandemie-teil-i/*.

[14] Scheppele, Kim Lane: Underreaction in a Time of Emergency: America as a Nearly Failed State, VerfBlog, 2020/4/09, *https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/*.

ample of this. As a third group, she considers the emergencies triggered by natural disasters. According to Scheppele, these have not received the same attention in political and legal theory.

Natural disasters are not political and cannot be triggered or controlled by authorities seeking more power, Scheppele claims. While it is hardly always right, just think of hunger disasters that are often triggered by political conditions more than nature, she is right that they do not necessarily represent the same threat to the rule of law as crises of a more political nature.

The important distinction between the three situations Scheppele outlines is the extent to which political considerations play into the definition and perception of something like a disaster that requires extraordinary measures. In the case of natural disasters, this applies to a small extent, at least initially. However, as we have seen during the pandemic, political elements will come into play as the situation develops. Such disasters, too, can give rise to excessive restraint of fundamental rights, and they can be used as an argument to generalize state of emergency and extraordinary powers of state to deal with crises.

IV. Control of exceptional powers

There are variants of parliamentary control over the executive's use of emergency powers in many countries.[15] Most democratic states recognize the need for control over the government's use of extraordinary powers. In Norway, the Corona Act was time-limited to one month at the time and was in effect only for two months before it expired. The main purpose of the act was to adopt economic measures to compensate those hit most hardly by the lockdown, to facilitate the functioning of the courts and the administration by the use of virtual hearings and signatures, immigration control measures and certain other measures. The King's power of attorney in § 7-12 of the Disease Prevention Act is permanent, but rules adopted pursuant to the provision shall be submitted to the parliament as soon as possible.

It is important to design procedures to ensure that interests and rights affected by the measures are identified and subject to public consultation and parliamentary review. Often in emergency situations, decisions are taken by a small group of people behind a veiled obscurity. This leads to less

[15] See Ittai Bar-Siman-Tov, Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic – A Comparative Overview (March 22, 2020), paper uploaded at Researchgate *https://www.researchgate.net/publication/340091555_Parliamentary_Activity_and_Legislative_Oversight_during_the_Coronavirus_Pandemic_-A_Comparative_Overview*.

transparent and informed decisions than decisions taken in accordance with regular democratic procedures.[16]

There are also other ways to control the government. It is a fundamental principle in many constitutions that the government's mandates under such provisions must only be used where necessary and that they go no further than necessary, *i.e.* a condition of proportionality. The assessment of proportionality contains both academic and political elements.

Some countries have institutionalized judicial review of whether the situation warrants emergency powers, and their use. In some countries, it is permissible to try the authorities' measures in accordance with special emergency procedures to prevent any unlawful measures being taken at all. In Israel, the Supreme Court banned the implementation of surveillance measures before Parliament had established a committee to oversee the government's use of them. In Germany, there have been several lawsuits in both the states and in the Constitutional Court on several sides of government action. In the Norwegian Corona Act a provision was inserted by the parliament stating that the legality and proportionality of all measures under the act should be subject to full judicial review.

The experience gained with the corona pandemic should be utilised in reviewing the legislation once the situation has stabilized. We can already draw some conclusions. There is widespread acceptance by the people of all countries that the authorities must have the power to adopt and take effective measures. Countries that have not already had rules on this have introduced such rules through exemption procedures and emergency decisions. At the same time, experience shows that in an exceptional situation there is little capacity and time to think about the precise design of the measures, how they should be coordinated and how to avoid undesirable consequences. It is also a challenge to design exemptions and regulations that can avoid having an effect of contagion on other types of extraordinary situations where the authorities' perception of the situation is more political, and not just as obvious to everyone.

[16] See Nature 17. March 2020, Coronavirus: three things all governments and their science advisers must do now, *Nature* 579, 319-320 (2020) doi: 10.1038/d41586-020-00772-4.

COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF POLAND

Marek ZUBIK*
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I. The key problem with which the Polish government had to struggle in the face of the coronavirus disease pandemic was the establishment of an appropriate legal regime of the management of public affairs in a situation of 'emergency'. From this point of view, the activity of public authorities can be divided into three periods. The first one, which lasted until mid-March 2020, was based on the increasing activity of administrative bodies, yet without adopting broad restrictions on constitutional freedoms and rights. The reactions of state authorities were undertaken on the basis of the Act of 5 December 2008 on the prevention and combating of infections and infectious diseases (hereinafter: the Act of 2008), and then on the basis of the newly adopted Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (hereinafter: the Act of 2020). The second period, which lasted until mid-May, was related to the introduction of the state of epidemic on the territory of Poland, on the basis of the Act of 2008, which enabled the government to impose far-reaching restrictions and limitations on the exercise of human rights. The third stage, which started in mid-May and lasts until today, involves the gradual lifting of the existing restrictions.

The first broad measures related to the prevention and control of the spread of COVID-19 were taken by the authorities of universities (including the suspension of classes) and local governments. These actions forced a reaction of central authorities. It was provided for closing nurseries, kindergartens, schools and universities across the country. Quite soon, the govern-

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ment realised that the provisions of the Act of 2008 were inadequate to the scale of the threat and to the necessity of taking extraordinary imperative actions. Therefore, the parliament decided not only to amend this act, but also adopted the aforementioned Act of 2020. Both acts were subsequently amended and adapted many times to the emerging challenges. On the occasion of these (and similar) legislative activities, regulations not related to combating the epidemic were adopted, e.g. there were made extensive amendments to the penal code.

II. In the beginning, restrictions on freedoms and rights were introduced gradually. At the peak, they reached a significant dimension and touched virtually all spheres of life, especially personal freedoms and rights, such as freedom of movement (including crossing the borders and the obligation to submit to quarantine), freedom of assembly, freedom of religious worship, as well as economic, social and cultural freedoms and rights, such as freedom of economic activity and right to education. In the latter scope, the classes have been suspended. The government introduced a compulsory online education, albeit without taking any measures to counteract the digital exclusion of some children and adolescents. The costs of some restrictions, likewise in several other European Union countries, were passed on to consumers, thus restricting their rights. For instance, carriers and organizers of mass events have been granted right to postpone deadlines for reimbursement for unused tickets up to six months. For this reason, the European Commission has initiated a legal procedure against Poland and other countries for violating European law on the protection of consumer rights.

Due to the far-reaching restrictions and the restrictiveness in their enforcement on the part of public administration bodies, social protests appeared. The police began sending requests to punish people for violating restrictive provisions to the appropriate epidemic control authorities. These authorities, through administrative decisions, imposed high administrative fines (ca. USD 2,600) on citizens. Appeals to courts against these decisions – unlike in the case of fines imposed by the police – did not, however, stop their immediate enforceability, which entailed an obligation to pay large amounts of money. This procedure turned out to be very painful for citizens. Some actions of administrative authorities and the police could be even perceived as legal harassment. Some of the situations publicised by the press met with the reaction from the ombudsman. These protests resulted in the easing of the repressive nature of some actions undertaken by administrative bodies.

Meanwhile, high representatives of the ruling party publicly appeared in public places, such as squares and cemeteries, disregarding bans con-

cerning other citizens. Public events and celebrations of anniversaries were organised bypassing the regulations on the sanitary regime and without following the precautionary measures required by law. This was usually explained by the circumstances of performing public duties. For example, the visit of the prime minister in a restaurant was considered as such a circumstance.

III. The adopted legal solutions raised fundamental constitutional doubts for at least two reasons. First, most of them were introduced by decrees of the minister, prime minister or government. In turn, the Polish Constitution requires that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute. Secondly, these limitations were so restrictive that they often violated the essence of individual freedoms and rights. The Constitution does not allow such deep restrictions, even in the form of a statue. The only legitimate possibility to apply them is to introduce one of the appropriate extraordinary measures. Nonetheless, the ruling authorities consciously and deliberately – despite the growing pressure of lawyers and experts – decided not to introduce any extraordinary measures and not to put at work institutions for disaster management.

The Polish Constitution provides for the following appropriate extraordinary measures: martial law, a state of emergency or a state of natural disaster. In the face of the coronavirus disease pandemic, the most rational solution would be to introduce a state of natural disaster, which is aimed at preventing or removing the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster. Such a decision of the government was mainly related to the fact that the constitutional effect of introducing any of extraordinary measures is the automatic extension of the term of office of some public bodies and the necessity to postpone the elections to a later period. According to the Constitution, during a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, no elections can be held. In February 2020, the Marshal of the Sejm (the Sejm is the lower house of the Polish parliament) set out the date of the presidential election on 10 May 2020. The parliamentary majority, with which the current President identifies himself, predicted that along with the epidemic and its proven destructive impact on the economy, there would be a decline in support for the incumbency. The second argument was the – more or less well-founded – fear that the introduction of extraordinary measures will imply the payment of high compensation to citizens for actions aimed at limiting human rights.

IV. The period of restrictions related to preventing and controlling the spread of the disease coincided with the presidential campaign launched

at the beginning of February 2020. The term of office of the incumbent President expires on 6 August 2020. Restrictions on assembly and mobility have significantly reduced the latitude of running the election campaign by candidates. At the same time, the ruling party were pushing at all costs to hold the presidential election on a predetermined date. The President was given a strong support in the election campaign from the public television, controlled by the government majority. During this period, the parliament changed the regulations on the already ongoing election campaign three times, thus ignoring the good practice of not amending the election law in the run-up to the elections. One of the adopted acts, which entered into force the day before the planned election date, provided for the election to be held only by general correspondence voting. Some political groups, including one of the coalition partners of the government majority, began to question the legality of such election activities and the manner of introducing legal changes.

Ultimately, the presidential election scheduled for 10 May 2020 were not held on this date. However, it was not dismissed in any formal way (in fact, there is no legal possibility to do so at all), and the formal campaign silence that preceded them was generally ignored. Instead, it was publicly announced that it came to a political agreement between the two leaders of parties forming a government coalition, under which the election was to be postponed. This agreement shall explain the failure to hold the presidential election on time. It was an unprecedented situation, because the Constitution does not allow – but for on account of the introduction of prevailing extraordinary measures – not to hold the already ordered election. In this way, it became clear that presidential election would have to take place on a date not provided for in the Constitution.

V. Subsequently, it was adopted the Act of 2 June 2020 on special rules for the organisation of general election for the President of the Republic of Poland ordered in 2020 with the possibility of voting by correspondence. This act made it possible to hold the election by means of alternative voting methods and allowed the voting date to be postponed to the end of June. Furthermore, it provided for the possibility of re-proposing presidential candidates, as well as limiting the time to collect 100,000 endorsement signatures, which are required to submit a candidate, up to a couple of days. Under these conditions, two new candidates were registered, including the one who replaced the former candidate form the main opposition party.

After the presidential election, which took place in two rounds – on 28 June 2020 and on 12 July 2020 – and ended up with the re-election of the incumbent President, numerous election protests were received by the

Supreme Court, mainly from citizens living outside of Poland and from the election committee of the opposition's main opponent. Protests are to be examined by the chamber of the Supreme Court composed of judges appointed by the current President at the request of the newly composed National Council of the Judiciary. The independence of these judges, appointed under the changed conditions, is sometimes questioned, also by the Court of Justice of the European Union. The procedure for examining these protests is still ongoing.

VI. The Polish legislation from the period of the coronavirus pandemic introduced numerous changes in the functioning of individual segments of public authorities. The Sejm introduced provisions allowing remote sittings and voting by means of electronic communication. In turn, the second house of the Polish parliament decided to hold sittings simultaneously in several rooms. Citizens' access to courts has been severely restricted. Particularly in the second period of the COVID-19 crisis, the activity of courts was actually stopped, limiting it only to urgent cases, such as the examination of law enforcement requests for pre-trial detention. In many cases, court and trial periods have been suspended. This has naturally affected the length of court proceedings, as well as the effectiveness of the judicial protection on human rights.

One of the adopted acts introduced provisions exempting officials from legal liability for violating the provisions on the management of public funds. Meanwhile, the media reported on questionable activities of the Ministry of Health related to ordering protective measures and the purchase of respirators. One has formulated corruption allegations and revealed transactions raising some objections to the reliable and economic use of public funds. These cases have not been thoroughly investigated and clarified so far. Significant doubts are also raised against the expenditure made by the government to cover the costs of holding the presidential election in May 2020 and compensate the public postal operator for the costs related to the preparation of the postal voting. The governmental actions from that period were largely undertaken without being backed by applicable provisions. The estimated cost of preparing the election packages is USD 18.5 million.

VII. During the period at least until the end of the presidential election, it was difficult to find statistical data depicting the actual condition of the Polish economy, including macroeconomic data on the state debt, inflation level, etc. At the same time, it is commonly known that the government has undertaken to finance some protective measures aimed at saving the economy by issuing treasury bonds purchased by the National Bank

of Poland. The scale of financing of the state's activity through the central bank in this way is currently unknown. Constitutional doubts may be raised by the fact that the Polish Constitution explicitly prohibits the covering a budget deficit by way of contracting credit obligations to the state's central bank.

LA EXPERIENCIA DE ESPAÑA EN EL ESTADO DE ALARMA ANTE EL CORONAVIRUS

Javier García Roca*

Sumario: I. *Los Estados excepcionales: la concentración del poder y sus contrapesos constitucionales*. II. *La declaración por el Gobierno y la autorización parlamentaria. Medidas adoptadas y desescalada del confinamiento*. III. *La función parlamentaria de control*. IV. *El control de constitucionalidad y la revisión judicial de las aplicaciones. El principio de responsabilidad*. V. *Conclusión*.

I. Los Estados excepcionales: la concentración del poder y sus contrapesos constitucionales

El coronavirus ha producido casi tres decenas de miles de muertes en España en poco tiempo, pero probablemente ha habido muchos más. La emergencia sanitaria llevó a la declaración por el Gobierno del *estado de alarma*, que fue autorizado y prorrogado por el Congreso, y produjo el confinamiento de millones de personas durante más de tres meses: de 14 de marzo a 21 de junio.

Se restringieron, directamente, la libertad de circulación, la libertad de empresa y la propiedad privada, e, indirectamente, otros *derechos fundamentales* como son los derechos de manifestación, tutela judicial, libertad de culto externo y el sufragio. Unas restricciones para asegurar los derechos a la vida e integridad física, que es un derecho absoluto e inderogable, y a la salud.

La alarma crea un "*Derecho excepcional*", distinto al normal y con un alcance provisional, que no puede tener sus mismas exigencias. La reserva de ley y el principio de legalidad se debilitan, y el procedimiento administrativo ordinario no puede ser seguido por la urgencia. Esta perspectiva no puede perderse al analizar las garantías. Frena la tendencia a un rigor excesivo,

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desentendido de la realidad de una pandemia. El Derecho se adecúa a la emergencia.

Permite también un "*Estado excepcional*", que no está exento de límites y contrapesos. La situación es distinta a una "dictadura comisoria" (todos los poderes del Estado concentrados en una sola mano, como pretendía Carl Schmitt, "soberano es quien decide sobre el estado de excepción")[1] o a un "*estado de necesidad*" (el gobierno actúa libremente y el parlamento dicta luego una *bill of indemnity*), ambos desprovistos de controles; el Estado excepcional es el modelo de un Estado constitucional que constitucionaliza sus excepciones incorporando garantías.[2] Se produce una concentración de poderes en el Gobierno y ésta es la razón de ser de cualquier estado de emergencia. Pero la organización constitucional, la división de poderes no se suspende, sino que se modula en la medida estrictamente necesaria para subvenir la emergencia. Hay contrapesos. Concentrar provisionalmente el poder en el ejecutivo no puede confundirse con una dictadura, si el Parlamento y tribunales independientes lo fiscalizan. En nuestra experiencia, estos límites se han mantenido razonablemente, pese a que ha habido que improvisar las respuestas, y a que ha habido frecuentes —e inevitables— errores.

No ha desaparecido la *función parlamentaria de control* sino que se ha intensificado.Tampoco se han suspendido las *competencias de las Comunidades Autónomas*. Si bien el Gobierno ha reforzado mucho sus facultades de coordinación, para dirigir una acción conjunta, no obstante, ha funcionado frecuentemente la Conferencia de Presidentes y se han respetado las competencias autonómicas en sanidad y otras materias. Se ha hablado de una "federalización del estado de alarma"[3] al organizarse la desescalada del confinamiento por las propias Comunidades Autónomas, conforme a unos indicadores sanitarios comunes.

El estado de alarma no permite "*suspender*" derechos fundamentales, esto es, derogarlos o suprimir su vigencia como ocurre con el estado de excepción (arts. 55.1 y 116 CE), o con el art. 15 del Convenio Europeo de Derechos Humanos.[4] Pero entraña un estado de *intensa* "*restricción*" de los derechos, según

[1] Schmitt, Carl, "Teología política" en *Estudios Políticos*, Doncel, Madrid, 1975, traducción de 1934, p. 35.

[2] Cruz, Pedro, *Estados excepcionales y suspensión de garantías*, Tecnos, Madrid, 1984, p. 23 ss.

[3] Velasco, Francisco, "Estado de alarma y distribución territorial del poder" en *El Cronista del Estado Social y Democrático de Derecho*, nº 86-87, 2020, y "Federalización del estado de alarma", *https://administradoresciviles.org/actualidad/noticias-sobre-administracion-publica/1623-federalizacion-del-estado-de-alarma-por-francisco-velasco-caballero*.

[4] Roca, María, "La suspensión del CEDH desde el derecho español" en *Revista Española de Derecho Europeo*, nº 72, 2019.

Pedro Cruz,[5] siempre y cuando las limitaciones sean proporcionadas y respeten el contenido esencial. Muchos no han comprendido este tercer estado de cosas, intermedio entre la normalidad y la suspensión. Criticar las fuertes limitaciones bajo la alarma es no haber entendido la lógica de un Estado excepcional. ¿Cómo frenar el virus sin el confinamiento? ¿Pueden manifestarse unos cientos de personas sin distancia social mientras la población permanece en reclusión? La experiencia del coronavirus ha permitido caer en la cuenta de la intensidad de estas restricciones.

No obstante, las medidas que restrinjan derechos fundamentales deben respetar el *principio de proporcionalidad* y sobrepasar un juicio de necesidad. Pero las medidas que se han adoptado en España y en prácticamente todos los Estados europeos se parecen mucho.[6] Vienen impuestas por la naturaleza de la emergencia sanitaria. Un informe del Parlamento Europeo[7] explica que todos los países europeos han dictado medidas similares, bajo marcos constitucionales y legales muy diversos

Cabe un *control de constitucionalidad* de la declaración de alarma ante el Tribunal Constitucional, así como un *control judicial* de las aplicaciones, para garantizar el principio de responsabilidad de los poderes públicos.

Debe advertirse que existe un *deber de colaboración* de todas las personas en casos de catástrofes o calamidades públicas (art. 30.4 CE) que —estimo— tiene la naturaleza de un *deber constitucional*. Habilita al legislador para intervenir, restringir ciertos derechos e imponer sacrificios. Esta intensa sujeción de quien está en una situación de deber constitucional —como ocurre con el deber tributario o de defensa— debe ser tenida en cuenta en las ponderaciones judiciales.

Por otro lado, la crisis sanitaria ha impulsado una *legislación social*. Hay alrededor de un 900.000 personas sometidas a *expedientes temporales de regulación de empleo* (ERTE); y se ha impulsado la regulación de un nuevo *ingreso mínimo vital* para un millón de familias. El Estado social no ha desaparecido, pese a los daños.

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5 Cruz, Pedro, *Estados excepcionales…*, *op. cit.*, p. 76.

6 Fourmont, Alexis y Ridard, Basile, "Le contrôle parlementaire dans la crisis sanitaire" en *Question d'Europe*, nº 558, 2020 *https://www.robert-schuman.eu/fr/questions-d-europe/0558-le-controle-parlementaire-dans-la-crise-sanitaires*.

7 Díaz Crego, María y Manko, Rafael, Briefing "Parliaments in emergency mode. How Member States´parliaments are continuing with business during the pandemic" en *European Parliament Research Service https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649396*. También Frances Z. BROWN y otros: "How will the coronavirus reshape democracy and governance globally" en *https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470*.

El Gobierno de coalición ha logrado aliados, variables y decrecientes, en la aprobación de las sucesivas prórrogas de la alarma. Pero la actitud de la oposición y de algunos medios de comunicación ha sido muy dura. Se ha generado un intenso conflicto social, difícil de explicar desde bases racionales. La *cultura consociacional*, el consenso de la transición, no vuelve a España ni en los tiempos del cólera.

Veámoslo con más calma. El art. 116 CE distingue *tres tipos de estados de emergencia*: alarma, excepción y sitio. La diferencia no es cuantitativa sino cualitativa. Tienen supuestos de hecho habilitantes distintos. La alarma está pensada para catástrofes naturales, crisis sanitarias o paralización de servicios públicos; se le privó de cualquier relación con el orden público y está despolitizada.[8] El estado de excepción, en cambio, reclama graves alteraciones del orden público y resistencias de los ciudadanos y por eso permite suspender algunos derechos civiles y políticos. El estado de sitio exige una gravísima crisis que reclama defender la misma supervivencia del Estado y por eso se concede competencia a la jurisdicción militar. Afrontando una reflexión comparada, me parece muy moderna y adecuada, la previsión constitucional de un estado de alarma para catástrofes, y la progresiva graduación de las emergencias en diversos tipos. La alarma se declara por el *Gobierno* y se comunica al Congreso. El estado de excepción exige la previa autorización del Congreso. Y el estado de sitio lo declara el Congreso. Pero, en los tres estados, hay una intervención de la cámara baja.

Con el coronavirus la emergencia es de una magnitud que no encaja plenamente en las categorías constitucionales[9]. Las normas que regulan la emergencia no pueden preverlo todo. No se puede tipificar lo impredecible. Esa es la contradicción. La Constitución en su art. 116 no identifica los supuestos de hecho habilitantes y es un precepto incompleto. Sí lo hace la *Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio* (LOEAES). Pero tampoco regula con detalle el régimen jurídico ni prevé algunas de las medidas que se han adoptado. Podríamos codificar ahora esta nueva emergencia, pero no podemos imaginar cuál será la siguiente. Es muy recomendable una ley de estados de emergencia que desarrolle las normas constitucionales. La Comisión de Venecia del Consejo de Europa ha compilado sus informes sobre estas situaciones.[10] Recomienda que las

[8] Cruz, Pedro, *Estados excepcionales…*, *op. cit.*, 1984, p. 69. Igualmente, Quadra Salcedo de la, Tomás, "Límite y restricción, no suspensión" en *El País*, 8 de abril de 2020; y "La aversión europea al estado de excepción" en *El País*, 20 de abril de 2020.

[9] Cruz, Pedro, *La Constitución bajo el estado de alarma*, en *El País*, 17 de abril de 2020.

[10] Venice Commission, *Compilation of opinions and reports on states of emergency*", 16 de abril de 2020.

constituciones definan y limiten estos estados e identifiquen qué derechos pueden suspenderse, que exista una declaración, y que las medidas sean proporcionadas, respetando el *Rule of Law*. Se sientan unos *estándares europeos*, y en buena medida globales, que España cumple.

Los arts. 1 a 3 y 8 LOEAES enuncian unos *principios que informan el Derecho de excepción*. Se deducen de la Constitución y tienen el rango de principios constitucionales. Son límites a la acción del Gobierno, pues orientan un control jurisdiccional de las restricciones. Por su naturaleza, deben jugar en cualquier Estado de Derecho: excepcionalidad, proporcionalidad, provisionalidad, división de poderes, publicación y publicidad, control jurisdiccional, control parlamentario y responsabilidad de los poderes públicos. Quienes sufran daños y perjuicios como consecuencia de los actos públicos durante la alarma tienen derecho a ser indemnizados.

II. La declaración por el Gobierno y la autorización parlamentaria. Medidas adoptadas y desescalada del confinamiento

Por el Real Decreto 463/2020, de 14 de marzo, se declaró el estado de alarma, para la gestión de la situación de crisis sanitaria. La OMS elevó el 11 de marzo la situación de emergencia a pandemia internacional, y la declaración vino sólo tres días después ante la avalancha de enfermos. No hay dudas sobre su concurrencia. Pero se ha polemizado sobre si la respuesta del Gobierno fue tardía. Se ha debatido también la aplicación conjunta de una serie de leyes sanitarias y de seguridad como una alternativa. Creo que habría sido un error, porque tamaña emergencia reclamaba la concentración temporal del poder, y la alarma permite una regulación unitaria, inmediata e intensa. Fortalece la reacción gubernamental.

La declaración tiene un período limitado: quince días. Mientras la duración ha sido más larga en otros países. Esta brevedad permite un control parlamentario de las prórrogas. Transcurrido el plazo, el Gobierno puede solicitar la autorización y debe justificarla. La Comisión pide información y luego delibera y vota el Pleno. La prórroga se adopta por mayoría simple. La experiencia ha corroborado las serias dificultades para aunar mayorías en un Congreso muy fragmentado y polarizado. La prórroga permite modificar las medidas propuestas por el Gobierno o añadir otras nuevas al Parlamento. Es un buen sistema. Ha habido seis prórrogas sucesivas de quince días. Se concedieron, respectivamente, por los Reales Decretos:

476/2020, de 27 de marzo; 487/2020, de 10 de abril; 492/2020, de 24 de abril; 514/2020, de 8 de mayo; 537/20120, de 22 de mayo; y 555/2020, de 5 de junio.

Entre las medidas adoptadas están las siguientes. La limitación de la libertad de circulación. El sometimiento de todas las fuerzas y cuerpos de seguridad al Ministro del Interior. La suspensión de la actividad de los centros docentes en todos los niveles de enseñanza, manteniendo la actividad a través de modalidades en línea. La posibilidad de las requisas temporales de bienes y la imposición de prestaciones personales. Fuertes medidas de contención de la actividad comercial para evitar el contagio. Severas restricciones en los transportes. Se refuerza el Sistema Nacional de Salud y se garantiza el abastecimiento alimentario.

Un Acuerdo del Consejo de Ministros, de 28 de abril, aprobó un *Plan para la desescalada*, de acuerdo con los cambios epidemiológicos, que fue remitido al Congreso. Se basa en la opinión de expertos y busca "abordar la reactivación económica con la máxima seguridad". Se fijaron cuatro fases progresivas de desescalada del confinamiento que proponían las CCAA y autorizaba el Gobierno. De nuevo, se advierte la presencia de impulsos y contrapesos a las decisiones del Gobierno.

III. La función parlamentaria de control

La declaración del estado de alarma tiene como ingrediente sustancial un control del Congreso que debe venir "reunido inmediatamente" según la Constitución, la Ley Orgánica del Estado de Alarma y el Reglamento del Congreso de los Diputados (art. 116, apartados 2, 5 y 6, CE, art. 8.2 LOEAES, art. 162.1 RCD). Ha habido suficiente control parlamentario de manera sincrónica. Pero hubo que improvisar mecanismos. El riesgo de contagio ha sido un serio obstáculo. En la sesión plenaria de 25 de marzo, la mayoría de los votos fueron ya emitidos a través de un procedimiento telemático.

El art. 82.2 del RCD, desde 2011, permite el voto telemático en los casos de "embarazo, maternidad, paternidad o *enfermedad*". Una Resolución de la Mesa, de 21 de mayo de 2012 articuló un procedimiento. Al llegar el coronavirus, hubo un aplazamiento de las sesiones e incluso se rechazó una petición de Ciudadanos, cuya líder estaba embarazada, en la que se pedía se facilitaran las intervenciones telemáticas, de acuerdo con el art. 70.2 RCD que establece que "los discursos se pronunciarán personalmente y de viva voz". Finalmente, un Acuerdo —secreto— de la Mesa, de 19 de marzo de 2020, extendió la autorización para usar ese procedimiento a todos los Di-

putados que lo solicitasen ante la imposibilidad de reformar con urgencia el Reglamento. Fue una respuesta adecuada, pero sorprende el carácter secreto del Acuerdo. Una interpretación sociológica permite anclar esta decisión en el término "enfermedad" que recoge el Reglamento.

Se ha usado un *sistema híbrido* de deliberación y votación presencial para unos cuarenta o cincuenta Diputados, convenientemente distanciados en sus asientos, y de *voto telemático* para el resto. Algo semejante ha ocurrido en muchos parlamentos europeos durante esta emergencia según muestra un informe del Parlamento europeo.[11] Pero no falta quien sostiene que, al igual que se ha introducido un voto telemático, deberían permitirse las intervenciones telemáticas, lo que resulta más discutible.[12]

Se han usado diversos *instrumentos de control*: comparecencias de los Ministros para informar, numerosas interpelaciones urgentes, y preguntas al Gobierno. La web del Congreso da cumplida información. Se ha interrogado sobre muy variados temas, que supongo son recurrentes en todos los Estados durante esta crisis. Es difícil saber la eficacia real de esta avalancha de control, como ocurre siempre con esta función parlamentaria, probablemente sea un control más extenso que intenso.[13] Barrunto que el tono innecesariamente agresivo de muchos controles no ayudaría a que la fiscalización redundara en rectificaciones y mejoras de la acción de gobierno. El viejo "si quieres que te escuchen, no chilles" debería recuperarse coma una máxima del parlamentarismo.

Ha habido diarias *comparecencias en Televisión Española* del Presidente y los Ministros, expertos y altos mandos militares. Muchas demasiado largas y retóricas. Si bien, se permitían las preguntas de los medios de comunicación, garantizando un pluralismo externo. Es difícil saber si el sistema responde a una estrategia. Pero la comunicación directa con los ciudadanos del Presidente a través de los medios no puede sustituir al control parlamentario. No es una alternativa sino un complemento.

Se ha creado una *Comisión parlamentaria de reconstrucción social y económica*. En su primera sesión, la oposición mostró una actitud conciliadora. Una buena práctica, imprescindible para afrontar la grave crisis económica. Previsiblemente, la elevada deuda pública española, que ronda todo un PIB, pase a ser más de un 120%. Es muchísimo, pese al *programa de rescate de la*

[11] Díaz Crego, María y Manko, Rafael, *op. cit.*

[12] Alonso, Victor, *op. cit.*

[13] García Roca, Javier, "Control parlamentario y convergencia entre presidencialismo y parlamentarismo" *en Cuestiones constitucionales: Revista Mexicana de Derecho Constitucional*, nº 37, 2017.

Unión Europea con ayudas y subvenciones que se anuncia. Sin una decidida intervención del Banco Central Europeo, no puede haber salida ni para España ni para la supervivencia de la Unión.

IV. El control de constitucionalidad y la revisión judicial de las aplicaciones. El principio de responsabilidad

La declaración del estado de alarma por el Gobierno, dando inmediata cuenta al Congreso, es una curiosa norma que tiene *rango de ley*, pese a no seguir el procedimiento legislativo. Así lo sostuvo la STC 83/2016 que revisó la declaración del estado de alarma en 2010 para frenar una huelga salvaje de los controladores en el espacio aéreo europeo. Se fundó en que es una disposición general que permite desplazar temporalmente las leyes. Un partido minoritario ha presentado un recurso de inconstitucionalidad. La demanda obligará a que se revise la constitucionalidad de la declaración.

En la STC 89/2019, el Tribunal Constitucional (TC) decidió no realizar un *juicio de "proporcionalidad*" de las medidas adoptadas conforme al art. 155 CE, la intervención coercitiva del Estado en Cataluña, sino otro más contenido de "*razonabilidad"* a la vista de la deferencia que deben merecer las decisiones políticas del Gobierno y el Senado cuando actúan como órganos de dirección de todo el Estado en situaciones de emergencia. No asume la selección de la medida más benigna. Estimo también que el control de constitucionalidad de la decisión política de declarar la alarma debe ser limitado y sólo debería producirse en situaciones de abuso. Pero no creo pueda negarse un control de necesidad de las medidas. Pienso en una proporcionalidad "restringida" o "no estricta" como la que aplica el Tribunal Europeo de Derechos Humanos en casos de terrorismo y suspensión de derechos.[14]

Durante el estado de alarma, ha habido una *amplísima regulación* con baja calidad normativa, hecha a la carrera, que ha generado una gran inseguridad jurídica. ¿Cuál es el rango de estas normas? No pueden considerarse leyes en virtud de una habilitación en la declaración. Muchas han sido impugnadas ante la jurisdicción contencioso-administrativa y las decisiones pueden ser controvertidas. La Constitución (art. 9.3) garantiza el *principio de responsa-*

[14] García Roca, Javier, "El *tempo moderato* de la intervención coercitiva del Estado (artículo 155 CE) en Cataluña: comentario a las SSTC 89 y 90/2019…" en *Teoría y Realidad Constitucional*, nº 44, 2019; y Roca, María, *op. cit.*

bilidad de los poderes públicos y la interdicción de la arbitrariedad. También el art. 3.2 LOEAES reconoce que tendrán derecho a ser indemnizados quienes sufran daños o perjuicios de forma directa. Muchos grandes despachos de abogados parecen estar preparando sustanciosas reclamaciones.

V. Conclusión

El estado excepcional no ha sido en España una dictadura comisoria por la presencia de contrapesos constitucionales: parlamentarios, jurisdiccionales, el Estado cuasi-federal y el Estado social. Se han producido intensas y razonables restricciones de derechos fundamentales, para preservar los no menos fundamentales derechos a la vida, integridad física y salud ante una grave crisis sanitaria. Pero el largo y pesado confinamiento de todos, la dureza de la oposición, y algunos errores gubernamentales en respuestas improvisadas han producido una agobiante situación de conflicto que ojalá refresque el verano... Mas la amenaza dista de haber desaparecido en el escenario global de una pandemia aún abierta.

COVID-19 AND CONSTITUTIONAL LAW: ROMANIA

Elena-Simina TANASESCU*

SUMMARY: I. *The legal framework for crisis response*. II. *A sanitary crisis meant to conceal a constitutional crisis*. III. *Restrictions to the exercise of fundamental rights*. IV. *Diaspora and the social contract enshrined in the Constitution*.

Although essentially a sanitary crisis, in Romania the COVID 19 pandemic has triggered the institution of emergency measures that helped concealing an on-going political and constitutional crisis. The legal regime of restrictions to the exercise of fundamental rights has been the focus of constitutional debates and it has allowed the Constitutional Court to display a rather formalistic approach of the Constitution.

I. THE LEGAL FRAMEWORK FOR CRISIS RESPONSE

In Romania, the COVID 19 pandemic has been dealt with as an emergency situation and not as a sanitary crisis.

The state of emergency – together with the state of siege – is provided for by Article 93 of the Constitution, which grants the President of Romania the power to resort to such measures under the oversight of Parliament. The state of alert has been established by a piece of delegated legislation meant to prevent risks and threats to national security. It is only Law n°55/2020 which has been adopted by Parliament in May 2020 in order to specifically deal with the COVID 19 pandemic.

The legislation implementing Article 93 of the Constitution on the *state of emergency* and the state of siege was adopted in 1999 in response to an internal political and social crisis which threatened to jeopardize the at this

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time still fragile Romanian constitutional democracy: what had started in December 1998 as a strike of coal miners from an industrial region in decline escalated into open confrontations with the police and, by the beginning of January 1999, threatened to degenerate into a general riot led by the miners, who took toward the capital of Romania (Bucharest) to demote the Government. Thus, Emergency Ordinance of Government (hereafter EOG) n°1/1999 set forth the legal framework of the state of emergency, defining it as "a set of exceptional measures of political, economic and public order nature" to be established in case of current or imminent dangers regarding national security or the functioning of constitutional democracy" or "imminence of calamities or national disasters". It also developed the constitutional provisions according to which the state of emergency can be declared by the President of Romania and has to be confirmed by Parliament within 5 days; it may last for a maximum of 30 days and may be renewed as many times as needed for a maximum of 30 days, each time with the approval of Parliament. The presidential decree instituting the state of emergency is a normative administrative act, which is subject to judicial review; it may restrict the exercise of some fundamental rights (bar the right to life, legality of crimes and access to justice), but may do so only in compliance with Article 53 of the Constitution (that is only if necessary, for a limited number of reasons and respecting the principle of proportionality).

On the other hand, Emergency Ordinance of Government n°21/2004 pertaining to the *state of alert* was adopted in order to deal with the wave of terrorist attacks that hit EU and NATO members during 2004, so in response to an international security crisis. It defines the state of alert as a "response to an emergency situation of particular magnitude and intensity" consisting of temporary measures necessary for the prevention and removal of threats - among others - to life and human health. Initially, the state of alert was meant to address a different type of crisis and therefore its legal regime was oriented more towards the executive power; it could be declared by an inter-ministerial body (National Committee for Special Emergency Situations) with the approval of the Prime minister. However, after its revision in 2014 and again in 2020, the legal regime of the state of alert became similar with the one of the state of emergency, despite the fact that the state of alert is not explicitly mentioned in the Constitution among the exceptional measures at the disposal of the executive. The state of alert can be declared by the Government and has to be approved by Parliament within 5 days and may last maximum 30 days, while it can be renewed as many times as needed, for durations not longer than 30 days, each time with the approval of Parliament.

Finally, Law n°55/2020 on measures for preventing and combating the effects of *COVID-19 pandemic* was adopted in order to deal with the specific situation at hand, but also to avoid an escalation of a political crisis on-going in Romania at the breakout of the pandemic. Law n°55/2020 basically regulates a state of alert meant to deal with the sanitary crisis and replicates the legal regime of the general state of alert.

II. A SANITARY CRISIS MEANT TO CONCEAL A CONSTITUTIONAL CRISIS

Measures meant to fight the COVID19 pandemic in Romania were first imposed towards the beginning of March 2020, *id est* as soon as the first infections started to be confirmed on the national territory. A minority interim Government initially decided to cancel selected international flights, close down schools and impose a 14 days institutionalised quarantine for persons entering Romania. Following a vote of confidence on March 14th, a still minority Government imposed a strict lock-down for 30 days, which was extended for 30 more days, based on the legislation pertaining to the *state of emergency* (between March 16th and May 14th 2020). During three days (May 14th – May 17th) this was replaced by a relaxed lock-down based on the legislation pertaining generally to the *state of alert,* only to be followed by another relaxed lock-down during 30 days (between May 18th and June 18th 2020) based on legislation adopted specifically in order to deal with COVID 19 pandemic (Law n°55/2020). Thereafter the lock-down was relaxed gradually, although the second phase of relaxation could not start on July 1st as initially announced by authorities, due to the still high number of confirmed infections.

This is to say that, towards the beginning of March 2020, when the sanitary crisis began, Romania was facing a constitutional crisis. Confronted with an ad interim liberal Government supported by a minority of MPs, the country was contemplating the possibility of anticipated general elections: presidential elections had been clearly won in December 2019 by the incumbent of the position, of liberal extraction; a Government supported by the liberal minority in Parliament had been in power since October 2019 (until February 5th, when a motion of censure had been adopted by the social democrat majority in Parliament); so the executive branch was looking for ways to determine a political shift in Parliament as well through anticipated general elections. However, all political calculations were stopped in their tracks upon the discovery of the first confirmed infections, which came from abroad. Amid political distrust and out of necessity the majority in

Parliament reluctantly acquiesced to grant confidence to the liberal (minority) Government in a sort of political truce, but only for the duration of the sanitary crisis. However, this did not mean that the Government enjoyed full support in Parliament, not even with regard to the management of the sanitary crisis, which led to original legal constructions and iterative decisions of the Constitutional Court, under the permanent threat of a motion of confidence once the sanitary crisis is over.

Thus, while the first time Parliament simply confirmed the institution of the state of emergency through the presidential Decree n°195/2020, upon the renewal of the state of emergency, through the presidential Decree n°240/2020, Parliament decided to review the normative substance of the administrative act and recommend changes in view of better expressing "the will of the representatives of the people" with regard to the legal details of the lock-down. The President however maintained the original version of his decree, which raised the main constitutional issue discussed all-along the pandemic, namely what is the precise legal regime of restrictions to the exercise of fundamental rights according to article 53 of the Romanian Constitution?

Doctrine noticed that while previous to the revision in 2003 of the Romanian Constitution such restrictions could be enacted by laws of Parliament and emergency ordinances (delegated legislation) adopted by Government, after that revision this competence only belongs to Parliament. Since EOG n°1/1999 had been adopted before the revision of the Constitution and it did provide for restrictions to the exercise of some fundamental rights, the President of Romania decided to implement those provisions and not take into account parliamentary recommendations not foreseen by the relevant legal framework. This antagonised the political majority in Parliament and ultimately led to Decision n°152/2020 of the Constitutional Court, who found that the powers granted to the President of Romania by EOG n°1/1999 do not infringe upon the separation of powers and are respectful of Article 53 of the Constitution, but, in a strange *obiter dictum* (paragraphs. 100-106), also found that the presidential decrees had overstepped their constitutional limits, which justified a parliamentary control on the substance of the administrative act. A separate opinion signed by two judges signalled this *ultra vires* of the Constitutional Court, who can only review primary legislation and not secondary one, and argued that it infringes upon the separation of powers, specifically on the power of ordinary courts to review normative administrative acts such as presidential decrees.

However, invoking the general principle of the executive's responsibility in front of Parliament, the social-democrat majority searched for alterna-

tive ways to restrict the emergency powers granted by the Constitution to the executive. Towards the end of the second period of 30 days of state of emergency it became clear that Parliament had lost its patience with the minority Government and threatened not to agree with a third period of state of emergency. This forced the minority Government to resort to the state of alert, which was also regulated through delegated legislation and raised the same issue of restrictions to be imposed on fundamental rights. In decision n°157/2020 (press release in English) the Constitutional Court found that EOG n°24/2004 pertaining to the state of alert is valid only in as much as it does not restrict the exercise of fundamental rights, which is hardly possible. A separate opinion signed by the same two judges pointed to hyperformalistic interpretation of articles 53 and 115 of the Romanian Constitution, the first requiring that restrictions on fundamental rights be imposed only through laws (interpreted by the Constitutional Court as normative acts issued only by the Parliament and not by the Government) and the second declaring in paragraph 6 that emergency ordinances "cannot […] affect the status of fundamental rights".

Therefore, the Government resolved to present the Parliament with a draft law dealing specifically with the COVID-19 pandemic, in order to allow the imposition of quarantine directly by Parliament. Parliament obliged and adopted Law n°55/2020 at great speed (roughly in two days) but, because according to Article 77 of the Constitution laws come into force only 3 days after their publication in the Official Journal, the new law could not be used immediately upon the expiration of the state of emergency. This explains why a state of alert based on EOG n°24/2004 has been used as a "bridge" for 3 days (between May 15th and until May 18th) and a different one has been implemented after May 18th, based on Law n°55/2020.

Outcome of a political compromise, Law n°55/2020 provided for a legal *novum*, namely it made the institution of the state of alert by the executive pending upon the approval of Parliament. This provision became practise when Parliament approved through an internal standing order the Governmental decree declaring a state of alert on the entire territory of Romania due to COVID-19 pandemic. The originality of the intermingling of powers brought about by this legal and institutional arrangement did not escape the Ombudsman, who addressed the issue to the Constitutional Court. In decision n°457/2020 the Constitutional Court struck down the legal provision requiring the *ex-post* approval by Parliament of a Governmental decree for which the law already gave an *ex-ante* mandate. Besides, this also questioned the constitutional role of ordinary courts who can review administrative acts such as Governmental decrees. Thus, the political

compromise engrained in Law n°55/2020 has become void because it was unconstitutional since the beginning, while the political crisis keeps on like in a pressure cook.

III. Restrictions to the exercise of fundamental rights

The Constitutional Court remained consistent in its formal approach with regard to the text of the Constitution: decision n°458/2020 invalidated the possibility of the executive to impose quarantine of persons infected with COVID-19 because such measures can only be taken by Parliament through law.

IV. Diaspora and the social contract enshrined in the Constitution

COVID-19 pandemic has revealed early on another important constitutional issue, namely the nature of the social contract that binds Romanians in a state which is declared by article 1 of the Constitution as a state governed by the rule of law, democratic and social. Public authorities and Romanians in the homeland largely perceived the virus as imported by fellow-citizens who came from abroad, from countries already known as fora of the pandemic. This focused again public attention and constitutional debates on the quantitatively[1] important diaspora and its role and impact on the homeland society.

Traditionally an emigration country, Romania has been confronted with a dramatic exodus of population, particularly after its accession to the European Union in 2007, which obliged the Romanian state to take the diaspora into account at political level. Thus, diaspora got the right to vote in parliamentary and presidential elections starting with 2008 and it has been the trigger of important political changes, particularly during the last two presidential elections (when it decisively contributed to the election of a politically liberal, ethnically German and religiously protestant President of Romania in a country which is predominantly conservative and focused on national values and the Orthodox religion) and the last two referenda (when it decided in favour of the fight against corruption and against the constitutional ban of same sex marriage). The Romanian diaspora retains a strong

[1] Romania has an important diaspora scattered all over the world and particularly in Italy and Spain, roughly 1 million Romanians in each.

influence on the national economy through remittances which represent roughly 3% of the GDP since 2012. Now that this diaspora was in trouble, because of the economic crisis following the sanitary one, the homeland strongly advised it not to come back, particularly during the Easter break – a traditional time to visit family in the Romanian Christian tradition - in order to protect Romanians who remained in the homeland. This questioned the very foundation of the Romanian state, declared in article 4 of the Constitution to lay on "the unity of the people and the solidarity of its citizens". However, social cohesion prevailed and solidarity proved to be sufficiently strong as to overcome what could have become a polarization of Romanians based on a territorial criteria. Public authorities constantly communicated statistics on the pandemic including figures referring to diaspora, while effectively supporting the repatriation of Romanians from abroad or facilitating their emigration in countries where their skills were needed. Media kept the general public informed on the "good deeds" accomplished by Romanians living abroad for the countries where they are now living. Thus a narrative of "unity in front of a common danger" started to be built with regard to Romanians irrespective of the soil on which they live. When the phasing out of the lock down had started diaspora was once again considered as part and parcel of the Romanian nation and an important trigger of modernisation.

In conclusion, beyond the classical debate on the legal regime of fundamental rights during exceptional and emergency situations, which allowed the Constitutional Court of Romania to exhibit its formalist views, in Romania the sanitary crisis related to COVID-19 pandemic has also raised two other issues of constitutional relevance, namely: *i)* who is better placed to review measures taken by the executive in order to deal with the situation, Parliament or the judiciary? and *ii)* the unity and solidarity of the people refers to all Romanians, including the diaspora.

In this context it is worth mentioning that courts have not entirely suspended activities during the lock-down: criminal cases have continued to be ruled upon, including by using ITC, while all other types of cases and other activities related to justice (enforcement of court decisions, introduction of new cases etc.) have been adjusted as to be continued even under the lock down.

COVID-19 AND CONSTITUTIONAL LAW IN THE UNITED KINGDOM

Merris AMOS*

SUMMARY: I. *Introduction*. II. *Public Emergency and Derogation*. III. *Issues Arising from the Right to Life*. IV. *Lockdown, the Right to Liberty, and Lawfulness*. V. *Lockdown and Other Human Rights*. VI. *Government Accountability*. VII. *Lifting Lockdown – Surveillance and Privacy*. VIII. *The Duty to Investigate*.

I. INTRODUCTION

The COVID-19 Pandemic has had, and continues to have, a devastating impact in the United Kingdom (UK). At the time of writing, the Government's figure for the total number of COVID-19 associated UK deaths (where there has been a positive test result) is 44,220 although the figure provided by the Office of National Statistics (where COVID-19 is mentioned on the death certificate) for just England and Wales is 49,371. A number of pressing constitutional and human rights questions have arisen and new problems continue to emerge. The purpose of this note is to provide a brief overview of the most important issues to date.

II. PUBLIC EMERGENCY AND DEROGATION

The UK has no codified constitution and no constitutional emergency powers provision. At the start of the pandemic it was argued by some that the UK should enter a derogation to the European Convention on Human Rights (ECHR) and therefore the national law protecting human rights, the Human Rights Act 1998 (HRA) to facilitate the Coronavirus Act 2020 and accom-

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panying secondary legislation. A derogation must meet the requirements of Article 15 of the ECHR which requires that there be a 'publicly emergency threatening the life of the nation' and that the measures taken are 'strictly required by the exigencies of the situation'.

Despite pressure to derogate, on 25 March 2020 the Government announced to Parliament that it was committed to protecting human rights and that the legislative measures taken were compliant with human rights guarantees. It has continued to deal with the crisis without entering a derogation and the protection of the HRA has remained in place. The HRA gives further effect to the ECHR and Protocol No.1 to the ECHR. This is accompanied by almost 20 years of national jurisprudence and the jurisprudence of the European Court of Human Rights (ECtHR) which is almost always followed by UK courts. The guarantees of the HRA apply to all public authorities and private bodies exercising public functions. Section 3 of the HRA ensures that key legislation is interpreted compatibly with human rights, so far as it is possible to do so.

III. Issues Arising from the Right to Life

UK courts and the ECtHR have interpreted Article 2 (the right to life) to include a duty not to take life (the negative duty), in some circumstances a duty to take steps to prevent life being taken (the positive duty) and as part of that, a duty to investigate the circumstances surrounding a death (the investigatory duty).

The two duties most important to the COVID-19 Pandemic are the positive duty to protect and the duty to investigate. The origins of the positive duty can be found in the judgment of the ECtHR in *Osman* (1997), adopted by the House of Lords in its judgment in *Officer L* (2007). It must be established that the public authority knew or ought to have known of the existence of a real and immediate risk to life and failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. In early March, with COVID-19 spreading rapidly, the risk to life was obvious. On 16 March 2020 in a report from Imperial College it was concluded that if a strategy of mitigation rather than suppression of the virus was pursued, this would possibly result in 250,000 deaths in Great Britain. Serious restrictions on movement, known as 'lockdown' were announced on 23 March 2020 and came into force on 26 March 2020.

Many now agree that there was unnecessary delay including an initial strategy of 'herd immunity' and shielding the vulnerable. Also the lock-

down was not as strict as in other countries, such as Italy and France, and questions have been raised over whether it was a reasonable response to the threat to life and whether it should have continued for longer. There have also been divergences in the strictness of lockdown and the easing of lockdown between the countries of the UK: England, Wales, Northern Ireland and Scotland. With lockdown in England eased significantly from 4 July, some believe this is too soon and risks a second wave of infections.

Other important issues generated by the right to life have been the lack of personal protective equipment for National Health Service (NHS) staff, care home staff and other frontline workers such as pharmacists and transport workers. There have also been questions raised about the prioritisation of medical treatment. On 12 April 2020 the *Financial Times* reported that the NHS had adopted a scoring system to decide which patients would receive critical care .This was denied by the Government and it has been difficult to prove that it was in use. Furthermore, at the peak of the crisis the health system was not at capacity and therefore rationing of critical care was not necessary.

Finally, there have been grave concerns about the welfare of those in the care of the state including those living in in care homes and those detained in prison and immigration detention. Up until 12 June 2020 the Office for National Statistics has recorded 19,394 deaths (where COVID-19 is mentioned on the death certificate) of care home residents in England and Wales.

IV. Lockdown, the Right to Liberty, and Lawfulness

The Health Protection (Coronavirus) Restrictions (England) Regulations 2020 imposing lockdown came into force on 26 March 2020. Similar regulations were made in relation to Wales, Scotland and Northern Ireland. A number of restrictions were imposed including the closing of certain premises, restrictions on gatherings (effectively preventing protest) and restrictions on movement. No person was permitted to leave the place where they were living without 'reasonable excuse'. A number of 'reasonable excuses' were listed but the list was non-exhaustive. There was further explanation in government guidance. Throughout lockdown there were regular reports of overzealous, discriminatory and unlawful enforcement by police.

Article 5 ECHR regulates deprivations of liberty and it is a limited rather than absolute or qualified right. For Article 5 to apply, there must first be a 'deprivation of liberty' and this has an autonomous meaning.

For the majority of people, the lockdown did not meet the deprivation of liberty threshold given the context and the absence of 'constant supervision and control'.

However, this is a finely balanced question. On the assumption that some had been deprived of their liberty, this is possible under Article 5(1)(e) 'for the prevention of the spreading of infectious diseases'. In *Enhorn v Sweden* (2005) the ECtHR held that the spreading of the infectious disease had to be dangerous to public health and safety; and that detention had to be a 'last resort'. In addition to this there are two overriding requirements anchored in the rule of law. The first is that any deprivation of liberty must be in accordance with a procedure prescribed by law. The second is that it must be lawful. To be lawful a deprivation of liberty must be lawful under domestic law and comply with the general requirements of the Convention. These are that the law must be sufficiently accessible to the individual and sufficiently precise to enable the individual to foresee the consequences of the restriction.

The messaging surrounding the lockdown was very confused. Guidance conflicted with the regulations and the further guidance issued by various police forces and the College of Policing. Government ministers also delivered inconsistent advice. This was compounded when the Prime Minister's Special Adviser, Dominic Cummings, broke the lockdown rules in mid-May and was not held accountable for his actions. For the majority, the message to stay at home was clear. But there was a minority for whom the lockdown was extraordinarily difficult, and the guidance unclear as to what they should do. With the easing of lockdown on 4 July, and new regulations, this remains a significant problem but to date no successful legal challenge has been brought.

V. Lockdown and Other Human Rights

Numerous other human rights have been interfered with as a result of lockdown including: the right to private life (Article 8), the right to family life (Article 8), freedom of religion (Article 9), freedom of expression (Article 10), freedom of assembly (Article 11) and the prohibition against discrimination (Article 14). These are all qualified rights meaning that, apart from Article 14 where a slightly different test applies, each can be subject to lawful interference provided that the interference is 'prescribed by law' and necessary.

As discussed above, whether or not the original lockdown was 'prescribed by law' is open to serious doubt. Putting this problem to one side, the next question is whether the interference was necessary. Whilst it is dif-

ficult to generalise, for the majority of people, the interference with rights was necessary for the protection of the rights of others. As discussed, the lockdown was a measure taken to protect life. However, for some, the lockdown was not proportionate to the objective pursued and in some instances in violation of an absolute right, such as Article 3 (freedom from torture and inhuman or degrading treatment or punishment) or Article 2 itself. In June 2020 Understanding Society reported that 63 percent of study participants with long term health conditions such as cancer or cardiovascular disease who needed NHS treatment did not receive it because the NHS had stopped their treatment.

Many examples of rights violations resulting from lockdown have arisen to date including an increase in reported incidents of domestic violence; a discriminatory impact on certain groups including the parents of children with autism spectrum disorder; disruption to the education of school age children; and a serious impact on property rights as a result of the requirement to close premises and businesses. In addition, many have been deterred from seeking vital medical treatment and have not taken sufficient steps to avoid serious damage to their mental health. In June 2020 the Childhood Trust reported that lockdown was having a significant impact on the mental health of children and young people and that students from disadvantaged backgrounds were more likely to fall behind and experience educational learning loss.

VI. Government Accountability

Messages from the Government concerning important issues such as contact tracing, testing, deaths in care homes, personal protective equipment for NHS staff and others, and the limits of lockdown have been evasive and unclear. For a significant period, whilst the Prime Minister himself was gravely ill with COVID-19, there was a power vacuum with no important decisions being made in his absence and Parliament in recess until 21 April. There was no effective parliamentary opposition either until the Labour Party elected its new leader, Keir Starmer, on 4 April 2020.

Figures for deaths have been far higher than the government reported each day as a part of its daily briefing. It was not until 29 April that it adjusted its figures to include deaths in all settings including in care homes and in the community. In early June the head of the UK Statistics Authority accused the government of continuing to mislead the public over the number of tests carried out. Around the same time a YouGov Poll revealed that pub-

lic trust in the UK government as a source of accurate information about the virus had collapsed.

Only some of the names of those who serve on the government's Scientific Advisory Group for Emergencies (SAGE) have been made public. Ruptures in the relationship between the government and its scientific advisers became apparent in early June. Prior to the 4 July easing of lockdown a member of SAGE publicly advised that relaxing the 2m distance rule at the same time as opening bars ran the risk of allowing the epidemic to regain a foothold.

Freedom of information law is ineffective in this context and Article 10, the right to freedom of expression, confers no right of access to public interest information. As discussed below there are the duties to investigate under Articles 2 and 3. Whilst these are not usually deployed to secure access to information in the short term, some are utilising this route to uncover information and litigation has started which may result in court ordered inquiries into questions such as the absence of suitable personal protective equipment for NHS and other frontline staff, the failures in testing and the delay in setting up an effective contact tracing system. One claim alleges that the guidelines allowing COVID-19 patients to be discharged from hospitals into care homes and the failure to provide personal protective equipment to staff and residents was an unlawful violation of the right to life. There have been numerous calls for an inquiry to prepare for a second wave of the virus.

VII. Lifting Lockdown – Surveillance and Privacy

For lockdown to be completely lifted, scientists are unanimous in stressing the importance of finding cases, isolating them and tracing their contacts. At the time of writing the UK still does not have an effective contact tracing system in place. It is not possible for local public health bodies to take on the role given the lack of expertise as a result of decades of cuts and austerity policies. Nonetheless, numerous concerns have been raised at the interference with privacy which will be necessary to facilitate the lifting of strict lockdown. Article 8 ECHR protects the right to respect for private life. The taking, retention and disclosure of the type of information needed will involve clear interferences with private life including private information (medical records, your location, your contacts) and autonomy (control over information about you). However, Article 8 is a qualified right and interferences are permissible for a variety of reasons including the rights of others (Article 2 right to life) and for the economic well-being of the country.

Justifications for interferences with private life to facilitate lifting the lockdown must be 'in accordance with the law' which has the same meaning as 'prescribed by law'. This lawfulness aspect of Article 8 is a vital tool for the ECtHR which has used it to shape the response of human rights law to the proliferation of state databases and other measures of surveillance. The measures must also be necessary and on this question, in its judgment in *Marper v UK*, the Grand Chamber of the ECtHR held that there must be safeguards to prevent the misuse of personal including only taking data which is relevant; retaining identification for the shortest period; and protect retained data from misuse and abuse. It remains to be seen what system the Government will put in place and what privacy protections there will be.

VIII. The Duty to Investigate

Finally, under Article 2 there is a duty to investigate where there is an arguable breach of Article 2. The form of the investigation required will vary depending on the circumstances but the more serious the events, the more intensive must be the process of public scrutiny.

It is beyond doubt that a large-scale public inquiry into the COVID-19 Pandemic and the response to it must take place in the long term. Key questions include: the lack of preparation for a pandemic despite the findings of a simulation exercise in 2016; the delayed response despite warnings from China and Italy and UK scientists; the initial 'herd immunity' and 'shielding' strategies; the slowness to test NHS staff, allowing them to get back to work; the slowness in testing the wider population; the impact of the policies of austerity and privatisation; and the disproportionate impact of the virus depending on wealth, location and ethnicity. Litigation has already commenced demanding an inquiry into the reasons for the shortage of personal protective equipment.

Given early signs that some ethnic groups are more susceptible to the harshest impacts of the virus, Public Health England started an inquiry in April which reported in early June although the part of the report concerning the impact on BAME groups was not published until 16 June 2020. Partly in frustration at this delay, in early June the Equality and Human Rights Commission announced its own inquiry into the impact of COVID-19 on ethnic minorities.

MIDDLE EAST

IMPACTS OF THE COVID-19 PANDAMIC ON THE CONSTITUTIONAL RIGHTS IN TURKEY

Selin ESEN*

SUMMARY: I. *Introduction*. II. *State of emergency in times of pandemic*. III. *Measures adopted to fight the Covid-19 pandemic and the question about their constitutionality*. IV. *Conclusion*.

I. INTRODUCTION

The Covid-19 outbreak has multidimensional effects on individuals, communities and states. Therefore, this global pandemic not only directly affects basic constitutional rights and freedoms, such as life, health, movement, expression, worship, association, assembly, privacy, property, and access to justice, but also it has visible impacts on economy, politics and culture. Some measures taken due to eliminate the pandemic are so drastic that raised the question of their compability with the Constitution, democratic norms and rule of law in many countries. The Covid-19 pandemic has profoundly affected Turkey, as it has adverse impacts on almost every country around the globe. Below, I will discuss some of the constitutional questions on countring Covid-19 in Turkey.

II. STATE OF EMERGENCY IN TIMES OF PANDEMIC

Many countries respond to the outbreak by declaring a state of emergency. Indeed, according to the data of the International Center for not-for-Profit Law 87 countries have declared a state of emergency due to Covid-19 pandemic.[1] As many constitutions contain provisions on emergency situations,

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1 *https://www.icnl.org/covid19tracker/* (accessed on 25 June 2020).

the 1982 Turkish Constitution provides for the executive to declare a state of emergency on grounds of public health. Certainly, Article 119 empowers the President to declare a state of emergency due to a "hazardous pandemic". The President's decision on the declaration of the state of emergency is published in the Official Gazette and submitted to the Parliament for its approval on the same day. The President may issue decrees on matters required by the state of emergency. Emergency decrees are the force of law and may restrict rights and freedoms more than ordinary times or suspend them during the state of emergency. They are subject to the Parliament's approval. If the Parliament does not approve them within three months, decrees are automatically repealed.

Even though the Constitution provides the fundamental rights and freedoms to be restricted in broader terms than usual, and their exercise to be partially or entirely suspended, it does not vest the executive an unlimited power. Article 15 of the Constitution stipulates three criteria to protect the rights and freedoms in a state of emergency. Firstly, measures taken under a state of emergency will not violate Turkey's obligations under international law. Secondly, fundamental rights and freedoms may be suspended "to the extent required by the exigencies of the situation", i.e. the principle of proportionality is applied. Thirdly, measures can not touch the rights and guarantees enumareted in paragraph 2, i.e. the 'right to life', and 'physical and spiritual integrity' of the person except in respect of deaths resulting from lawful acts of war, freedom of religion and conscience, freedom of thought, prohibition of retrospective offences and penalties and presumption of innocence. Note that Article 15 of the 1982 Constitution is almost identical with Article 15 of the European Convention on Human Rights. However, guarantees provided in Article 15 serve no useful purpose because Article 148.1 of the 1982 Constitution disallows judicial review of emergency decrees issued during the state of emergency.

Clearly, lack of judicial review of emergency decrees gives rise to the President to exercise his powers arbitrarily, thus a substantial infringement of rule of law guaranteed in Article 2 of the Constitution as one of the characteristics of the Republic. In fact, Turkey was under the state of emergency between July 2016 and July 2018 after the coup d'etat attempt. During this period of time, the executive abused its powers with emergency decrees by regulating many matters that were not relevant to the emergency situation and limiting the rights beyond the exigencies of the situation.[2] We may argue

[2] Esen, Selin, "Judicial Control of Decree-Laws in Emergency Regimes- A Self-Destruction Attempt by the Turkish Constitutional Court?", *IACL Blog*, 2016, *https://blog-iacl-aidc.*

that the Constitutional Court had a share in government's actions beyond its constitutional limits during the state of emergency. The Constitutional Court had partly eliminated adverse consequences of the constitutional prohibition on judicial control of the emergency decrees with its case-law starting from1991. However, the Court overturned its previous decisions after the coup d'etat attempt in 2016, that paved the way the government not to be legally accountable.[3]

Law No. 2935 on State of Emergency enumarates the measures that administrative authorities may take in case of declaration of a state of emergency due to a "natural disaster" or a "hazardous pandemic". According to Article 9, among others, the administrative authorities may prohibit to be resided in certain places, restrict enter and exit to a residential area, evacuate a residential area; suspend education and training in all public and private educational institutions and closing dorms; inspect places such as restaurants, taverns, bars, clubs, movie theatres, and touristic places such as hotels and motels and limit their opening and closing hours and close them if necessary; restrict or suspend annual leave of public personnel in the emergency area; use all communication facilities in the emergency area and temporarily confiscate them if necessary; regulate the distribution of necessary articles; limit or prohibit entrence and exit of means of transportation to the emergency area.

III. Measures adopted to fight the Covid-19 pandemic and the question about their constitutionality

Unlike many countries, the Turkish government has fought the pandemic without declaring a state of emergency. The question here is whether this preference of the government makes the Turkish case more democratic than other countries that have declared a state of emergency. As in almost every country, the Turkish government has imposed very stringent measures aimed at controling the spread of Covid-19 and its economic effects. Among others, these measures included a curfew and quarantine; madatory use of face masks in public spheres; suspension of air travel; ban on intercity travel without permission issued by provincial governors; closure of restaurants, shops and shopping malls, movie theatres etc; suspension of formal education at all

org/2016-posts/2018/5/18/analysis-judicial-control-of-decree-laws-in-emergency-regimes-a-self-destruction-attempt-by-the-turkish-constitutional-court.

[3] *Ibid.*

levels and starting online teaching; suspension of the right to annual leave of health personnel. Note that, as mentioned above, many of these measures are enumerated in Law on State of Emergency.

So, the question here is whether measures imposed fighting the Covid-19 oubreak are constitutional. In order to answer this question we should discuss Article 13 of the Constitution as a limitation clause of fundamental rights and freedoms. Article 13 stipulates conditions in order to restrict a fundamental right or freedom. Firstly, rights may be *limited only by law*. Thereby, decree-laws, presidential decrees, by-laws or any other administrative regulations may not impose restrictions on rights and freedoms. Article 104.17 of the Constitution makes an exception to this provision, stipulating that social and economic rights can be regulated by presidential decrees. Secondly, fundamental rights can be restricted *in accordance with the reasons mentioned in the relevant articles* of the Constitution. Thirdly, limitations on rights and freedoms should be *in conformity with the wording and spirit of the Constitution*. Namely, limitations should be compliant with the constitutional guaranties and prohibitions. In addition, the Parliament should take the whole of the Constitution into consideration when restricting the rights and freedoms. Fourthly, restrictions must be in conformity with the *"requirements of the democratic social order"*. Fifthly, limitations must be in accordance with the *principle of proportionality* and the *requirements of the secular Republic*. Finally, Article 13 envisages a guarantee of the *"essence of the right"* as the limit upon the limitations.

Many measures imposed by the government arguably fulfills all requirements of Article 13 of the Constitution. As stated above, restrictions on the rights and freedoms must be in accordance with the specific reasons mentioned in the relevant articles of the Constitution. Many measures do not meet this requirement. As an example, consider measures concerning freedom of movement, such as curfew, quarantine, the requierement of permision for intercity travel, prevention of enterance and exit to a city. Article 23 of the Constitution guarantees freedom of movement and stipulates that this freedom may be restricted by law for the purpose of "investigation and prosecution of an offence", and "prevention of offences". Therefore, Article 23 does not allow in ordinary times freedom movement to be restricted for a purpose of public health or pandemic diseases. Worship services were prohibited in mosques as another measure to halt the spread of the virus. Article 24.2 of the Constitution establishes freedom of worship. This provision refers to Article 14 of the Constitution as the only constitutional limit on this freedom. Note that, Article 14 prohibits the abuse of rights and freedoms, which has no relation with the public health.

Besides, the government has implemented several measures affecting the labor relations such as suspension of non-essential economic and commercial activities and layoffs. Closure of workplaces restricts the right to property, freedom to work and conclude contracts guaranteed in Article 35 and Article 48 of the Constitution respectively. Also suspension of layoffs limits freedom to work and conclude contracts. However, while the Constitution allows the Parliament to restrict the right of property only with the aim of "public interest", it does not provide any limitations for freedom of work.

As another measure, Law No. 7226 on the Amendment of Ceratain Laws adopted on 25 March 2020 in the Parliament suspended judicial time limitations due to the Covid-19. Resting on Law No. 7226, the Council of Judges and Prosecutors postponed all hearings, negotiations and on-site examinations except pressing matters, criminal investigations and proceedings on persons on remand.[4] Suspension of limitation periods can be considered as an appropiate measure because of prevention of negative impacts of Covid-19 on claiming rights. However, postponement of hearings in all courts have led to a severe number of grievances especially for the persons on remand. Indeed, detenees, who were likely to be released, had to remain in custody, because the hearings could not be held. Moreover, it was issued a ban on visits between persons on remand and convicted prisoners and their relatives and attorneys. Clearly, persons on remand and prisoners' right to see their attorneys is the integral part of the right to a fair trial which is guaranteed under Article 36 of the Constitution. Note that, the Constitution does not mention any reason to limit the right to a fair trial. Yet, this measure is not only unconstitutional, but also contradicts with the European human rights standards. Indeed, the statement of the Commissioner for Human Rights of Council of Europe on Covid-19 pandemic stresses that inmates should continue to have access to information, legal assistance and independent complaint mechanisms.[5]

One may claim that in addition to the expressly mentioned restrictions or in the absence of an express reference in the Constitution , the scope of the right can be subject to inherent or implied limitations, other than rights and freedoms with an absolute character, such as freedom from torture and

[4] Decision of the Council of Judges and Prosecutors No. 2020/51 adopted on 30 March 2020.

[5] Statement of the Commissioner for Human Rights of Council of Europe on "COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe", 6 April 2020, *https://www.coe.int/en/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe*.

freedom from slavery. Unlike the express limitations, implied restrictions are inherent in respective right itself. As long as express and inherent limitations of the right are respected, there will be no breach and the question as to possible limitations did not arise.[6] Note that, the Turkish Constitutional Court adopts this interpretation in its recent rulings.[7] However, the European Court of Human Rights rejectes this doctrine, embracing the view that the enumeration given in a clause is exhaustive.[8]

The other question concerning the constitutionality of the measures is whether they can be adopted by an administrative act. The answer of the Constitution to this issue is clear. As mentioned above, Article 13 of the Constitution stipulates the rights and freedoms to be restricted by law, that is, only by a statute adopted by the Parliament, not by an administrative act. However, many measures have taken by administrative decrees issued by the administrative authorities, such as the Presidency, Ministry of the Interior, Ministry of Health or provincial governers. Only a small part of the measures taken due to the Covid-19 is based on a spesific law.[9]

Accordingly, it is highly doubtful that many administrative measures that restrict the rights and freedoms meet the principle of legality which is one of the cornerstones of rule of law established in the Constitution and by the European Court of Human Rights. According to the Strasbourg Court's case-law there are four requirements of the principle of legality: the measure should have a basis in domestic law; the law must be adequately accesible; the relevant domestic law must be formulated with sufficient precision to enable those concerned to forsee; there must be a measure of legal

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[6] P. van Dijk and G.J.H. van Hoof, Theory and Pratice of the European Convention on Human Rights, 3rd Edition, Kluwer Law International, The Netherlands, 1998, p. 761; Selin Esen, *Anayasa Hukuku Açısından Dolaşım Özgürlüğü* [Freedom of Movement in Constitutional Law], Yetkin Editorial, Ankara, 2014, pp.159-160.

[7] E.g. *see* E. 2014/87, K.2015/112, 8 December 2015, Official Gazette 28 January 2016, No. 29607 [Constitutional review]; E.2016/37, K.2016/135, 14 July 2016, Official Gazette 23 September 2016, No. 29836 [Constitutional review]; case of *Resul Kocatürk*, App. 2016/8080, 26 December 2019 § 48; 2017/21973, 11.12.2019, § 35 [Constitutional complaint].

[8] E.g. *see* Case of *Sidiropoulos and others v. Greece*, App. 26695/95, 10 July 1998. Bernatte Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention on Human Rights*, 6th Edition, Oxford, 2014, pp. 308-309.

[9] For instance, Provisional Article 1 and Provisional Article 2 de of Law No. 7226 adopted by the Parliament on 25 March 2020 y Law No. 7244 adopted by the Parliament on 16 April 2020. (Kemal Gözler, "Korona Virüs Salgınıyla Mücadele için Alınan Tedbirler Hukuka Uygun mu? (2)" [Are the measures taken for fighting Corona virus pandemic lawful?2], *http://www.anayasa.gen.tr/korona-2.htm* (accessed on 8 june 2020).

protection in domestic law against arbitrary interferences by public authorities with protected rights.[10]

Administrative authorities in Turkey claim that legality of their decrees basicaly rest upon two legislation, namely Law No. 5442 on Provincial Administration adopted on 10 June 1949 and Law No.1593 on Protection of Public Health adopted on 24 April 1930. Pablic authorities generally refer Article 11/C of Law No. 5442. Paragraph 1 of Article 11/C of Law on Provincial Administration enumerates powers and duties of provincial governors. Accordingly, powers and duties of a governor include providing peace and security, personal liberty, safety, public well-being and preventive law enforcement within the province. In order to implement them, governor will take "necessary decisions and measures". Under this provision, there is no right or freedom that a governor cannot intervene. Paragraph 2 of Article 11/C stipulates a specific provision in relation to freedom of movement. Accordingly, when public order or security has been impaired or there are severe indications that it will be impaired to stop or interrupt the ordinary life, the governor may restrict the entry and exit of people who are suspected of distrupting public order or public safety, to certain places for up to 15 days. Governor may regulate or restrict roaming and gathering of people, and navigating of vehicles in certain places or for certain hours. Clearly, this provision has no concerns with public health or pandemic. Still, it implies a high level of ambiguity by not providing any criterion to specify what actions of a person will be deemed "suspected" to intervene freedom of movement.[11] As a result, Article 11/C is too general and ambiguous in order to meet the principle of legality. This contradicts with the European standards on human rights. According to the well established case-law of the European Court of Human Rights, "it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".[12]

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[10] Jayawickrama, Nihal, *Judicial Application of Human Rights Law,* Cambridge University Press, 2002, p.189.

[11] Özgenç, İzzet "Toplantı ve Gösteri Yürüyüşü Hürriyeti İle Seyahat Hürriyeti Bağlamında Özgürlük ve Güvenlik İlişkisi" [Relationship between freedom and security within the context of freedom of assembly and freedom of movement], *Anayasa Yargısı* 35, 2018, p. 189.

[12] E.g. *see* case of *Malone v. United Kingdom*, App. 8691/79, 2 August 1984, § 68.

Second legislation that the administrative measures are generally based upon is Law No. 1593. Many administrative decrees related to Covid-19 refer articles 27 and 72 of this law. Article 27 provides that "Public Health Protection Councils take measures in order to improve the health of the city, towns and villages and eliminate existing disadvantages. Councils help to organize the information collected on infectious and pandemic diseases, protect people from infectious and social diseases, and inform people about the benefits of healthy life and eliminate infectious disease when it breaks out". The same article enumerates some public health related diseases and vests the Ministry of Health power to take action. However, the list does not include epidemic or pandemic diseases. Article 72 also recites the measures to be taken, including quarantine, in case one of the diaseses named in article 57 breaks out. Article 57 enumerates diseases, such as cholera, plague, diphteria, dysentery, scarlet fever, measles etc. Because Article 57 does not consist of a viral disease Article 72 cannot be applied to the Covid-19 cases.

Also sanctions imposed on individuals who violate the Covid-19 measures are arguably unconstitutional. For example, although curfew as a measure is not prescribed by Law No.1593, administrative authorites impose administrative fines and other sanctions on individuals who violate curfews citing Article 282 of this law.[13] Article 282 envisages administrative fines for those who act contrary to bans and obligations stipulated in this law. Article 282 cannot be deemed as a legal basis of such measures, because Law No. 1593 does not stipulate a nationwide curfew. Beside Article 282, administrative sanctions rest upon Law No. 5326 on Misdemeanors adopted by the Parliament on 30 March 2005. According to Article 32 of Law No. 5326, an administrative fine is imposed on those who act contrary to the lawful administrative orders that aim at protecting public health. As Professor Gözler points out accurately, this provision cannot be applied to the unlawful measures on Covid 19.[14]

Another matter concerning legality is that many decrees are not published in the Official Gazzette or made public properly. This makes interventions to the rights and freedoms unpredictable and inaccessible. Sometimes citizens are acquainted with new measures on social media or TV news. This practice is clearly contrary to the principle of legality and the rule of law established in Article 2 of the Constitution and the European

[13] Turhan, Engin, "Salgın Dönemlerinde Ortaya Çıkabilecek Ceza Sorumlulukları-Korona Tecrübesi" [Criminal liabilities in times of epidemic- Corona experience], *Suç ve Ceza Hukuku Dergisi*, V. 13 No.1, March 2020, p. 216.

[14] Gözler, Kemal, "Korona Virüs Salgınıyla Mücadele için Alınan Tedbirler Hukuka Uygun mu? (2)" [Are the measures taken for fighting Corona virus pandemic lawful? 2], *http://www.anayasa.gen.tr/korona-2.htm* (accessed on 8 june 2020).

Court of Human Rights case-law. As the Strasbourg Court underlines, accessibility is the formal or objective requirement that the law actually exists and is publicly available to its subjects with a sufficient level of precision, in case anyone intends to consult it.[15]

Another problematic issue is govenment's use of the extraordinary circumstance resulting from the pandemic as an opportunity for its supporters and for suppressing the opposition. Law No. 7242 amending Law on the Enforcement of Judgments and Security Measures adopted on 14 April 2020 is a clear example. This legislation provided to release thousands of convicted prisoners from certain crimes in an effort to reduce the spread of the Covid-19 virus in prisons. However, Law excludes various categories of crimes and prisoners, namely persons on remand and convicted prisoners serving a sentence for crimes against state intelligence services; violation of the National Intelligence Agency Act; Anti-Terrorism Act; espionage; deliberate manslaughter; intentional injury; injury to a child, an elderly person, or a spouse; sexual violence crimes; drug production and trade. Note that anti-terrorism legislation in Turkey has been heavily criticized, as the concepts of terrorism and terrorist act are defined broadly and vaguely.[16] Note that, a considerable portion of imprisoned journalists, lawyers, political and human rights activists are prosecuted for violating anti-terrorism legislation. Regardless of crime and punishment, execution and enforcement in criminal law must be based on the principle of equality. All convicted prisoners and persons on remand are among those most vulnerable to viral contagion as they are held in a high-risk environment. In fact, Law's discriminatory provisions among inmates in the same situation is contrary to the principle of equality enshrined in article 10 of the 1982 Constitution. Likewise, this discriminatory law contradicts with the European human rights standards. As underlined in the statements of human rights institutions of the Council of Europe, the resort to alternatives to deprivation of liberty is imperative in situations of overcrowding and even more so in cases of emergency. Particular consideration should be given to those detainees with underlying health conditions; older persons who do not pose a threat to society; and those who have been charged or convicted for minor or non-violent offences. Clearly, in this context, it is also all the more

15 E.g. *see* case of *Vasiliauskas v Lithuania*, App. 35343/05, 20 October 2015, § § 167–168; *Kononov v. Latvia*, App. 36376/04, 17 May 2010 [GC], § 187; *Sunday Times v United Kingdom*, App. 6538/74, 26 April 1979, § 49.

16 Esen, Selin, "Constitutional perspective on fighting terrorism in ordinary times in Turkey and the Turkish Constitutional Court", in *Der Rectstaat in Zeiten von Notstand un Terrorabwehr* (eds.Otto Depenheuer and Arno Scherzberg), Lit Verlag, Münster, 2019, pp. 29-44.

imperative that those persons, including human rights defenders, activists and journalists, who are detained in violation of human rights standards be immediately and unconditionally released.[17]

Another case of the government abusing the pandemic situation is the prohibition of the donation campaigns launched by opposition municipalities. Mayors of the two largest cities of the country, both are from the Republican People's Party (CHP), second largest party in the Parliament, had started donation campaigns in order to provide support to low-income citizens facing with economic hardship following lockdown measures. Even-though Law No. 5393 on Municipalities vests municipalities the authority to accept and collect donations unconditionally, the Ministry of Interior blocked the donation accounts. Following the campaign of the municipalities, President Erdoğan launched a "solidarity campaign".[18]

In addition, the government has used the Covid-19 pandemic situation especially to restrict freedom of assembly to inhibit the opposition. For instance, pro-Kurdish Peoples' Democracy Party, the third largest party in the Parliament, took a decision to march from the east of the country to the west to protest a Parliament resolution that lifted the parliamentary immunity of its two deputies.[19] The governors of 10 provinces, which were expected to pass the march, prohibited entry and exit to their provinces on grounds of the Covid-19. Besides, the bar associations were forbidden for the same reason to rally to protest a bill proposed by the ruling Justice and Development Party that would establish multiple bar associations in big cities.[20] These examples suggest that the administrative authorities deliberately choose a ban that impaires the very essence of the right to peaceful assembly that will constitute a disproportionate and unnecessary interference in a democratic society, instead of taking the necessary measures to provide both enjoying the right and maintain social distance among the protesters to prevent the spread of the Covid 19.

During the pandemic, freedom of expression was also inproportionally restricted. For example, in one month, 303 people sharing false and provoca-

[17] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic", CPT/Inf(2020)13, 20 March 2020; Council of Europe Commissioner of Human Rights, "Statement on COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe", 6 April 2020.

[18] *www.bianet.org*, 1 April 2020.

[19] *Gazeteduvar.com.tr*, 6 June 2020.

[20] *Birgün (*daily), 3 July 2020.

tive information on social media about the Covid-19 were arrested.[21] According to the Ministry of Interior, between March 11th and May 21st, 510 individuals were arrested due to the same reason.[22] Besides, several critical media outlets were fined and sanctioned by the Radio and Television Supreme Council, the Turkey's regulatory agency, on grounds of their reports on corona virus.[23]

Another issue to be discussed is possible violation of the right to privacy by the Covid-19 measures. As done in many countries, the Ministry of Health in Turkey launched the "Pandemic Isolation Tracking Project" to monitor quarantine and curfew violators. Accordingly, individuals who violate quarantine or curfew will take a warning message. If they continue to violate these measures, then the administrative action may be taken.[24] Obviously, this application is a convenient tool to violate privacy. It is not clear yet, whether the government has used this application with any other objective.

Also note that lack of transparency on Covid-19 measures is a noteworthy practice. Administrative authorities create confusion, uncertainty, and mistrust by providing insufficient and unreliable information. For instance, the government has not provided a satisfactory information about money spent collected in the National Solidarity Donation Campaign. The Turkish Medical Association, the largest organization of medical doctors in the country has been raising concerns about the accuracy of the data about the Covid-19 cases provided by the Ministry of Health.[25]

Meanwhile, the judiciary has done a little to ensure that the government acts within its constitutional limits. So far, two cases concerning measures against the pandemic have been brought to the Constitutional Court. Republican People's Party applied to the Constitutional Court claiming unconstitutionality of the Law No. 7242 amending Law on the Execution of Sentences and Security Measures. This case is pending. The Court has not yet delivered its judgment. The other case was brought before the Constitutional Court through a constitutional complaint. The applicant alleged that the administrative decree issued by the Ministry of the Interior imposing a

21 *www.diken.com.tr*, 17 April 2020.

22 *https://twitter.com/TC_icisleri/status/1263498305125978112/photo/1*; *https://www.gazeteduvar.com.tr/gundem/2020/05/21/icisleri-bakanligi-asilsiz-korona-paylasimlari-yapan-510-kisi-yakalandi/* (accessed on 21 May 2020).

23 Türmen, Rıza, "Korona ve İnsan Hakları" [Corona and Human Rights], *t24.com.tr* (21 June 2020)

24 *Daily Sabah*, 8 April 2020.

25 *www.bianet.org*, 12 May 2020.

total confinement measure that lasted for more than two months for persons over 65 years of age violated certain constitutional rights. The Court ruled that the application was inadmissible as the applicant did not exhaust all administrative and judicial remedies.

IV. Conclusion

The Covid-19 pandemic has globally contradictory effects on the fundamental rights. On the one hand, human rights increase in importance, on the other hand, violations on the rights have become very clear and obvious for everyone to see. The pandemic has especially strengthened the hands of authoritarian regimes to restrain fundamental rights and freedoms. In fact, this is the case in Turkey. Measures taken by the Turkish government are mainly similar to other countries. However, unlike many other countries, Turkey has taken action without a declaration of emergency. Nature of many of these measures is exceptional. In other words, it is not possible to take such measures in accordance with the Constitution without declaring a state of emergency. Thus, while fighting the pandemic, the Turkish government has obviously ignored the Constitution. Moreover, it has taken advantage of the extraordinary situation to suppress the opposition. The Covid-19 pandemic has accelerated and deepened "authoritarianism" and process of "deconstitutionalization" in Turkey.

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AUSTRALIA – COVID-19 AND CONSTITUTIONAL LAW

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SUMMARY: I. *Introduction*. II. *State and Federal relations*. III. *Curtailment of fundamental rights*. IV. *Insufficient Parliamentary oversight of executive action*. V. *Role of the courts*.

I. INTRODUCTION

The Commonwealth of Australia is a *federal parliamentary democracy* established by the *Constitution* of 1901. For the most part this constitutional system has appeared to function well during the COVID-19 pandemic and the response has inspired some innovations which may prove to be permanent. However, the pandemic has placed stress on federal relations and revealed weaknesses notably in parliamentary oversight of the executive and, to some extent, in rights protection.

II. STATE AND FEDERAL RELATIONS

The federal balance is an omnipresent issue in Australian constitutional law and gives rise to various issues of legal and political significance. The dynamic social, economic and political situation created by the COVID-19 pandemic has demonstrated both ways in which Australia's federal system functions effectively and ineffectively.

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1. *Examples of effective federal cooperation. Formation of National Cabinet and its role in decision-making during the crisis*

Perhaps the most significant constitutional innovation of the COVID-19 pandemic has been the creation of a 'National Cabinet'. The National Cabinet comprises the elected heads of each government in the federal polity: the Prime Minister, the Premiers of each State and of the Chief Ministers of the two mainland territories. It first met on 15 March 2020, early in the crisis, and has met on a regular basis (including on a daily basis) since that time. The National Cabinet is briefed by the Australian Health Protection Principal Committee – an expert public health body comprised of all Commonwealth, State and Territory Chief Health Officers.

Although styled as a 'Cabinet', a body with a distinct history and role within a Westminster parliamentary government like Australia's, the status of the National Cabinet is not entirely clear. When first established the National Cabinet appeared to be an intergovernmental cooperative body with no formal legal basis. The role of the body to date has been to generally coordinate jurisdictional responses to COVID-19 but there is no legal requirement for any of the jurisdictions to comply with the decisions reached by the National Cabinet. It is clear that in certain areas the decisions reached by the National Cabinet operate only as a framework or guideline with each jurisdiction having flexibility to determine how or if to implement the measure.

The National Cabinet is a very rare, perhaps sui generis, kind of intergovernmental body in Australia. Historically, select cabinets have been established by the Commonwealth government to deal with particular subject matters or events. The closest analogy to the National Cabinet is the War Cabinet established during the Second World War. However, the War Cabinet solely comprised of select Ministers of the federal government. The Advisory War Council (AWC) was a body that also operated during WWII as a quasi-cabinet committee and was comprised of both members of the War Cabinet and members of the opposition parties in the Commonwealth Parliament. The AWC operated throughout the War and reported directly to the Prime Minister and the Parliament but, again, none of its members were elected representatives of other polities in the federal system.

The Prime Minister of the Commonwealth government announced after the first National Cabinet meeting in March 2020 that the body had been given 'cabinet status' under the Commonwealth government's

cabinet guidelines, and as a result its deliberations and documents has the same confidentiality and freedom of information protections as the federal Cabinet.[1]

The National Cabinet has, as a general matter, been perceived as successful and efficient. As a result, on 29 May 2020 the Primer Minister announced that a new National Federation Reform Council (NFRC) would replace the existing Council of Australian Governments (COAG) meetings, with the National Cabinet to remain at the centre of the NRFC. The National Cabinet will continue to meet regularly, much more regularly than its predecessor COAG, and will be briefed by experts to inform its decision-making. During the COVID-19 pandemic the body will meet every two weeks, in the longer-term meetings will take place once a month.[2] While National Cabinet will continue to focus on other critical areas unrelated to COVID-19 it is clear that in the immediate term that will be its primary focus, especially Australia's economic response to the pandemic.[3]

2. *Sharing responsibilities over COVID-19 responses*

The Commonwealth and State polities have concurrent power to respond to the various health, economic and social issues created by COVID-19. While under the Australian Constitution the Commonwealth has enumerated legislative powers, these include various powers that extend to the relevant subject matter areas, including:

- Quarantine (s 51(ix));
- Implied nationhood power (s 51(xxxix) and s 61));
- Foreign and interstate trade and commerce power (s 51(i));
- External affairs power (treaty implementation limb and the externality limb) (s 51(xxxix);
- Aliens power (s 51(xix));
- Corporations power (s 51(xx));
- Territories power (s 122);
- Commonwealth places power (s 52(i));
- Sickness benefits power (s 51(xxiiiA).

[1] Prime Minister, Scott Morrison, Transcript – Press Conference 15 March 2020 (*https://www.pm.gov.au/media/transcript-press-conference*).

[2] COAG becomes National Cabinet – Press Release – 2 June 2020 (*https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet*).

[3] *Ibid*.

Prior to the COVID-19 pandemic, the Commonwealth and each of the States and Territories had enacted legislation to address public health emergencies. Due to the Australian Constitution's override clause, s 109, any inconsistency between the Commonwealth measures and the States measures would result in the Commonwealth law prevailing. However the relevant Commonwealth law, the *Biosecurity Act*, has a concurrent operation clause, designed to allow State and Territory biosecurity laws to continue to operate to their fullest extent possible subject to the relevant constitutional limitations.

This legal framework has enabled the States and Territories to take on the lion share of regulating the public health response to COVID-19. It is State and Territory laws that have implemented the key public health measures like mandatory quarantine for all incoming overseas travelers, restrictions on public gatherings and social distancing. The vast majority of these public health measures have given legal force to the decisions made by the National Cabinet and the role of the Commonwealth government has been more confined, primarily providing enforcement support including from the Australian Defence Force.

3. *Examples of federal tensions*

While there has been a large degree of cooperation between the polities in relation to many aspects of Australia's response to COVID-19 there are a number of areas where the pandemic has brought to the fore federal tensions. There are two prominent examples.

The first is the decision regarding the closure of schools. From early in the crisis the Commonwealth government has consistently emphasized that the decision of the National Cabinet is that schools should remain open. Despite this, each State and Territory jurisdiction has taken a different approach to the issue, including some jurisdictions closing schools and moving to remote learning for a full school term. As the Commonwealth only has very limited constitutional power with respect to 'education', it could not override these decisions, but it did respond by announcing a possible withdrawal of funding to non-government schools, followed by offering early access to Commonwealth government funding to non-government schools if they agreed to reopen.[4]

[4] The Hon Dan Tehan MP, Minister for Education of the Commonwealth of Australia, Transcript Media Release 29 April 2020 *https://ministers.dese.gov.au/tehan/minister-education-dan-tehan-interview-michael-rowland-abc-news-breakfast*.

Another example is the States' decision to close their borders. The Commonwealth has generally opposed the closure of State borders stating that the public health advice does not support the measure and that it damages Australia's economic recovery. The Commonwealth government has been particularly critical of two States who have implemented strict border closures – Queensland and Western Australia. High Court proceedings were instituted in May 2020 by private litigants challenging the constitutionality of each of those States' border closures primarily arguing that they infringe the freedom of trade, commerce and intercourse under s 92 of the Constitution. The Commonwealth government quickly intervened in support of those challenges and is taking an active role in the proceedings.

III. Curtailment of fundamental rights

The Australian constitutional system is highly unusual in that there is no formal rights framework at a federal level – either statutory or constitutional - and only some of the State and Territories have formal rights framework.[5] The government restrictions imposed to address COVID-19, and in particular the enforcement of those restrictions, has highlighted some of the issues this causes.

1. *Black Lives Matter Protests in June 2020*

In early June 2020 there were many large protests organized throughout Australia in response to the Black Lives Matter movement and the death of George Floyd. In most States and Territories these protests occurred when the COVID-19 public health measures imposed serious restrictions on people's freedom of assembly. Because of the absence of a formal rights protection framework in most places these restrictions do not have to be balanced against other countervailing rights like freedom of speech.

Each polity took a different approach to these protests. Some States publicly announced that they would do everything within their power to prevent the protests and in NSW the government declined to authorise the assembly under the relevant legislation. This decision was challenged in the courts and was overturned by the NSW Court of Appeal on the day of one of the largest protests in Sydney. The Court of Appeal empha-

[5] Victoria: *Charter of Human Rights and Responsibilities Act 2006* (Vic); Australian Capital Territory: *Human Rights Act 2004* (ACT); Queensland: *Human Rights Act 2019* (Qld).

sized that while the circumstances of the case potentially raised competing public interests of 'great importance' the Court's decision was limited to a narrow technical point about the operation of the *Summary Offences Act* applicable to public assemblies.[6]

2. *Privacy issues re COVIDSafe app*

One of the Commonwealth government's key responses to COVID-19 has been the roll out of a somewhat controversial mobile phone application called COVIDSafe that was intended to assist in contact tracing by recognizing other devices with the app and storing information about the date, time, distance and duration of contact with that other person's mobile phone. When the app was first rolled out in late April 2020 there was significant public controversy about the lack of privacy protections around it. In particular there were concerns that the information collected and stored could be used for collateral purposes, including by law enforcement. These concerns revealed deeper issues of distrust with governments in Australia management of data. The Commonwealth government swiftly enacted legislation designed to address the main privacy concerns.[7] While the right to privacy is expressly stated to be a concern of the legislation the absence of a formal right means that considerations of proportionality are largely absent from the public debate.

IV. Insufficient Parliamentary oversight of executive action

A live constitutional issue in Australia that has been brought to the fore by the executive's use of emergency powers and the reduction in Parliamentary sittings and the limited scrutiny of executive action.

By the end of February and into March 2020 as the pandemic worsened both in Australia and globally the State, Territory and Commonwealth governments restricted their parliamentary sittings. The Commonwealth Parliament sat for 1 day in April 2020 for an emergency sitting to pass the fiscal measures and special pairing arrangements were put in place in both the Senate and the House to enforce social distancing.

6 *Bassi v Commissioner of Police* [2020] NSWCA 109 at [7].

7 *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).

Throughout this period the National Cabinet dominated as de facto decision-making body without constitutional authority.

This diminution in the frequency of Parliamentary sittings has also led to a reduction in the effectiveness of parliamentary committees. These bodies play a significant role in scrutinizing primary and delegated legislation and holding the executive to account.[8] In part to remedy this lack of Parliamentary oversight, the Senate established a Select Committee on COVID-19 to inquire into the Commonwealth government's response to the pandemic.[9]

As well as the reduction in sittings the COVID-19 crisis has also generally led to less debate and scrutiny of executive action. This has coincided with an explosion in executive spending and in the substantial use of delegated legislation by the executive.

1. *Executive spending*

At the Commonwealth level the Parliament is supposed to retain some control over executive spending through the passage of annual appropriations laws[10] and, in significant areas, requiring express authorization of executive spending through legislation.[11] However, these principles operate differently in times of crisis, and the COVID-19 pandemic has once again demonstrated that Parliament essentially leaves executive spending unchecked during these times.

As at July 2020, the Commonwealth government has allocated $320 billion in financial support to address the economic crisis caused by COVID-19.[12] The two centerpieces of this fiscal package are programs known as

[8] Including the Senate Scrutiny of Bills Committee, the Senate Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights. Each of these Committees have resolved to meet regularly remotely by teleconference during the COVID-19 pandemic but their functions require them to table their reports in Parliament and to otherwise bring matters of concern to the attention of Parliament. These key accountability measures have been necessarily adversely impacted by the pandemic.

[9] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Terms_of_Reference*.

[10] Section 81 of the Constitution.

[11] *Williams v Commonwealth* (2012) 248 CLR 156.

[12] Hon Josh Frydenberg MP, Treasurer of the Commonwealth of Australia, Ministerial Statement on the Economy, Parliament House, Canberra (12 May 2020) *https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/speeches/ministerial-statement-economy-parliament-house-canberra*.

'Jobseeker' and 'Jobkeeper', the former a significant increase in social security payments and the classes of persons eligible for those payments and the latter a national wage subsidy. Notably, the Jobkeeper figures were originally miscalculated by the Commonwealth government by $60 billion – the largest accounting error in Australian history.

Many of these spending measures have been authorized by very broadly drafted primary legislation, passed during emergency sittings in Parliament,[13] which authorizes the executive to determine by delegated legislation or by the exercise of broad discretionary powers the terms of the payments, including the eligibility requirements. This means that the key parts of Jobseeker and Jobkeeper programmes are determined by the executive and can be varied by the executive without any effective Parliamentary oversight.

2. *Increase in use of delegated legislation*

Another significant accountability concern is the increased and inappropriate use of delegated legislation by the executive since the start of the COVID-19 pandemic. This significant use of delegated legislation, including instruments that are not able to be disallowed by Parliament, hinders the capacity of Parliament to perform its property constitutional function.

This is not a new phenomenon, there has been increasing concern about the overuse of delegated legislation by Australian executives for some years,[14] but during the COVID-19 pandemic the majority of legal instruments authorizing government action at a Commonwealth level have been sourced in delegated rather than primary legislation.[15] In addition a large proportion of those instruments have been expressly exempted from the usual disallowance procedures.[16] Constitutionally the overuse of these

[13] As at July 2020 the key economic responses to the COVID-19 pandemic were passed by the Commonwealth government in 2 sittings days of Parliament. These included thousands of pages of legislation which included amendments to the existing tax administration laws and social security laws. As the COVID-19 pandemic delayed the delivery of the annual federal Budget (usually delivered in May) the Parliament also passed appropriations act and supply acts.

[14] Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, (June 2019).

[15] See for example, the Special Measures in Response to COVID-19 implemented by the Federal Court of Australia: *https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes*.

[16] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News*. As at 18 June 2020 19.1% of the instruments were not subject to Parliamentary disallowance.

mechanisms, particularly in circumstances where the Parliament is not sitting regularly, is contrary to constitutional principle as it fundamentally undermines the ability of Parliament to control the use of delegated legislation through the mechanisms of tabling and disallowance.

Relatedly, many of the measures enacted during the COVID-19 crisis have used Henry VIII clauses (a provision that enables delegated legislation to amend or modify primary legislation).[17] There are significant accountability concerns with the use of such clauses as they essentially allow the executive to override the operation of primary legislation enacted by the democratically elected Houses of Parliament.

V. Role of the courts

In comparison with the very prominent role played by Australia's executive governments, and the, albeit diminished, but still important role played by the Parliaments at least to authorise executive action, the Australian judiciary has thus far played a fairly limited role in the early part of the pandemic. This is perhaps reflective of the reactive nature of the judiciary as an institution and the dynamic and quickly evolving nature of the COVID-19 pandemic.

Like the Parliaments, the courts have been affected by the pandemic by having a reduced number of hearings. By the end of March 2020 many of the courts had swiftly implemented online hearings to allow for the continued operation of the court to mitigate significant delays in hearings and to prioritise the health and safety of the community. Such measures while evidently prioritizing very significant concerns clearly limit the capacity of those institutions to give effect to the open court principle that courts sit in public and in open view, which is central to Australia's judicial system.[18]

In terms of COVID-19 related issues being litigated in the courts. There have been cases commenced in lower courts and the High Court of Australia (Australia's apex Court) challenging the constitutionality of the emergency legislation placing restrictions on jury trials in the Australian Capital Territory, but these cases are, at present, inactive due to the very low number of COVID-19 cases in that jurisdiction meaning the legislation is not being relied upon by the Courts.[19]

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[17] Including key changes made to the *Corporations Act 2001* (Cth) and social security legislation.

[18] *Hogan v Hinch* (2011) 243 CLR 506 at [20]; *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J).

[19] *R v UD (No 3)* [2020] ACTSC 139.

There have also been cases challenging the constitutionality of the border closures (referred to above). The dynamic nature of the virus in Australia has meant that since those cases have commenced at various points they could have been rendered moot by the States deciding to reopen their borders either fully or partially. It remains possible that this issue may not be finally determined by the High Court because of changes on the ground. If that occurs, the debate over the 'correctness' of these measures will play out only on the political stage.

Finally, the lack of formal rights' frameworks in the majority of Australian jurisdictions and a rights' protection culture means that there are very limited means to bring constitutional challenges to other aspects of COVID-19 restrictions. To the extent that the courts can police executive or legislative action this is much more likely to be done through administrative law challenges.

NEW ZEALAND, COVID-19 AND THE CONSTITUTION: AN EFFECTIVE LOCKDOWN AND MUTED RULE OF LAW CONCERNS

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SUMMARY: I. *Introduction*. II. *The lockdown and health orders: authority, clarity and enforcement*. III. *Bespoke legal framework: raw and sweeping powers?* IV. *Nationwide Covid-free bubble but with severe border restrictions*. V. *Parliamentary workarounds and some judicial disruption*. VI. *Treaty of Waitangi: stifled relationship with Māori*. VII. *Conclusion*.

I. INTRODUCTION

New Zealand has been relatively successful in dodging the clutches of Covid-19. The country was locked down in household bubbles for 7 weeks and subject to low-level gathering restrictions for a further 3½ weeks. This tactic of 'going hard and early', as the Prime Minister put it, has rid the community of the virus. At the date of writing, the only Covid cases recorded since late May are those of returning New Zealanders, caught at the border by strict quarantine arrangements. Domestic life has pretty much returned to normal, without ongoing legal restriction other than at the border.

The success of this elimination strategy was no doubt due to a mix of favourable conditions, decisive leadership, strong communications, a cooperative community and uncomplicated institutional arrangements (unitary Westminster democracy, with Cabinet-led government and unicameral legislature). But an elimination strategy may still prove challenging, with many unknowns reintegrating a nationwide Covid-free bubble with the virus ravaged rest of the world.

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While the Covid response was pretty effective, New Zealand did not manage to dodge constitutional issues in its emergency response. Perennial issues arose: rule-of-law concerns, restrictions on rights, institutional decision-making challenges, enforcement discretion and so forth. However, the depth of concern about these issues was much more muted than in other countries – especially as the country quickly emerged from significant and ongoing restriction. And parliamentary and judicial processes, while attenuated for a period, continued provide oversight over the government's response to the virus.

II. The lockdown and health orders: authority, clarity and enforcement

The high-point of the response was a state-mandated lockdown, requiring people to stay isolated within their household bubbles.[1] The legal implementation of the lockdown was not straightforward, even if strong messaging from the Prime Minister and Director-General of Health generated powerful expectations and strong social licence for the lockdown.

The emergency power relied on was an existing and long-standing provision giving medical officers of health the power to address infectious diseases.[2] The Director-General, acting as medical officer of health for the entire country, issued a number of health orders. The first order closed business premises other than those essential and prohibited congregation in public without physical distancing. A second order, issued 9 days later, was more comprehensive: all people were ordered to remain at their current home or place of residence, except as permitted for (prescribed) essential personal movement. Nearly 5 weeks later the lockdown was eased slightly when a third order was issued, allowing more businesses to operate and increasing permissible personal movement. These health orders were directly enforceable by the police, with powers of arrest and prosecution for breaches.[3] In addition, civil defence emergency legislation gave the police a directive power, where people's actions might contribute to the pandemic emergency – failure to do so amounting to an offence.[4]

[1] Dean R Knight, 'Lockdown Bubbles through Layers of Law, Discretion and Nudges' VerfBlog (7 April and 3 May 2020) <*www.verfassungsblog.de*>.

[2] Health Act 1956, s 70(1).

[3] Health Act 1956, s 71A and 72.

[4] Civil Defence Emergency Management Act 2002, s 91.

This regime threw up a number of legal, institutional and constitutional issues. First, there was an ostensible gap between the government's messages about the lockdown and the hard legal rules relied on to implement them, most acutely in the first 9 days of lockdown. The behaviour expected of the community was greater than the legal rules contained in the health orders, giving rise to rule of law concerns about whether the full extent of the lockdown was legally authorised. In other words, some were worried that the government was legislating by press conference, arguing the expressive conduct – strong 'nudges' and urging of the public – breached section 1 of the Bill of Rights 1688 by suspending laws without parliamentary consent. Concern was especially heightened due to the analogue with New Zealand's most famous constitutional case, where the prime minister was chastised for suspending a superannuation scheme by press release.[5] However, these concerns were arguably ameliorated by their broader context and way the lockdown was enforced. If the specific rules were read in the context of the broader civil defence emergency powers then much of the gap was filled, albeit by discretionary directive powers of medical officers of health and police. As it turned out, police were quite circumspect in the early days of lockdown, using their coercive and prosecution powers sparingly (only a handful of people were prosecuted in the first 9 days, seemingly for clear breaches of the health orders). Regardless, there remains a question mark about whether the government is legally entitled to encourage certain community behaviour other than through legislation, where the expectations amount to significant restrictions on people's rights. Many, but not all, of these concerns fell away though once the more comprehensive second order was issued.

Secondly, and relatedly, there were rule of law concerns about the clarity of the precise legal obligations during the early days of lockdown. This was fuelled in part by overreliance on statements at press conferences and the sparce rules in the early days. Again, many of these concerns fell away when sharper and more comprehensive rules were issued in the second health orders, although rule ambiguity was impossible to fully shake.

Thirdly, there were doubts about whether the Director-General could legally invoke the special powers in the Health Act to implement the lockdown.[6] In particular, concerns were eventually raised about whether the power to 'isolate or quarantine' people could properly be used at large in

[5] *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

[6] Andrew Geddis and Claudia Geiringer, 'Is New Zealand's COVID-19 lockdown lawful?' UK Const L Blog (27 April 2020) <*www.ukconstitutionallaw.org*>; compare Knight

relation to the entire community or whether it should be read as an individualised power. So too the power to close all premises. The government was adamant the power could be relied on but others argued the power should be read narrowly in a way that preserved individual freedoms.

After a misguided habeas corpus challenge failed,[7] a former legislative drafter lodged judicial review proceedings to test the legality of the lockdown, especially the power to isolate and lack of legal rules in the early days.[8] However, that challenge will not be determined until well after the lockdown itself has been lifted.

Fourthly, reliance on these Health Act powers raised an institutional quirk or, in the eyes of some, a constitutional conundrum. The special powers for infectious diseases were vested in medical officers of health. In this instance, the Director-General of Health – the senior health official – exercised those powers over the entire country. But the lockdown was not a creation merely of the officials; the Prime Minister and Cabinet were obviously intricately involved in its genesis, deployment and evolution – as the vast suite of proactively disclosed Cabinet papers testifies.[9] Significantly, before lockdown, the Prime Minister outlined an extra-legal 'alert level framework' which signalled to the public the prevailing pandemic conditions and associated suite of expected restrictions on day-to-day life.[10] The language of these four alert levels were quickly embraced by the public, adding to the lockdown's social acceptance and degree of compliance. But, while the lockdown restrictions imposed by the Director-General reflected the Cabinet's wishes, the power to issue health orders remained with the Director-General, not ministers. This created a some difficulties. The Director-General's powers were legally his and direction by Cabinet would probably have been unlawful. However, Cabinet's decision-making processes about lockdown restrictions were clearly preferable – cloaked with the democratic legitimacy that a technocratic official lacked. Hence, Cabinet and the Director-General engaged in an elaborate and delicate tango to ensure symmetry in decisions made. This virtuous charade seemed to mask what was a problematic misallocation of authority but things could easily have been different.

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and McLay, Dean R Knight and Geoff McLay, 'Is New Zealand's Covid-19 lockdown lawful? – an alternative view' UK Const L Blog (11 May 2020) <*www.ukconstitutionallaw.org*>.

7 *Nottingham v Ardern* [2020] NZCA 144.

8 *Borrowdale v Director-General of Health* (CIV-2020-485-194; heard 27-29 July 2020).

9 New Zealand Government, 'Unite Against Covid-19: Proactive release' <*www.covid19.govt.nz*>.

10 New Zealand Government, 'Unite Against Covid-19: Alert system overview' <*www.covid19.govt.nz*>.

Fifthly, it goes without saying that the lockdown came with deep human rights implications. But, as subordinate instruments, health orders could be quashed if they unduly restricted rights. The orders prima facie restricted the rights to movement and association.[11] However, the government took the view that such restrictions were proportionate – and thus were justified and lawful restrictions.[12] There was no widespread or serious momentum to second guess that broad assessment, although some rights dimensions are in play in the judicial review proceedings mentioned earlier. However, some restrictions on the fringes of the lockdown regime, such as restrictions on outdoor activities due to high risk of accident, might have been vulnerable if tested.

Finally, the even-handedness and fairness of police enforcement continued to be a lurking concern. The universal nature of the restrictions and heavy reliance on front-line police discretion creates obvious conditions for discriminatory enforcement. Māori especially have been subject to heavy and undue police attention for years; early data suggests that during the lockdown Māori were again exposed to more frequent coercive powers than others but the extent of this is yet to be unpicked.

III. Bespoke legal framework: raw and sweeping powers?

The lockdown was lifted in mid-May. A bespoke legal framework for managing the virus and imposing ongoing restrictions was then passed by Parliament: the Covid-19 Public Health Measures Act 2020. While restrictions continued to be implemented via subordinate health orders, the new regime is much improved, more sophisticated and more democratic than its Health Act predecessor. Authority to issue the health orders was vested in the Minister of Health but after taking into account views of other ministers and expert officials, and subject to a detailed and constraining purpose statement. Post-issue oversight is also layered on to ameliorate potential abuse or overreach in the issue of health orders (confirmation by Parliament; provision for parliamentary disallowance; exposure to invalidity for inconsistency with Bill of Rights Act). The bespoke legislation is also subject to a sunset provision, albeit renewable by resolution of Parliament (every 90 days, up to two years).

Despite all this, the emergency powers still look ugly – raw and potentially sweeping. In order to prevent the risk of the outbreak or spread of

[11] New Zealand Bill of Rights Act 1990, ss 18 and 19.

[12] New Zealand Bill of Rights Act 1990, s 5 (justified limitations).

the virus, orders can require persons to refrain from or take 'any specified actions' or comply with 'any measures'.[13] This includes, without limitation, isolation, quarantine, restricted movement, physical distancing, medical testing, restricted business activities and contact tracing. Spelt out in this way, and against the backdrop of a diminishing threat from the virus, greater public nervousness about the emergency powers was evident. This was not helped by the rushed enactment of the legislation – passed in two days, with no select committee scrutiny or public consultation.

Once passed, a new alert level 2 health order was quickly issued to succeed the lockdown restrictions. The new order encouraged physical distancing, restricted the size of gatherings (initially up to 10 people comingling but subsequently relaxed to 100 people) and mandated contact tracing measures for hospitality businesses. But otherwise day-to-day activities resumed. The gathering-size restrictions caused some concern, especially for churches – some of which complained their right to worship was unduly fettered.[14]

IV. Nationwide Covid-free bubble but with severe border restrictions

In early June, as the then last active case of the virus recovered, the country moved to alert level 1 – with all day-to-day restrictions lifted. With a nationwide virus-free bubble, attention moved back to the border. Since the middle of March, only citizens and permanent residents were allowed to return to New Zealand, along with a handful others granted special permission. Health orders initially required returnees to self-isolate. However, that was ramped up to require quarantine for a fortnight at state-managed facilities (ie, otherwise empty hotels), along with requirements for medical testing. Some provision was made for compassionate exemptions for those with dying relatives or family funerals. The numbers of returnees proved hefty and logistically tricky. The number in quarantine quickly rose to the size of a small town and the hotels are now full. The government, together with airlines, are managing incoming passenger loads to ensure quarantine capacity is matched.

The administration of people in quarantine has not been trouble-free. A few momentarily escaped and some on compassionate exemptions failed

[13] Covid-19 Public Health Measures Act 2020, s 11.
[14] New Zealand Bill of Rights Act 1990, s 15.

to comply with agreed safety plans. The government's response was heavier restriction, increased policing and temporary suspension of compassionate exemptions. Facing a spiralling accommodation bill, a cost-recovery framework has been proposed. However, charges are expected to only apply to those making temporary trips abroad or returning for short visits; citizens and permanent residents relocating back to New Zealand or with compassionate circumstances will not.

The quarantine regime has provided to be a moving feast, throwing up a number of legal and constitutional issues. First, some decision-making about exemptions was poor. Early on officials were chastised by a judge for applying criteria other than those required in the health order and refusing exemptions.[15] Later, when exemptions were suspended, another judge warned officials that a blanket suspension amounted to abdication of discretions.[16] More robust processes have now been implemented.

Secondly, questions have been raised about whether the requirement for medical testing, as part of the quarantine requirement, might breach the right to refuse medical treatment.[17] The question is complicated by the way the right is framed (treatment vs examination) and the obvious public benefit in any justificatory calculus. The instinct of medical officials has been to not push the point. Refusal has been met by extending the time of quarantine, not coercion, even though court orders seem possible under the existing infectious diseases regime.[18]

Thirdly, the management of quarantine capacity – including charging those quarantined for the cost of accommodation – has raised as yet unsolved human rights questions. New Zealand citizens have a cherished and fundamental right to enter New Zealand.[19] The various border measures place an indirect burden on the ability of citizens to return and there is a question about whether the measures are legal. The operation of a general system of quarantine is undoubtedly justified in the light of the response to the virus and thus lawful; however, the management of passenger flows and charges raise trickier questions about whether they burden the right too much and whether the logistical and fiscal considerations justify such burdens. Right-consistency of these aspects may depend more on matters of design and operation.

15 *Christiansen v Director-General of Health* [2020] NZHC 887.

16 *Hattie v Attorney-General* (CIV-2020-404-303; Minute of Muir J; 8 July 2020).

17 New Zealand Bill of Rights Act 1990, s 11.

18 Health Act 1956, Part 3A.

19 New Zealand Bill of Rights Act, s 18(2) and Immigration Act, s 13(1).

V. Parliamentary workarounds and some judicial disruption

The impact of the virus and lockdown on the operation of Parliament was relatively modest and disruption of court business temporary.

Parliament adjourned for just over a month during the level 4 lockdown. However, select committees and other parliamentary processes continued, through Zoom and other electronic means. Most significantly, an Epidemic Response committee was established to scrutinise the government's action. In many respects, this committee became New Zealand's 'parliament-in-miniature' during the lockdown. Chaired by the leader of the opposition and with an opposition majority, it was given plenary powers to inquire into the government's response to Covid-19. During the lockdown, it met three mornings a week – questioning key ministers and officials, as well as hearing from experts and those adversely affected. The committee was pretty effective, especially in its first few weeks of operation during the lockdown. It pressed on many of the operational challenges and soft points of the lockdown, playing an important agenda-setting role in political discourse. But its proceedings eventually became more partisan and little less constructive once the height of the emergency passed.

When Parliament returned, proxy voting was relaxed, reducing the number of MPs when sitting and voting. Parliament initially operated with limited attendance (about a fifth of MPs present) and physical distancing. After a couple of weeks, usual attendance and operation resumed. With the return of Parliament's usual accountability proceedings, the Epidemic Response committee was also wound up.

Parliament passed a number of Covid-related measures but not without the odd hiccup. The need for swift action placed pressure on the policy- and law-making processes. For example, in one instance, an incorrect version of a bill was passed into law, through all three readings in one day, before anyone noticed. The passing of the Covid-19 Public Health Response Act 2020 in two days, without select committee scrutiny and public consultation, was also rightly criticised. However, in a novel and welcome first, the Act was immediately sent to select committee for post-enactment review in order to ameliorate the lack during it passage.[20]

The business of the courts was severely during the lockdown and the consequential backlog continues to be a concern. The courts did their best

[20] Finance and Expenditure Committee, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (July 2020).

to continue to operate during lockdown, using remote audio-visual hearings and occasional in-person hearings. During the level 4 lockdown, only priority proceedings (those affecting the liberty, personal safety or wellbeing of individuals, along with other time-critical proceedings) were heard; as restrictions loosened, more proceedings were able to take place. Jury trials were suspended once lockdown kicked in – and have only recently recommenced 4½ months on. The backlog of jury cases is causing concerning delays.

VI. Treaty of Waitangi: stifled relationship with Māori

The story of New Zealand's response to Covid, while effective, lacked an important indigenous thread and voice, especially concerning because the nation was founded on the premise of an ongoing relationship between the government and Māori under the Treaty of Waitangi. There was little obvious engagement with Māori on the emergency response – even though the government expressed worries about the likely disproportionate effect of the virus on Māori and their health. Some particular flashpoints were symptomatic (propriety of Māori-managed roadblocks preventing entry into tribal areas; gathering restrictions affecting tangihanga (funerals); police entry powers onto marae). However, more concerning was Māori felt shut out of the design of health and lockdown measures – raising constitutional questions about compliance with partnership obligations under the Treaty of Waitangi.

VII. Conclusion

New Zealand's response to Covid-19 has proved relatively effective, so far eliminating the virus. Constitutional concerns have not been absent but been pretty muted, especially relative to problems elsewhere in the world. The short-and-sharp period of lockdown and restrictions has meant normal day-to-day life has returned. However, ongoing management of the border will no doubt continue to be challenging.

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