

TACKLING THE EMERGENCY POWERS THAT SHAPED THE LEGAL LANDSCAPE DURING COVID-19

ANALYSING THE LEGAL DISRUPTIONS AND REGULATORY SOLUTIONS –

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ABSTRACT: When speaking of extraordinary powers, we usually think of powers available to the executive during times of emergency. The outbreak of COVID-19 has impacted fundamentally the functioning of States, their democratic institutions and legal systems. Therefore, it is understandable that governments are continuing to resort to exceptional measures in seeking to get control over the spread of COVID-19. These exceptional measures inevitably restrict rights and institutional actions in ways that can be justified only in these extraordinary circumstances. It is in the greatest interest of society that these measures against COVID-19 are imposed and enforced within the framework of established democratic principles, the international legal order and the rule of law. While some constitutions include detailed rules providing for a state of emergency (sometimes of various kinds) in the event of external or internal threats, others address emergencies by making use of rules that allow for a certain modification of the normal balance of powers between the executive and legislative powers. Interestingly, however, even where specific emergency constitutional mechanisms exist, Member States have preferred not to trigger them, either for historical reasons or for fear of triggering a mechanism perceived as too repressive. Legislation adopted in situations of emergency raises questions as to temporal limitations, scope and proportionality and legal certainty. This paper will analyze the extraordinary public powers that are usually reserved for emergency situations in which ordinary public powers are not sufficient to effectively deal with a crisis. Ordinary constitutional processes are too slow to respond to the immediate needs of the population, so that they must be restricted to enable swift help and relief to those affected. The comparative analysis in several states will overview the effects of the extraordinary powers in the form of emergency powers provided for by emergency legislation.

KEYWORDS: *COVID-19, extraordinary powers, state of emergency, constitution, regulatory management tools*

“The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail.”⁴¹

INTRODUCTION

Solving the challenges from the Covid 19 pandemics, inevitably involved the regulatory issues. Regulation is the steppingstone putting countries into action, dealing not only with the health issues in our case, but also with the economy, procurement, production, services, maintenance, delivery and functionality. Every response on the pandemics that triggered essential impact requested clear line of regulatory ground, and prompt measures so to be effective and timely.

Beyond the immediate response, the regulatory framework should also provide platform that will enable economic recovery, social stability, leveraging future crisis or immediate clashes. As never before, Governments stood ahead of challenges (1) with the population: limiting the right to movement, correct access to information, rights of free healthcare, limiting the public gathering, limiting the social wellbeing and the needs of different categories ect. These measures are also known by OECD Country Policy Tracker⁴² under *containment measures*.

Challenges (2) related to the economy and business: restrictions on work, opening and availability of business and goods,

duration of restriction, consequences and damages for closing business and remuneration or else known as *fiscal and monetary initiatives*; (3) leveraging business and quality of life through the existing legislation: relaxing inspection regimes, subsidies, waiving license charges or deadlines or also known as *relaxing measures*. The effects of these measures have far more effect and impact measures brought during normal times.

Covid 19 changed the reality and created new forms of emergency situation and internationally wide required extraordinary powers than the existing ones. While the health threat it poses and the challenge it represents for human health is paramount, no less important is the strain it puts on the legal order. For most of the affected countries, in particular in the EU, this outbreak is posing unprecedented institutional challenges and has obliged institutions and governments to adopt strict measures affecting citizens' rights in a way unparalleled since the Second World War (EPRS, 2020).

Extraordinary powers are understood as those powers available to the executive during times of emergency. Newer days, they do not generally suspend the constitutional order but instead, they tend to respond to the particular needs of the emergency situation. Which constitutional norms are modified, to what extent, and which extraordinary powers are awarded, depends on the specific situation. Emergency law is tailored towards the requirements of the executive to be able to deal with the crisis situation (Muller, 2017) Usually in the time of crisis, ordinary public policies are not sufficient to be effective in situations when ordinary constitutional procedures apply. At those times, if no extraordinary powers are in place, the processes are not very responsive. During those times, countries often introduce shifting in distribution of powers in order to deal with crisis.

⁴¹ Interim report on the measures taken in the EU member states as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights (2020), Opinion No. 995/2020, Strasbourg

⁴² Available to see and check for every OECD country on <https://www.oecd.org/coronavirus/country-policy-tracker/>

GENERAL UNDERSTANDING OF “EXCEPTIONAL SITUATIONS”

The Venice Commission, in its 2020 Interim report on the Covid-19 measures taken by the EU member states, observes the human rights by 3 perspectives, that can be called “the 3 instruments” justifying their changed dimensions:

-the first is *exception* to human rights, which excludes from the specific scope of such human rights certain actions taken in times of emergency.

-the second instrument is *limitation* to human rights, the possibility to do so is laid down in restriction clauses, which allow States to restrict certain non-absolute human rights in order to protect other rights or important interests.

-the third instrument is a *derogation* to human rights, the temporary suspension of certain human rights guarantees resorted to in a state of emergency.

Derogations are more radical measures than exceptions and limitations and may be used only in exceptional circumstances of “*war or other public emergency threatening the life of the nation*” (Article 15.1 of the ECHR). Derogations are subject to the conditions of necessity, proportionality and temporariness. They also entail procedural obligations (declaration of a state of emergency, notification under human rights treaties) that make oversight easier and more robust (OECD, 2020)

From constitutional perspective, the emergency powers have been identified as those who are *de jure* state of emergency, and those who are *de facto* state of emergency. The first type is present and foreseen in the constitutions or legal acts in line with the constitution, by which the country is officially declaring state of emergency. The second ones may also be called “extra-constitutional” due to their nature – as state of emergency

declared under extraordinary circumstances. Even if the second type does not necessarily constitute a violation of international or constitutional law, the absence of a formal declaration may preclude a state from resorting to certain measures provided in international human rights instruments. It is good practice for a declaration of a state of emergency to precede the activation and use of emergency measures (OECD, 2020).

The Venice Commission favors the system of *de jure* constitutional state of emergency powers (the first type), which provides for better guarantees of fundamental rights, democracy and the rule of law and better serves the principle of legal certainty deriving therefrom than a system of a *de facto* extra-constitutional state of emergency (the second type).⁴³

THE CONCEPT OF “STATE OF EMERGENCY”

When we speak of “state of emergency”, we speak of conditions recognized by national laws, clearly stated in line with the limitations imposed by the international law. In certain conditions, the state of emergency sometimes exempts human rights, if there is a “threat to life, the whole nation, or condition of public emergency” (Article 4 ICCPR and Article 15 ECHR).

From regulatory perspective, different approaches to analyze the “state of emergency”:

The *sovereignty approach* understands this condition as outside the legal regulation of the country that cannot be taken in the existing positive legal scope.

Another is the “rule of law approach,” understanding this category as necessary to be regulated, however different from the positive legal framework. This later, is the most common used method that

⁴³ Ibid.

countries introduce. As it is an exceptional condition, the national legislation should regulate the length, the gravity, definitions of types that can be put under “emergency conditions”. For emergency measures three principles are necessary to be met: 1. principle of *necessity*, 2. principle of *proportionality* and principle of *temporariness* or said in simple terms – the condition can restrain and limit the human rights only to overcome an exceptional situation and return to its normalcy when proportionality of powers showed adequate results, assuring that no long term disbalance of state powers has been met while overcoming the emergency. If the condition lasts longer period than planned, the State needs to ensure that the change in distribution of power does not disturb the separation of powers. This is where the principle of *checks and balances* is endorsed.

DECLARING “STATE OF EMERGENCY”

During a “state of emergency”, the flexible exercise of public powers depends on several aspects: the length of the condition and the execution of measures to be effective, the legitimacy of their empowerment.

The constitutional culture allows certain states to declare the state of emergency and entrust special power to institutions, since the constitution allows, and the legal order is aligned.

While some Member States’ constitutions include mechanisms allowing for recourse to a “state of emergency” or the entrustment of special powers to specific institutions, other Member States’ legal orders do not, either for historic reasons or owing to institutional tradition. Crucial aspects of the exercise of public powers under a pandemic threat include not only the extent of the measures adopted, but also their legitimacy, raising the question of their duration and of the degree of parliamentary oversight.

A declaration of a state of emergency is subject to the rules of the domestic legal order of a country. These rules must be clear, accessible and prospective. The basic provisions regarding the state of emergency and the resulting emergency powers should ideally be included in the constitution, clearly indicating which rights derogate and which rights do not. This is all the more important as emergency powers often restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law.

A declaration of a state of emergency may be issued by Parliament or by the Executive (Governments or Presidents). Ideally, it to be declared by Parliament, but in many cases it is to the executive, followed by immediate approval of Parliament. In urgent cases, immediate entry into force could be allowed – however the declaration should be immediately submitted to Parliament, (to confirm or repeal it).

COMPARATIVE ANALYSIS ON THE CONSTITUTIONAL GATEWAYS TO RESPOND ON THE COVID “STATE OF EMERGENCY”

The unforeseen circumstances shook the Governments to promptly react and adapt its legislation to the newly conditions. The emerging legislative challenges had to find its legal ground in the highest legislative act – the constitution. The preparedness and comprehensiveness of the constitutions is clearly the first indicator on how fast a state could introduce an emergency. In this analysis several EU member states are taken in comparison, and few best practice examples which stood out.

While some Member States’ constitutions include detailed rules providing for a “state of emergency” (sometimes of various kinds) in the event of external or internal threats (France, Germany, Poland, Hungary), others (Belgium, Italy) address emergencies by making use of

rules that allow for a certain modification of the normal balance of powers between the executive and legislative powers. Interestingly, however, even where specific emergency constitutional mechanisms exist, Member States have preferred not to trigger them, either for historical reasons (Germany) or for fear of triggering a mechanism perceived as too repressive (France). With exception to Spain, the preference has been for ordinary urgent legislative measures. Legislation adopted in situations of emergency raises questions as to temporal limitations (Hungary), scope and proportionality, and legal certainty (Italy). All seven of the Member States considered here, however, offer a degree of parliamentary control over the measures adopted (EPRS, 2020).

The Belgian Constitution, for example, does not allow suspension to impose specific measures for “state of emergency”, but instead allows for the Belgian parliament to delegate legislative powers to the Government (which shown to be the case in many countries). In order this to be implemented, several principles have been clarified in the chapter of the role of Council of State. The principles allow the use of the special powers, that in any case are timely limited.

The French Constitution deals with extraordinary events, existence of threat or danger under several provisions that allow “presidential exceptional powers” or “state of siege” while a “state of emergency” exist. All the circumstances during “state of emergency”, represent potential danger and harm to the French nation that requires more stricter rules than the one in normal situation. It gives wider power to the president and less institutional balance.

In the case of Germany, the constitution, or better known – the ‘Basic Law’ was not the legislative tool during the Covid 19 pandemics. Since the constitution was not consisted of any emergency situa-

tions (having in mind the German history and role in WWII), state of emergency was first introduced 1968, whereby distinction between internal and external state of emergencies were introduced. The external regimes were known as “state of tension” and the “state of defense”, both allowed by the Federal Government. Both terms are not related to situations as Covid 19, since its nature in focused on state of tensions and military attack as last instance. So, in this whole period, Germany have brought its measures under the Infection Protection Act as central legislative tool. This act outlines the Federal and *Länder* governments to take over actions to prevent, control and combat the pandemic. During the Covid lock down, various measures have been adopted that lasted over the timeframe envisaged in the act for pandemic regime (originally duration of 2 weeks, extended to several months). What makes the German situation specific is the unique power of the *Länder* governments to execute the Federal Acts, i.e enactment of the measures or withdrawal of restrictions from the Infection Protection Act. As the needs during the pandemics were unpredictable and urgent, the amendment of the Act enabled the Bundestag to declare an ‘epidemic outbreak of national importance’, conferring additional competencies upon the Federal Health Ministry, such as the right to procure medical equipment for care, disinfecting and research purposes, and the right to reorganize the deployment of medical personnel across the territory.⁴⁴

Regardless of the gravity of the situation, the Hungarian Constitution cannot be suspended or impact the work of the Constitutional courts. However, in rare circumstances (as such we’re discussing in this paper) it enables the State to govern under special rules or the so-called ‘special legal order’. There are six cat-

⁴⁴ Ibid.

egories of special rules, where the Covid 19 is categorized under Art.53 “state of extreme danger”. The are adopted by the Assembly with 2/3 majority vote. The special legal order allows to have limitations of human rights, but only to the acceptable limit when human dignity is untacked. The concrete legal act that concern dealing with the Covid 19 were “the Disaster Management Act” and “the Coronavirus Containment Act”. They are both adopted to secure extraordinary measures and rules that govern state of extreme danger.

Italy during the worst time of the pandemics had a lot of restriction measure in place. While imposing the measures the government mostly relayed on the “decree-laws”, as a possibility given by article 77 of the Constitution. The decree-laws showed legal power as ordinary laws, as the Constitution didn’t consist any legal ground for “state of emergency” and did not set rules to transfer special power to special institutions. However, 60 days after their adoption, they are submitted to the Parliament to be voted and converted into law.

Despite this gap, the Italian legal system allows for specific measures to be put in place under extraordinary circumstances. First, the government can step in and replace local entities (regions, provinces, metropolitan cities and municipalities) in the exercise of their powers for reasons of public security, to preserve the legal and economic unity of the state or to guarantee essential levels of assistance concerning social and civil rights (Article 120 of the Constitution) (EPRS, 2020). Additionally, the Prime minister can introduce set of measures and the Health minister can issue civil protection orders. For the above reasons, the Italian principle of handling the Covid 19 was criticized by some, for allowing decrees, ministerial orders and semi-laws to shake the legal certainty and misuse

the governmental prerogatives to diminish the role of the Parliament.

Unlike Italy, the Polish constitution provides very clear position of the pandemic, by having regulated three types of state of emergencies, one of which is “state of natural disaster”. In the definitions of natural disaster, it explicitly mentions “massive occurrence of (...) infectious diseases of human beings”. The Covid 19 pandemics found its place right here, and by this definition in the Constitution it can only be applicable for 30 days. There are no limits of the times of extensions. This condition of natural disaster can last until there is necessity.

The Spanish constitution also provides legal ground for declaring state of emergency under art. 4 of the Spanish Organic Law that allows the Government to declare a state of alarm under very specific circumstances, essentially, in cases of natural disasters, health crises, when public essential services are paralyzed and certain requirements are met, or when there is shortage of goods of primary necessity.⁴⁵ One of the regulated emergencies that was declared at the beginning of Covid 19 is the “state of alarm”, that can be declared only when the competent authorities cannot ensure the return to normality making use of their ordinary prerogatives. It regulates maximum period of 15 days, but it was extended.

COMPARATIVE ANALYSIS ON THE REGULATORY MANAGEMENT TOOLS AS RESPONSE TO THE COVID “STATE OF EMERGENCY”

In the previous chapter an analysis on how the states reacted according to the needs using the constitutional prerogatives. In this chapter the analysis will be on the regulatory & non-regulatory management tools, stressing the measures imposed as management tool as response to COVID 19.

⁴⁵ Ibid.

In the United Kingdom, primary and secondary emergency legislation were introduced. Also, non-legislative changes are noticed. The legislative changes addressed the police, immigration officers and public health official's needs, providing them new powers to detain potentially infectious persons and prohibit and restrict gatherings and public events for the purpose of curbing the spread of COVID-19 (OECD, 2020). The non-regulatory measures were introduced for relaxation of rules in certain areas, facing the needs of the population. They were focused on relaxation on procedures and competition measures on food and drug supplies, vehicle testing rules ect.

France during the Covid 19 has introduced new Emergency law that put in place the emergency measures to confront the new challenges. This act empowered the Government to restrict people's movement, to take special relaxed economic measures in supplying goods and services, supporting the French companies.

The Netherlands was among the countries that introduced decentralized approach on introducing regulatory and non-regulatory measures. It is a country that did not invoke a state of emergency or use special fast track legislative procedures. Instead, it relied on using existing flexibilities in the law-making process (e.g. carrying out the interdepartmental preparation of draft legislation with high urgency, shortened consultation periods) and the possibility of enacting regional emergency regulations. The mayors of the largest cities in these regions, were authorized to adopt these emergency regulations. The regions, however, coordinated on the vast majority of provisions. The involvement of the central government was on call.

One unique example in the comparative practice (and beyond Europe) for not using the regulatory management tools, but instead *relying on containing strategy* is South Korea. The Government relied

only on the distance measures, remote work from home and regular testing. The strongest mechanism was encouraging the population to stay in place, insist on using the free-of-charge services for massive testing in facilities equipped with rapid tests. The Korean health authorities were allowed to implement epidemiological investigations when needed.

WHAT ARE THE FUTURE CHALLENGES FOR REGULATORY MANAGEMENT?

Covid 19 challenged the Governments around the world to react immediately and create systems of functioning that allow efficiency in emergency conditions. The examples given in this text are to create perception on the methods and the tools of putting in place a new regulatory landscape. All the decision brought during the pandemics were lacking a robust data and evidence, thus its effectiveness has seen through the prism of crisis management preparedness of the Governments. Regulatory measures had to be adopted in the existing legislative framework and the non-legislative measures had to comply with the institution's capacities. As the pandemic is still ongoing, it is disputable which of emergency measures and legislative tools should be a positive example but what is certain to point out are the future challenges all the countries are dealing. Few issues still needs to be addressed:

Covid 19 showed that the health systems in many countries are to clash under emergency situations. In the future, the governments should embrace concepts of *systems thinking* and *resilience* into health policy making to prepare socioeconomic systems for future systemic shocks (e.g. climate change) (OECD, 2020).

Empowering Governments to shape the legislative directions, almost always in emergency procedures brought without Parliament's voting – is a critical strategy on long run. The administration can

become easily reluctant to put in power legislation that doesn't have the necessary Risk Analysis Assessment (RIA). It is time of promoting innovative approaches to regulatory management, emergency like-data based decision-making. Scholars and international organisations are pointing out to another newly embedded principle of work – *Human Behavioural Insight Tool*⁴⁶ i.e. modeling human behavior responses in public policies to understand how society will react to legislative changes and to shift away from traditional assumptions about human behaviour utilised in economic analysis.

Collective actions for supporting likewise policies to complement (or if needed) supplement public policies, is a challenge that is still not developed, but proved to be necessary. Overpassing the transboundary challenges cannot be left alone. Analytical tools that assist to policy makers particularly in crisis is a necessity. Even more because the traditional approaches confirmed that during the Covid period, the systems are not balanced and prepared for emergency situations.

Digitalisation and online structures that enable services and enforcement are in full blast during the pandemics. Remote functioning becomes inevitable part of people's life. That is why – the regulatory framework in digitalization should be the priority in the collective actions.

Governments should beforehand plan on collecting the experience from the beginning of the pandemic, to be able to build evidence-based policies. The OECD Best Practice Principles on Regulatory Policy highlight the importance of administrations choosing consultation tools that are suitable for the types of stakeholder engagement and for the right phase of the policy process. Choosing the appropriate consultation tools (e.g. ICT consultation tools or representative deliberative pro-

cesses such as citizens juries) is particularly important in light of the reduced timelines and the need to minimize face-to-face interactions whilst developing COVID-19 responses. For *ex post* reviews, it will become particularly important to consult at first hand with those directly affected by the regulation.⁴⁷

CONCLUSIONS

All established measures and conditions during the Covid 19 pandemic, inevitably have impact (at least minor) on the rule of law, protection of human rights, administrative processes, governance and institutional functioning. Some countries had strong legal framework in power, thus easier and effective way to introduce measures. Other countries had stronger health systems, thus easier access to healthcare throughout all the population. All their actions articulated the global Covid 19 management.

When the “state of emergency” is aligned with the national legislation it is less abused or misused due to the regular scrutiny of the institutions. The certainty would be even bigger if the constitution, as the most important legislative act, is always the primary source of shaping the landscape of concrete legal acts, pointing out responsible institutions and choosing the correct management tools.

The lack of constitutional safeguards allows Parliaments or Governments to create extraordinary public powers that are not designated as emergency powers and are therefore used in non-emergency and ordinary situations. This blurs the line between ordinary and extraordinary powers and may normalize the use of extraordinary powers. Such blurred lines allow extraordinary powers to be created for the sake of convenience rather than necessity (Mueller, 2017).

⁴⁶ Ibid.

⁴⁷ Ibid.

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