MINI-CONFERENCE 2023
MEASURES TAKEN BY STATES IN RESPONSE TO THE COVID-19 CRISIS AND THEIR IMPACT ON CONSTITUTIONAL JUSTICE: EMERGENCY SITUATIONS

Venice Commission
20th meeting of the Joint Council on Constitutional Justice
Sofia, Bulgaria
25 April 2023

VENICE COMMISSION
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Venice Commission: 20th meeting of the Joint Council on Constitutional Justice

Mini-Conference
Measures taken by States in response to the COVID-19 crisis and their impact on constitutional justice: constitutional case-law on emergency situations

Sofia, Bulgaria
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Hyatt Regency Sofia

Sofia, Bulgaria

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Joint Council on Constitutional Justice

Opening Session

Measures taken by States in response to the COVID-19 crisis and their impact on constitutional justice – constitutional case-law on emergency situations

Pavlina Panova, President of the Constitutional Court of Bulgaria

Welcome to Sofia

The name of Bulgaria's capital means wisdom. I wish you all that this meeting of yours contribute to future wise decision-making by the Member States of the Council of Europe.

The selected topic of your conference continues to be up-to-date, even though we left the COVID-19 pandemic behind our backs. However, is this really so? And if it is true and to some extent a relief, the lessons this crisis taught us give us the opportunity to design policies that are tailor-made to cope with such global crises; policies that allow us on the one hand to safeguard the life and health of citizens in health-challenging situations, and on the other hand to protect their fundamental rights and freedoms.

Let me share with you how we responded to the COVID-19 related challenges here in Bulgaria and what legal instruments we employed to manage the crisis triggered by the pandemic.

Initially, the National Assembly declared, as provided for in the Constitution, a state of emergency for a period of two months (from 13 March 2020 till 13 May 2020[1]), which was thereafter regulated by law through a special epidemic situation lasting until 31 March 2022 (the deadline being repeatedly extended).

The measures related to the state of emergency and the special epidemic situation provoked the initiation of several cases before the Constitutional Court.

I. The special epidemic situation: a legal instrument adapted to regulate the COVID-19 related crisis

Ruling in constitutional case no. 7/2020, the Court held in its decision no. 10 of 23 July 2020 that a crisis threatening the general public might not necessarily justify declaring a state of emergency. In case the crisis was of an intensity that did not call for emergency governance of the country – and the Court considered the 'redistribution of the remit of functions and powers and/or limitations in the exercise of certain rights and freedoms pursuant to Article 57, para 3 of the Constitution to be such a case – it could be contained by declaring a situation to help the State overcome the crisis without making recourse to a state of emergency. The Constitutional Court found that managing the COVID-19 pandemic did not require declaring an emergency. The special epidemic situation, which justified the adoption of a series of measures subject to judicial review, was considered a constitutionally legitimate instrument to manage the crisis.

1. Decision of the National Assembly, promulgated SG no. 22/2020; Decision of the National Assembly, promulgated SG no. 33/2020.

II. Recourse to new technologies in the work of public authorities and their influence on citizens' fundamental rights

The necessity to maintain physical distance as required by the pandemic and at the same time the need for state authorities to continue operating so as to discharge their powers called for recourse to new technologies.

1. Constitutional Court

Distant sessions through videoconferencing were envisaged as a modality for convening meetings of the Constitutional Court. Thus, following an amendment to the Rules of Procedure of 2020, the Constitutional Court now may convene its meetings and adopt decisions through videoconferencing that secures the confidentiality of consultations. Should the need so require, judges may take part in face-to-face meetings through videoconferencing as well (Article 30b[2]).

2. National Assembly

The National Assembly has also adapted its working modalities by providing for the possibility that Members of Parliament placed under mandatory isolation or quarantine due to COVID-19 take part in parliamentary sessions through videoconferencing. The Constitutional Court has ruled on this provision's compliance with the Constitution. It held[3] in particular that the possibility envisaged by the National Assembly was an adequate response to the constitutional necessity for the National Assembly to continue functioning effectively even in a special epidemic situation and temporary epidemic measures in place. According to the Constitutional Court, "[T]he voting modality and technical means and technologies envisaged in the challenged decision allow to establish beyond any doubt whether the identity of the MP using the online platform coincides with the one of the MP duly registered to take part in the plenary meeting. Thus, the constitutional requirement for participation "in person" should be deemed to have been satisfied".

3. Courts

The Constitutional Court has ruled in several of its decisions that in certain situations recourse to new technologies may limit citizens' fundamental rights disproportionately to the aim pursued. It has found so in relation to the

2. New – promulgated SG no. 30/2020, in force as of 4 April 2020.
3. Decision no. 2 of 16 March 2021 in constitutional case no. 13/2020.

possibility to use videoconferencing in court in several scenarios, including during a pandemic, as well as in relation to the obligation for public authorities to have access to and store location-related information from internet traffic data that is collected generally and non-selectively.

In its Decision no. 15 of 17 November 2020 in constitutional case no. 4/2020 the Constitutional Court held that the possibility for Ministry of Interior to have access to traffic data about location which was collected in a general and non-selective manner for a period of six months ran contrary to the Constitution. According to the Constitutional Court, enforcement of mandatory isolation or treatment of persons with infectious diseases did not require access to their data for a six-month period. The Court was of the opinion that such access was admissible only for the time that hospital treatment and/or mandatory isolation was required, and following reliable information about the health condition of the person in question provided by the health authorities; this information however, being also sensitive, should not be made public without the express consent of the person concerned.

In its Decision no. 13 of 5 October 2021 in constitutional case no. 12/2021, the Constitutional Court ruled that the possibility provided for in the Criminal Procedure Code to conduct hearings for the purpose of imposing remand measures through videoconferencing in certain scenarios, including emergencies and epidemics, is incompatible with the Constitution. The Constitutional Court held that the distance hearing deprived the court from the possibility to gain immediate and direct impressions about the objective physical condition of the person in question and by extension about their allegations of sustained physical injuries or maltreatment. The Constitutional Court found that this possibility affected inadmissibly the very essence of the right to defence, be it through a defence counsel or exercised personally by the accused, and that it ran contrary to Article 122 read in combination with Article 56 of the Constitution.

The Constitutional Court has further declared incompatible with the Constitution a provision of the Health Act, which allows in certain scenarios, including again emergencies and epidemics, persons with mental disorders, whose admission in hospital for mandatory treatment has been requested by court order, to take part in trial proceedings via videoconferencing.[4]

4. Decision no. 14 of 17 November 2022 in constitutional case no. 14/2022.

In all cited decisions, the Constitutional Court found that limitations of citizens' fundamental rights established by law were incompatible with the Constitution premising its conclusions on the proportionality principle (prohibition of excessiveness) as a rule of law requirement. The case-law is consistent on the issue of possible limitations of fundamental rights in case of a legitimate aim ("only in those cases where this is required for the protection of high constitutional values or for the prevention of other essential public interests being affected" [5]), the grounds for the limitation is provided for by law, the limitation falls within the boundaries established by the Constitution and the principle of proportionality to the aim pursued arerespected.[6] The Court applies the proportionality principle as a "decisive criterion to determine the type and scope of constitutionally admissible limitations prescribed by law and the specific boundaries for exercising fundamental rights".[7]

In its Decision no. 13 of 5 October 2021 in constitutional case no. 12/2021 the Constitutional Court expressly held that according to the proportionality principle "the limitation of rights may be a proportionate means to attain a particular aim only if it does not go beyond what is strictly necessary, taking the importance of the defended interest into account and provided there is no unjustified extension vis-à-vis other Constitutional values of the grounds for allowing limitations of citizens' rights."

To conclude, in the context of COVID-19 related crisis the Constitutional Court acted as an authority realizing the necessity for the State to take action to combat the pandemic but at the same time firmly guaranteeing that such action would not affect citizens' fundamental rights. In this regard the uninterrupted access to justice is extremely important so that as the Constitutional Court expressly held,[8] "the rule of law is reinforced even in emergencies and disasters when human rights need to be protected the most".

I wish success to the conference and may your
stay in Sofia be nice and fruitful!

5. Decision no. 13/2021 in constitutional case no. 12/2021.
6. Cf. Decision no. 20/1998 in constitutional case no. 16/1998; Decision no. 15/2010 in constitutional case no. 9/2010; Decision no. 2/2011 in constitutional case no. 2/2011; Decision no. 7/2016 in constitutional case no. 8/2015; Decision no. 8/2016 in constitutional case no. 9/2015; Decision no. 3/2019 in constitutional case no. 16/2018 r.; Decision no. 7/2019 in constitutional case no. 7/2019 etc.
7. Decision no. 15/2020 in constitutional case no. 4/2020.
8. Decision no. 13 of 5 October 2021 in constitutional case no. 12/2021.

Valentin Georgiev and Zlatko Knežević
Co-Chairs

The challenges of the state of emergency in the COVID-19 era - some responses of the Constitutional Court of Serbia

Vladan Petrov, Judge of the Constitutional Court of Serbia

A SHORT OVERVIEW OF THE STATE OF EMERGENCY IN CONSTITUTIONAL THEORY

The state of emergency as a deviation from the regular state in the life of the state is basically treated as an exception to the rule. According to one understanding, the state of emergency is not a constitutional state. One of the founders of this understanding is Karl Schmitt, who claimed that the sovereign decides on the state of emergency, and since the sovereign is legally unlimited, then the state of emergency regime is outside the framework of positive law. It is a *state-concentrated conception*.[1] That conception was expressed in the words of one of the "founding fathers" of the US Constitution back in 1787, Alexander Hamilton: "The circumstances that endanger the safety of nations are infinite and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed".[2]

1. L. Trócsányi, "The Theoretical Questions of Emergency Powers", Emergency Powers in Central and Eastern Europe – from Martial Law to COVID – 19, Budapest-Miskolc 2022, 24.
2. A. Hamilton, Federalist Papers No. 23.

According to another theoretical understanding, one of the first advocates of which was Albert Venn Dicey, the state of emergency is a legal regime of special legal rules, but it also rests on the principle of the supremacy of law.[3] The rule of law is a framework and a principle that must be respected even in a state of serious danger to the life of the state and citizens. In other words, this theoretical conception, a constitution-concentrated conception, views the state of emergency as an integral part of constitutionalism[4].

The issues related to a state of emergency that can be considered central are:

1. who, that is, which state body is authorized to declare a state of emergency;
2. when, that is, under what conditions the state of emergency is declared;
3. the legal mechanisms of action of state bodies in a state of emergency;
4. the legal control of the implementation of those mechanisms or measures;
5. the goal of the state of emergency.

II. BRIEFLY ABOUT THE "VENETIAN DOCTRINE" OF THE STATE OF EMERGENCY

The Venice Commission has developed standards that form the "solid core" of the rule of law in a state of emergency. Rather than the "Venetian doctrine" of the state of emergency, one could speak of concrete and practical instructions, a kind of "Venetian manual" for the actions of the state and competent authorities in a state of emergency.[5]

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3. See A. V. Dicey, Introduction to the Study of the Law of the Constitution, London 1924, 283-284.
4. L. Trócsányi, 24.
5. The Venice Commission did it, basically, in three ways. The first is the adoption of several documents of a general nature, starting from the Emergency Powers (1995) to the Compilation of VC Opinions and Reports on State of Emergency (2020) and the document entitled Respect for Democracy, Human Rights and the Rule of Law during States of Emergency - Reflections (2020). The second one is the Observatory of Situations of Emergency in the Venice Commission Member States through summary reports by topic and by country (2020). The third way are opinions on the constitutional and legal arrangements pertaining to the states of emergency in particular countries (for example, Armenia, Finland, France, Montenegro, Türkiye, Romania, North Macedonia).

Immediately after the declaration of the pandemic, the Venice Commission came out with a new document entitled *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency-Reflections*.[6] This document sets out essential elements of the state of emergency in modern conditions. First, it defines the state of emergency through the dichotomy between norm(alcy) and exception.

Second, the Commission has established certain principles of the state of emergency. These are the following:

1. the rule of law as an overarching principle;
2. necessity (proclamations and measures);
3. proportionality of measures;
4. temporariness – time-limited duration of the state of emergency;
5. predictability of legislation in a state of emergency;
6. loyal cooperation among state institutions and local institutions.

Third, the Commission had previously taken the position that the declaration, that is, the act on the declaration of a state of emergency is a "unilateral administrative act" (1995).

Fourth, the Commission considered in particular the need for additional measures in the COVID-19 pandemic which are neither necessary nor usual in states of emergency, arising, for example, as a result of civil unrest. At the end of this document, the Venice Commission once again underlines the importance of respecting the rule of law in a state of emergency: "Rule of law-compliant emergency powers have important in-built guarantees against abuse: the principles of necessity, of proportionality and of temporariness. Respect for these principles must be subject to effective, non-partisan parliamentary control and to meaningful judicial control by independent courts. The dichotomy between normalcy and exception which is at the basis of a declaration of the state of emergency does not necessarily entail and does not need to entail a dichotomy between effective action against the emergency and democratic constitutionalism, or between protection of public health and the rule of law".[7]

6. Respect for Democracy, Human Rights and the Rule of Law during States of Emergency-Reflections (CDL-PI(2020)005rev.
7. *Ibid*, 25.

III. TWO "UMBRELLA" DECISIONS OF THE CONSTITUTIONAL COURT OF SERBIA

During the validity of the 2006 Constitution of Serbia, a state of emergency was declared once, in March 2020, due to the immediate and, at that point, completely uncontrollable danger of the spread of the infectious disease COVID-19. Since the Speaker of the National Assembly assessed that the Assembly was unable to meet at that moment, she informed the President of the Republic and the Prime Minister to that effect.

The state of emergency was declared by virtue of the Decision which was jointly adopted by the President of the Republic, the Prime Minister and the Speaker of the National Assembly on March 15, 2020.[8] The state of emergency was terminated by the Decision of the National Assembly on May 6, 2020.[9] A part of the general public raised the question of the justification and constitutionality of the declaration of the state of emergency, and several initiatives for assessing the constitutionality of the Decision were submitted to the Constitutional Court (hereinafter: CC). The CC rejected all those initiatives by its Ruling of May 21, 2020.[10]

That Ruling contains a comprehensive analysis and many observations related to the topic of the state of emergency in general and regarding the declaration of a state of emergency in this particular case. Thus, the CC established four constitutive elements of the state of emergency according to the 2006 Constitution of Serbia. Those are:

1. a constitutional requirement - 'public emergency that threatens the life of the state or citizens';
2. a protected object - 'the state or citizens';
3. means or mechanisms of protection - 'measures derogating from the constitutionally guaranteed human and minority rights';

8. RS Official Gazette, No. 29/20.
9. RS Official Gazette, No. 65/20.
10. Ruling IUo-42/2020.

4. goal – effectiveness in overcoming a public emergency and the urgency of returning to a regular constitutional state of affairs. Two more important characteristics of the state of emergency arise from these elements:

   a) its temporary character (duration of no more than 90 days, with the possibility of extension for a maximum of 90 days);

   b) constitutional elements of the procedure for declaring a state of emergency (state authority, i.e. state authorities that declare a state of emergency and the decision to declare a state of emergency).

The CC also answered why it considered the declaration of a state of emergency to be constitutionally justified. Bearing in mind the legal standard "public emergency that threatens the life of the state or citizens" and the "margin of appreciation" of the competent authorities, the CC made an assessment that the outbreak of the infectious disease COVID-19 and the danger of its uncontrolled spread on the territory of the Republic of Serbia could be considered an emergency that significantly threatens the health of the wider population, thus calling into question the normal course of life in the country, including the functioning of its institutions, public services and economy.

The CC also answered the question of why it was not possible in this particular case to consider the declaration of an emergency situation an appropriate and proportionate state response to the threat of the spread of the infectious disease COVID-19. The measures of derogation from human rights in a state of emergency, "provided that they are justified and proportionate, as well as other measures that can be adopted in a state of emergency, which can also expand the rights regulated by the law or reduce the obligations provided for by the law, give the state far greater opportunities to timely and effectively react with a view to eliminating a public emergency threatening citizens' lives". In the opinion of the CC, the legal "capacity" of an emergency situation does not guarantee such effectiveness of the response of state bodies and services (insufficient efficiency of services, problems in coordination, impossibility of fundamental healthcare reorganization, etc.)."

The Ruling also addresses the legal protection mechanisms. The CC has pointed out that the disruption of competences, most often in favour of the executive power, as well as derogations from human rights are not, in themselves, evidence that the separation of powers has been violated or that the control mechanisms of the rule of law have ceased to operate.

The essential feature of the state of emergency is its goal. That goal is legal and legitimate if, by derogating from the human rights guaranteed by the constitution, it aims to effectively establish a regular state.

The CC has also dealt with the nature of the decision to declare a state of emergency.

> "Regarding the nature of the decision on the declaration of a state of emergency, the CC first points out that the decision on the declaration of a state of emergency is of a specific nature, bearing in mind that it represents an act by which the state is taken from a regular to an extraordinary constitutional state (…) It establishes in the state one of the two irregular states provided for by the Constitution - a state of emergency, and its legal basis is, in fact, "necessity, understood as the supreme need to preserve the constitution, and, therefore, also the source allowing acceptance of regulations derogating from the formal constitutional text, but which should preserve the essence of the constitution' (Giuseppe De Vergottini, Comparative Constitutional Law, Belgrade, 2015, 403). Bearing in mind the above, the CC holds that the decision to declare a state of emergency is an act of a general and constitutive nature establishing a new legal situation. It also has a distinctive general effect, because only with its entry into force, i.e. the introduction of a state of emergency, a legal condition is created for prescribing measures to derogate from human and minority rights, as well as for taking all other measures of the competent authorities and services in order to eliminate the causes of the state of emergency."

Finally, the CC has taken the unambiguous position that, due to the absence of any more specific constitutional criteria for assessing whether the National Assembly is able to meet or not, the issue is factual, not legal.

> "The issue of the (in)ability of the National Assembly to meet is, according to the opinion of the CC, a factual rather than a legal issue, bearing in mind that the Constitution and other legal acts have not determined the situations when the National Assembly is unable to meet, especially taking into account the fact that the CC cannot assess the organizational capacity of the National Assembly to promptly meet in the conditions of danger to people's lives and health. Therefore, the CC has no constitutional or other

legal 'standard' on the basis of which it could call into question the notification of the Speaker of the National Assembly that the Parliament was unable to meet."

The second "umbrella" decision, relying on the principles established by the first decision, had as its subject two decrees and one order (the Decree on Measures During a State of Emergency and the Decree on a Misdemeanour for Violating the Order of the Minister of Internal Affairs on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia (in the period of its validity) as well as the Order on the Restriction and Prohibition of the Movement of Persons). It concerned the assessment of the constitutionality and legality of certain measures of derogation from the human rights common to the Constitution in a state of emergency. In its Decision of September 17, 2020,[11] the CC examined several potential violations of the Constitution. The first question related to the violation of the *ne bis in idem* principle referred to in Article 34, paragraph 4 of the Constitution. The contested provisions of these regulations allowed the conduct of misdemeanour and criminal proceedings for the same offense, contrary to the explicit prohibition set forth in Article 8 of the Law on Misdemeanours ("prohibition of retrial in the same matter"), as well as double punishment, i.e. double final decision against the same person in relation to the same punishable act, i.e. punishment for the same act in one criminal proceeding, after the final judgment was already passed in another previously completed criminal proceeding, thus contravening Article 34, Paragraph 4 of the Constitution. Such arrangements violated the constitutional guarantee of the *ne bis in idem* principle, but they also contravened Article 202, Paragraph 4 of the Constitution, which regulates the derogation from the human rights guaranteed by the Constitution and determines human rights whose derogation is not allowed even in a state of emergency. Among those rights is the principle of legal certainty in criminal law (Article 34 of the Constitution), which enjoys absolute protection. Identical prohibitions are laid down in Article 15 of the ECHR and in Article 4 of Protocol 7 to the ECHR. In view of that, the CC determined that the challenged provisions in the decrees were not, in the period of their validity, in accordance with the Constitution and also with ratified international treaties.

11. Decision IUo - 45/2020.

The second question related to the constitutionality of temporary measures restricting and prohibiting the movement of persons in public places and measures of mandatory stay of certain persons or groups of persons who were infected or suspected of being infected with the infectious disease COVID-19, at the address of their residence, i.e. residence, with the obligation to report to the competent health institution, until the suspicion was eliminated, that is, the results of testing for the presence of the SARS-CoV-2 virus were obtained (Article 2 of the Decree on Measures during a State of Emergency). In connection with these measures, the Order on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia of March 18, 2020, issued by the Minister of Internal Affairs, with the approval of the Minister of Health, which ceased to be valid on April 9, 2020, was contested. The CC found that the measures provided for in the contested Article 2 of the Decree were measures whose implementation was necessary in order to protect the constitutionally guaranteed right to life and the health of the population in the Republic of Serbia, in a situation where there was a threat of an uncontrolled spread of the epidemic and the occurrence of harmful consequences of unfathomable proportions for life and health of the population and the health system of the Republic of Serbia. Those measures were time-bound to the duration of the state of emergency and were reviewed several times in the course of its duration, with a view to adjusting all the measures to the extent in which their application was necessary against the backdrop of changes in the epidemiological situation. As for the Order of the Minister of Internal Affairs, the CC took the view that it is an executive act that implemented and specified the Government Decree from which the order directly originated.

The third question was whether certain bans on the movement of certain categories of persons (for example, persons over 65 years of age) were in accordance with the Constitution. The CC took the position that the prescribed measures prohibiting the movement of certain categories of persons did not constitute deprivation of liberty either in terms of purpose or content. The purpose of those measures was not to deprive certain categories of persons of their freedom for a certain period of time, but to ensure that these categories, especially the vulnerable ones, such as older persons, are additionally and effectively protected from the possibility of contracting a dangerous infectious disease. The content of those measures included the creation of conditions for more effective protection against infectious diseases for those citizens who, due to their age and chronic diseases common in people of that age, were more exposed to the risk of infection. As a result,

the initiator's allegations that the right to equal protection and the right to a legal remedy (Article 36 of the Constitution) against the "decision on deprivation of liberty" were violated were also rejected. The same rationale was given for the contested provisions prescribing measures to temporarily restrict the movement of asylum seekers and irregular migrants placed in asylum centres and reception centres in the Republic of Serbia for the duration of the state of emergency.

The fourth constitutional question related to the possible violation of the right to freedom of religion (Article 43 of the Constitution) due to the prohibition of movement for all persons during the Easter holidays and the impossibility of attending Easter religious services and performing the act of communion. The CC has found that this is not a measure that derogates from the freedom of religion, but a measure that limits the freedom of movement during the state of emergency, which did not violate the right to freedom of religion for Orthodox believers. For the justified reasons of protecting citizens from dangerous infectious diseases, only some forms of religious expression were prohibited in specific circumstances, which, due to their content and the large number of people who would be gathered in a closed space, would pose a risk of infection.

The fifth question concerned the possible violation of the rights of animals, i.e. pets, because during the curfew, owners of pets could not take them out for a walk. The CC pointed out that the amendments to the disputed Order stipulated a time period for taking pets for a walk. At the same time, the CC has pointed out that it is undisputed that the impossibility of taking pets for a walk during a certain period of time (for example, dogs) was inevitably associated with a certain degree of discomfort experienced by the pets regarding their established physiological needs, but that this level of discomfort did not amount to torture and abuse of pets, nor could it be considered endangering the well-being and health of animals.

Finally, one of the initiators believed that the ban on movement during the state of emergency made it impossible for him to practice law. The CC answered that the disputed provisions of the Order stipulated that the measures prohibiting movement did not apply to persons issued with a movement permit by the Ministry of Internal Affairs, which enabled a large number of entrepreneurs to continue their activities after the issuance of these permits.

IV. CONCLUDING REMARKS

In brief, it is possible to draw certain conclusions about the state of emergency introduced due to the infectious disease COVID-19 in the Republic of Serbia.

First, the state of emergency was declared by the body or bodies duly authorized by the Constitution; the so-called alternative mechanism provided for by the Constitution was applied in accordance with the Constitution.

Second, there was a constitutional-legal basis for declaring a state of emergency in the specific case. Third, the legal mechanisms undertaken in the state of emergency have been and still are the subject of assessment by the CC. In this respect, the CC assessed that there were certain irregularities, but that they did not in any way call into question the rule of law. Fourth, the state of emergency lasted as long as it was necessary for the state to adapt to subsequent challenges in the fight against COVID-19 and to find appropriate "defensive" means and measures that would not require a new declaration of a state of emergency. Therefore, the constitutionally legitimate goal of the state of emergency was achieved. In any event, the state of emergency caused by an invisible enemy showed that the Republic of Serbia had material and legal mechanisms for defence against threats to the state and its citizens, but that in some instances daily actions of the state authorities were not fully aligned with the rule of law. This only confirms that the state of emergency can never be fully brought under the law, but also that it is a completely legitimate effort of a modern legal state to ensure the maximum possible accomplishment of that goal.

La Cour de justice de l'Union européenne face à la crise sanitaire[1]

Sally Janssen, Chef du service Recherche et documentation de la Cour de justice de l'Union européenne

Introduction

Dès le début de la crise sanitaire, la Cour de justice de l'Union européenne a été très réactive et a immédiatement pris toutes les mesures sanitaires nécessaires en vue de protéger la santé de l'ensemble des acteurs appelés à se rendre dans les locaux de l'institution.

Cela a commencé avec l'annulation début mars 2020 de toutes les visites programmées.

Ensuite, le vendredi 13 mars 2020, elle a invité tout le personnel à ne plus se rendre dans ses locaux à partir de cette date pour, comme on le pensait à ce moment-là, travailler à domicile durant une quinzaine de jours. En réalité, ces quinze jours se sont transformés en deux ans de régime de travail à domicile généralisé.

1. Cette intervention est entièrement basée sur l'article rédigé par M. le Greffier adjoint de la Cour, Gaudissart, M.A., « La Cour de justice de l'Union européenne face à la crise sanitaire », publié dans Coronavirus et droit de l'Union européenne, Dubout, Édouard, Picod, Fabrice, 1964-c2021, 2021, p. 573 à 593 [Cour de Justice de l'Union européenne / Curia (80.246.106.4) www.stradalex.com - 20/06/2023], et sur les divers communiqués de presse qui ont été publiés pendant la période concernée sur le site internet de l'institution.

Le fait que la Cour de justice de l'Union européenne avait déjà entamé des démarches pour équiper toute l'institution de laptops a particulièrement aidé pendant cette période difficile. Grâce à cette mesure, ainsi qu'à la numérisation accrue des flux de documents soumis aux juridictions, mais également échangés en interne – mesures qui avaient été prises bien avant le début de la crise, en vue de préparer l'institution à différents scenarii de crise possibles et en vue d'accroître sa capacité d'action en de telles situations – il a été possible de garantir le bon fonctionnement des juridictions de l'Union. Bien évidemment, l'engagement décisif des Membres des deux juridictions ainsi que de tout le personnel de l'institution a fait la différence. La solidarité et l'engagement de chacun ont été remarquables.

Ensuite, diverses mesures ont été mises en œuvre, dans le respect des règles de procédure applicables, afin de ne pas interrompre le traitement des affaires : il s'agissait de plusieurs aménagements concernant aussi bien la phase écrite que la phase orale de la procédure ainsi que la tenue des délibérations et la signification rapide aux parties des décisions prises.

II. L'impact de la crise sanitaire sur le déroulement de la phase écrite de la procédure

Si les effets de la crise sanitaire ont été plus tangibles sur l'organisation et le déroulement de la phase orale de la procédure, plusieurs défis sont toutefois apparus également quant à la phase écrite de la procédure. Les mesures de confinement prises par les autorités sanitaires nationales (pensons aux interdictions de déplacements et de réunions impliquant la présence physique de plusieurs personnes), ont eu un impact sur le respect des délais de procédure (A), sur le mode de transmission des actes de procédure (B) et sur la manière dont été prises les décisions relatives au traitement procédural des affaires (C).

A. Le respect des délais de procédure

Le premier défi concernait le respect des délais de procédure. Dès le début du mois de mars 2020, les greffes des deux juridictions ont été assaillis de questions de la part des représentants des parties aux procédures en cours, afin de savoir si la Cour et le Tribunal envisageaient de prolonger les délais prévus pour le dépôt de leurs mémoires ou observations écrites, vu qu'ils

ne pouvaient pas se rendre physiquement sur leur lieu de travail habituel pour consulter les dossiers et préparer leurs mémoires ou observations écrites.

Anticipant les nombreuses demandes prévisibles individuelles de report des délais pour force majeure, la Cour et le Tribunal ont décidé, le 19 mars 2020, de suspendre d'un mois tous les délais impartis dans les procédures en cours, en ce compris les délais prévus, par exemple, pour le dépôt des observations écrites dans les affaires préjudicielles ou pour le dépôt des mémoires en réponse, dans le cadre des pourvois, ainsi que les délais fixés par les greffes (dépôt des mémoires en réplique et en duplique, réponses aux questions posées aux parties, et cetera).

La pandémie de Covid-19 a ainsi été assimilée à un cas de force majeure, au sens de l'article 45, second alinéa, du Protocole sur le Statut de la Cour de justice de l'Union européenne. Seuls les délais de recours et de pourvoi ainsi que les délais afférents aux procédures présentant une urgence particulière sont restés inchangés.

Cette approche flexible qui a été adoptée par la Cour et le Tribunal au sujet des délais de procédure a été affichée sur le site Internet de l'institution dès le début de la crise jusqu'au retour aux délais de procédure « ordinaires », le 1er septembre 2021, vu l'évolution de la situation sanitaire qui l'a permis sans préjudice toutefois de la possibilité des parties d'invoquer de manière ponctuelle une situation de force majeure.

B. La transmission des actes de procédure

Quant à la transmission des actes de procédure, le recours à l'application e-Curia était déjà obligatoire pour l'ensemble des affaires portées devant le Tribunal. Toutefois, cela n'était pas (et n'est d'ailleurs toujours pas) le cas pour la Cour. Par conséquent, pour le dépôt et la signification de ces actes de procédure, les modes traditionnels de communication - les envois par voie postale ainsi que les envois effectués par télécopieur ou par courrier électronique - peuvent également être utilisés. Ces modes traditionnels de communication supposent un fonctionnement normal des services postaux et la présence effective de collaborateurs des greffes dans les locaux de l'institution. Or, ce sont ces deux prémisses qui ont fait défaut pendant la crise sanitaire. Parfois, dans plusieurs affaires caractérisées

par une urgence particulière, il aura fallu trouver l'adresse électronique des parties concernées - voire contacter ces parties par téléphone - afin d'être en mesure de leur signifier certains actes de procédure, et ce ne fut pas toujours chose aisée. Il est aussi arrivé que les membres des greffes se rendent ponctuellement dans les locaux de l'institution afin de scanner des documents ou traiter les courriers les plus urgents.

Pour faciliter au maximum la communication avec les parties et les juridictions des États membres en ces temps de crise, la Cour a assoupli les modalités d'ouverture d'un compte e-Curia et a incité les juridictions des États membres ainsi que les représentants des parties ne disposant pas encore d'un tel compte à en demander l'ouverture.

C. Les décisions des juridictions relatives au traitement procédural des affaires

La crise sanitaire a eu également un impact sur la manière dont été prises, à la Cour comme au Tribunal, les décisions relatives au traitement procédural des affaires et, notamment, les décisions relatives au choix de la formation de jugement, les décisions concernant la tenue des audiences, et la nécessité d'être éclairé par des conclusions de l'avocat général.

En raison de l'impossibilité de se réunir liée à la crise sanitaire, la Cour et le Tribunal ont donc décidé, à partir du 16 mars 2020, de recourir à la voie écrite pour les décisions qui ne suscitent pas de difficultés particulières et d'organiser, dans les autres cas, des audioconférences ou des vidéoconférences.

III. L'impact de la crise sanitaire sur le déroulement de la phase orale de la procédure

D. Annulation et report de toutes les audiences de plaidoiries fixées à courte échéance

Quant à la phase orale de la procédure, dans un premier temps, la Cour et le Tribunal se sont contentés de reporter les audiences impliquant des personnes qui paraissaient directement impactées par la crise sanitaire et d'inviter les représentants des parties qui avaient séjourné ou voyagé,

au cours des deux dernières semaines, dans des pays ou des zones géographiques bien délimitées à se faire remplacer lors des audiences auxquelles ils devaient participer.

Au fur et à mesure que le virus progressait, des mesures plus radicales devaient être prises. C'est la raison pour laquelle, le 13 mars 2020, la Cour et le Tribunal ont décidé d'annuler toutes les audiences programmées les deux semaines suivantes. Cette décision a été suivie de plusieurs décisions similaires, consécutives, toujours dans le but de réduire au maximum les déplacements physiques et les contacts interpersonnels et ainsi les risques de propagation du virus.

En revanche, la Cour et le Tribunal ont opté pour le maintien des audiences de prononcé d'arrêts et de lecture des conclusions. Pour limiter les déplacements et les rencontres, ces prononcés ont été regroupés sur une journée de la semaine et ont été effectués en présence d'un nombre très restreint de personnes. Ces mesures ont permis à la Cour et au Tribunal de régler un nombre très significatif d'affaires tout au long de la crise sanitaire, sans porter atteinte à l'efficacité des mesures adoptées pour lutter contre la pandémie et en respectant l'article 37 du statut, qui prévoit que les arrêts sont signés par le président et le greffier et lus en séance publique.

E. Conversion de plusieurs audiences en questions pour réponse écrite

Certaines affaires, comme les procédures d'urgence, posaient à la Cour une difficulté particulière dans la mesure où, dans de telles procédures, l'audience de plaidoiries est en principe obligatoire, afin de permettre à l'ensemble des intéressés visés à l'article 23 du Statut - dont la plupart ne participent pas à la phase écrite de la procédure - de se prononcer sur les questions posées par la juridiction de renvoi. Pour ce motif, et afin de ne pas retarder indûment le traitement de ces affaires, la Cour a donc décidé d'annuler l'audience de plaidoiries et de convertir les questions qu'elle avait l'intention de poser aux parties, lors de cette audience, en questions pour réponse écrite. Cependant, cette solution a évidemment eu des répercussions non négligeables sur la charge de travail des services de traduction de l'institution, les réponses écrites aux questions posées par la Cour devaient être traduites non seulement vers la langue de travail de la Cour, mais également vers la langue de procédure de l'affaire.

Dans plusieurs affaires, plus sensibles ou plus complexes, l'assentiment préalable des parties ou des intéressés visés à l'article 23 du Statut a par ailleurs été recueilli avant que la Cour ne prenne la décision de remplacer l'audience de plaidoiries par des questions pour réponse écrite.

F. La reprise progressive des audiences de plaidoiries

Avec la diminution du nombre de personnes contaminées par le virus dans l'Union européenne et la levée progressive des mesures de confinement prises par les autorités nationales, la Cour et le Tribunal ont décidé, à un certain moment, de reprendre, les audiences de plaidoiries dans les locaux de l'institution.

Le 25 mai 2020, la Cour a donc tenu sa première audience de plaidoiries « post-confinement » et, au Tribunal, c'est le 11 juin 2020 que la reprise des audiences s'est effectuée.

Toutefois, ces audiences « post-confinement » se déroulaient très différemment de celles organisées « avant-confinement ». Des mesures de protection sanitaire extrêmement strictes ont été prises, en conformité avec la réglementation adoptée par les autorités luxembourgeoises, afin d'assurer un déroulement optimal des audiences et, en particulier, la protection de la santé de tous les participants à ces dernières. Ces mesures concernaient tant l'accès aux bâtiments et les règles à respecter lors de tout déplacement à l'intérieur de ceux-ci que les modalités d'organisation de l'audience elle-même, qui ont été adaptées aux circonstances exceptionnelles du moment.

En ce qui concerne l'accès aux bâtiments, l'institution a mis en place une procédure particulière prévoyant, notamment, le respect des gestes barrières, une distance minimale de sécurité de deux mètres, le port obligatoire d'un masque de protection lorsqu'une telle distance ne pouvait pas être respectée et un contrôle de température effectué (puis, par la suite un Covid-check : un certificat de vaccination, un certificat de rétablissement ou un test négatif) à l'entrée des bâtiments.

En ce qui concerne les audiences proprement dites, toutes les salles d'audience de la Cour et du Tribunal ont été aménagées afin de garantir, ici également, le respect d'une distance minimale entre chaque personne présente dans la salle d'audience – les représentants des parties, mais également les membres de la formation de jugement, l'avocat général, le greffier d'audience, l'huissier audiencier et le public éventuel – et, dans l'hypothèse où le nombre de visiteurs serait trop important et ne permettrait pas de respecter les règles de distanciation, une retransmission de cette audience était assurée dans une autre salle.

Enfin, les traditionnelles rencontres des membres de la formation de jugement avec les représentants des parties, avant l'audience, ont été provisoirement abandonnées et les agents et avocats sont autorisés, à titre exceptionnel, à plaider sans la toge, depuis la place qui leur est attribuée au début de l'audience afin de limiter le nombre de déplacements en cours d'audience et d'éviter, notamment, qu'un même pupitre et un même microphone soient utilisés successivement par plusieurs personnes. En tout état de cause, un nettoyage approfondi de chaque salle d'audience est effectué aussitôt l'audience terminée.

Lorsque les représentants des parties se trouvaient dans l'impossibilité absolue de se rendre à Luxembourg, soit en raison des mesures prises par les autorités nationales, soit en raison de l'absence de toute liaison aérienne avec le Grand-Duché ou en raison de l'annulation de vols, en dernière minute, des mesures ont été prises par l'institution afin de permettre à ces parties de plaider à distance, depuis leur lieu d'origine, par exemple une plaidoirie par visioconférence a donc eu lieu, pour la première fois dans l'histoire de la Cour, le lundi 25 mai 2020, dans une affaire renvoyée devant la grande chambre. Une partie qui se trouvait dans l'impossibilité de se déplacer a ainsi été autorisée à plaider à distance, depuis Paris, alors que tous les autres participants à l'audience se trouvaient dans la salle.

Le Tribunal a d'ailleurs expressément prévu dans son nouveau règlement de procédure une base légale à cet égard. En effet, l'article 107 bis de ce nouveau règlement prévoit que lorsque des raisons sanitaires, des motifs de sécurité ou d'autres motifs sérieux empêchent le représentant d'une partie à participer physiquement à une audience de plaidoiries, ce représentant peut être autorisé à prendre part à cette audience par vidéoconférence.

Il convient de préciser que l'institution a remporté le Prix de la bonne administration décerné par la Médiatrice européenne, dans la catégorie Excellence en Innovation / Transformation, pour le projet « Audiences à distance ».

III. L'impact de la crise sur l'organisation des délibérations des juridictions de l'Union

L'organisation des délibérations des juridictions de l'Union a également été marquée par une approche évolutive.

Dans un premier temps, les juges rapporteurs ont été invités à s'atteler prioritairement à la rédaction de leurs rapports préalables et de leurs projets de motifs ; les avocats généraux à la rédaction de leurs conclusions et les présidents de chambre à l'organisation des délibérations, par voie écrite, dans les affaires susceptibles de se prêter à un tel mode délibératif. Ceci a permis aux deux juridictions de traiter et clôturer un nombre significatif d'affaires en dépit de l'impossibilité de se rencontrer physiquement pour en discuter.

Ensuite, au fur et à mesure que la crise se prolongeait, il est devenu évident, toutefois, que ces mesures ne suffisaient pas et qu'il fallait recourir à d'autres solutions pour les délibérations des juridictions, notamment concernant des affaires plus complexes, l'enjeu ou la portée politique, sociale ou économique appelant un débat d'idées oral.

Certains tours de table et certains délibérés ont repris en présentiel, dans les locaux de l'institution, à la fin du mois d'avril 2020, qui correspondait, dans la plupart des pays de l'Union et, notamment, au Grand-Duché de Luxembourg, à une phase de diminution progressive du nombre de cas de contamination. À la Cour, les premières affaires qui bénéficièrent de telles délibérations présentielles étaient les affaires soumises à la procédure préjudicielle d'urgence et, notamment, les affaires dans lesquelles l'audience de plaidoiries s'est tenue peu de temps avant le début du

confinement, mais d'autres affaires, moins urgentes, ont également donné lieu à des échanges directs entre les membres de la formation.

Dans certaines affaires, les délibérations ont revêtu un caractère mixte, certains membres de la formation de jugement étaient présents, physiquement, dans une salle de délibéré répondant aux exigences sanitaires les plus strictes, tandis que les autres membres de la même formation participaient à distance aux délibérations, en ayant recours tantôt à l'audioconférence, tantôt à la visioconférence.

Ainsi, le recours aux nouvelles technologies de l'information s'est révélé également être un précieux secours pour la gestion des délibérations des juridictions en ces temps de crise sanitaire.

IV. Conclusion

Le fonctionnement des juridictions de l'Union n'a donc heureusement pas été paralysé ! Au contraire, face au Covid, la Cour et le Tribunal ont su agir rapidement, et ils ont réussi à limiter au maximum le nombre de personnes contaminées par le virus tout en préservant une capacité d'action significative.

Les statistiques témoignent d'une activité juridictionnelle soutenue, tant en 2020 qu'en 2021 et en 2022. Exempté la période allant du 16 mars au 24 mai 2020, les portes des salles d'audience sont restées ouvertes aux représentants des parties et au public, tout au long des années frappées par la pandémie, et ce dans l'intérêt de la bonne administration de la justice et conformément au principe de publicité des audiences. La continuité du service public de la justice a été rendue possible par la préexistence de structures et de plans de crise, par la mise en place de protocoles sanitaires rigoureux, par une stratégie précoce destinée à équiper le personnel de l'institution en matériel informatique permettant le travail à distance et par une adaptation des modalités de fonctionnement des juridictions dans le respect des règles de procédure.

Ainsi, en 2021, 1 720 affaires ont été introduites devant les deux juridictions de l'Union, ce qui représente une augmentation de 8,6 % par rapport au nombre relativement bas d'affaires introduites en 2020 en raison du début de la pandémie (1 584). Le nombre d'affaires introduites en 2021 n'a certes pas atteint le chiffre record de 2019 (1 905), mais il a dépassé les chiffres de 2018 (1 683).

Quant aux affaires clôturées, dont le nombre s'élève à 1 723, la tendance est très positive puisque leur nombre était nettement supérieur en 2021 à celui de l'année 2020 (1 540) et s'est situé presque au même niveau qu'avant la pandémie (1 739 affaires clôturées en 2019 et 1 769 en 2018).

Pour le futur, la Cour de justice de l'Union européenne a l'intention de continuer à développer son système de technologies de l'information, ses capacités d'innovation et l'accélération d'initiatives de digitalisation ambitieuses lancées avant la crise et incluant notamment la mise en place d'un SIGA (système intégré de gestion des affaires) offrant, à tous les acteurs concernés, une vue d'ensemble sur l'état de la procédure.

Rule of law must not stop during the COVID-19 pandemic: Croatian Constitutional Court's case-law

Mirjana STRESEC, Senior Legal Adviser, Constitutional Court of Croatia

On the 11 March 2020 the World Health Organisation declared the COVID-19 pandemic and on the same date the Croatian Government declared the COVID-19 epidemic in Croatia.

Overall, the responses of countries to the pandemic were different, as were the consequences of these responses. In some countries, whether or not a state of emergency has been declared, division of powers shifted from regular to extraordinary. The far-reaching public health measures[1] and socio-economic measures[2] were enacted and they encroached upon human rights and freedoms.

1. The public health measures, enacted in order to prevent spreading of the disease and protect lives of citizens, were: individual mobility restrictions on citizens (e.g. stay-at-home); restriction on international and internal travel; limitation on public and private gatherings and events (e.g. no weddings or limited ones, no religious ceremonies or limited ones, no cultural or sport events); closure of premises and facilities (e.g. schools, shops, services, parks, churches, sport facilities); physical or social distancing; use of face masks and personal protective equipment; isolation of infected individuals and quarantine of individuals suspected of infection; testing, treatment and vaccination; contact tracing procedures; measures in long-term care facilities or homes for the elderly, etc.
2. These measures aimed at sustaining the economy and were such as fiscal measures in the form of tax relief and cash support to firms, and employment protection measures.

Consequently, under the specific pandemic circumstances, it was a challenge for countries to ensure the achieved level of democracy, the rule of law and respect for human rights[3] . The question is how good or bad the states have faced this challenge. Instead of an answer, it is better to quote few sentences from the Report of the Secretary General of the Council of Europe for year 2021:

> "Since 2020, the Covid-19 pandemic has presented our continent's governments and societies with a challenge unlike any other since the Council of Europe was founded. Tragically, at the time of writing, millions of people have lost their lives. Many more have lost their jobs and the various lockdown and physical restrictions have required enormous changes to the way that we live, work and communicate. (...) Overall, however, what can be seen is a clear and worrying degree of democratic backsliding. (...) This is deeply troubling. Democracy is essential if people are to live in freedom, dignity and security. More than that, it is also required as a backstop for maintaining human rights and the rule of law. The three pillars of our work are in fact inseparable. If one weakens, so do the others."[4]

The common standards for upholding democracy, the rule of law and respect for human rights are well known and elaborated in many international, global and regional, documents. One of the many examples is the Rule of Law Checklist (CDL-AD(2016)007), adopted by the Venice Commission[5] at its 106th plenary session held in Venice on 11-12 March 2016, i.e. point 51 that relates to exceptions in emergency situations reads:

> 51. The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary

3. These are three interdependent core values of the Council of Europe, the European Union (Article 2 of the Treaty on the European Union) and the Republic of Croatia (Article 3 of the Constitution) as a member state of both, too.
4. State of Democracy, Human Rights and the Rule of Law, A Democratic Renewal of Europe, Report by the Secretary General of the Council of Europe for 2021, page 5, https://rm.coe.int/annual-report-sg-2021/1680a264a2
5. See other relevant documents of the Council of Europe (particularly of the Venice Commission) together with the instruments on the rule of law adopted in the EU such as COM/2014/0158 final, Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, 2014.

> division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.

Regarding the protection of the rule of law in Croatia, as well as democracy and respect for human rights, briefly the constitutional and legal framework under which the COVID-19 epidemic/pandemic have been dealt with by the Croatian authorities will be presented. This will be followed by an overview of cases in which some of the main constitutional issues have been raised and where the Constitutional Court (hereinafter: Court) stated its views on them.

II. The law

Constitution

The Croatian Constitution[6] does not explicitly use either the term "normal" or the term "state of emergency". These terms are deduced by use of *argumentum a contrario* principle.

Human rights and freedoms may be limited in normal (ordinary) situations relying on the need to protect public health in accordance with Article 16 of the Constitution, while in emergency situations in accordance with Article 17 of the Constitution.

Under Article 16 of the Constitution, constitutional freedoms and rights may only be limited by (ordinary) legislation in order to protect the freedoms and rights of others, as well as the legal order, public morals and health. Every limitation has to be proportionate to the nature of the need for limitation in each individual case.

On the other hand, Article 17 of the Constitution provides for limitations of constitutionally guaranteed individual freedoms and rights in cases of

6. Official Gazette Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14

war, immediate threat to the independence and unity of the State or in the event of severe natural disasters.[7] Such limitations are decided upon by a two-thirds majority of all Members of Parliament or, if the Parliament is unable to convene, by the President of the Republic at the proposal of the Government and with the countersignature of the Prime Minister. In such cases, special standards of prohibition of discrimination and appropriateness[8] apply to all emergency limitations of rights and freedoms. At the same time, even in the case of an immediate threat to the existence of the State the Constitution prohibits limitation of the right to life, prohibition of torture, cruel or degrading treatment or punishment, application of provisions concerning legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion.[9]

Moreover, under Article 101 of the Constitution, the President of the Republic may issue emergency decrees with the force of law, in cases of war, immediate threat to the independence, unity and existence of the State or when the state bodies cannot regularly perform their constitutional duties. Countersignature of the Prime Minister to the emergency decrees is required, except for the war situation, and the Parliament has to approve the decrees as soon as it is able to convene.

The Constitution does not provide either the Government or the President of the Republic with any emergency powers exceeding their regular mandates till the Parliament is able to convene.

Legislation - Croatian authorities approach to the COVID-19 epidemic

The Republic of Croatia has not declared a state of emergency for the entire duration of the COVID-19 epidemic/pandemic.[10] The Croatian Parliament decided not to rely on the constitutional emergency framework. Therefore, the epidemic/pandemic issue was addressed by relying on Article 16 of the

7. Article 17.1 of the Constitution envisages three forms of state of emergency, while the fourth form is foreseen in Article 101.2 of the Constitution and it refers to the inability of state authorities to regularly perform their constitutional duties.
8. Appropriateness is less strict than proportionality in Article 16 of the Constitution.
9. Article 17.3 of the Constitution.
10. This is not the only extraordinary circumstance whose existence has not been officially declared on the territory of the Republic of Croatia. Namely, the Republic of Croatia has not declared a state of war during the whole time of Serbian aggression on its territory.

Constitution requiring that every limitation on freedoms and rights must satisfy the principle of proportionality, and the two existing and interrelated laws, i.e. one on civil protection system and the other on prevention of population from infectious diseases. Both of these laws were amended in order to provide a comprehensive legal basis for the enactment of anti-epidemic/pandemic measures (hereinafter: measures). The amendments to the laws were passed through the Parliament in accordance with the prescribed legislative procedure, after the COVID-19 epidemic has been declared by the Government.

The Civil Protection System Act (hereinafter: CPSA)[11] regulates the entire system and operation of civil protection. According to the CPSA the Civil Protection Headquarters are established at the national, regional and local level. The Headquarters are expert, operational and coordinating bodies for the implementation of civil protection measures and activities in big accidents and catastrophes.[12]

The Civil Protection Headquarters of the Republic of Croatia (hereinafter: the National Headquarters) is established and appointed by the Government of the Republic of Croatia on the proposal of the Minister of Internal Affairs. The National Headquarters consists of heads from the central state administration bodies, the civil protection system's operational forces and other legal persons of particular importance for the national civil protection system (e.g. firefighters and mountain rescue service). The Head of the National Headquarters is the Minister of Internal Affairs, but when a disaster is declared, the leadership is taken over by the Prime Minister or, under the authority of the Prime Minister, by a Member of the Government or the Head of the National Headquarters.[13]

On 18 March 2020 the Act on the Amendment to the CPSA[14] was passed through the Parliament supplementing the CPSA with new Article 22.a which gave the authority to the National Headquarters to render decisions and instructions if special circumstances endangering the life and health of citizens appear. The Article did not specify what these decisions and instructions exactly are, but only that they are going to be implemented by

11. Official Gazette nos. 82/2015, 118/2018, 31/2020, 20/2021 and 114/2022.
12. Article 21.1-3 of the CPSA.
13. Article 22 of the CPSA.
14. Act on the Amendment to the CPSA (Official Gazette no. 31/2020).

local and regional civil protection headquarters.[15] The Act on the Amendment to the CPSA entered into force on 19 March 2020.

The Act on the Protection of the Population from Infectious Diseases (hereinafter: APPID)[16] envisages infectious diseases and enumerates measures to protect the population from infectious diseases.[17] According to the APPID the Government of the Republic of Croatia, at the proposal of the Minister of Health, by a special decision declares an infectious disease epidemic and determines infected area. The decision declaring an infectious disease epidemic is published in the Official Gazette.[18]

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15. Newly introduced Article 22.a of the CPSA (Official Gazette nos. 82/2015, 118/2018 and 31/2020) reads:
Article 22.a
(1) In the case of the occurrence of special circumstances implying an event or a certain situation which could not have been foreseen and could not be influenced, and which endangers the life and health of citizens, property of greater value, significantly imparts the environment, economic activity or causes significant economic damage, the Civil Protection Headquarters of the Republic of Croatia shall render decisions and instructions that are implemented by the Civil Protection Headquarters of local and regional self-government units.
(2) The decisions and instructions referred to in paragraph 1 of this Article shall be taken in order to protect the life and health of citizens, to preserve property, economic activities and the environment, and to harmonise the actions of legal persons and citizens.
16. Official Gazette nos. 79/2007, 113/2008, 43/2009, 130/2017, 114/2018, 47/2020, 134/2020 and 143/2021.
17. For example Article 47.2 of the APPID provides for safety measures such as: implementation of mandatory anti-epidemic disinfection, disinsection and pest control; establishment of quarantine; the ban on travel to a country where there is an epidemic of an infectious disease; the ban on the movement of persons or the restriction of movement in infected or directly endangered areas; the trade restriction or ban of certain types of goods and products; the prohibition of the use of facilities, equipment and means of transport.
18. Article 2.5 of the APPID.

On 17 April 2020, the Act on Amendments to the APPID (hereinafter, "AAAPPID/2020") was passed through the Parliament and entered into force on 18 April 2020.[19] The amendments, *inter alia*, authorised the National Headquarters to enact safety measures in cooperation with the Ministry of Health and the Croatian Institute for Public Health under the Government supervision in cases when the Government declares an infectious disease epidemic or danger of it in Croatia and also the World Health Organisation declares pandemic or epidemic or danger of them.[20] At the same time, self-isolation, i.e. isolation of persons in their own homes or other appropriate spaces, as a new security measure was added to the list of already prescribed measures.[21]

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19. Act on Amendments to the APPID (Official Gazette no: 47/2020).
20. Article 47.4 of the of the consolidated text of the APPID (or Article 10.3 of the AAAPPID/2020) reads:

Article 47

(4) Where, in accordance with Article 2 paragraphs 4 and 5 of this Act, an infectious disease epidemic or a danger of an infectious disease epidemics is declared, and in relation to which the World Health Organisation has also declared a pandemic, i.e. epidemic or threat thereof, the Civil Protection Headquarters of the Republic of Croatia may also by its decision order security measures referred to in paragraphs 1 to 3 of this Article, in cooperation with the Ministry of Health and the Croatian Institute of Public Health. Decisions of the Headquarters are rendered under direct supervision of the Government of the Republic of Croatia.

21. The later amendments to the APPID (published in Official Gazette nos. 134/2020 and 143/2021) specified more safety measures such as: obligation to correctly wear a face mask or medical mask; prohibition or restriction of holding public events and/or gatherings; prohibition or restriction of holding private gatherings; and the obligation to present proof of testing, vaccination or recovery from an infectious disease before entering offices of bodies governed by public law.

III. The case-law

Many cases have been dealt by the Constitutional Court in relation to the COVID-19 epidemic/pandemic.

The Court has been called upon to review the constitutionality of the Civil Protection System Act, the Act on Protection of the Population from Infectious Disease and some other laws that were related to the COVID-19 epidemic/pandemic, as well as numerous anti-epidemic/pandemic measures enacted by the executive power.

Almost all of the measures were found to be suitable and necessary for protection of life and health of citizens from infections with coronavirus[22] e.g. the obligation of wearing face protection masks in public transport and public facilities,[23] the obligation of COVID-19 testing or having COVID-19 certificates in healthcare activities,[24] the national system for issuing EU digital COVID-19 certificates,[25] restrictions on public gatherings[26] and the pandemic organisation of primary health care[27]). In other words, the Court held that the protection of life and health of citizens overweighs the restriction of human rights and freedoms. One of the reasons was that due to the complexity of the crisis and the lack of elements to predict future developments of the COVID-19 epidemic/pandemic, the national margin of appreciation was tolerated by the Court. The epidemic/pandemic was going on and the scientific knowledge was not sufficient (particularly at the beginning) to assess whether the measures that have been enacted were suitable and what kind of measures should be enacted in the future.

22. The example of an exception is Decision no. U-II-2379/2020 of 14 September 2020. The Court held that "in the period from 27 April 2020 to 26 May 2020, point II. Decision on working hours and working methods in trade activities during the declared epidemic of the COVID-19 disease (Official Gazette no. 51/20) in the part of paragraph 1 that reads "Sundays" and paragraph 3 that reads "Sundays" was not in accordance with Article 16 of the Constitution". In other words, the Court held that the pandemic measure related to the temporary ban or limitation of working hours for stores on Sundays was not proportional. In this case, the Constitutional Court itself has proprio motu initiated the proceedings in accordance with Article 38.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/1999, 29/2002 and 49/2002 - consolidated text).
23. Ruling no. U-II-3170/2020 et al. of 14 September 2020.
24. Ruling no. U-II-5571/2021 et al. of 21 December 2021.
25. Ruling no. U-II-6004/2021 et al. of 21 December 2021.
26. Ruling no. U-II-6267/2021 et al. of 12 April 2022.
27. Ruling no. U-II-6278/2021 of 12 April 2022.

The legal issues risen before the Court, *inter alia*, were: the right to vote of citizens infected or suspected to be infected with coronavirus; modifications of functioning of the Parliament during the health crisis; whether the action of the executive power conforms with the Constitution and other laws; whether the powers of the public authorities are defined by law; the legal nature of the safety measures and their constitutional review, etc.

Firstly as regards to the right to vote the Court held, in its **Communication and Warning no. U-VII-2980/2020 of 3 July 2020**, that the voters must not be prevented from voting for health reasons, infectious diseases included.

Namely, on 5 July 2020 the parliamentary elections were held in Croatia. On 1 July 2020 a candidate in the elections requested the Court to review the constitutionality and legality of the Instructions and Recommendations of the State Election Commission stating that voters who are suspected to be infected with COVID-19 must not come to the polling station or contact the town/municipal election commission or election committee to be allowed to vote in their homes, as is the case for those voters who are infected with COVID-19.

The Court reacted immediately and rendered Communication and Warning on 3 July 2020 stating that from the perspective of Article 16 of the Constitution, it is not constitutionally and legally unacceptable to exclude the possibility of citizens who have been diagnosed with COVID-19 or any other infectious disease, and are thus in isolation, and also citizens who are in self-isolation due to the suspicion that they have an infectious disease, to come in person to a polling station.

However, citizens who have been diagnosed with COVID-19 or any other infectious disease – as well as all others who, for other prescribed reasons, do not come to polling stations but may vote outside polling stations according to the rules on voting outside polling stations provided by the Act on the Election of Representatives to the Croatian Parliament[28] – enjoy the right to request the granting of the equal possibility to vote, but, by the nature of things, according to the rules on voting outside polling stations which are adjusted to the nature of the potential risk of infection and aligned

28. Article 83.2-83.6 of the Act on the Election of Representatives to the Croatian Parliament (Official Gazette Nos. 116/1999, 109/2000, 53/2003, 167/2003, 44/2006, 19/2007, 20/2009, 145/2010, 24/2011, 93/2011, 19/2015, 104/2015 and 98/2019).

with requirements regarding the health safety and protection of other participants in the election process whose health protection is guaranteed by the Constitution.[29]

Therefore the Court held that the State Election Commission in its instructions and/or recommendations for conducting the parliamentary elections must secure, in accordance with its authorities, the legal possibility to exercise the voting right guaranteed by the Constitution and the law for all citizens who are entitled to it, including those citizens who request it and who have been diagnosed with COVID-19 or any other infectious disease and are thus in isolation without delay, by adjusting the rules on voting outside polling stations in cooperation with the Croatian Institute of Public Health and by taking into account the protection of the health of all participants in the election process.

The second case relates to the work of representatives in the Croatian Parliament that has functioned normally during the COVID-19 epidemic/pandemic. In **Decision no. U-I-4208/2020 of 20 October 2020**, the Court held that in the era of teleworking there is no justification for restricting representatives from attending sessions of Parliament and debating during the pandemic when there are other technical possibilities which does not limit the rights and duties of Members of the Parliament.

The Court was requested by 35 representatives from the opposition to review the constitutionality of newly introduced Article 293.a of the Standing Orders of the Croatian Parliament (hereinafter: Standing Orders).[30] Namely, the Standing Orders were amended on 30 April 2020 in a way that this Article was added to regulate the special functioning of Parliament in pandemic circumstances by introducing the possibility of shortening time for debate and for breaks, limiting the number of representatives (or Members of Parliament) present at the session and suspending the right to reply. The Article also provided that voting may be organized in the Parliament chamber for sessions, but also electronically and/or by raising a hand in one or more rooms outside the chamber for Parliament sessions.

29. Articles 58 and 69 of the Constitution.
30. Official Gazette nos. 81/2013, 113/2016, 69/2017, 29/2018 and 53/2020.

The Court recalled that under the Constitution power in the Republic of Croatia derives from the people and belongs to the people[31] who exercise it through the election of representatives and through direct decision-making,[32] and that the democratic multi-party system is one of the highest values of the constitutional order, as is the rule of law.[33] Furthermore, the Constitution defines the Parliament as a representative body of citizens.[34] According to the Standing Orders representatives perform their function primarily by participating in Parliament sessions, debating and voting on certain issues on the agenda, submitting motions and posing questions,[35] etc.

The Court held that these newly introduced measures have a legitimate aim which is to protect life and health of representatives in the pandemic, but they are preventing representatives from attending sessions of Parliament and participating in a debate. Also, the number of representatives who can attend a session of Parliament was below the simple majority (quorum) of representatives needed to be present for decision-making and this quorum cannot be amended by the Standing Orders because the Constitution stipulates that the Parliament makes decisions by a majority vote.[36]

The Court noted that there are possibilities for a different way of organizing the work of the Parliament which does not limit the rights and duties of representatives. Furthermore, it was not evident whether the less restrictive measures for exercising the rights and duties of representatives to debate and attend sessions were considered by the legislator, and why the adopted measures would be justified in a situation where there are technical possibilities for all representatives to vote irrespective of whether they are in the Parliament chamber or not.

Therefore, the Constitutional Court concluded that any restriction to the exercise of representatives' rights and duties which belong to them according to the Constitution must be objectively and reasonably justified. As this was not the case here, the Court repealed Article 293.a of the Standing Orders.

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31. Article 1.2 of the Constitution.
32. Article 1.3 of the Constitution.
33. Article 3 of the Constitution.
34. Article 70 of the Constitution.
35. Article 14.1 of the Standing Orders.
36. Article 82.1 of the Constitution.

In the next case the Constitutional Court was asked to review the constitutionality of Article 22.a of the Civil Protection System Act (hereinafter: CPSA) and several provisions of the Act on Amendments to the Act on the Protection of the Population from Infectious Diseases[37] as regards to: the necessity of activating constitutional emergency framework; the National Headquarters authority to enact measures/decisions[38] restricting certain human rights and freedoms; the legitimate aim and proportionality of measures, and its judicial control; the legal nature of measures and the competence of the Constitutional Court to review them; the proportionality of imposition of the measure of self-isolation on healthy persons, and whether persons on whom this measure has been imposed are deprived of the right to work and earnings, and sufficient legal protection. In its **Ruling no: U-I-1372/2020 *et al.* of 14 September 2020**, regarding the above-mentioned issues the Court held the following.

Firstly, regarding the **necessity of activating constitutional emergency framework provided by Article 17 of the Constitution**, the Constitutional Court has set the boundary between its tasks and the Parliament's competence.

The Court recalled that the Parliament may, in exercising its legislative power when restricting certain human rights and freedoms, act on the basis of two constitutional grounds: either pursuant to Article 16 of the Constitution by (ordinary) laws or their amendments enacted in the legislative procedure by majority vote of all Members of Parliament prescribed by the Constitution for a particular law; or pursuant to Article 17 of the Constitution by a decision enacted by a two-thirds majority of all Members of Parliament (only) in cases of war, immediate threat to the independence and unity of the State or in the event of severe natural disasters.[39] Even in these cases the right to life, the prohibition of torture, cruel or degrading treatment or punishment, the application of legal definitions of offences and penalties, and freedom of thought, conscience and religion cannot be restricted.[40]

37. Articles 10, 13, 14 and 18 of the Act on Amendments to the Act on the Protection of the Population from Infectious Diseases (Official Gazette no. 47/2020; hereinafter: AAAPPID/2020).
38. The safety measures are enacted in the form of decisions. See footnote 21.
39. Article 17.1 of the Constitution.
40. Article 17.3 of the Constitution.

The Court held that the decision on whether to restrict certain rights and/or freedoms on the basis of Article 17 of the Constitution is in the exclusive competence of the Parliament.

The constitutionality review of the Parliament's decisions restricting certain guaranteed rights and/or freedoms on the basis of Article 17.1 of the Constitution is within the jurisdiction of the Constitutional Court. However, the Court does not have jurisdiction to review whether or not the Parliament should in certain special circumstances, such as in the case of declared COVID-19 epidemic/pandemic, regardless of whether or not these circumstance are explicitly referred to in Article 17 of the Constitution, apply or "activate" Article 17 of the Constitution.

Based on these general legal positions, the Court held that the decision on whether certain measures to combat the COVID-19 epidemic/pandemic will be enacted on the basis of either Article 16 or Article 17 of the Constitution is in the exclusive competence of the Parliament. The Constitution provided this option to the Parliament since it is a legislative body. The Court held that it is not authorised to order the Parliament which of the two constitutional options for restricting human rights and freedoms to choose. Therefore, the fact that the challenged acts (and measures) were not enacted on the basis of Article 17 of the Constitution, in the opinion of the Court, does not in itself make those acts unconstitutional.

Secondly, **regarding the National Headquarters authority to enact measures/ decisions[41] restricting certain human rights and freedoms, the legitimate aim and proportionality of measures, as well as its judicial control**, the Court found that the challenged amendments to the both acts,[42] by which the National Headquarters is authorized to enact anti-epidemic/pandemic measures,[43] were passed through Parliament in the prescribed urgent legislative procedure and voted for by a prescribed majority vote of all Members of Parliament.

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41. The safety measures are enacted in the form of decisions.
42. See part II. Law - Legislation.
43. The measures were prescribed by Article 47 of the Act on the Protection of the Population from Infectious Diseases (Official Gazette nos. 79/2007, 113/2008, 43/2009, 130/2017 and 114/2018), and supplemented by Article 10 of the Act on Amendments to the Act on the Protection of the Population from Infectious Diseases (Official Gazette no. 47/2020; hereinafter: AAAPPID/2020).

The Court held that the National Headquarters belongs to the circle of executive bodies since this indisputably stemmed from the provisions of the CPSA governing the position, composition and powers of the National Headquarters, as well as the supervision of its work. Article 22.a of the CPSA gave the authority to the National Headquarters to render decisions and instructions if special circumstances endangering the life and health of citizens appear. Decisions and instructions are rendered in order to protect the life and health of citizens, preserve property, economic activities and the environment, and harmonize the actions of legal persons and citizens.[44] The challenged amendments to Article 47 of the APPID[45] authorised the National Headquarters to enact safety measures with the Ministry of Health and the Croatian Institute for Public Health under the Government supervision in cases when the Government declares an epidemic or danger of it in Croatia and also the World Health Organisation declares a pandemic or an epidemic or danger of them.

Starting from the fact that the COVID-19 epidemic/pandemic represents special circumstances referred to in Article 22.a of the CPSA and that it is a new infectious disease that endangers the population's health (although it is not explicitly specified in the APPID), the Court held that Article 22.a of the CPSA in conjunction with Article 47 of the APPID (as amended by Article 10 of the AAAPPID/2020) has established a legal framework on the basis of which the Headquarters (along with the Ministry of Health) is legally authorized to enact anti-epidemic/pandemic measures/decisions.

The Court pointed out that decisions of the National Headquarters are subject to the control of executive, legislative and judicial authority because the National Headquarters operates under the Government's direct supervision. According to the Constitution the Government is responsible to the Parliament[46] and the Parliament supervises the work of the Government and other public office holders responsible to the Parliament in accordance with the Constitution and laws.[47] Consequently, there is no obstacle for the Parliament, if it deems it necessary, to request the Government's report on the implementation of measures and the National Headquarters' work.

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44. See footnote 16.
45. Article 10 of the AAAPPID/2020.
46. Article 112 of the Constitution.
47. Article 80.11 of the Constitution.

Moreover, the National Headquarters' decisions are subject to the Constitutional Court review, since in abstract control cases the Court decides on the constitutionality and legality of these decisions. Individual decisions made in the implementation of certain decisions/measures of the National Headquarters are subject to judicial and Constitutional Court review.

The legitimacy of the aim pursued by the measures was unquestionable because in principle all of the measures have the same legitimate aim and that is protection of the health and life of citizens through preventing and suppressing the spread of the COVID-19 epidemic/pandemic.

On the other hand, the Court held that it cannot at the level of principle review the necessity and proportionality of the safety measures provided by Article 47 of the APPID (and supplemented by Article 10 of the AAAPPID/2020) because these are measures of a general nature on the basis of which an authorized person or body (Minister of Health or the National Headquarters) enacts particular (specific) decisions/measures, and that the review of the constitutionality and legality of particular decisions, including their proportionality, can only be the subject of special Constitutional Court proceedings.

Following from all the above considerations, the Court held that the Parliament remained within the limits of its powers provided by the Constitution when it enacted the amendments to both acts, which, amongst other, provide measures restricting human rights and freedoms with the aim of preventing the spread of an infectious disease epidemic in order to protect human life and health.

Thirdly, **regarding the legal nature of the measures/decisions of the National Headquarters and the competence of the Constitutional Court to decide on their constitutionality and legality**, the Court held that these measures/decisions, that can indisputably restrict human rights and freedoms, are "other regulations" within the meaning of Article 125.2 of the Constitution[48] and therefore the Court is competent to review their constitutionality and legality.

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48. Article 125.2 of the Constitution reads:
Article 125
The Constitutional Court of the Republic of Croatia:
(...)
shall decide on the compliance of other regulations with the Constitution and laws;
(...).

Fourthly, **regarding the proportionality of imposition of the measure of self-isolation[49] on healthy persons (without symptoms of COVID-19), and whether persons on whom this measure has been imposed are deprived of the right to work and earnings, and sufficient legal protection**, the Court noted that self-isolation is a special measure (implemented on the basis of a decision of the Minister of Health or the National Headquarters) applied to healthy persons (without symptoms of COVID-19) that have been exposed to the risk of infection or have been in close contact with a sick person or have resided for the last 14 days in areas/countries with a local or widespread transmission of COVID-19.

The Court held indisputable that the measure of self-isolation is a restriction of certain rights and freedoms (primarily the right to freedom of movement) and therefore examined whether the imposition of this measure on healthy persons (without symptoms) meets the requirements of proportionality.

Inasmuch as the measure of self-isolation is provided by the APPID, the Court held that the legality of its imposition at the level of a principle is not constitutionally disputable.

The Court also found that the legitimacy of the measure's aim imposed in an individual case is not disputable either. A temporary ban on the movement (self-isolation at home or elsewhere) of a person who is reasonably suspected of being at risk of the COVID-19 virus infection is intended to prevent the spread of the disease by impeding contact with other persons.

The measure of self-isolation, which is ordered by a competent general practitioner or epidemiologist as a preventive measure due to the suspicion of infection by COVID-19, is, by its nature (by its effects), a personal measure. It is an individual measure by which the person on whom it is imposed - sick leave begins to apply, and the Croatian Institute of Public Health is notified of the imposed measure in order to register the measure in the central register in which all persons on whom the measure is imposed are registered at the national level. Consequently, the person on whom the self-isolation measure is imposed has the right to payment of remuneration in accordance with the Act on Compulsory Health Insurance.[50]

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49. The measure was provided by Article 10 of the AAAPPID/2020.
50. Article 39.3 in conjunction with Article 55.2.7 of the Act on Compulsory Health Insurance (Official Gazette nos. 80/2013, 137/2013 and 98/2019).

In respect of the insufficient legal protection, the Court found that the measures adopted by the competent bodies on the basis of the APPID are subject to sanitary inspection supervision[51] and are ordered by a ruling. An appeal may be filed against such a ruling, and the deadline for issuing a second-instance ruling is prescribed by the General Administrative Procedure Act.[52] Judicial protection is provided against the second-instance ruling by bringing an action before an administrative court. Therefore, the Court held that sufficient administrative and judicial protection is provided by law.

IV. Conclusion

The COVID-19 jurisprudence of the Croatian Constitutional Court shows how public health objectives can be interlinked with democratic values and human rights, and how implications of the public health objectives can be assessed in order to protect democracy, the rule of law and respect for human rights during the epidemic/pandemic.

At the time of any crisis, not just the health one, it should be bear in mind how delicate democracy, the rule of law and respect for human rights are, and how important it is that constitutional courts and other courts with constitutional jurisdiction protect them in accordance with the common international standards. Although today the pandemic is a part of history, it is pivotal to do the a posteriori analysis of constitutional courts' case-law in order to learn lessons for the future and to be able to protect better the three pillars of the Council of Europe and EU when the next crisis arise.

51. Articles 68 and 69 of the APPID and Articles 13 and 14 AAAPPID/2020.
52. Article 121 of the General Administrative Procedure Act (Official Gazette no. 47/09).


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COVID-19 v. Constitutional guarantees. A drama in three acts

Luis POMED SANCHEZ,
Head of Department of Research and Doctrine,
Constitutional Court of Spain

1. Forward

Coronavirus in numbers

Spain. Almost 14 million confirmed cases and 120 000 deaths.

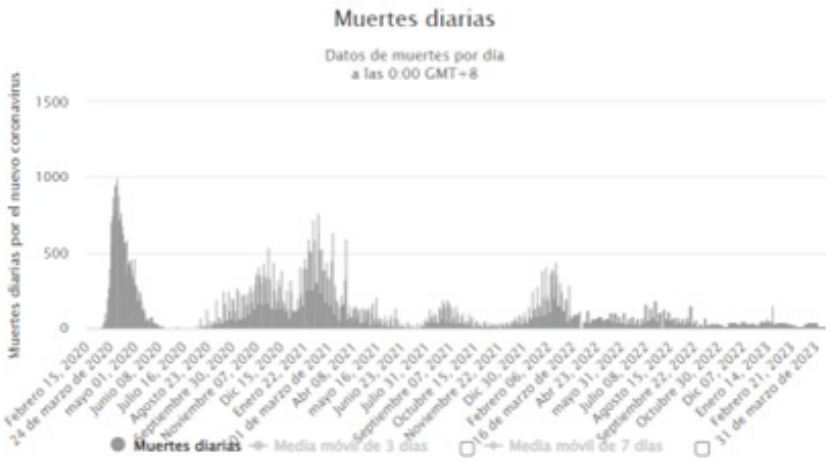
The statistics are reliable when compared to countries with similar population.

Italy, 25 million confirmed cases, 180 000 deaths.
Poland, 6,5 million cc, 120 000 deaths.
South Korea, 31 million cc, 35 000 deaths.
Germany, 39 million cc, 170 000 deaths.
France, 39 million cc, 162 000 deaths

When facing the challenge of new pandemics, we do need reliable statistics. Some figures arouse doubts:

US, 103 million cc, 1 million deaths.
China, 99 million cc, 120 000 deaths.

Nuevas muertes diarias en España



II. Legal framework

The Spanish Constitution of 1978 distinguishes three types of states of exception: states of alarm, emergency, and siege (martial law). Article 116.1. According to Article 55.1 SC, suspension of some fundamental rights and public liberties can only be accorded "when the sate of emergency or siege (martial law) is declared".

These constitutional provisions were soon developed by the Organic Law of 1st June 1981 on the states of alarm, emergency, and siege.

a) State of alarm. Adequate for natural disasters and "health crisis, such as epidemics and serious pollution". Declared by the Government for 15 days. Can be extended 15 more days with the accord of the Congress.
b) State of emergency. Serious disturbance of public order. Declared by the Government, prior authorisation by the Congress. 1 month; can be extended another month by the Congress.

c) State of siege (martial order). Martial state of exception. Declared by the Congress. Most powers vested in military authorities.

ACT ONE:
First of alarm, that, at the end of the (judicial) day was annulled

Royal Decree 463/2020, 14th March. Article 7 contained a general lockdown or confinement order. According to this provision, freedom of movement was constrained to some —expressly identified— activities.

With some amendments, this Royal Decree was in force until 21st June 2020. Judgment 148/2021, 14th July, ruled this provision null as it contained a suspension of the fundamental right to freedom of movement that could only be accorded when an state of emergency is declared.

Partial lockdown of Parliament declared contrary to the Constitution by Judgment 168/2021, 5th October. According to Article 116.5 SC, both chambers of Parliament keep working when a state of emergency or siege is declared: *"Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation."*

ACT TWO
The never ending state of alarm

By a new Royal Decree (926/2020, 25th October) the state of alarm was reinstated.

Innovations:

a) Delegation of powers to regional authorities
b) Extension of the state of alarm for six months
c) Information to the Parliament provided by the Prime Minister (bimonthly) or the health minister (every month).

All these innovations were considered contrary to the Constitution by Judgment 183/2021, 27th October.

a) Extraordinary powers can not be delegated and under no circumstances that delegation can include the power to change the regulation contained in the Royal Decree.

b) According to the SC, the extension of the state of alarm can never exceed 15 days, since this is a constitutional rule to assure the control of the Executive by the Legislative.

c) Since it is the Prime Minister who has been appointed by the Parliament, it is he/she who must inform the chamber to assure the constitutional definition of checks and balances.

ACT THREE
When we woke up, the rule of law was still there

Law 3/2020, 18th September, adopting procedural and organisational measures to fight COVID 19 introduced a new procedure for the adoption of general measures to fight Coronavirus.

According to this new procedure, administrative regulations should be authorised or ratified by judges prior to their entry into force.

The Law was submitted to a preliminary ruling (Question of Unconstitutionality) by an administrative court and was annulled by Judgment 70/2022, 20th June. The intervention of judges in the procedure of the adoption of administrative regulations implies their intervention in the exercise of a regulatory power exclusively attributed by Article 97 SC to the Government. When exercising their jurisdiction, judges establish individual rules, but they can no approve general rules.

DENOUEMENT

In the aftermath of the pandemic:

1. We should bear in mind the importance of TRANSPARENCY. Reliable statistics are essential to face environmental and health challenges.
2. Need to rethink Emergency Law.
   Diminished relevance of traditional threats (public order).
   Increasing relevance of new threats (we cannot rule out new pandemics and environmental catastrophes).
3. Global governance and critical assessment of past experience.

COVID-19 and the Latvian Constitutional Court: from gambling to YouTube

Kristaps TAMUŽS, Head of the Legal Department, Constitutional Court of Latvia

Albeit normally in Latvia the Constitutional Court is the only institution authorized to declare legal provisions or acts invalid due to their incompatibility with provisions with a higher legal force, with regard to restrictions adopted to curb the spread of COVID-19 the situation was partially different. Namely, one day after 11 March 2020 when COVID-19 was declared a pandemic by the World Health Organisation, state of emergency was declared in Latvia, giving the Cabinet of Ministers wide-ranging legislative powers. However, in state of emergency the Cabinet of Ministers is authorized to issue ordinances, which fall within the competence of administrative courts as general administrative acts (ordinances regulated issues such as the mandatory wearing of protective masks, restrictions of access to various institutions, etc.).

However, some of the COVID-related restrictions were examined by the Constitutional Court and some cases are still pending. In what follows I will briefly describe three cases that have already been examined by the Constitutional Court (concerning restrictions on gambling, restrictions on air travel to Latvia, and restrictions on the operation of shopping malls), as well as two cases that are still pending before the Court. I will conclude on a positive note, by describing some innovations with respect to the working methods of the Constitutional Court that have been brought about due to the COVID-19 pandemic.

Examined cases

The gambling case[1]

On 11 December 2020, the Constitutional Court of Latvia adopted its first judgment regarding COVID-19 restrictions. In this case it was assessed whether the restrictions imposed during the emergency situation on in-person gambling as well as on interactive (online) gambling are in compliance with the Constitution of the Republic of Latvia and the Treaty on the Functioning of the European Union.

Facts of the case:

The case was initiated on the basis of constitutional complaints filed by five companies engaged in organizing gambling. The applicants alleged that the contested provisions restricted the right to property, which is enshrined in Article 105 of the Constitution and includes the right of an individual to engage in commercial activity under a license.

The restriction on interactive gambling was said to be incommensurate with its legitimate aim – to protect society from the spread of COVID-19 –, as online gambling is organized without any actual interaction between individuals. Likewise, the restriction was incommensurate with its other legitimate aim – to protect the public from unnecessary expenditure. As concerns the restrictions on in-person gambling, the applicants agreed that the closure of gambling halls and other gathering places might be an appropriate way to contain the spread of COVID-19, however, the restriction was not appropriate for the other legitimate aim of protecting the public from unnecessary spending.

It was furthermore alleged that the contested provisions violated the principles of legitimate expectations and proper legislative procedure and were said to be contrary to the principle of equality. In the opinion of one of the applicants, the contested provision also placed an unfounded and disproportionate restriction on the freedom of establishment contained in Article 49 of the Treaty on the Functioning of the European Union.

1. Judgment of 11 December 2020, case no. 2020-26-0106; the judgment is available in English: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf.

Court's findings:

The Court detailed how the proportionality should be applied together with the precautionary principle. Namely, if the resort to the precautionary principle as such is justified whenever there is a serious risk to health and welfare, the state does not have to wait until the risk becomes reality. However, the restrictions adopted by the legislator, on the basis of such precaution, still have to be in line with the Constitution.

The Court also acknowledged that during the state of emergency the state did not necessarily need to use the right to derogate from the European Convention of Human Rights in order to restrict the rights of individuals. For example, in this case, the right to property was not included in the declaration of derogation, as the state had resolved that the measures in respect of this right would fully meet the principles of individual assessment, that is, the test of the fundamental rights restriction.

It was also concluded that in cases when the legislator believes that the achievement of particular aims requires the quickest possible action, there is no necessity for the legislator to conduct such research about the threat of the respective damage or hold such debate on the prevention of the damage which would significantly delay the adoption and effectiveness of the decision. Thus, the lack of in-depth research and discussions in the course of adopting the contested provisions could not serve as a ground for recognizing those provisions as being unlawful. However, the restrictions still must follow a legitimate aim and be proportionate.

With regard to in-person gambling the Court found that the restriction of property rights was proportionate with regard to the restriction for the purpose to protect the rights of other people and public welfare by preventing in-person contact and the resulting overloading of the healthcare system.

However, **with regard to interactive (online) gambling** the Court did not agree to the proposal that it was necessary to restrict property rights in order to protect the society against unnecessary expenditures in the time of expected economic downturn. The Court stated that "taking [such] decisions in the place of the citizens themselves means a disproportionate paternalistic interference with human rights to freedom of choice and self-determination". Therefore, it was found that the restrictions of online gambling lacked a legitimate aim and therefore did not comply with the Constitution.

The travel restriction case[2]

On 18 February 2022, the Constitutional Court decided to terminate legal proceedings in a case regarding the requirement to take COVID-19 test prior to entering an aircraft bound for Latvia.

Facts of the case:

The case was initiated on the basis of an application of a natural person. The applicant is a citizen of Latvia who has been residing in Germany for several years. The applicant travels to Latvia regularly and had planned to do it also in the second half of January or in February 2021 by passenger air transport.

The applicant alleged that the requirement to take a COVID-19 test before entering Latvia imposed disproportional restriction on her right to freely return to Latvia, included in Article 98 of the Constitution.

Court's findings:

The Constitutional Court found that the right of Latvian citizens to freely return to Latvia was an absolute right and could not be restricted. However, it was noted that there are various ways on how a citizen of Latvia could return to Latvia, for example, by crossing the land border or entering through a port, airport, railway station, or otherwise. Thus, the Constitutional Court concluded that a person's right to return to Latvia should be differentiated from a person's wish and possibility to use a particular type of transportation for this purpose.

The Constitutional Court found that entering into the territory of Latvia was not restricted, for example, for the citizens of Latvia who entered Latvia by vehicle that was not providing commercial transportation services and who had tested positive for COVID-19 or had not taken a COVID-19 test. Additionally, it was noted that the contested norm could have indeed caused certain inconvenience for the person because it impeded traveling in the manner she desired. However, this cannot be regarded as an insurmountable obstacle as Latvia had not prohibited its citizens from traveling and had not closed its borders. Hence, the Constitutional Court concluded that the applicant's right to freely return to Latvia had not been restricted and therefore discontinued the proceedings in the case.

2. Decision to terminate the proceedings of 18 February 2022, case no. 2021-10-03; the decision is available in English: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/03/2021-10-03_Decision_on_termination_of_the_proceedings.pdf.

The shopping malls case[3]

On 10 March 2022, the Constitutional Court delivered a judgement regarding the compliance with the principle of equality and property rights of legal regulation prohibiting the operation of shops located within large shopping malls.

Facts of the case:

The case was initiated on the basis of applications submitted by companies running shops on the premises of large shopping malls that have the possibility to ensure entrance from the outside, as well as by owners of large shopping malls which lease their premises to traders and service providers. They complained that the prohibition of operation of shops was incompatible with the principle of legal equality as well as with the right to own property

Court's findings with respect to shop owners

The Constitutional Court concluded that the impugned measures did effectively reduce the risk to contract COVID-19 and subject others to this risk, while also easing the burden on the health care system. Therefore, the measures adopted by Cabinet of Ministers were ruled to be suitable to attain the legitimate aims proposed.

Nevertheless, the Constitutional Court found that the Cabinet of Ministers had failed to identify noteworthy aspects related to the spread of COVID-19 with respect to trade in stand-alone shops (which continued to remain open). People could move between these shops through outdoors, where the risk of contracting the virus was said to be minimal. The Court concluded that there were no significant differences between a shop located in a large shopping center that had been zoned off from the common-use premises and to which an entrance from the outside had been ensured, as opposed to any other shop set up outside a shopping mall's premises with an entrance from the outside.

The Constitutional Court recognized that regulation permitting such shops in large shopping malls to continue operating would allow to achieve the legitimate aims equally effectively. Hence, other measures existed that would restrict the affected shop owners' fundamental rights to a lesser extent and would ensure the fulfillment of the legitimate aims in the same quality.

3. Judgment of 10 March 2022, case no. 2021-24-03; the judgment is available in English: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/06/2021-24-03_Judgement.pdf.

Therefore, the Court concluded that the contested regulation, insofar as it applied to shop owners, was incompatible with property rights as well as with the principle of equality.

Court's findings with respect to shopping mall owners

The Constitutional Court recognized that the possibility for owners of large shopping malls to benefit from leasing the premises was closely connected to the tenants' rights to use these premises for trading. Thus, the contested regulation substantially stripped the owners from the possibility to exercise their right to lease their premises of and gain profit from it.

The Court recognized that gatherings of persons are linked to the risk of spread of COVID-19. Therefore, alternative regulation allowing all shops within large shopping malls to continue their operations, even if stricter epidemiological safety requirements were to be adopted, could not be recognized as being a more lenient measure. Hence, the Court found there to be no less restrictive measures that would allow reaching the legitimate aims of the restriction imposed on owners of large shopping malls in the same quality.

The Constitutional Court concluded that the contested regulation prevented the owners from exercising their right to property at their own discretion. The Court noted that commercial activities are clearly essential for the development of the national economy and such obstacles inevitably leave a negative impact not only on the traders and owners of trading venues but also the national economy in general. However, the Court also underscored that the entire society benefits from the contested regulation, as it protects both people themselves from falling ill and the health care system from becoming overloaded. In view of the spread of the virus and the threats it posed for the health system, the legitimate interests of some commercial companies could not be placed above the interests of the entire society.

Thus, the Court recognized that the contested regulation, insofar as it applied to owners of large shopping malls, complied with property rights.

The Constitutional Court further recognized that owners of large shopping malls were in similar and relatively comparable circumstances with owners of premises of large shops. The contested regulation allowed trading within the premises of large shops. On the other hand, with certain exceptions, trade was not allowed in large shopping malls during the whole time the contested regulation was in force. Hence, the contested regulation provided for differential treatment of these groups.

Seeing that there are no significant differences between a large shopping mall and a large shop, the Court did not identify objective arguments allowing to conclude that the differential treatment of owners of large shopping malls and owners of large shops had a legitimate aim. Hence, the Court recognized that the contested regulation, insofar it applied to owners of large shopping malls, was incompatible with the principle of equality.

Pending cases

Unvaccinated member of the Parliament[4]

On 7 June 2022, the Constitutional Court initiated a case with respect to the obligation of members of the Parliament to get vaccinated against COVID-19.

Facts of the case:

The case was initiated on the basis of a constitutional complaint submitted by a member of the Parliament. The applicant had not presented by 15 November 2021 to the Parliament a certificate concerning COVID-19 vaccination or recovery; therefore, she had been denied participation in the work of the Parliament both on-site and remotely. More specifically – the possibility for her to discharge her duties as a member of the Parliament had directly depended on the fact whether she had been vaccinated against or recovered from COVID-19. Thus, the applicant's right to respect of private life, as well as the right to participate in the work of the State had allegedly been violated.

It was argued that, although the restriction on fundamental rights established in the contested provision could be related to the protection of public health and safety, it was said to be disproportionate. This aim could be reached by more lenient measures, for example, by ensuring that all members of the Parliament are regularly tested for COVID-19 if the Parliament operates on-site or by allowing remote work of the Parliament. Moreover, the public benefit allegedly does not outweigh the damage caused to the applicant's rights because, firstly, COVID-19 vaccines are said to have significant side-effects, and, secondly, allegedly, scientific evidence about the length of immunity caused by vaccines and their ability to curb the spread of COVID-19 is lacking.

4. An English translation of a press release concerning the initiation of the case may be found here: https://www.satv.tiesa.gov.lv/en/press-release/a-case-initiated-with-respect-to-the-obligation-of-a-member-of-the-saeima-to-get-vaccinated-against-COVID-19/.

Imported mink case[5]

On 7 July 2022 the Constitutional Court decided to initiate a case regarding compliance of Cabinet of Ministers Regulation prohibiting mink import with Article 105 of the Constitution (right to own property).

Facts of the case:

The case was initiated following a constitutional complaint submitted by merchants whose commercial activity includes importing and breeding of mink, as well as obtaining, processing and exporting of mink fur.

The applicants argue that mink have long been imported into Latvia from within the European Union in order to breed them and obtain their fur. They claim that the contested regulation is incompatible with the right to own property because since the prohibition to import mink into the territory of Latvia they have been forced to suspend their commercial activities in Latvia. The contested provision was adopted as part of epidemiological safety measures against COVID-19 due to concerns regarding transmission of the virus from mink.

COVID-19 innovations in the working methods of the Court

As many constitutional courts, the Constitutional Court of Latvia is a conservative institution. Before of the onset of the COVID-19 pandemic it was rather reluctant to establish an online presence exceeding the bare minimum (i.e., a website with texts of judgments and some additional information). That all changed in 2020 when there appeared an objective need to hold hearings online. The Court very quickly figured out a way to not only hold hearings by means of an online meeting platform but also to broadcast those hearings on YouTube. This has turned out a permanent change – even though COVID is (hopefully) gone, the hearings of the Constitutional Court may be watched – and are being watched – by anyone on the internet.

The second change concerns the working methods of the staff of the Court. Even though it is still possible for anyone to walk into the building of the Court and hand in their application, a lot of work is now done remotely. Thus, even if there are obstacles not related to COVID that for some reason hamper in-person work, the Court's IT systems and administrative arrangements can now be considered well adjusted for working remotely.

5. An English translation of a press release concerning the initiation of the case may be found here: https://www.satv.tiesa.gov.lv/en/press-release/a-case-initiated-with-respect-to-prohibition-to-import-mink-into-the-territory-of-latvia/.

The COVID-19 Case-law of the Belgian Constitutional Court

Jan THEUNIS, Legal Adviser, Constitutional Court of Belgium

1. Introduction

As most other countries, Belgium was taken by surprise by the COVID-19 pandemic. There was no ready-made law available to deal decisively with a crisis of such magnitude. As a result, the federal government mostly relied on the Civil Security Act of 2007, which grants powers to the Minister of the Interior to take protectionary measures in case of acute and temporary emergencies (such as fires, explosions or the release of radioactive materials).[1]

Only in August 2021, the Pandemic Act was passed, introducing a solid legal basis for vigorous government action in case of an 'epidemic emergency'. Both legal grounds were submitted to the Constitutional Court, either by preliminary rulings (Civil Security Act) or by actions for annulment (Pandemic Act).

As the Court only has jurisdiction to review primary legislation, the secondary legislation taken under these laws, including the curfew, the rules on social distancing or the obligation to wear a face mask, belong to the jurisdiction

1. L. Lavrysen, J. Theunis, J. Goossens, T. Moonen, S. Devriendt, B. Meeusen and V. Meersschaert, 'Belgium. Developments in Belgian Constitutional Law', in *2021 Global Review of Constitutional Law* (I·CONnect/Clough Center 2022) 33.

of the ordinary courts and tribunals and of the Council of State.[2] Both the Court of Cassation and the Council of State demonstrate substantial deference towards these administrative measures. That case-law is covered only occasionally in this overview.

2. Soon after the virus outbreak the federal government was granted special powers by two Acts of 27 March 2020. In these acts, the federal parliament temporarily attributed part of its legislative powers to the (minority) government, allowing it to adopt collateral measures to cope with the COVID-19 crisis, in addition to the core measures described above. In particular, the special powers enabled the government to take necessary social, economic and financial measures and also to guarantee a proper administration of justice, for example, by suspending time-limits. The royal decrees[3] taken in application of these special power Acts must be ratified by parliament within one year of their entry into force. From that ratification they fall under the jurisdiction of the Constitutional Court. In its first COVID-19 judgment, on 4 June 2020, the Court declined jurisdiction to rule on such royal decree that was not ratified yet at that time.[4] Three years later, the Court has decided about 60 pandemic-related cases and rendered about 30 judgments.[5] In what follows, a selection of that case-law (updated to July 2023) is summarised.

2. The judicial review of administrative acts (both of individual and general scope) is exercised by the ordinary law courts and the Council of State, see J. Theunis, S. Van Garsse and E. Vleugels, 'Balancing legality and legal certainty. The plea of illegality in Belgian public law and the role of the Council of State and other judicial bodies', in M. Eliantonio and D.C. Dragos (eds), *Indirect Judicial Review in Administrative Law* (Routledge 2022) 13-28.
3. Royal decrees are regulations, issued by the federal government and signed by the King.
4. Similar cases are often examined jointly in one judgment; on the other hand, some cases result in two judgments (one on the suspension request, another on the merits). All judgments are available at the Court's website (www.const-court.be), in French, Dutch and German (official languages in Belgium). Occasionally, the Court also provides an English translation (or summary).
5. Similar cases are often examined jointly in one judgment; on the other hand, some cases result in two judgments (one on the suspension request, another on the merits). All judgments are available at the Court's website (www.const-court.be), in French, Dutch and German (official languages in Belgium). Occasionally, the Court also provides an English translation (or summary).

2. No State of Emergency

3. From the outset, it should be noted that the Belgian Constitution, adopted in 1831, was not designed to deal with crisis situations.[6] More so, the possibility of deviating from constitutional provisions, for example in a crisis situation, is explicitly prohibited by the Constitution. According to Article 187, the Constitution cannot be suspended in part nor in full. Consequently, no state of emergency can be proclaimed to permit a suspension of rights and freedoms protected by the Constitution.[7]

In its COVID-19 case-law, the Constitutional Court repeatedly stated that the safeguard of Article 187 is closely linked with the fundamental rights guaranteed in Title II of the Constitution. However, it does not oppose a set of constraining measures by which the competent legislature responds in a comprehensive and far-reaching manner to an actual emergency such as the COVID-19 pandemic.[8] A mere limitation of a fundamental right does not in itself violate Article 187 of the Constitution, as long as the judicial review provided for in the Constitution remains unaffected.[9]

3. The Civil Security Act

4. As mentioned above (*supra* no. 1), the urgent measures in response to the pandemic were primarily taken by ministerial decree, based on the Civil Security Act. More than once, the Constitutional Court had to recall that these ministerial decrees are beyond its jurisdiction which is limited to Acts of parliament (primary legislation), as opposed to administrative acts and

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6. M. Verdussen, 'The impact on parliamentary assemblies: the crisis triggered by the Covid-19 pandemic in Belgium. Restricting parliamentary control over the government and limiting democratic debate', in *The Parliament in the time of coronavirus – Belgium* (Study Robert Schuman Foundation 2020) 2.
7. A. Alen and D. Haljan, *Constitutional Law in Belgium* (Kluwer 2020) 330.
8. Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.31.2.
9. Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.19.1-B.20.4; Constitutional Court (27 April 2023) ECLI:BE:GHCC:2023:ARR.068, B.19.2-B.19.3; Constitutional Court (17 May 2023) ECLI:BE:GHCC:2023:ARR.076, B.20.2-B.20.3. See, in the same sense, ECtHR (21 March 2023) *Telek and Others v. Türkiye,* ECLI:CE:ECHR:2023:0321JUD006676317, § 124: "Pour la Cour, même lorsque des considérations de sécurité nationale entrent en ligne de compte dans le contexte d'un état d'urgence, les principes de légalité et de la prééminence du droit applicables dans une société démocratique exigent que toute mesure touchant les droits fondamentaux de la personne puisse être soumise à une forme de procédure contradictoire devant un organe indépendant compétent pour examiner les motifs de la décision en question et les preuves pertinentes."

regulations, including royal and ministerial decrees (secondary legislation).[10] The latter can be challenged before the Council of State (directly, through an action for annulment)[11] and by the ordinary courts and tribunals, including the Court of Cassation (indirectly, through a plea of illegality). However, any question on the constitutionality of the legal basis of secondary legislation that may rise before the ordinary and administrative courts should be referred to the Constitutional Court.

Whereas the Court of Cassation refused to do so,[12] a police tribunal did refer some questions, following the prosecution of individuals for violating the ministerial measures. In judgment 109/2022 the Constitutional Court ruled that the power delegated to the Minister of the Interior does not violate the principle of legality in criminal matters. Since various risk and emergency situations are involved which cannot be described in full and in detail, the legislature was entitled to adopt broad wording so that appropriate action could be taken in respect of those risks. Moreover, the Minister does not have unfettered power, since it is sufficiently circumscribed by the Civil Security Act. More specifically, the Act clearly defines the essential elements of the offence, consisting of the refusal or failure to comply with the ministerial measures ordered under that Act.[13] By contrast, the Court considers it unjustified to prohibit the courts and tribunals from taking account of mitigating circumstances when assessing violations of those measures.[14]

Incidentally, the Court also settled an issue that was highly debated among legal scholars: exceptionally, direct delegation to the minister, rather than to the government,[15] may be justified if, as in this case, objective reasons exist that require urgent action by the executive branch, and only to the extent that any delay may aggravate the existing risk or emergency situation.[16]

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10. Constitutional Court (26 November 2020) ECLI:BE:GHCC:2020:ARR.161, B.2-B.3; Constitutional Court (1 July 2021) ECLI:BE:GHCC:2021:ARR.101, B.2-B.3.
11. E.g. Council of State (30 October 2020), No. 248.819 (on the curfew).
12. Court of Cassation (28 September 2021), ECLI:BE:CASS:2021:CONC.20210928.2N.16.
13. Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.2-B.8.4.
14. Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.20-B.26.
15. According to Article 108 of the Constitution regulatory powers should be exercised by royal decree.
16. Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.8.2.

5. Both the Court of Cassation and the Council of State had previously accepted the Civil Security Act as a valid legal basis for the ministerial measures.[17] By its judgment 109/2022, repeated in judgment 170/2022[18] and judgment 104/2023[19] the Constitutional Court thus confirmed that case-law.

4. The Pandemic Act

6. In response to growing criticism of governing by ministerial decrees, federal parliament finally passed the Pandemic Act of 14 August 2021, designed to effectively address epidemic emergencies. The Act allows the King to declare the pandemic state of emergency for up to three months, renewable for up to three months at a time. Parliament must ratify each declaration and prolongation within 15 days. From now it is clearly stated that administrative police measures necessary to prevent or limit the consequences of the emergency for public health should be taken by royal decree and are thus a collective decision of the government. However, in case of imminent danger the Minister of the Interior can exercise these powers alone and take all necessary administrative police measures that "do not tolerate any delay". These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event local circumstances require so, the governors and mayors can take – in accordance with possible instructions of the Minister of the Interior – measures applicable to their own territory that are stricter than the royal or ministerial decrees.[20]

By judgment 33/2023, the Constitutional Court dismissed the ten actions for annulment of the Pandemic Act, lodged by a number of citizens, four members of parliament and some non-profit organisations. The above delegations fall within the constitutional limits outlined in Judgment 109/2022 (*supra* no. 4). Apart from their limitation in time, the emergency measures must be necessary, appropriate and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of possible categories of measures that can be taken (such as social distancing, restrictions for gatherings, etc.). It is clear from the general design of the Act that the legislator intended to establish a reasonable balance between, on the one hand, the protection of individual

17. Court of Cassation (28 September 2021), ECLI:BE:CASS:2021:CONC.20210928.2N.16; Council of State (30 October 2020), No. 248.819.
18. Constitutional Court (22 December 2022) ECLI:BE:GHCC:2022:ARR.170.
19. Constitutional Court (29 June 2022) ECLI:BE:GHCC:2023:ARR.104.
20. L. Lavrysen, J. Theunis, J. Goossens, T. Moonen, S. Devriendt, B. Meeusen and V. Meersschaert, 'Belgium. Developments in Belgian Constitutional Law', in *2021 Global Review of Constitutional Law* (I·CONnect/Clough Center 2022) 34.

fundamental rights and freedoms and, on the other, the public interest pursued by the restrictions. However, since the Act leaves it up to the King, the Minister of the Interior and governors and mayors to concretely determine what administrative police measures should be taken, the Court does not review the authorised measures but only the delegations granted by the Act. It is up to the Council of State and the ordinary courts and tribunals to verify in concrete cases whether a specific measure taken under the Act complies with the repartition of competences and the constitutional guarantees and fundamental freedoms. These judicial bodies will decide whether the measures comply with the principles of legality, legitimacy and proportionality. That judicial review also includes verifying whether the conditions for delegation have been met.[21]

5. Quarantine Measures

7. In July 2020, after a period of so-called "lockdown light", restrictions on physical contact between individuals were relaxed and travelling became possible again. In light of this new phase in the COVID-19 crisis, measures were taken to counter the associated risks of further spread of the virus, including quarantine measures and contact tracing, introduced by two Acts of the Flemish Parliament (decrees) of 10 July 2020 and 18 December 2020 and an Act of the Common Community Commission (ordinance) of 17 July 2020 (for the bilingual Brussels-Capital region).

More specifically, these measures concern mandatory isolation and self-isolation, medical examination and medical testing, the compliance of which is monitored and non-compliance is punishable. Other measures relate to data processing of certain categories of persons in the context of enforcement and contact tracing. Several actions for annulment were filed against those rules, by both individuals and a non-profit organisation aiming to promote human rights.[22] Judgment 26/2023 of the Constitutional Court rules is of particular importance on three issues.

21. Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.16, B.50.1-B.62. A suspension request by some applicants was dismissed (due to expiry of time limit), Constitutional Court (9 June 2022) ECLI:BE:GHCC:2022:ARR.080.
22. A suspension request by some applicants was dismissed (due to lack of proof of urgency), Constitutional Court (10 June 2021) ECLI:BE:GHCC:2021:ARR.088 and ECLI:BE:GHCC:2021:ARR.089.

Firstly, the Court confirmed that the Flemish Community and the Common Community Commission are competent for preventive health care activities and services, covering the detection and control of infectious diseases. However, the communities are also competent to establish a data protection authority in the matters for which they are competent. If they do so, as the Flemish Community did, a decree concerning personal data should be submitted to the advisory opinion of the Flemish data protection authority, instead of the federal data protection authority. Yet, the Flemish authority was not notified to the European Union, as required by the GDPR. As a result, the Court annulled the relevant Articles 2 of the Decree of 18 December 2020 that relate to data processing, but it maintains the effects of those provisions until the entry into force of a decree that is GDPR-proof and until 31 December 2023 at the latest.[23]

Secondly, the Court considers the measures of mandatory isolation and self-isolation. Referring to the case-law of the European Court of Human Rights (ECtHR), it does not qualify these measure as a deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights (ECHR), but as a restriction of freedom of movement within the meaning of Article 2 of Protocol 4 to the ECHR. Such restriction is, furthermore, justified and proportionate given that, in light of the infectiousness of COVID-19, (self-)isolation is a measure necessary for the protection of public health and the health of others. The Court does note, however, that such a restriction of freedom must be subject to judicial review, which is indeed available.[24]

Thirdly, the Court finds a violation of the principle of legality in criminal matters. For a criminal law to be foreseeable and precise, the elements that determine the scope of the criminalisation must be set out in an official text, which is published in a way that allows any person to take cognisance of it at any time. In principle, such publication is done in the Belgian Official Gazette. For the interpretation of the terms "high-risk area" and "red zone", the Decree of 18 December 2020 and the Ordinance of 17 July 2020 refer to the places designated by the Foreign Affairs Administration. However, neither the decree nor the ordinance contain the link to the website "www. info coronavirus.be" where the lists of high-risk areas and red zones are published. In relation to those terms, therefore, the Court finds a breach of the principle of legality.[25]

23. Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.17-B.30.15.
24. Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.32-B.48.
25. Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.49-B.55.

6. Contact Tracing

8. Because of the close connection between the federal competences and the community competences affected by the measures, the federal government and several federated entities concluded a cooperation agreement that regulates the manual and digital detection of persons (suspected to be) infected with COVID-19 and their contacts. To this end, the cooperation agreement of 25 August 2020 establishes a number of databases (previously regulated by royal decree) and provides for the collection of numerous personal data, including sensitive health information. A political party, three members of parliament and a non-profit organisation lodged an action for annulment of the various acts of parliament ratifying that agreement. They alleged a violation of the right to respect for private life and of the protection of personal data, guaranteed by Article 22 of the Constitution, by Article 8 of the ECHR, by Articles 7 and 8 of the EU Charter of Fundamental Rights, which have analogous scope, and by the General Data Protection Regulation.

By Judgment 110/2020 the Constitutional Court rejected most of the challenges. In doing so, it took into account the review framework resulting from the case-law of the European Court of Human Rights and the Court of Justice of the EU. The cooperation agreement aims to protect public health, which is a legitimate objective, and the centralisation of data is justified for reasons of security and data integrity and of expediency in the manual detection of potentially infected persons. However, the Court does consider unconstitutional:

1. the failure to designate bodies at the level of the federated entities as joint controllers of the central database and (
2. the absence of a maximum retention period for personal data stored in another database.

The Court annuls the provisions in question but provisionally maintains their effects. In addition, the Court annuls the authorisation granted to the Information Security Committee allowing the communication of personal data to third parties for the purpose of scientific research.[26]

26. Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.110.

7. COVID Safe Ticket

9. On 14 July 2021, the federal State and various federated entities concluded a cooperation agreement on the use of the COVID Safe Ticket, which was amended on 27 September and 28 October 2021, thus providing a legal basis for the domestic use of the EU digital COVID certificate. This certificate contains information about the vaccination, test result or recovery of the holder issued in the context of the COVID-19 pandemic, from which the COVID Safe Ticket is generated (via the COVID-Scan application). A cooperation agreement was necessary because the communities are competent for preventive health care, while the federal government is competent for the enforcement of public order (including public health). The cooperation agreement sets out the rules on the use of the COVID Safe Ticket for gaining access to certain places or events during the COVID-19 pandemic. The federated entities subsequently introduced the COVID Safe Ticket and regulate data processing in that regard.

By Judgment 68/2023 the Constitutional Court ruled on multiple actions for annulment against the COVID Safe Ticket legislation.[27] The Court observed *inter alia* that the legislation has not introduced a mandatory vaccination. Indeed, the COVID Safe Ticket can be obtained not only on the basis of a vaccination certificate, but also on the basis of a test and recovery certificate. The validity period of the COVID Safe Ticket is significantly shorter when it is obtained pursuant to a negative diagnostic test, that has a validity period of 24 or 48 hours depending on the type of test, than when it is obtained pursuant to the administration of a vaccine or obtaining a recovery certificate. However, that difference in treatment is based on an objective and pertinent criterion with regard to the aim being pursued, which is to limit the spread of the coronavirus. Indeed, unlike the vaccination certificate or the recovery certificate, a negative diagnostic test does not show that the person has developed immunity to COVID-19. It only allows to establish that the person was not a vector of the coronavirus at the time the test was taken. Accordingly, the Court considers the difference in treatment between vaccinated and non-vaccinated individuals reasonably justified.[28]

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27. Two cases were decided by the reduced chamber (panel of three, consisting of one president and two judges), because of manifest inadmissibility (Constitutional Court, 3 February 2022, ECLI:BE:GHCC:2022:ARR.020) or lack of jurisdiction (Constitutional Court, 31 March 2022, ECLI:BE:GHCC:2022:ARR.053).
28. Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.23.2-B.24.4.

Furthermore, the Court finds that the contested provisions do not fall within the ambit of Article 12 of the Constitution and Article 2 of Protocol 4 of the ECHR. The freedom of movement guaranteed by those provisions ensures that anyone lawfully on the territory is not arbitrarily restricted in his freedom of movement by an individual measure such as house arrest or street ban. However, those provisions do not prevent access to certain places from being subject to generally applicable conditions, such as purchasing an entrance ticket or presenting a COVID Safe Ticket.[29]

While the contested provisions do not interfere with freedom of movement, they do fall within the scope of the right to private life. Overall, the Constitutional Court considers the COVID Safe Ticket legislation necessary to protect the life and health of the people concerned and of other people in society, as well as to avoid the need to once again restrict activities or close certain industries. In that regard, the Court points to the positive obligation, by virtue of Articles 2 and 8 of the ECHR, to take appropriate measures to protect the life and health of those within their jurisdiction.[30] However, the Court does note that in particular the Flemish Decree of 29 October 2021, as part of the COVID Safe Ticket legislation, did not develop clear criteria for the optional use of the COVID Safe Ticket in hospitals, residential care centers, rehabilitation hospitals and facilities for persons with disabilities. Consequently, for visitors to those residential care facilities for vulnerable people, it was not sufficiently foreseeable whether the use of the COVID Safe Ticket was mandatory or not. On that point the legislation violates the right to private and family life.[31]

Judgment 68/2023 was followed by three similar rulings on 17 May 2023.[32] In Judgment 76/2023 the Court adds that Article 7 of the International Covenant on Civil and Political Rights has not been violated as the persons concerned by the use of the COVID Safe Ticket are not subjected without their free consent to medical or scientific experimentation. Also the contested measures, including the wearing of the mouth mask and the

29. Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.40.
30. With reference to ECtHR (Grand Chamber, 21 April 2021) *Vavřička and Others v. Czech Republic*, ECLI:CE:ECHR:2021:0408JUD004762113, § 282.
31. Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.42-B.47.
32. Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.075; Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.076; Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.077. A suspension request by some applicants was dismissed (due to lack of proof of urgency), Constitutional Court (20 January 2022), ECLI:BE:GHCC:2022:ARR.010 and Constitutional Court (3 February 2022), ECLI:BE:GHCC:2022:ARR.021.

social distancing rules, are not so severe as to constitute inhuman and degrading treatment within the meaning of that Article.[33]

8. Vaccination Registration

10. The federal government and the sub-entities collaborated in order to launch a massive, voluntary and free vaccination campaign against COVID-19. On 12 March 2021 they concluded a cooperation agreement on the processing of data related to vaccinations against COVID-19. A citizen sought annulment of the various acts of parliament consenting to that cooperation agreement. She argued that the agreement violated the right to protection of private life, the right to protection of personal data and the principle of non-retroactivity.

By Judgment 84/2023 the Constitutional Court considered that the contested acts may directly and adversely affect the applicant's decision to be vaccinated. [34]The Court rejected however most of her arguments. Firstly, it found that all the specific purposes of registration in Vaccinnet – such as high-quality

33. Constitutional Court (17 May 2023), ECLI:BE:GHCC:2023:ARR.076, B.23.1.
34. Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.14.2.

healthcare, pharmacovigilance, vaccine traceability, scientific research, etc. – are directly related to the vaccination campaign, are sufficiently precise and are limited to what is strictly necessary.[35]

Secondly, regarding the retention period of the data in Vaccinnet, the Court considered a period of at least 30 years to be standard for health data. Taking into account the particular pandemic circumstances, the Court approved the need to keep vaccination records until the decease of the vaccinated person. [36]

Thirdly, the Court ruled that the retroactive effect of the cooperation agreement of 12 March 2021 is justified. While the cooperation agreement of 12 March 2021 has effect from 24 December 2020 for some provisions and from 11 February 2021 for others, the content of those provisions corresponds to the previous regulation of vaccination data in a Royal Decree of 24 December 2020 (entered into force on 24 December 2020) and in a protocol agreement of 27 January 2021 (entered into force on 11 February 2021). Therefore, the retroactive effect does not compromise legal certainty and legitimate expectations.[37]

Finally, however, the Court annulled the provision authorising the Information Security Committee to allow the disclosure of vaccination data registered in Vaccinnet to third parties in certain circumstances. The decisions of that Committee, which are binding, are subject to jurisdictional control yet not to parliamentary control. The persons concerned are thus denied the guarantee of parliamentary control, while European Union law does not impose such independence.[38]

11. In another case the Court decided that the preliminary question on the rules of the same cooperation agreement were not of use for the referring judge.[39]

9. Good Administration of Justice

12. Two judgments concerned the rules on internment, as a special method of detention. As a rule, such detainees (internees) are heard in person by the judge deciding on their situation of internment. The opportunity to be heard in person is considered to be crucial to the judge's assessment

35. Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.23.3.
36. Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.37.1-B.37.4.
37. Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.49.1-B.49.3.
38. Constitutional Court (1 June 2023) ECLI:BE:GHCC:2023:ARR.084, B.30.1-B.32.
39. Constitutional Court (16 March 2023) ECLI:BE:GHCC:2023:ARR.045.

of the personal, mental or psychological condition of internees. However, the federal Act of 20 December 2020, containing various temporary and structural provisions on justice in the context of the fight against the spread of COVID-19, temporarily lifted that rule. According to Article 46 of the Act, only the internee's lawyer and the public prosecutor are heard. With Judgment 32/2021 the Constitutional Court suspended that provision. In order to protect public health during a viral pandemic by minimising physical contact between people, less restrictive measures are possible. These include an appearance by videoconference or in a sufficiently spacious, well-ventilated courtroom, or even a hearing in the institution in which the internee is staying. With Judgment 76/2021, the Court annulled the provision for the same reasons. In both judgments the Court expressly relied on case-law of the European Court of Human Rights on Article 5 (4) of the ECHR.[40]

13. More rapidly than the federal parliament (no. 2), the Walloon parliament, by a Region Act (decree) of 17 March 2020, granted special powers to the Walloon government for a limited period of time, allowing it to tackle the COVID-19 pandemic. On this ground, the Walloon Government adopted on 18 March 2020 a regulation temporarily suspending the time limits for bringing an action for annulment before the Council of State against Walloon administrative acts or regulations. Article 2 of the Decree of 3 December 2020 ratified this temporary suspension. An action for annulment was brought by a company involved in an appeal before the Council of State. The Constitutional Court has jurisdiction to review that article, which has appropriated the ratified regulation. By Judgment 69/2022, the Court annulled the contested article for violation of the rules on repartition of competences. In determining the rules of procedure for the Council of State, it infringes federal competence. [41]However, the Court upheld the effects of the measure in order to avoid legal uncertainty over admissibility issues before the Council of State.[42]

14. Royal decree no. 3, taken in application of one of the two federal special power Acts (*supra* no. 2), suspended the limitation period for criminal

40. Constitutional Court (25 February 2021) ECLI:BE:GHCC:2021:ARR.032, B.6-B.8.5; Constitutional Court (20 May 2021) ECLI:BE:GHCC:2021:ARR.076, B.4-B.6.5.
41. A federal special powers Royal Decree of 21 April 2020 also prolonged the time limits before the State Council.
42. Constitutional Court (19 May 2022) ECLI:BE:GHCC:2022:ARR.069, B.7-B.28. See also Constitutional Court (10 November 2022) ECLI:BE:GHCC:2022:ARR.146, B.7-B.8.

proceedings for a total of four months (18 April 2020 to 17 July 2020). The regulation was ratified by the Act of 24 December 2020. In three cases, the Court of Cassation and a court of first instance referred preliminary questions to the Constitutional Court on the possible violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) because the suspension applies in general, without excluding those proceedings whose verdict was delayed for reasons other than the health crisis.

In Judgments 2/2023, 34/2023 and 108/2023 the Constitutional Court recalls that the measure was aimed at ensuring the effective application of criminal laws, protecting society and safeguarding the rule of law, as the crisis caused by the COVID-19 pandemic forced the courts to drastically limit their activities to the most urgent and important cases. In those circumstances, the Court ruled that it was neither necessary nor feasible to require courts to determine on a case-by-case basis whether the pandemic had a concrete impact on the treatment of a case. Therefore, equal treatment was justified.[43]

15. Royal decree no. 2 on the other hand, ratified by the same federal act of 24 December 2020, was found to be discriminatory for not including certain procedures in the automatic extension of the limitation period to bring an action before a civil court, without any justification. Therefore, the Constitutional Court ruled a violation of Articles 10 and 11 of the Constitution.[44]

10. Protection of Tenants

16. By a Region Act (ordinance) of 19 March 2020 also the parliament of the Brussels-Capital Region granted special powers to the Brussels government. By Order of 20 May 2020, the government imposed a moratorium on evictions until 31 August 2020 to prevent the most vulnerable people from being left without housing or stable accommodation in the context of the COVID-19 pandemic. By Ordinance of 4 December 2020, the Parliament of the Brussels-Capital Region confirmed the order. Two homeowners and a homeowners' interest group sought the repeal of this ordinance.

In Judgment 97/2022, the Constitutional Court first of all found that such measure falls within the competence of the regions. That power does not

43. Constitutional Court (12 January 2023) ECLI:BE:GHCC:2023:ARR.002, B.8-B.12; Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.034, B.8-B.11; Constitutional Court (6 July 2023) ECLI:BE:GHCC:2023:ARR.108, B.7-B.10.
44. Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.031, B.8-B.12. See also Constitutional Court (10 November 2022) ECLI:BE:GHCC:2022:ARR.146, B.5-B.7.

extend to impeding the enforcement of court decisions as such, which would be contrary both to the fundamental principle of the Belgian legal order that court decisions may be altered only by the use of legal remedies and to the rules governing the repartition of competences. In exceptional circumstances, however, a temporary postponement of the enforcement of court decisions ordering evictions, as provided for in the impugned provision, does not fundamentally undermine that principle and those rules.[45]

As regards the alleged infringement of the right to peaceful enjoyment of property, the Court found that the moratorium on evictions could fall within the scope of use of property in accordance with the general interest' within the meaning of Article 1.2 of Protocol 1 to the ECHR, and consequently, within the scope of that treaty provision read in conjunction with Article 16 of the Constitution. The measure pursued a legitimate objective in the public interest and struck a fair balance between, on the one hand, the interests of tenants of immovable property whose eviction was prohibited and, on the other hand, the interests of owner-landlords.

The Court took into account, in particular, the measure's temporary nature and limited duration, as well as the competent legislature's broad discretion to take appropriate measures to protect the rights to health and shelter of a segment of the population which, even under normal circumstances, faces hardship. Moreover, the rent was still due, payable and recoverable during the period in question and it was for the ordinary courts to assess whether compensation on the basis of the principle of equality for public burdens was warranted and to determine the amount of compensation.[46]

11. COVID-19 Discriminations

17. A Flemish Region Act (decree) of 15 May 2020 suspended the start date of certain sustainable energy projects, in order to avoid that, because of the COVID-19 pandemic, they would not be operational in time and therefore would not be eligible for green certificates. The Region Act differentiates between projects that have a start date expiring in 2020 or 2021 and projects with a start date expiring in 2022 or later. The start date of the first category

45. Constitutional Court (14 July 2022) ECLI:BE:GHCC:2022:ARR.097, B.6-B.14.
46. Constitutional Court (14 July 2022) ECLI:BE:GHCC:2022:ARR.097, B.21-B.29 (summary from CODICES-database, www.codices.coe.int BEL-2022-2-004; this database, initiated by the Venice Commission, contains the full text of over 10,000 judgments from over 100 courts mainly in English and in French, but also in other languages, as well as summaries of these judgments in English and in French).

of projects is automatically suspended from 20 March 2020 to 17 July 2020. The start date of the second category of projects is only suspended, for the same period, 'if it is evidenced that the project cannot be realised within the original period of validity due to COVID-19'. In Judgment 2/2022 the Constitutional Court ruled that this distinction was reasonably justified because the latter projects had more time to recover any delay incurred by COVID-19 and because a suspension of the start date remained possible in all cases.[47]

18. In midst of the second COVID-19 wave, the federal parliament passed an Act to allow nursing activities to be carried out in the pandemic by persons not legally qualified for that purpose. The Act of 6 November 2020 was in force until 1 April 2021, but the King could extend its application for up to six months. By Judgment 169/2020 the Constitutional Court dismissed the suspension claim.[48] In a second judgment, on the merits, the Court ruled that neither the principle of equality nor the fundamental right to health protection were violated. The Act imposed a strict set of cumulative conditions for non-nursing staff (shortage of nurses, complexity of the activities, supervision of a coordinating nurse…), so there is no equal treatment of different situations as the applicants argued. Furthermore, the contested Act aimed to relieve the overburdened healthcare staff during the pandemic, for a limited period of time. As to the right to health protection, the Court concluded that the Act enhances rather than diminishes that right. By Judgment 56/2021 the action for annulment was rejected.[49]

At a later stage of the pandemic, by an Act of 28 February 2022, the legislator allowed the pharmacists to administer COVID-19 vaccinations. The action for annulment of that law, brought by the Belgian association of physicians, is still pending.[50]

19. Very soon after the virus outbreak, on 23 March 2020, the federal parliament adopted temporary measures in favour of self-employed persons forced to partially or completely interrupt their activities as a result of COVID-19. In Judgment 43/2023 the Constitutional Court considered it discriminatory that a certain category of self-employed persons was excluded from these measures, more specifically the beneficiaries of incapacity or

47. Constitutional Court (13 January 2022) ECLI:BE:GHCC:2022:ARR.002, B.9-B.14.
48. Constitutional Court (17 December 2020) ECLI:BE:GHCC:2020:ARR.169, B.2-B.5.5.
49. Constitutional Court (1 April 2021) ECLI:BE:GHCC:2021:ARR.056, B.4-B.16.
50. Case no. 7855.

disability benefits who are self-employed in main occupation with the authorisation of their medical doctor. According to the Court, there is no reasonable justification as to why their loss of income due to the enforced interruption of their self-employment is not compensated.[51]

20. The federal parliament also adopted an Act of 20 December 2020 'containing various temporary and structural provisions on the administration of justice in the context of the fight against the spread of the coronavirus COVID-19'. One of the measures temporarily relaxed the unanimity requirement for the general meeting of co-owners using the written procedure. Asked whether that provision infringes Articles 10, 11 and 23 of the Constitution, Judgment 45/2022 holds that the question is based on a manifestly incorrect interpretation of that provision.[52]

21. In Judgment 57/2023, the Constitutional Court ruled on a difference in treatment regarding the possibility of obtaining a reduction in the property tax. One of the parties wished to obtain such reduction because it was unable to receive guests (or a significantly lower amount of guests) at its hotel during a certain period due to the COVID-19 pandemic. The Court dismissed that complaint, noting that both the federal and the regional authorities adopted several specific measures to mitigate the impact of that pandemic on businesses, including the hotel and restaurant sector.[53]

12. Pending cases

22. Finally, two cases concerning preventive healthcare related to COVID-19 are still pending. They involve an authorisation to the executive, by the Walloon Parliament (case no. 7829) and the competent Brussels legislature (case no. 7830), to take specific sanitary measures in case of a pandemic state of emergency. The first case also covers the collection and processing of health data. Those issues have already been raised in earlier cases, in particular Judgments 33/2023 (*supra* no. 6) and 26/2023 (*supra* no. 7). Beyond that, the individual right to refuse treatment is at stake in the first case. Both judgments will be handed down by the end of 2023.

51. Constitutional Court (16 March 2023) ECLI:BE:GHCC:2023:ARR.043, B.6.1-B.6.5.
52. Constitutional Court (17 March 2022) ECLI:BE:GHCC:2022:ARR.045, B.3-B.6.
53. Constitutional Court (30 March 2023) ECLI:BE:GHCC:2023:ARR.057, B.11.


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The powers of the government in a state of emergency and the constitutionality of lockdown measures

António Manuel ABRANTES,
Adviser to the President,
Constitutional Court of Portugal

1. Introduction

The Constitutional Court of Portugal has a vast case-law regarding the Covid-19 pandemic and its effects on constitutional justice[1]. This paper will focus only on the two topics indicated in the title: the powers of the Government in a state of emergency and the constitutionality of lockdown measures.

1. For a full summary of the case-law of the Court on this matter, see Constitutional Court of Portugal, "Rulings of the Constitutional Court of Portugal related to the Covid-19 pandemic", October 2022, available at: https://www.tribunalconstitucional.pt/tc/file/covid19_en_nov22.pdf?src=1&mid=6936&bid=5537

2. The powers of the Government in a state of emergency

2.1 Introduction

In the Portuguese legal system, the entry into force of a state of emergency has two key moments. First, there is a formal declaration of the state of emergency, with the intervention of the three most important constitutional bodies: the Government is consulted; the Parliament issues the authorization; and the President of the Republic issues the formal declaration. The presidential decree declaring the state of emergency plays a decisive role in establishing the legal framework that regulates this state of constitutional exception and in defining its limits (notably, which fundamental rights may be suspended and in what circumstances). In a second moment, the state of emergency is implemented by the Government.

In March of 2020, following the first cases of Covid-19 in Portugal, the President of the Republic initially declared the state of emergency by Decree no. 14-A/2020, of 18 March, and later renewed it by Decree no. 17-A/2020, of 2 April. In order to implement this second presidential decree, the Government approved Decree no. 2-B/2020, of 2 April. Article 43(6) of this governmental decree determined that any act of disobedience or resistance to the legitimate orders of the competent authorities carried out in breach of its provisions would not only be punished as a crime of disobedience, provided for in the Criminal Code, but the upper and lower limits of the corresponding sanction would be increased by one third.

However, according to Article 165(1)(c) of the Portuguese Constitution (hereinafter, the "Constitution"), the power to issue provisions regarding the definition of criminal sanctions is primarily reserved to the Parliament. This means that, as a rule, the Parliament is the only body with the necessary powers to legislate in these matters, unless it expressly authorizes the Government to do so. In this case, there was no previous authorization by the Parliament allowing the Government to legislate on the matter, notably to increase the sanction for the crime of disobedience in the specific case of acts of disobedience or resistance to the legitimate orders of the competent authorities carried out in breach of the provisions of the governmental decree that implemented the state of emergency.

Some of the offenders that were punished with this increased sanction claimed before the ordinary courts that this particular provision was unconstitutional, for breaching Article 165(1)(c) of the Constitution. Some courts agreed with this reasoning, while others didn't, and eventually appeals were filed and the Constitutional Court was called to decide in each of these cases. The most interesting point was that its first ruling, issued by the Third Chamber of the Court, deemed this provision of the governmental decree not unconstitutional, claiming the Government had the power to legislate on this matter. However, in subsequent decisions, the two other chambers of the Court ruled in a different direction and judged the same provision unconstitutional.

2.2 The position of the Third Chamber in Rulings nos. 352/2021 and 193/2022

In the first set of rulings assessing the constitutionality of this provision, the Third Chamber of the Court decided, by a majority of 3 judges (with 2 dissenting opinions) that the Government had the power to legislate on this matter due to Article 19(8) of the Constitution, which provides the following: "declarations of a state of siege or a state of emergency grant public authorities the power to take all steps necessary and appropriate for the prompt restoration of constitutional normality".

The Chamber interpreted this provision to mean that the declaration of a state of emergence gives birth to a temporary state of constitutional exception, characterized by two main elements:

1. the suspension of certain fundamental rights; and
2. the increase of powers of the executive, by extending the powers of the Government to adopt the emergency measures necessary to address the situation at stake.

Therefore, considering this exceptional distribution of powers between constitutional bodies, the Chamber sustained an innovative idea. Since the presidential decree establishing the state of emergency authorized the Government to produce primary norms that limited fundamental rights (notably, the right to freedom and freedom of movement) – and this was unquestionable, because the presidential decree stated this expressly -, then the necessary conclusion was that the Government was also authorized to produce secondary norms, i.e. provisions establishing sanctions for violations of the primary norms.

According to the Chamber, if the Government approved a provision increasing the upper and lower limits of the sanction for the crime of disobedience or any other offence, this would certainly constitute a breach of the powers of the Parliament, and the provision would be unconstitutional from an organic standpoint. However, since the increased upper and lower limits were only applicable to breaches of the specific provisions that implemented the state of emergency (the so-called primary norms), it was argued that the Government could approve these secondary norms, because they were directly related to the provisions covered by the declaration of the state of emergence. As I underlined previously, this interpretation was based on Article 19(8) of the Constitution, which grants public authorities [exceptional] powers to take all steps necessary and appropriate for the prompt restoration of constitutional normality.

Lastly, the Court argued that this interpretation did not breach Article 19(7) of the Constitution, which provides that declarations of a state of emergency cannot affect the application of the constitutional rules concerning the powers of constitutional bodies. The reasoning was that this normative power was exceptional and did not inhibit the regular use of normal legislative power, because the executive operates, in this very particular constitutional framework, as an extraordinary legislator by virtue of necessity. The exercise of this power was based on an extraordinary title (the declaration of the state of exception), it had a temporary nature (the validity of the presidential decree) and it had a specific purpose (the restoration of constitutional normality). Therefore, the Court concluded that the provision was not unconstitutional.

2.3 The position of the First Chamber in Ruling no. 477/2022

This view was subsequently challenged by the First Chamber of the Court in a different case where the constitutionality of the same provision was discussed. In a nutshell, the Chamber decided that the provision was unconstitutional from an organic standpoint, because the Government lacked the power to legislate on this matter.

The Chamber started by underlining that the legal framework provided for the state of emergency is based on the separation between two different acts: its declaration by the President of the Republic, and its implementation by the Government. It was noted that the dichotomous relationship

between the two acts is based on a conception of the presidential decree as a normative act authorizing the suspension of certain fundamental rights, which must be expressly specified, as required by Article 19(5) of the Constitution.

In this regard, the Chamber sustained that the presidential decree has the important function of delimiting the executive powers of the Government. Therefore, there must be a continuity between the discipline enshrined in the declaration of the state of emergency and the regulation issued by the Government implementing the state of emergency.

The Chamber noted that the presidential decree only authorized the Government to apply the crime of disobedience to non-compliance with or resistance against orders provided in the governmental decree implementing the state of emergency. The decree did not make any reference to the possibility of increasing the penalty provided in the Criminal Code for this offence. The Chamber further clarified that, even if the presidential decree had authorized the Government to do so, that authorization would not be valid, because a state of emergency cannot affect the constitutional rules of competence and functioning of constitutional bodies, as provided in Article 19(7) of the Constitution, mentioned above.

Having said this, the Chamber then went on to analyse the role of the principle of separation of powers in a constitutional state of exception, and argued that Article 19(8) of the Constitution should be interpreted in the light of Article 19(7). In this respect, it distanced itself from the Third Chamber and stated that the separation of powers and the delimitation of the powers of constitutional bodies constitute negative limits to the regime of states of constitutional exception, which remain intact during their validity. This status quo can only be altered through the Constitution. The Chamber stated that a different interpretation of Article 19(8) of the Constitution, which would recognize the legitimacy of the Government to legislate on matters constitutionally reserved to another constitutional body, would distort the purpose for which the exclusive powers of the constitutional bodies as a negative and insurmountable limit of the state of constitutional exception were enshrined by the constitutional legislator in Article 19(7) of the Constitution.

It was thus concluded that the Government does not have, in the exercise of its powers to execute a decree implementing a state of emergency, legislative powers in relation to crimes and penalties, since the constitutional rules on the division of powers and the powers of constitutional bodies remained fully in force.

2.4 The position of the Second Chamber in Ruling no. 619/2022

A few months later and in a different case, the Second Chamber of the Court was also called to assess the constitutionality of the same provision. After recalling the existing case-law and the divergent positions expressed, on the one hand, by the Third Chamber of the Court in Rulings no. 352/2021 and no. 193/2022, and, on the other hand, by the First Chamber of the Court in Ruling no. 477/2022, the Second Chamber agreed with the latter and decided that the provision under review was unconstitutional from an organic standpoint.

It noted that the Constitution provides strong guarantees in order to ensure, as far as possible, constitutional normality in a state of exception. In terms of the powers of constitutional bodies, the legislator sought to provide safeguards against the risks of unilateral actions by drawing a tripartite division of powers that promotes their interdependence: the power to declare the state of emergency belongs to the President of the Republic (Article 134(d) of the Constitution), after hearing the non-binding opinion of the Government, and the power to authorize it belongs to Parliament (Article 138(1) of the Constitution). Thus, in situations of constitutional exception, the executive is invested in the role of a true executor of prior legislative choices imposed on it by primary decision-making bodies.

The Chamber then argued that this interpretation of the constitutional aspects of a state of exception appeared to be the most consistent with Article 19(7) of the Constitution, as it was unequivocal that the Constitution had intended to keep intact the rules governing the division of powers between constitutional bodies. Therefore, the executive could only approve rules usually included within the scope of the exclusive powers of Parliament if those rules strictly executed the presidential decree declaring the state of exception. It was also pointed out that the scope of action of the Government in the absence of the referred authorization by Parliament is thus bounded by the specification of those rights, freedoms and guarantees whose exercise is suspended (Article 19(5) of the Constitution).

Subsequently, the Chamber held that the exclusive powers of Parliament provided for in Article 165(1)(c) of the Constitution remain intact even during a state of constitutional exception. It was stressed that giving criminal relevance to certain behaviours, as well as imposing sanctions for non-compliance with duties resulting from a state of emergency, inevitably involved more fundamental rights than those that could be legitimately suspended in each specific case (notably, those that derive from the prohibition of retroactive criminal laws and defendants' rights of defence, and which are safeguarded, in any event, from the possibility of suspension by Article 19(6) of the Constitution). It was then pointed out that the division of powers is especially important in terms of criminal law, and thus a change in the division of legislative powers resulting from a state of emergency must not entail granting the executive any powers related to the definition of crimes and their corresponding penalties.

Departing from these premises, the Chamber underlined that the President's Decree no. 20-A/2020, of 17 April, partially suspended the right to move and to reside anywhere in national territory; the right to private property and to private economic initiative; the rights of workers; the right to move abroad; the rights to assemble and to demonstrate; the freedom to worship, in its collective dimension; the freedom to learn and to teach; and, finally, the right to the protection of personal data. However, it added that this decree had not suspended the guarantees in criminal proceedings, notably the right not to be criminally sentenced except by virtue of a previous law declaring the action or omission punishable (Article 29(1) of the Constitution), nor had it mentioned the grant of sanctioning powers to the Government. On the contrary, the decree itself provided that acts of disobedience against the rules issued under the powers of execution of the state of emergency would be sanctioned according to the law (in particular, Article 7 of the State of Siege and State of Emergency Law (Law no. 44/86, of 30 September), which established that non-compliance with this law, or with the declaration of the state of emergency or the rules implementing it was punishable as a crime of disobedience).

The Chamber then concluded that the Government does not have, when executing the presidential decree establishing the state of emergency, legislative powers in relation to crimes and penalties. Thus, since the constitutional rules on the division of powers between constitutional bodies remained fully in force, the provision under review was unconstitutional

from an organic standpoint.

3. The constitutionality of lockdown measures

3.1 Introduction

A second relevant topic that was decided by the Court related to the constitutionality of two different types of lockdown measures:

1. measures that imposed a period of mandatory confinement or prophylactic isolation on passengers arriving on certain flights; and
2. measures that established a period of mandatory confinement or prophylactic isolation in a health establishment or at home for citizens subject to active surveillance by the health authorities (for having tested positive for Covid-19 or having had contact with an infected person).

There was an interesting evolution in the case-law of the Court in this regard. At first, the Court simply assessed the constitutionality of these measures from an organic standpoint, and declared some of them unconstitutional because it considered that they were adopted by a body that lacked the power to do so.[2] Considering that these measures interfered with fundamental rights, they had to be regulated by Parliament or by the Government following an authorization issued by Parliament, in accordance with Article 165(1)(b) of the Constitution. Therefore, the Court deemed lockdown measures approved by the Government without this previous authorization unconstitutional. Later on, one of the chambers of the Court (the Second Chamber) also assessed these measures from a substantive standpoint, and considered them unconstitutional for breaching the right to personal freedom provided in Article 27(1) of the Constitution. This paper will focus only on this second line of reasoning, because it seems to me the most relevant for our discussion.

Before going into that, I must however start by addressing an issue that the Court had to decide in all of these cases - to determine what was the specific fundamental right that was affected by lockdown measures. Was it the right to personal freedom enshrined in Article 27(1) of the Constitution? Or rather the freedom of movement within national territory provided for

2. See Rulings nos. 424/2020, 87/2020, 729/2020, 769/2020, 173/2021, 87/2022, 88/2022, 89/2022, 90/2022, 334/2022, 336/2022, 351/2022, 353/2022, 352/2022, and 510/2022.

in Article 44(1) of the Constitution?
In the first set of rulings, where the Court assessed the cases only from an organic standpoint, this was not a crucial distinction because, regardless of their classification, they are both personal fundamental rights and, therefore, their regulation falls within the powers of Parliament. In these first rulings, the Court was inclined to consider that these measures entailed a limitation to the right to personal freedom, but noted that the solution would be the same even if the right in question was the freedom of movement within national territory.

This distinction had, however, very important consequences in the second set of rulings, where the substantive aspects were also considered, for two main reasons. Firstly, the presidential decree had only suspended the freedom of movement (Article 44 of the Constitution), not the right to personal freedom (Article 27 of the Constitution). Secondly, the right to personal freedom benefits from a much wider protection than the freedom of movement.

In this regard, the Second Chamber of the Court followed two different lines of reasoning. According to the first - the "monist perspective"[3] -, confinement measures always necessarily contend with the right to personal freedom enshrined in Article 27 of the Constitution, because they circumscribe a person to a given physical space, which goes beyond the mere prohibition to enter a certain territorial space. According to the second - the "dualist perspective"[4] -, confinement measures do not always entail the same degree of limitation to individual liberty, and therefore might be considered, in some cases, as a limitation to the right to personal freedom (Article 27 of the Constitution) and, in other cases, to the freedom of movement within national territory (Article 44 of the Constitution).

3.2 The monist perspective - Rulings nos. 464/2022, 465/2022, and 466/2022

According to Justice António Ascensão Ramos, who followed that first line of reasoning in Rulings nos. 464/2022, 465/2022, and 466/2022, lockdown measures must always be analysed in reference to Article 27 of the

3. See Pedro Machete/Cláudia Saavedra Pinto, "O direito à liberdade pessoal e a crise sanitária", *Estudos em Homenagem ao Conselheiro Presidente Manuel da Costa Andrade*, Volume I, Almedina 2023, p. 754.
4. *Ibid*., p. 764.

Constitution.
In the first and second rulings, the Court was called to decide two appeals filed against court decisions that had denied the application of Article 25(1) and (4) of the regime attached to Resolution no. 45-C/2021, of 30 April, of the Council of Ministers, on the grounds of their organic and substantive unconstitutionality. The appealed courts had refused to apply the provisions within the scope of a habeas corpus request filed by passengers of flights from Brazil who had been subjected by the Portuguese Immigration and Borders Service to mandatory precautionary isolation following their arrival in Portuguese territory. In the third ruling, the Court was called to decide an appeal filed against a decision handed down by the Criminal Investigation Court of Santarém which, granting a request for habeas corpus presented by the applicant, had refused to apply Article 3(1) (b), (2), and (3) of the regime attached to Resolution no. 157/2021, of 27 November, of the Council of Ministers, by reference to clauses 2 and 10 of that resolution. These provisions established the mandatory confinement in a health establishment, at home or, if that was not possible, in another place defined by the competent health authorities, of "citizens that were subject to active surveillance by the health authorities or by other health professionals".

The Court first defined the constitutional parameters of the isolation obligations, debating whether they should be deemed as an encroachment on the right to personal freedom enshrined in Article 27(1) of the Constitution, or rather as interferences in the freedom of movement within national territory provided for in Article 44(1) of the Constitution. The majority was of the opinion that circumscribing a person to a given physical space, which goes beyond the mere prohibition to enter a certain territorial space, contends with the right to personal freedom provided in Article 27(1) of the Constitution. The Court rejected the view that this article merely provided constitutional protection against commitment to a public establishment or legal measures of a criminal nature with a similar effect.

The main novelty when compared to previous decisions was the fact that the Court pronounced for the first time on the substantive constitutionality of the provisions under review, and not merely on their organic constitutionality. In this regard, the Court resorted to German-inspired doctrine, which had previously been adopted by Portuguese constitutional jurisprudence (Ruling no. 494/94), to define deprivation of liberty as any

form of confinement of the human person to a given physical space, without the measure in question having to be equivalent or sufficiently similar to prison. This led the Court to conclude that the precautionary isolation measures under analysis entailed an actual deprivation of liberty and not a mere restriction to this right. Thus, based on the understanding that measures that entail a deprivation of the personal freedom protected by Article 27 of the Constitution must be specifically provided for in the Constitution (contrary to measures which are merely restrictive), the Court concluded that the measures contained in the provisions under review could be qualified as forms of deprivation of liberty that were not authorized by the list contained in Article 27(2) and (3) of the Constitution, and were thus substantively unconstitutional. The possibility of assessing the level of deprivation of the right to liberty was also rejected as grounds to deny the applicability of the principle that requires measures that entail a deprivation of liberty to be specifically provided for in the Constitution, since the wording of Article 27(1)(2)(3) of the Constitution treats in a similar manner measures that entail a partial deprivation of liberty and measures that entail a complete deprivation of liberty.

The Court also pondered the possibility of regarding instances of deprivation of liberty of carriers of infectious and contagious diseases as admissible in light of the exhaustive list in Article 27 of the Constitution based on: (i) a form of extensive interpretation of Article 27(3)(h) (involuntary commitment of carriers of mental illness); (ii) the qualification of the commitment/confinement as a "security measure of a non-punitive nature" (Article 27(2)); or (iii) resorting to the theory of intrinsic limits of ponderation, views which are common in Portuguese case-law and doctrine. Without taking a clear stand on the viability of any one of these three positions, the Court remarked that, even if any of the three were accepted, deeming a provision constitutional would always depend on the existence of an extremely delicate balance when modulating intrusive measures, considering the particular legal weight of the protection of the right to personal freedom provided for in Article 27 of the Constitution. The Court also highlighted the need, in any case, for the measure entailing a deprivation of liberty to be ordered (or later confirmed) by a court of law. Having arrived at this point, the Court concluded that the provisions under review did not reveal a secure connection between the legitimizing referent (public order dangers associated with the dissemination of the SarsCov-2 virus) and the encroachment on the right to personal freedom.

The absence of legal criteria for subjecting the person to isolation, the fact that the person was not allowed a minimum reasonable space to move, the fact that a judge was not called to apply (and/or confirm) the measures and the fact that there was no time limit for the confinement period were given particular relevance. For this reason, the Court concluded, by majority, that the provisions under review were not only organically unconstitutional, for breach of Article 165(1)(b) of the Constitution, but also substantively unconstitutional, for breach of Article 27(1)(2)(3) of the Constitution.

3.3 The dualist perspective - Rulings nos. 489/2022 and 490/2022

A few months later, Justice Mariana Canotilho argued in Rulings nos. 489/2022 and 490/2022 that lockdown measures do not always entail the same degree of limitation to individual liberty.

It was pointed out that Article 27(3) of the Constitution allows certain restrictions to that right to liberty. All of them concern either prison or detention, with the exception of two:

1. the subjection of a minor to protection, assistance or education measures in an establishment fit for such purposes, ordered by the competent court of law (sub-paragraph (e)); and
2. the commitment of a person with a mental illness to a therapeutic establishment fit for such purpose, ordered or confirmed by a competent judicial authority (sub-paragraph(h)).

The Court then remarked that the common element in both cases is that the deprivation of liberty occurs in a context of institutionalization. Therefore, the restrictions to the right to freedom expressly authorized in Article 27(3) of the Constitution are circumstances in which the person is not merely prevented from moving around as he sees fit, but is placed against his will in an institution, which has profound implications in terms of his freedom that go well beyond the mere freedom of going in and out of that institution. In this regard, the Court highlighted that being committed to an institution raises various issues in terms of fundamental rights, since it entails a significant loss of the ability to make decisions about one's own life, which explains why the Constitution only allows it in a limited, exhaustive and well-grounded set of exceptional cases. The

Court argued that the mandatory confinement to a health establishment is similar in nature to the exceptions provided for in Article 27(3) of the Constitution, since it entails a deprivation of liberty, in a context of institutionalization or similar circumstances, such as the confinement in a hotel (decided in Ruling no. 424/2020 and respective subsequent jurisprudence). Consequently, taking into consideration that the restrictive measures of mandatory confinement in an institution (or equivalent) are not comprised in any of the exceptions provided for in Article 27(3), that would automatically indicate the substantive unconstitutionality of those measures, for breach of Article 27 of the Constitution.

However, the Court moderated the impact of this conclusion by adding that the most typical confinement measure – which consists of an obligation to stay home, for a period pre-determined by the competent administrative authority – could also be analysed from a different perspective. In fact, the restriction to fundamental rights imposed on someone who is at home in precautionary confinement is a much more limited compression of someone's individual freedom than the sacrifice imposed on citizens forced to comply with a similar measure in a context of involuntary commitment or equivalent. Considering that these situations are not comparable, either practically or substantially, to prison, detention or subjection to involuntary commitment or equivalent, the Court admitted that, depending on their specificities, measures of the kind could be deemed as a restriction on the freedom of movement, in the light of Article 44(1) of the Constitution.

The Court then specifically addressed the provisions under review and concluded that the concrete confinement measures provided therein represented an actual deprivation of personal freedom that could be included within the scope of protection of Article 27(2) and (3) of the Constitution (and not of Article 44), and so were substantively unconstitutional for four different fundamental reasons. To begin with, the provisions did not establish a maximum absolute limit for the duration of the confinement measure, nor did they regulate the possibility and conditions of its extension or renewal, which prevented citizens from predicting the restriction to liberty that could effectively be imposed on them. Secondly, the provisions did not provide for any specific mechanisms for guaranteeing the rights of citizens, nor any kind of judicial control, and they did not require that citizens be informed of the means of defence against such measures at their disposal. Thirdly, the competent legislative body had not established the

legal framework for the monitoring of people subject to confinement, and therefore the competences and procedures intended to ensure compliance with the confinement obligation were unclear. Lastly, the Court stressed that the provisions under review were omissive on how the social and medical needs of citizens were to be met by the competent authorities, and on the exceptional cases where the obligation to remain at home should give way before the need to ensure respect for fundamental rights.

On these grounds, the Court decided that the indeterminate nature and broadness of the provisions under review, together with the potentially protracted duration of the measure, as well as the possibility of the police being called to ensure compliance with it, inevitably entailed a deprivation of liberty, in breach of Article 27(2) and (3) of the Constitution, and so were substantively unconstitutional.

Therefore, although the conclusion was the same, the novelty here was that the Court deemed that, in the abstract, lockdown measures that do not imply institutionalization - such as the obligation to stay at home – might, in some cases, and depending on the circumstances of their application, only imply a limitation to the right to move (Article 44) and not to the right to personal freedom (Article 27).

Better safe than sorry? The case of Israel's response to COVID-19

Moran YAHAV, Chief of Staff to the President, Supreme Court of Israel

Good afternoon everyone. Special thanks to the organizers of this event, to our hosts in Bulgaria and thank you all for staying to hear the last presentation of the day.

As we have heard throughout the day, the unprecedented global crisis caused by COVID-19 created many challenges for legal systems worldwide. Interestingly enough, despite the similar nature of many of these challenges, each legal system experienced this crisis – as Tolstoy would say – in its own unique way.

To set the Israeli scene – the first verified COVID-19 case in Israel was detected on February 27th, 2020. Since then, Israel has experienced five main "waves" of COVID-19 outbreaks, the last of which ended in April 2022, exactly a year ago. The country was also put under three full lockdowns, as well as specific lockdown in high-risk municipalities.

In an unfortunate conjunction, during these years, Israel also faced an unprecedented political crisis, with **four** general elections held between 2019 and 2021.

This political reality meant that for a significant part of the COVID-19 crisis, the State of Israel was run by transitional governments and parliaments ("Knesset" in Hebrew), with no up-to-date State budget.

Meanwhile, the judicial workload in all three instances of our court system did not decrease during the crisis. As for the Supreme Court – which in Israel is comprised of 15 Justices, sitting both as a Court of Appeals and as a High Court of Justice – over 9,300 cases were submitted in the year 2020 alone; with around 1,500 petitions to the High Court of Justice, many of which were directed at steps taken by the authorities in the fight against COVID-19. And of course, there was a need for quick rulings in times of great uncertainty.

Throughout all this, and even in the midst of statewide COVID lockdowns, the entire Israeli Court System has remained continuously open and available to the public, adapting "on the fly" to the challenges. Like many other countries, Israel soon decided to turn the challenge into an opportunity, by, for example, developing various technological solutions – such as holding detention proceedings by means of visual conferencing.

At present, and as result, we are continuing to develop additional technological solutions, including a tailor-made platform that will allow various types of hearings and procedures to be held through video conferencing, as well as advanced mechanisms of online dispute resolution technology (ODR).

The focus of my presentation today is the way in which the Israeli Supreme Court, sitting as the High Court of Justice, addressed some of the principled "COVID cases" brought before it.

It should be noted that though states of emergency are unfortunately not new to the state of Israel, a plague is a different kind of a state of emergency. So in terms of the legislative and constitutional terrain, the Government Basic Law – basic laws are basically chapters in Israel's yet unfinished constitution – stipules in Article 38 that the government has the authority to declare a state of emergency for 7 days at a time, while the Basic Law: Human Dignity stipulates that emergency regulations cannot change the law or its provisions, but they can suspend or limit rights as long as it is done for a proper purpose, and only for as long as it is necessary to do so.

We also had in place an old law – reminder of the British mandate over the State of Israel – regarding public health, which allowed for the enactment of emergency regulations as well.

In retrospect, it is possible to generalize and say that from the outset, the prevailing mindset among Israeli governmental authorities was a precautionary one. The many then-unknown variables – the nature of the virus; its effects; and the question of when a cure or vaccine would become available – led decision-makers to prefer a policy of "better safe than sorry", resulting in broad and unprecedented restrictions being imposed on individual liberties.

This approach was based on the thesis that protecting public health is equivalent to protecting "the right to life", which meant that the balance struck by decision-makers was narrated as a horizontal balance between competing rights – chief among them the right to life – and other liberties.

It also meant that given the rapid spreading of the virus and the frequent changes in the available knowledge about it, many of the decisions taken by the Executive were the result of urgent, expedited decision-making processes, mostly utilizing means of emergency regulations.

Following comments from the Supreme Court, the Knesset later enshrined some of these restrictions in primary legislation. In this respect, a recent survey of the work of Legislatures during COVID-19 found that the Israeli Knesset had adapted relatively quickly to the COVID-19 limitations and resumed its work early on. But the legislative processes themselves were often expedited. In some cases, only 24 hours passed from when a bill was introduced and the time of its final approval as a law.[1]

The response of the Supreme Court to the decisions of the other two branches of government evolved over time. At the outset, given the extent of the "unknown", the Court accepted the government's precautionary approach.

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1. Amendment No. 6 to the Law on Special Powers for Dealing with the Novel Coronavirus (Temporary Provision), 5720-2020: The bill was submitted on February 3rd, 2021 and approved on the following day (during a session that began on the previous night).
Amendment No. 9 to this law also passed in less than 24 hours: It was submitted on September 2nd, 2021 and approved in the second and third readings later that day.
In addition, the Twenty-Fourth Knesset Elections Law (Special Provisions and Legislative Amendments), 5720-2020 was approved two days after it was submitted to the Committee (submitted: December 20th, 2020; approved: December 22nd, 2020).

The quote you see here is from a decision regarding a lockdown put in place on one municipality:

> *In the legal aspect, the pandemic takes us through terra incognita – through unheard-of legal and constitutional fields and pathways, which not even the pessimists could have envisioned.*
>
> *Fundamental constitutional rights – such as the right to privacy, property, freedom of occupation, and freedom of movement within Israel – fall silent in the face of phrases such as lockdown and closure, quarantine, roadblocks, GPS tracking by the Shabak, social distancing, and more. This all unfolds before our eyes like a dystopian nightmare in a democratic State founded on civil liberties.*
>
> *Normally, such measures would have been summarily struck down as manifestly illegal – but these are not normal times, because the hour requires (Yevamot 90b:4, Sanhedrin 46a), there is no choice but to restrict the public, even though the public has done nothing to deserve this.*
>
> (Justice Isaac Amit, HCJ 2435/20 *Loewenthal v. Prime Minister* (April 4th, 2020))

But as early as two months into the COVID-19 crisis – and even more so when it was understood that we are going to have to learn to live alongside the virus – the Court started to question this approach. Rather than horizontal balancing of the right to life vis-a-vis other rights, the Court balanced the public interest in health against various rights; and began demanding a wider factual basis to justify the Government's decisions.

In order to demonstrate the Court's reasoning and its development over time, I want to focus on three cases today: the first, and probably the most interesting, concerns contact-tracing carried out by the Israeli Security Agency – the ISA or *Shabak*; the second – a case concerning significant restrictions on the right to protest during the elections period in early 2021; and finally, a case concerning the government's decision to close – literally overnight – the State borders in February 2021.

A few weeks after the first verified COVID-19 patient was detected in Israel, the government decided to authorize the *Shabak* to utilize its surveillance technology to help carry out epidemiological investigations, such that the

movements and contacts of those found positive to the virus will be traced 14 days prior to the detection of the virus. The reason for this extraordinary measure was that the state's epidemiological investigation framework has collapsed and no other existing technological solution seemed at sight. This was done first through emergency regulations and later, following a decision by the Court, through an interpretation of an existing article of the *Shabak's* Law.

The decision of the Court was handed down towards the end of April 2020. This was at the height of the first major wave: the education system has been shut down for over a month; the country had been under a general lockdown for some time; private businesses were closed and the public sector provided vital services only.

The Court noted that from the data provided by the government it appears that using the surveillance technology of the *Shabak* is indeed effective. However, the Court held that even though given the language of law, it is in principle possible to authorize the *Shabak* to act in order to protect the "vital interests of the State's national security", this can only be done in the face of a clear and immediate danger to the State's citizens or to its form of government. The Court held that given the need for immediate action at the outset of the crisis, the government acted within its authority when it ordered the *Shabak*'s to preform contact tracing. But, the Court rules that given the fact that we are now two months into this crisis, it is expected of the government to find different solutions or to enshrine this authority in primary legislation.

The authorization of the *Shabak* ended a few days after the Court's ruling, and for a while the government had not renewed it. In the summer of 2020 and in the midst of another major wave, the Knesset passed the *Shabak* Authorization Law –allowing the government to authorize the *Shabak*, for 21 days at a time, to collect and process technological information on contacts of COVID patients with other individuals. In practice, such "authorization decisions" were continuously issued over and over again for over six months.

Four human rights organizations filed a petition to nullify the Law and the periodical authorization decisions.

The Court emphasized the infringement on citizens' privacy, and the problematic aspects of empowering an internal security service to direct its surveillance measures at innocent citizens and residents of the State, especially given the fact that this surveillance mechanism is only partially transparent.

The problematic nature of this measure, the Court added, was made worse by the fact that the Law allowed the government to grant the *Shabak* a sweeping authorization to monitor **all** verified COVID patients – that is, without limiting the mechanism to cases of patients not cooperating with the epidemiological investigation or who had reported zero contacts.

However, the Court held that the "center of gravity" of the infringement on the right to privacy, and accordingly, the "center of gravity" of the judicial review, is not the Law itself – which included mechanisms meant to reduce the infringement on the right to privacy – but rather the periodical authorization decisions of the government. These decisions, the Court held, suffered from significant flaws, *inter alia*, the lack of clear, measurable criteria meant to reduce the infringement on the right to privacy. Absent such guidelines, the government's decisions did not reflect relevant developments: morbidity rates fluctuated; epidemiological investigations had improved; a vaccine had been developed; and later on most of the high-risk population had been vaccinated.

As a result, the Court decided that if the government chose to continue using the *Shabak*'s contact-tracing ability, it would not be able to do this in an all-encompassing manner. The Court held that the government must formulate objective criteria defining the scope of using the *Shabak*, and the authorization must be limited to cases where the patient did not cooperate with the epidemiological investigation or when zero contacts were reported.

Following the decision, the Government stopped using the *Shabak*'s contact-tracing and the Authorization Law had not been renewed after July 2021.

On March 2021, the Court handed down another significant ruling, this time concerning a Law known as "the Framework Law" and the Regulations that had been enacted by virtue of it, imposing significant restrictions on the right to protest.

The Law was enacted as a temporary law, allowing the government to declare a state of emergency due to COVID-19 for 6 months. It also authorized the government to declare a "special emergency situation". Such a state was indeed declared on March 2021, and special regulations were put in place.

The regulations prohibited, *inter alia*, participating in a demonstration involving more than 20 people in an open area, or more than 10 people in a building; and they prohibited participating in a demonstration that took place more than one kilometer away from the demonstrator's place of residence.

The law and regulations became the target of several High Court of Justice petitions. One of the key arguments made by the petitioners was that these restrictions were imposed during election time, and were thus perceived as preventing political demonstrations.

The Court denied the petitions against the "Framework Law", holding again that the infringement on rights was caused as a result of the regulations, not as a result of the Law itself. In this regard, the Court held that the process of enacting the Regulations was flawed and lacking. The Regulations were approved via a late-night telephone poll amongst the ministers, and the cabinet meeting had not been documented with meeting minutes, so it was impossible to know what factual basis was presented to the members of the government.

In light of the State's clarification that the restriction on demonstrations meant limiting them to twenty-people "capsules" – which were allowed to stand next to each other so long as they maintained two meters' distance between them – it was held by majority opinion that this restriction passes the tests of proportionality. However, the Court decided to nullify the prohibition on holding demonstrations more than one kilometer away from one's place of residence, due to a disproportionate infringement on the freedom of demonstration. It was held that especially during elections time, it is important that citizens be able to demonstrate close to where politicians operate and reside.

As a result, the Court also ordered the cancellation of all fines that had been imposed on citizens who had demonstrated far from their homes. It was later reported in the media that approximately 7.5 million shekels – the equivalent of 2M US dollars or 1.85 M Euros – were consequently returned to about 18 thousand citizens.

Another case that illustrates the importance of upholding the guidelines of administrative law under conditions of uncertainty, concerns the decision to close the State borders in February 2021. As I mentioned, most of the population had been vaccinated by then, but rumors had begun to spread about variants of the virus that might be resistant to the vaccine. As a result, the State of Israel abruptly decided to close its borders almost completely, and many citizens who had been abroad for various purposes woke up one day to discover that they could not return to their country.

Following comments made by the panel during the hearing, the authorities significantly moderated the restrictions, and established quotas. But the factual basis on which the quotas were based on remained unclear.

The Court ruled that the precautionary principle is not a "magic word," and it cannot justify a sweeping and disproportionate derogation from the freedom of movement and the right of every citizen to leave their homeland and enter it.

The Court also considered the fact that once again these restrictions were imposed close to the date of general elections to the Knesset – which had been scheduled for March 2021 – thereby potentially denying the right of many citizens to vote.

The Court held that limiting the entry into and exit from Israel would have to be based on a comprehensive and up-to-date factual basis, and would have to meet the criteria of constitutionality. The President of the Supreme Court quoted in her decision a famous Hebrew poem:

"Home is a place,
That if you need to return to,
Will always have its door open for you".

To sum up. The COVID-19 crisis posed complex challenges: administrative decision-making processes based on apprehension and uncertainty; a lack of clear data; and a pressing need to make these decisions quickly. But "better safe than sorry", as the Court declared, is not a "magic" word. It is exactly in times of emergency that it is all the more important to uphold the rule of law and protect the basic logic of constitutional and administrative law, so that they, in turn, may protect us all.

I wanted to end with this quote from Albert Camus – The Plague. In the book, it was said in a context of a conversation between two people, but I think it is a beautiful reminder for us working in constitutional courts that protecting lives – should also mean protecting those things that makes life worth living.

There is a famous expression rumored to be an ancient Chinese curse:

"May you live in interesting times".

The COVID-19 crisis has certainly presented us all with some very interesting times; perhaps too interesting. I would like to end my presentation today by wishing us all some peace and quiet…

Thank you, and I look forward to our discussion!

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Joint Council on Constitutional Justice
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PARTICIPANTS

ALBANIA
Ela ELEZI, Legal Adviser, Constitutional Court, Tirana

ALGERIA
Lyes SAM, Chief of Staff, Constitutional Court, Algeria

ARMENIA / ARMÉNIE
Naira HOVHANNISYAN, Assistant to the President, Constitutional Court, Yerevan

AZERBAIJAN
Zeynab SALIMBAYLI, Head of International Law and International Cooperation Department, Constitutional Court, Baku

BELGIUM
Jan THEUNIS, Legal Adviser, Constitutional Court, Brussels

BOSNIA AND HERZEGOVINA
Zlatko KNEŽEVIĆ, Vice President, Constitutional Court, Sarajevo
Co-President of the Joint Council on Constitutional Justice, Member of the Venice Commission
Natasa VUKOVIC, Secretary General, Constitutional Court, Sarajevo
Ermina DUMANJIC, Head of the Centre for Records, Documentation, Information and Publication, Constitutional Court, Sarajevo

BULGARIA
Pavlina PANOVA, President, Constitutional Court, Sofia
Mariana KARAGYOZOVA-FINKOVA, Judge, Constitutional Court, Sofia
Philip DIMITROV, Judge, Constitutional Court, Sofia, Member of the Bureau of the Venice Commission
Yanaki STOILOV, Judge, Constitutional Court, Sofia
Valentin GEORGIEV, Secretary General, Constitutional Court, Sofia, Co-President of the Joint Council on Constitutional Justice

CROATIA
Mirjana STRESEC, Senior Legal Adviser, Constitutional Court, Zagreb

CYPRUS
Maria MICHAELIDOU-KYRIACOU, Senior Legal Officer, Supreme Court, Nicosia
Natasa PAPANICOLAOU, Legal Officer, Supreme Court, Nicosia

CZECH REPUBLIC
Lubomír MAJERĆIK, Head of the Analytics Department, Constitutional Court, Brno
Tereza ORDELTOVÁ, Analyst, Constitutional Court, Brno

ESTONIA
Berit AAVIKSOO, Adviser to the Constitutional Review Chamber, Supreme Court, Tartu

FINLAND
Minna HEIKINSALMI, Referendary Councillor, Supreme Court, Helsinki

GEORGIA
George LOMTADZE, Head of Court's Secretariat, Constitutional Court, Batumi

IRELAND
Rebecca MURPHY, Executive Legal Officer to the Chief Justice, Supreme Court, Dublin

ISRAEL
Moran YAHAV, Chief of Staff to the President, Supreme Court, Jerusalem

KAZAKHSTAN
Bakyt NURMUKHANOV, Deputy Chairman, Constitutional Court, Nur-Sultan
Aizhan SHATKANBAYEVA, Judge, Constitutional Court, Nur-Sultan
Zhanna NAZAROVA, Head of the Department of Organisational Work and Translation, Constitutional Court, Nur-Sultan

KOREA, REPUBLIC
Jaekang LEE, Rapporteur judge, Constitutional Court, Seoul
Chiwon SEO, Assistant Director International Affairs Division, Constitutional Court, Seoul

KOSOVO
Veton DULA, Director of the Communication and Information Office, Constitutional Court, Pristina

KYRGYZSTAN
Kanybek MASALBEKOV, Head of the Division for International Relations and Comparative Analysis of Legislation, Constitutional Court, Bishkek
Chyngyz SHERGAZIEV, Constitutional Court, Bishkek

LATVIA
Kristaps TAMUŽS, Head of the Legal Department, Constitutional Court, Riga

LIECHTENSTEIN
Robin SCHÄDLER, Constitutional Court, Vaduz

LITHUANIA
Jolita MILIUVIENĖ, Adviser to the President, Constitutional Court, Vilnius
Rūta SVIRNELIENĖ, Head of Division, Administration and Protocol, Constitutional Court, Vilnius

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Georges SANTER, Honorary President, Constitutional Court, Luxembourg
Viviane PROBST, Constitutional Court, Luxembourg

MONTENEGRO
Ksenija IVANOVIĆ, Adviser, Constitutional Court, Podgorica

NETHERLANDS
Paulien DE MORREE, Council of State, The Hague

NORWAY
Christopher Haugli SØRENSEN, Deputy Secretary-General, Supreme Court, Oslo

PALESTINE[1]
Ms Farah SARROUH/ SHUAIBI, Supreme Constitutional Court, Ramallah

PORTUGAL
António Manuel De CARVALHO ABRANTES, Adviser to the President, Constitutional Court, Lisbon

ROMANIA
Gheorghe STAN, Judge, Constitutional Court, Bucharest
Christina TITIRISCA, Assistant-Magistrate, Constitutional Court, Bucharest

SERBIA
Vladan PETROV, Judge, Constitutional Court, Professor, Law Faculty, Belgrade University, Belgrade, Member of the Venice Commission
Verica JAKOVLJEVIĆ, Senior Legal Adviser, Constitutional Court, Belgrade

SLOVAKIA
Tomáš PLŠKO, Legal Adviser, Constitutional Court, Košice

SLOVENIA
Vesna BOŽIČ STAJNPIHLER, Adviser, Constitutional Court, Ljubljana

SPAIN
Luis POMED SANCHEZ, Head of Department of Research and Doctrine, Constitutional Court, Madrid

1. This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.

TÜRKIYE
Ayça ONURAL, Legal Adviser, Constitutional Court, Ankara

COURT OF JUSTICE OF THE EUROPEAN UNION
Sally JANSSEN, Head of Unit in the Research and Documentation Directorate, Court of Justice, Luxembourg
Nadezhda TODOROVA, Legal administrator, Research and documentation Department, Court of Justice

***

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Adérito QUIVE, Constitutional Council of Mozambique, Maputo

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Fatma ELRAZAZ, Vice President, Supreme Constitutional Court, Cairo
Abdelaziz SALMAN, Vice President, Deputy Secretary General, Supreme Constitutional Court, Cairo

CONSTITUTIONAL COURT OF BULGARIA

Organising team
Ginka VIHROGONOVA, International Relations and Protocol
Polina PESHEVA, International Relations and Protocol
Stiliyana STOYANOVA, Legal expert
Kristiana RANGELOVA, Legal expert

Legal department
Nadejda MILKOVSKA, Head of Legal Department
Nikola YOVCHEV, Legal expert
Alexander CEKOV, Senior Legal expert
Blagovesta RISTOMANOVA, Legal expert
Alexandra NIKOLOVA, Legal expert
Desislava KEMALOVA, Legal expert
Nina DELIMARINOVA, Chief Legal expert
Radoslava YANKULOVA, Chief Legal expert
Daniela DIMITROVA, Senior Legal expert
Delyana IVANOVA, Legal expert
Rayna GEORGIEVA, Chief Legal expert

***

VENICE COMMISSION
Schnutz Rudolf DÜRR, Deputy Secretary of the Venice Commission, Secretary General of the World Conference on Constitutional Justice
Tania VAN DIJK, Legal Adviser

INTERPRETERS
Corrine MC GEORGE-MAGALLON
Nicolas GUITTONNEAU

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The European Commission for Democracy through Law, better known as the Venice Commission, is a Council of Europe independent consultative body on issues of constitutional law. Its members are independent experts.

Set up in 1990 under a partial agreement between 18 Council of Europe member states, it subsequently played a decisive role in the adoption and implementation of constitutions in keeping with Europe's constitutional heritage.[1]

The Commission holds four plenary sessions a year in Venice. In 2002, once all Council of Europe member states had joined, the Commission became an enlarged agreement, opening its doors to non-European states, which could then become full members. In 2022 it had 61 full members[2] and 10 other states and entities[3] formally associated with its work. The Commission is financed by its member states on a proportional basis, which guarantees the Commission's independence vis-à-vis those states which request its assistance.

1. On the concept of the constitutional heritage of Europe, see *inter alia "The Constitutional Heritage of Europe"*, proceedings of the UniDem seminar organised jointly by the Commission and the Centre d'Etudes et de Recherches Comparatives Constitutionnelles et Politiques (CERCOP), Montpellier, 22 and 23 November 1996, *"Science and technique of democracy"*, No.18..
2. On 16 March 2022, the Committee of Ministers of the Council of Europe decided, in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, that the Russian Federation ceases to be a member of the Council of Europe. On 23 March 2022, the Committee of Ministers decided that the Russian Federation ceases to be a member of the Venice Commission.
3. The associate member Status of Belarus was suspended by the Committee of Ministers of the Council of Europe on 17 March 2022. Belarus terminated this status with effect on 22 March 2023.

VENICE COMMISSION OF THE COUNCIL OF EUROPE
KEY FACTS

ESTABLISHMENT

10 MAY 1990

by 18 Council of Europe member States

TO DATE

61 MEMBER STATES
INCLUDING 15 NON Council of Europe MEMBERS
+ 4 observer countries
+ 2 beneficiaries with special cooperation authorisation

CLOSE COOPERATION WITH
EU, OSCE/ODIHR and OAS
3 INTERNATIONAL ORGANISATIONS
PARTICIPATING IN THE WORK OF THE COMMISSION

ADOPTION OF
some **1110**
COUNTRY-SPECIFIC OPINIONS + GENERAL REPORTS

ORGANISATION
of over **100**
INTERNATIONAL CONFERENCES

TRAINING IN
- human rights
- rule of law
- good governance
- electoral administration and justice

WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE*
COURTS **121** MEMBERS
NUMBER OF JUDGMENTS IN CODICES DATABASE OVER **11,600**
*SINCE 2009

EUROPEAN COURT OF HUMAN RIGHTS
references to Venice Commission in over **290** JUDGMENTS AND DECISIONS*
* Since 2001
requests for **7** *amicus curiae* BRIEFS**
**Since 2005

IN 2022

OPINIONS
The Venice Commission adopted **50** DOCUMENTS for 20 countries
7 according to the urgent procedure

- 8 OPINIONS on constitutional texts and issues concerning: Belarus, Chile, Kosovo, Mexico, Montenegro, Tunisia
- 33 OPINIONS on (draft) legislative texts and other legal issues
- 3 TEXTS of general nature
- 6 *AMICUS CURIAE* BRIEFS

EVENTS / LEGAL ADVICE
It (co)organised 29 EVENTS
to 3 ELECTION OBSERVATION MISSIONS OF THE PARLIAMENTARY ASSEMBLY

CONSTITUTIONAL CASE-LAW
published 3 BULLETINS on Constitutional Case-Law
responded to 28 REQUESTS FOR COMPARATIVE INFORMATION by constitutional courts on the VENICE FORUM

NUMBER OF JUDGMENTS ADDED TO **CODICES DATABASE** **513**
WWW.CODICES.COE.INT

www.venice.coe.int

Joint Council on Constitutional Justice

In order to steer cooperation between the constitutional courts and the Venice Commission, the Venice Commission established the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and the liaison officers, appointed by the constitutional courts. The JCCJ has a double presidency, which means that its meetings are co-chaired. One of the chairs is a member of the Venice Commission, elected by the Commission at a plenary session and the other is a liaison officer, elected by the liaison officers during the meetings of the JCCJ. The mandates of the two co-chairs run for two years each. The constitutional courts and councils and supreme courts with constitutional jurisdiction participating in the Joint Council thus have a very strong role in determining the Venice Commission's activities in the field of constitutional justice.

The geographical scope of the Joint Council covers the Venice Commission member states, associate member states, observer states and states or entities with a special cooperation status which is equivalent to that of an observer (South Africa, Palestine). Within the JCCJ, all participating courts – whether from member or observer states – benefit from the same type of cooperation. The European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights participate in the Joint Council as well.

The meetings of the JCCJ usually focus on the publication of the E-Bulletin on Constitutional Case-Law, the production of the CODICES database, the Venice Forum (Classic, Newsgroup, Observatory) and on the cooperation with regional and linguistic groups of constitutional courts as well as the World Conference on Constitutional Justice.

The meetings of the JCCJ are generally followed by a "mini-conference" on a topic in the field of constitutional justice, chosen by the liaison officers during which they present the relevant case-law of their courts (e.g. "Independence of the Judiciary, the role of the constitutional courts" in 2019).

The JCCJ meets once a year, at the invitation of one of the participating courts (May 2023: Sofia, Bulgaria).

Venice Commission of the Council of Europe

The Venice Commission – the full name of which is the European Commission for Democracy through Law – is an advisory body of the Council of Europe on constitutional matters. Its primary role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides "emergency constitutional aid" to states in transition.

MEMBER STATES: (as of 31 May 2023) [1] [2]

Albania (1996), Algeria (2007), Andorra (2000), Armenia (2001), Austria (1990), Azerbaijan (2001), Belgium (1990), Bosnia and Herzegovina (2002), Brazil (2009), Bulgaria (1992), Canada (2019), Chile (2005), Costa Rica (2016), Croatia (1997), Cyprus (1990), Czech Republic (1994), Denmark (1990), Estonia (1995), Finland (1990), France (1990), Georgia (1999), Germany (1990), Greece (1990), Hungary (1990), Iceland (1993), Ireland (1990), Israel (2008), Italy (1990), Kazakhstan (2011), Kosovo (2014), Kyrgyzstan (2004), Latvia (1995), Liechtenstein (1991), Lithuania (1994), Luxembourg (1990), Malta (1990), Mexico (2010), Republic of Moldova (1996), Monaco (2004), Montenegro (2006), Morocco (2007), Netherlands (1992), North Macedonia (1996), Norway (1990), Peru (2009), Poland (1992), Portugal (1990), Republic of Korea (2006), Romania (1994), Serbia (2003), Spain (1990), Slovakia (1993), Slovenia (1994), San Marino (1990), Sweden (1990), Switzerland (1990), Tunisia (2010), Turkey (1990), Ukraine (1997), United Kingdom (1999), USA (2013).

OBSERVER STATES:

Argentina (1995), Holy See (1992), Japan (1993), Uruguay (1995)

PARTICIPATING INTERNATIONAL ORGANISATIONS:

European Union, OSCE/ODIHR, OAS

CO-OPERATION:

Palestine* (2008), South Africa (1993)

1. Resolution CM/Res(2022)2 on the "Cessation of the Membership of the Russian Federation to the Council of Europe" (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies) and Resolution CM/Res(2022)3 on "Legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe" (Adopted by the Committee of Ministers on 23 March 2022 at the 1429bis (extraordinary) meeting of the Ministers' Deputies).
2. The associate member Status of Belarus was suspended by the Committee of Ministers of the Council of Europe by Decision CM/Del/Dec(2022)1428ter/2.3,17 March 2022. Belarus terminated their status of Associate Member with effect on 22 March 2023.

* This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.

FOR MORE INFORMATION PLEASE CONTACT:

Venice Commission
Council of Europe - DGI
F 67075 Strasbourg - France
Tel. +33 388 41 39 08
E-mail: Venice@CoE.int

www.venice.coe.int/WCCJ
www.codices.coe.int

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

VENICE COMMISSION
COMMISSION DE VENISE

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE