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ON THE PUBLIC HEALTH CRISIS: WITH SPECIAL REFERENCE TO THE CASE LAW OF THE CROATIAN CONSTITUTIONAL COURT*

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ABSTRACT

This article aims to explore the effect of the Public Health Crisis on liberal democracies such as the Republic of Croatia. We will focus on the experiences of the last such crisis - the COVID-19 pandemic, which the WHO declared on March 11, 2020. The article is divided into three parts. The first part of the article provides a conceptual analysis of the term "emergency" or "state of emergency". Public health crises are only one type of crisis that trigger legal mechanisms intended for situations that go beyond the framework of "normal". Therefore, these situations differ from normal and are spatially and temporally limited. They all have in common that they are unexpected, unpredictable and demand an urgent and exceptional reaction from the state. Although crises differ in scope, novelty, or secrecy, their separation is methodologically problematic. It is argued that public health emergencies are "scientific" in the sense that state authorities should primarily follow the recommendations of public health experts.
The second part of the paper refers to the impact of crises on the state's constitutional framework, the relations between the executive, legislative and judicial branches and the protection

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of human rights. This section of the paper will focus on the critical analysis of articles about this problem in the context of the COVID-19 pandemic. Most constitutions define emergencies and mechanisms to protect the democratic order from usurpation of power. However, these terms are broadly formulated and, in practice, have proven unclear. The answers to the posed questions should prove vital if and when the EU decides to adopt a more comprehensive emergency legal framework by providing guidelines on essential issues that may arise.

The final part of the article provides an overview of arguments presented by different authors regarding whether the COVID-19 pandemic and the response in Croatia represented a state of emergency as defined under Article 17 of the Constitution. This is notable because the Parliament passed COVID–19 legislation under Article 16, which does not recognise a crisis. This section of the paper explores why the Constitutional Court did not acknowledge this distinction while reviewing pandemic-related legislation. It questions whether the Croatian constitutional framework adequately ensures mechanisms are in place to confirm that an emergency is still ongoing, preventing it from exceeding the "necessary" timeframe and potentially becoming "the new normal." It also examines whether said framework provides sufficient parliamentary and judicial oversight of the executive branch, as discussed in European Parliament research papers from 2020 and on, showing it to also be an important issue at the EU level. All this is done through an analysis of landmark cases of the Constitutional Court of the Republic of Croatia.

Keywords: *Constitutional Court of the Republic of Croatia, Public Health Crisis, Public Trust, Separation of Powers, State of Emergency*

1. INTRODUCTION

On March 11, 2020, the World Health Organisation declared the severe acute respiratory syndrome coronavirus 2 (SARS-Cov-2) a pandemic.[1] High disease transmission rates and an initial lack of adequate medicines and vaccines marked the COVID-19 pandemic.[2] A global crisis has emerged as countries were unprepared for the situation, ignoring previous warnings from the World Health Organisation.[3] COVID-19 is not the first global emergency that the world has encountered. In the first decades of this century, the world was faced with a terrorist threat that led to numerous countries declaring a formal or *de facto* state of emergency, which implied a deviation from fundamental human rights guaranteed by the constitution and international conventions, such as the right to a fair trial.[4]

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1 Kouroutakis, A., *Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 33-46, p. 33.

2 Kouroutakis, *op. cit.*, note 1, p. 33.

3 Lachmayer, K; Ketteman, M. C.; Conclusions: Pandemocracy - *Governing for the People, Without the People?* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 329-346, p. 329.

4 Jabauri, A, *State of emergency: shortcut to authoritarianism*, Journal of Constitutional Law, Vol. 1, 2020, pp. 121-143, p. 127.

The first part of the paper attempts to define the concept of an emergency. There are different crises, but this paper focuses on public health emergencies. Pandemics approach the ideal type of emergency and the most extreme.[5] Emergencies vary at first glance, as some present a security threat, others threaten public health and financial stability, and human rights that are affected by the emergency measures that states have resorted to.[6] Although crises differ in scope, novelty, or secrecy, distinguishing between them poses a methodological challenge.

The fundamental challenge that accompanied the pandemic, in addition to the fight against the disease itself in circumstances of overcrowded hospitals, deaths, and substantial economic costs, was maintaining the democratic order.[7] This was especially challenging in the early 2020s, as democracies faced weakening from populism and authoritarianism.[8] Therefore, the second part of the article will consider the relationship between law and politics, focusing on the impact of the pandemic on the rule of law and the principle of separation of powers. In times of crisis, citizens often call for a swift response from the executive branch, which has led to the concentration of power in the hands of its holders.[9] One author noted that "The Hour of the Executive" had arrived.[10] Some authors argue that the changes that affected liberal democracies were so profound that democracy as a concept has evolved into a pandemocracy with new priorities, actors and normative goals.[11]

A state of emergency is a situation where the rule of law is tested.[12] It is important to emphasise that the state of emergency applies only to liberal democracies in which the rule of law must be maintained even during times of crisis, since there is no democracy without it.[13] At the core of the concept of democracy, as the

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5 Postema, G. J., *Law's rule: the nature, value, and viability of the rule of law*, Oxford University Press, New York, 2022, pp. 247-262.

6 Jabauri, *op. cit.*, note 4, p. 127.

7 Lachmayer; Ketteman, *op. cit.*, note 3, p. 346; Dyzenhaus, D., '*Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*', Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2005–2040, p. 2006.

8 Lachmayer; Ketteman, *op. cit.*, note 3, p. 346

9 Lachmayer; Ketteman, *op. cit.*, note 3, p. 335; Jabauri, *op. cit.*, note 4, p. 123; Gragl, P., *Lawless Extravagance: The Primacy Claim of Politics and the State of Exception in Times of COVID-19*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 9-31, p. 21.

10 Gragl, *op. cit.*, note 9, p. 22.

11 Ketteman, M. C.; Lachmayer, K., *Introduction,* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 1-8, p. 1.

12 Zwitter, A., *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, ARSP Archiv für Rechts- und Sozialphilosophie, ARSP Band 98 Heft 1, 2012, pp. 95-111. p. 95.

13 Dyzenhaus, *op. cit.*, note 7, pp. 2005 -2040; Zwitter, *op. cit.*, note 12, p. 103.

foundation of justice, lies the principle of citizens' right to vote freely, equally, and secretly, while the state's primary duty is to regularly hold elections that will enable citizens' participation in governance.[14] In authoritarian states, there is less concern about derogating the rule of law and the separation of powers.[15] Most authoritarian systems do not meet the rule of law criteria since they do not have "supremacy of and equality before the law".[16]

Because public health crises are open-ended, there were fears about the "normalisation" of the state of emergency. [17] Parliamentary oversight of declaring and extending a state of emergency is essential in a crisis. The role of the judiciary during the pandemic has also been criticised. The judicial practice was particularly problematic in some Central and Eastern European countries, where fears of the growth of autocracy are already present, and many of the measures to fight the coronavirus were passed by executive power without parliamentary oversight. Critics claimed that courts unquestioningly supported the decisions of governments in the fight against COVID-19.

The final section of the paper focuses on Croatia's handling of the COVID-19 pandemic situation in the context of the whole European Union, starting from the declaration of an "epidemic" for the entirety of Croatian territory in March 2020 by the Minister of Health,[18] the Croatian Parliament's decision not to activate Article 17 of the Constitution regarding constitutional states of emergency at any point and its consequent role in dealing with the pandemic, up to the Croatian Government's declaration of the end to the pandemic decision in May 2023.[19] It gives a brief explanation of the anti-epidemic legislation amendments that were adopted and the criticism they received by the scientific community and in the form of many constitutionality review applications that followed and persisted throughout the pandemic period. Lastly, a more detailed overview of landmark cases of the Constitutional Court of the Republic of Croatia regarding specific measures adopted by the National Civil Protection Directorate[20] is also provided,

14 Zwitter, *op. cit.,* note 12, p. 104.

15 *Ibid.*, p. 103.

16 *Ibid.*, p. 106.

17 Jabauri, *op. cit.*, note 4, p. 127.

18 Available at: [https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf], Accessed 2 April 2025.

19 Official Gazette, No. 51/2023.

20 A special executive body appointed by the Croatian Government to adopt specific measures that dealing with the epidemic on a day-to-day basis required. It was first regulated in 2018 via an amendment to the Civil Protection System Act, but its powers were expanded through the adoption of multiple amendments to both the aforementioned act and the Act on the Protection of Population from In-

focusing primarily on the arguments provided in the joint (majority opinion) sections of the Court's decisions and rulings in order to examine whether and how it fulfilled its role as the guardian of the rule of law, checks and balances and the rights and freedoms of the people in extremely challenging and never before seen circumstances.

2. THE CONCEPT OF A STATE OF EMERGENCY

Various legal traditions and constitutional laws define states of emergency differently.[21] The first part of the article will, therefore, provide an overview of the definitions of "states of exception",[22] "states of emergency", or "emergencies".[23] This paper will use the last two terms interchangeably, with the same meaning.[24] We must agree that the terms relating to states of emergency have proven unclear in practice.[25] This is not only because different legislations use different terminology to describe a state of emergency. Additionally, many legal frameworks lack a precise definition of a state of emergency, making it an ambiguous term. Some constitutions do not define a state of emergency at all.[26]

Emergencies are commonly viewed as crises that a state perceives to surpass the threshold of a serious threat and to require urgent, exceptional and temporary measures that are not permitted under normal circumstances.[27] Legal theorist Gerald

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fectious Diseases that followed in 2020 and 2021. Its composition, *modus operandi* and appointment requirements were regulated in the Rules of composition, functioning and appointment requirements for the directors and deputies of civil protection directorates adopted by the Minister of the Interior, Official Gazette, No. 126/2019. The Directorate started adopting measures even before the before mentioned Minister of Health's epidemic declaration decision.

21 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

22 Carl Schmitt used this term. According to Schmitt, a state of exception is not described within the valid legal order. Schmitt, C., *Politička teologija*, Naklada Breza, Zagreb, 2019, p. 14. See also Zwitter, *op. cit.,* note 12, p. 98.

23 Zwitter, *op. cit.,* note 12, pp. 96-97.

24 Com. Gragl, *op. cit.*, note 9, p. 10.

25 Zwitter, *op. cit.,* note 12, pp. 96-97.

26 *Ibid.*

27 Greene, A., *Emergency Powers in a Time of Pandemic*, Bristol University Press, Bristol, 2021, p. 30, according to Günther, C. M., *Legal vs. Extra-Legal Responses to Public Health Emergencies*, European Journal of Health Law, Vol. 29, No., 1, 2022, p. 133. On emergencies and conceptions of law, see Krešić, M., *Emergency Situations and Conceptions of* Law, in: Amatucci, C. (ed.), Revisiting the limits of freedom while living under threat. II. Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia, Riga, University of Latvia Press, 2024. pp. 68-78.

Postema defined emergencies as "circumstances of great peril and complexity that urgently demand a decisive response" that would not otherwise be permissible.[28]

The legal definition of emergencies must be broad since what constitutes an emergency is decided by the state authorities who have to deal with it, and their decision can be unpredictable.[29] Zwitter points out that all states of emergency have the following features:

" (…) they deal with cases where the nature of a situation requires the restructuring of state functions in order to mitigate the situation's negative effect on the state and its citizenry more effectively (better) and more efficiently (faster). The reason for the existence of legal regulations on states of emergency is thus to ensure the survival of a state and its citizenry and to bring the situation back to normal by temporarily changing the structure of state functions in favour of efficiency and effectiveness (…)."[30]

The nature of emergencies is thus related to the conditions "of necessity, concreteness and urgency".[31] It is important to emphasise that a state of emergency is "a legal state" different from normal.[32] It denotes "an exception" to the normal state functioning, not a situation outside the application of the constitution.[33]

"Henceforth, a theoretical (and not an operational) definition of emergency cannot be material but has to be structural-functional - a definition that focuses on the state."[34]

A crisis is a factual situation in which the state must change its structure to meet the conditions of urgency and concreteness.[35] The threat in question "must be of a magnitude that severely harms the state or its citizens and of such a gravity that the state can successfully only face by changing its own structure".[36] Urgency implies efficiency, the need for "speedy action", and concreteness refers to "a precisely defined beginning and end".[37]

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28 Postema, *op. cit.*, note 5, 248.

29 Zwitter, *op. cit.,* note 12, p. 97.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.,* p. 99.

34 *Ibid.*, p. 97.

35 *Ibid.*

36 *Ibid.*

37 *Ibid.* p. 98.

"Emergencies are therefore situations that hit the states in an unforeseen, unforeseeable, or unpreventable way when applying state functions of times of normalcy."[38]

Emergencies have a beginning and an end; they are limited by time (temporal limitation).[39] Whether an emergency "actually exists" is conditioned by the necessity that arises from the state's vision that a change in its structure is necessary (spatial and territorial limitation), and the only goal for which emergency power can be used is to alleviate the emergency (limitation of objective).[40] Postema points out that different types of emergencies differ in severity, scope, novelty, and the need to maintain confidentiality.

"(…) some emergencies combine extreme peril, genuine novelty, radical urgency, and a need for utmost secrecy. But many do not, and it distorts our thinking to put all emergencies into the basket with the most extreme ".

Emergencies can represent threats to national security that are located within the borders of a country, for example, violent public unrest; threats can also cross-national boundaries, as in the case of terrorism or war, there are also natural disasters, for example in the form of earthquakes or floods, these can also be accidents such as nuclear power plant explosions, financial crises and public health crises.[41]

States of emergency marked the first decades of the 21st century. First, as already pointed out in the article's introduction, in 2001, the state measures introduced to combat terrorism were problematic. However, terrorism was not the cause of most of the emergencies that followed; much more often, the causes were economic, civil wars, natural disasters or contagious diseases.[42] Thus, the crisis caused by terrorist threats was followed by state measures to combat the financial crisis in 2008, the migrant crisis in 2015[43], and finally, the pandemic in 2020. We agree with Zwitter that a precise demarcation of these crises is impossible in "a legal-theoretical and methodological" sense since emergency norms are generally not specified for a specific type of crisis.[44] In the following section of the paper, we will highlight specific features of public health crises.

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38 Zwitter, *op. cit.,* note 12, p. 98.

39 *Ibid.*, pp. 98-100.

40 *Ibid.*

41 Postema, *op. cit.*, note 5, p. 256.

42 Zwitter, *op. cit.,* note 12, p. 95.

43 See Dyzenhaus, *op. cit.*, note 7, pp. 2005–2040; Krešić, M., I*zbjeglička i COVID-19 kriza: Izvanredni režimi – da ili ne?*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. XV, No. 1, 2024, pp. 27-48.

44 Zwitter, *op. cit.,* note 12, p. 96.

2.1. PUBLIC HEALTH EMERGENCIES

The COVID-19 pandemic has been described as a public health emergency due to its unexpectedness, severity, and danger, necessitating swift government action.[45] Pandemics almost correspond to the "ideal" state of emergency.[46] This threatens the well-being of the entire state population, which requires urgent and exceptional but temporary measures by the state authorities.[47]

When we compare the way the media and politicians discussed the terrorist threat at the beginning of the 21st century with their approach to the COVID-19 pandemic, we can see an apparent similarity. In both instances, war-related language was employed.[48] We heard terms like the "war on terror" and the "war against COVID-19".[49]

"If we look into the linguistic aspects of the speeches made in the context of COVID19- related emergencies, we will see the same pattern, - the virus is a common enemy, against which we are at 'war'; medical professionals - i.e. the 'troops' are at the 'front line' while fighting against the common enemy and often speeches include calls for 'unification' and 'standing together' in times of this emergency".[50]

Countries have tried to "flatten the curve". The term means "using social distancing to decrease the peak burden on healthcare systems and to buy time for scientists and doctors to respond".[51] To achieve social distancing, governments used various means, such as the obligation to wear masks, general or partial closure, and contact tracing.[52] There have been, for example, restrictions on freedom of movement, assembly, worship, education, participation in elections, and the right to access courts. [53]

When it comes to serious threats to public health, restrictions on certain rights may be justified provided that there is a legal basis for it, that they are necessary,

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45 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

46 Günther, *op. cit*, note 27, p. 139.

47 *Ibid.*

48 Jabauri, *op. cit.*, note 4, p. 127.

49 *Ibid*.

50 *Ibid.,* p. 128.

51 Markel, H., *America's Coronavirus Endurance Tes*t, New Yorker, available at: [https://www.newyorker.com/science/medical-dispatch/americas-coronavirus-endurance-test] accessed 10 February 2025, see more in: Weiss, A., Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic, *Columbia Law Review*, Vol. 121, No. 6, 2021, pp. 1853–1894, p. 1855, note 10.

52 Kouroutakis, *op. cit.*, note 1, p. 34; Weiss, *op. cit.*, note 48, p. 1873.

53 Amon J. J.; Wurth M. A., *Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers*, Health and Human Rights Journal, Vol. 22, No. 1, 2020, p. 399.

proportionate to the aim, based on scientific evidence, non-discriminatory, limited in time, respect the dignity of the individual, and that the legislative body or the courts can review the restrictions introduced.[54] While not the only example of human rights restrictions due to extraordinary circumstances in modern times, the limits due to the COVID-19 pandemic have been the most restrictive.

The strain between "technocratic agility and democratic legitimacy" has been highlighted in the fight against the COVID-19 pandemic.[55] The pandemic has been accompanied by a global increase in "unilateral executive lawmaking worldwide".[56] The executive branch obtained legislative powers, putting parliaments in a bind, which we will discuss further in one of the following sections of the paper.[57] This has led to the issue of "democratic illegitimacy", which carries the risk of citizens' non-compliance with public health regulations.[58] There has been a reversal of positions; democratic participation in government has been given a lower place in the hierarchy of values compared to "centralized, direct technocratic decision-making".[59] One of the distinguishing characteristics of a public health emergency from other crises is that it is a "scientific emergency"; state policies should "follow the science".[60] The state of emergency, if we go all the way in this approach, is just a legal way for governments to impose the recommendations of public health experts on the population.[61]

What is not present in other crises, such as crises caused by terrorism, civil wars or natural disasters, is precisely the key role of public health experts.[62] Legal regulation should direct the population's behaviour, motivate individuals, or require them to behave in a certain way, even contrary to what individuals believe to be in their best interests.[63] The fight against the pandemic required the most extreme restrictions on almost all dimensions of life, an exceptionally high level of community coordination that cannot be achieved by force alone.[64] The key was to en-

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54 Amon; Wurth, *op. cit.*, note 53, p. 399.

55 Weiss, *op. cit.*, note 51, p. 1853.

56 *Ibid.*, p. 1854.

57 Windholz, E. L., *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, Theory & Prac. Legis., Vol. 8, No. 1-2, 2020, p. 94 according to Weiss, *op. cit.*, note 51, p. 1854, note 1.

58 Weiss, *op. cit.*, note 51, p. 1857.

59 *Ibid.*. 1857-1858.

60 *Ibid.*, p. 1877.

61 *Ibid.*

62 Windholz, E. L., *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, Theory & Prac. Legis., Vol. 8, No. 1-2, 2020, p. 94.

63 Windholz, *op. cit.*, note 62, p. 96.

64 *Ibid*.

sure voluntary compliance with the introduced measures, and this is only possible when citizens believe that such government demands are legitimate, i.e. acceptable and credible.[65] Legitimacy is thus closely tied to citizens' trust in the government.[66] Research shows that citizens' perception of the legitimacy of government is a decisive factor in their compliance with imposed obligations.[67] To ensure public trust, it is necessary to enable the transparency of government actions.[68] In a pandemic, the success of public health measures depends on citizens' willingness to agree to and respect them, so legitimacy is not just a matter of academic debate.[69]

3. PRESERVING THE DEMOCRATIC ORDER

This article section is primarily devoted to the issue of protecting democratic values and institutions in crises. The first subsection will show why the law is the best tool for overcoming these challenges. In his famous work, *Political Theology* from 1922, Carl Schmitt defines a state of exception as a situation not covered by the existing legal framework. This state arises in cases of extreme necessity or when there is a threat to the state's existence, highlighting the importance of determining who holds sovereignty. The sovereign is the one who decides whether an emergency has taken place and what actions are necessary to address it.[70] The second subsection deals with the issue of how to maintain the foundations of the principle of separation of powers in times of crisis.

3.1. LAW AND POLITICS IN THE TIME OF COVID-19

We came to the issue of whether a state of emergency is within the law. When we talk about people's dealings with health crises, stories of society's moral and legal collapse in such situations have been preserved since ancient times.[71] Thucydides writes about the plague in Athens in 430 BC during the Peloponnesian War, describing these times of crisis as "lawless extravagance" (ἐπὶ πλέον ἀνομίας). In the event of a public health crisis, those in power will regularly try to prevent society from "descending into utter lawlessness".[72]

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65 *Ibid*., pp. 95, 103.

66 *Ibid.,* p. 102.

67 Weiss, *op. cit.*, note 51, p. 1873.

68 Grogan, J., *States of emergency: analysing global use of emergency powers in response to COVID-19*, European Journal of Law Reform, Vol. 22, No. 4, 2020, p. 352.

69 Weiss, *op. cit.*, note 51, p. 1873.

70 Schmitt, *op. cit.*, note 22, p. 14.

71 Gragl, *op. cit.*, note 9, p. 9.

72 *Ibid.,* pp. 9-10.

The idea that law and crises exclude each other is not new.[73] Often, the historical source for the state of emergency is found in the tradition of the Roman dictatorship.[74] In emergencies, the Senate would urge the consuls to appoint a dictator with almost unlimited powers for six months.[75] In that case, the "trusted individual" would be given the legal authority to restore "normal government" and, when he succeeds, return the power obtained in the state of emergency to regular state bodies.[76]

According to Giorgio Agamben, modern theorists use this Roman example to show that dictatorship belongs to the sphere of law. Still, this example shows that dictatorship has no limits and is absolute.[77] The dictator operates in "an emptiness of law".[78] Only in modern times, Agamben points out, is the state of emergency not discussed predominantly as a "quaestio facti" but as a legal problem, and it is precisely in this context that efforts are made to include it in the legal order. Agamben placed the state of emergency between law and politics.[79] A state of emergency is both a component of the legal order that is activated during crises when the survival of that order is at risk and a unique "technique of ruling" that allows the sovereign's decisions to supersede legal norms. This results in suspending those norms, effectively placing them outside the established legal system.[80] The state of emergency represents a "grey zone" that indicates the "affirmation of the legal order" and its suspension, creating space for decisions not bound by existing norms.[81]

Paul Gragl points out that the relationship between law and politics is extremely problematic during emergencies since there is a belief that "politics is permitted to do anything, even in violation of the law, if necessary"[82] to avoid society's aforementioned moral and legal collapse.[83] This is embodied in the Latin maxim "necessitas non habet legem" (necessity has no law).[84] Gragl calls this "the primacy

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73 *Ibid.*, p. 9.

74 Dyzenhaus, *op. cit.*, note 7, p. 2012.

75 Weiss, *op. cit.*, note 51, p. 1858.

76 Dyzenhaus, *op. cit.*, note 7, p. 2012.

77 *Ibid.,* p. 2015.

78 *Ibid*.

79 Agamben, G., *Izvanredno stanje*, Deltakont, Zagreb, 2008, pp. 9, 35 and 39. See also Kukavica, S., *Izvanredno stanje. Između prava i politike. Temelji moderne države*, 2022. [https://ideje.hr/izvanredno-stanje-izmedu-prava-i-politike-temelji-moderne-drzave/] Accessed 10 January 2025.

80 Agamben, *op. cit.,* note 79, pp. 9-11 according to Kukavica, *op. cit*., note 79.

81 Agamben, *op. cit.*, note 79, pp. 35-36 according to Kukavica, *op. cit.,* note 79.

82 Ketteman ; Lachmayer, *op. cit.,* note 11, p. 2.

83 *Ibid.*; Gragl, *op. cit.*, note 9, p. 10.

84 Gragl, *op. cit.*, note 9, p. 10.

claim of politics"[85] - the law should follow politics, not *vice versa*.[86] In such situations, health and life represent the supreme good that needs to be protected.[87]

"We may interpret these words to the effect that, under the primacy claim of politics which places the good before the right, any use of constitutional provisions that constrain the powers of politics can be regarded as an abuse directed against this good itself."[88]

Law and politics are closely connected even in regular times, especially in legislation.[89] The influence of politics on law does not necessarily have to be detrimental, Grangl points out; politics continually adapts the law to reflect changes in the world.[90]

"This good pursued by politics is historically contingent and will usually also change in accordance to what is required in a specific situation: in the case of a pandemic such as COVID-19, the preservation of life and public health will most likely take the position of the supreme good; in the event of a security crisis, the defence of the State itself will be considered paramount; and during a global recession and financial crisis, the protection of the economy and the banking system will have absolute priority."[91]

Politics becomes problematic when it ascribes "absolute primacy over the law", cancels constructive legal reforms, disproportionately suspends or abolishes fundamental human rights and ignores the principle of separation of powers.[92]

To solve the existing paradoxes, there are efforts to include "the state of exception" in positive law; a well-known example is Article 48 of the Weimar Constitution from 1919.[93] The mentioned constitutional article authorised the president of the republic to derogate from the constitutional provisions on the rule of law if it is necessary to preserve the constitution.[94] The lack of oversight regarding emergency powers has created significant challenges in practice.[95]

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85 *Ibid*.

86 *Ibid*., p. 12.

87 *Ibid*., p. 10.

88 *Ibid*., p. 13.

89 *Ibid*., p. 14.

90 *Ibid*., p. 14.

91 *Ibid*., p. 15.

92 *Ibid*., pp. 14, 17.

93 Gragl, *op. cit.*, note 9, p. 20.

94 Jabauri, *op. cit.*, note 4, p. 134.

95 *Ibid*., p. 125. See Schmitt, *op. cit.*, note, p. 18.

Gragl believes that law cannot be derived from exceptions. Still, only from rules, and even in the crisis brought about by the COVID-19 pandemic, should the power of exceptions not be overestimated.[96] The legal system requires reform to establish clear guidelines for responding to emergencies. This includes defining the circumstances under which legal rules can be suspended, outlining the scope of such suspensions, and specifying when and how these rules should be reinstated. Additionally, provisions should allow individuals to challenge any suspension of their rights.[97] Zwitter also believes that a state of emergency does not override the rule of law, which he describes as "a common (mis)perception".[98]In any case, whether a state of emergency is within or outside the law is still not "an old-fashioned or settled debate".[99]

When governments face crises that require decisive and immediate action, scholars also question whether these actions must be legally limited.[100] In this paper, we will follow the path of those convinced of the value of law even in states of emergency.[101] Christian M. Günther provides additional theoretical arguments, referring to the American legal theorist Lon Fuller and his understanding of the "inner morality of law" based on eight legal principles, according to which a legal norm that governs human behaviour must be "(1) promulgated (2) general (3) clear (4) non-contradictory (5) possible to comply with (6) constant through time (7) prospective (i.e. non-retroactive); and (8) there must be congruence between these norms and their administration".[102] The listed elements should contribute to the success of public health measures, helping us differentiate laws from arbitrary authority.[103] Laws equally bind both citizens and government officials.[104] Günther emphasizes the value of individual autonomy or freedom, even in emergencies.[105]The legal form inspires trust among citizens and is thus essential for the effectiveness of public health measures, the value of autonomy, and the creation of a "framework for self-directed action".[106]

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96 Gragl, *op. cit.*, note 9, p. 30-31.

97 *Ibid*.

98 Zwitter, *op. cit.,* note 12, p. 100.

99 Günther, *op. cit*, note 27, p. 132.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.,* pp. 134-135.

103 *Ibid.*, p. 147.

104 *Ibid.,* pp. 147-148.

105 *Ibid.*, pp. 133 and 143.

106 *Ibid.*

3.2. SEPARATION OF POWERS

The idea of the separation of powers originates from the Enlightenment and the French Revolution.[107] The fundamental features of the state of emergency are expanding state powers over citizens and granting legislative powers to the executive.[108] Anomia, Gragl points out, arises with the onset of an emergency and must be remedied, usually by granting legislative power to the executive. Then, executive time comes, and the "Hour of the Executive" occurs.[109] Constitutions are regularly designed to operate in a "state of normative normality," however, emergencies necessitate a deviation from the traditional understanding of the separation of powers.[110] The main argument in favour of giving the executive power a decisive role in crisis management is temporal; emergencies require a swift reaction that can only come from it.[111] This undoubtedly weakens democracy.[112] Democracy necessitates monitoring the initiation, continuation, and duration of a state of emergency by either parliament or the judiciary (relative temporal limitation). Additionally, the powers granted during states of emergency should have a fixed duration (absolute temporal restriction).[113]

In many countries, explicit constitutional restrictions on transferring legislative powers to the executive in crises give them legitimacy.[114] Today, over ninety per cent of constitutions in force provide emergency powers. These emergency clauses allow governments to step out of the usual constitutional framework and take actions they would otherwise not be able to do.[115]However, some countries do not expressly mention the state of emergency in their constitution. The countries that fought against the pandemic without the concept of a state of emergency in the constitution are, for example, Sweden, France and Italy; the latter does not recognize the concept of a state of emergency in peacetime.[116] During the COVID-19 pandemic, a number of countries did not formally declare a state of emergency but managed the crisis through existing or new laws, primarily statutory health

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107 Zwitter, *op. cit.,* note 12, p. 107.

108 *Ibid*.

109 Gragl, *op. cit.*, note 9, p. 22.

110 *Ibid.*, pp. 22-23.

111 *Ibid*.

112 Zwitter, *op. cit.,* note 12, p. 95.

113 *Ibid*., p. 109.

114 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

115 Weiss, *op. cit.*, note 51, p. 1858; Ginsburg, T.; Versteeg, M., *COVID-19. States of Emergencies: Part I,* available at:
[https://blog.harvardlawreview.org/states-of-emergencies-part-i/] Accessed 10 July 2022.

116 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

law, for example, Austria and Germany.[117] Health legislation may be unsuitable as a basis for emergency powers either by design or by purpose.[118]

We agree with those who point to the need for detailed constitutional regulation of the exercise of authority in crises, providing more guarantees for preserving democracy.[119] The constitution should define how emergency powers can be used, their limitations, parliamentary oversight of their proclamation and possible extension, and judicial review of emergency powers.[120]

It is necessary to create guarantees against abuse and rules to end the state of emergency and return to normality.[121] In case of improper formulation of the constitutional norms on the state of emergency, the executive can completely take over the legislative power.[122] Due to reshaping the principle of separation of powers during the state of emergency and the concentration of power in the executive, "political self-entrenchment" or "executive abuse of power for self-serving purposes" may occur.[123]

The return to normality is especially problematic in countries where there is already a democratic deficit, since the process of "continuous deterioration" of constitutional democracy[124] - "democratic decay"[125] is taking place in them. In these states, without adequate supervision of the executive, there is an acute danger of their transformation into authoritarian or semi-authoritarian regimes.[126] The COVID-19 pandemic thus represented an exceptional challenge for liberal democracies in Central and Eastern Europe, where signs of democratic decay have been present for a long time.[127] In the mid-2000s, the democratic processes in these countries began to go in the opposite direction.[128] An often-mentioned example is Hungary, which, according to some indicators, can no longer be considered a

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117 *Ibid.*, p. 334.

118 Grogan, *op. cit.*, note 68, pp. 338-339.

119 Drinóczi, T.; Bień-Kacała, A., *COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, The Theory and Practice of Legislation, Vol. 8, No. 1–2, 2020, pp. 171–192, pp. 171-172.

120 *Ibid.*, pp. 172; Jabauri, *op. cit.*, note 4, p. 143.

121 Drinóczi; Bień-Kacała, *op. cit.,* note 119, pp. 172.

122 *Ibid*. p. 125.

123 Kouroutakis, *op. cit.*, note 1, pp. 37 and 45.

124 Drinóczi; Bień-Kacała, *op. cit.,* note 119, pp. 172-1733.

125 Daly, T., *Designing the Democracy-Defending Citizen*, Constitutional Studies, Vol. 6, 2020, pp.189-193, p. 192.

126 Jabauri, *op. cit.*, note 4, p. 143.

127 Guasti, P., *The Impact of the COVID-19 Pandemic in Central and Eastern Europe. The Rise of Autocracy and Democratic Resilience*, Democratic Theory, Vol. 7, No. 2, 2020, pp. 47–60.

128 Daly, *op. cit.,* note 125, p. 192.

liberal democracy but rather a hybrid system that contains elements of democratic rule, since elections are still held, but also elements of authoritarian rule due to the concentration of power in the ruling party.[129] During emergencies, the legislature and judiciary should stay true to their functions while overseeing the executive branch.[130] With necessary adjustments, the legislature and judiciary should continue performing their "ordinary functions".[131]

Parliamentary oversight of the implementation of emergency powers by the executive branch is crucial to the legitimacy of these regulations.[132] When introducing a state of emergency, the exceptional problem and most significant danger is the possibility of its indefinite extension.[133] The problem appears in the literature as the "normalization" of the state of emergency.[134]

What was the role of parliaments during the COVID-19 pandemic? Research has shown that most countries' executive branch was leading in legislation during the pandemic, while the parliaments were marginalised.[135] This is also confirmed by Joelle Grogan's extensive analysis of the legal measures taken by states to fight the pandemic, which included 74 states.[136] The parliaments thus had limited scope for intervention in the fight against the pandemic, which contributed to the opinion that these bodies are being transformed from legislators into bodies that only have a particular influence when passing laws.[137]

In all European countries, governments have introduced public health measures and measures to assist economic actors through urgent procedures.[138] Parliamentary decision-making was therefore limited in scope; governments often adopted the measures above, bypassing parliaments, and the role of parliaments used to be reduced to the ratification of executive power proposals. The dominance of executive power is also visible at the European Union level; the Commission and intergovernmental bodies played a key role in the fight against the pandemic, thus ensuring the importance of national governments.[139] Therefore, in addition to the

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129 *Ibid*.

130 Jabauri, *op. cit.*, note 4, p. 143.

131 Grogan, *op. cit.*, note 68, p. 353.

132 Griglio, E., *Parliamentary oversight under the Covid-19 emergency: striving against executive dominance*, The Theory and Practice of Legislation, Vol. 8, No. 1-2, 2020, pp. 49-70, p. 53.

133 Jabauri, *op. cit.*, note 4, pp. 122.

134 *Ibid*.

135 Griglio, *op. cit.*, note 132, p. 49-50.

136 Grogan, *op. cit.*, note 68, p. 338.

137 Griglio, *op. cit.*, note 132, p. 51.

138 *Ibid.*, pp. 49-50.

139 *Ibid.*, p. 50.

concentration of power at the domestic level (horizontal aspect), the executive has also strengthened its role concerning other layers of governance, international and European (vertical aspect).[140]

As Griglio pointed out, this can be seen as part of a longer trend of marginalizing parliament in its traditional role as a legislator, or rather, its declining involvement in lawmaking.[141] This is related to the greater technical complexity of the decisions made and, in European countries, to the increasing penetration of European governance into national systems.[142] Parliaments have less information than the executive and are faced with the problem of collective action. Courts also show weaknesses concerning the executive; for example, they lack more information than parliament. The courts also lack democratic legitimacy.[143]

In the last pandemic, neither the legislature nor the judiciary succeeded in checking the executive branch.[144] In a pandemic, when "technocrats with expertise in medicine" decide on policies to fight the disease, the courts are inclined to support them. In theory, judicial review is a decisive element of constitutionalism.[145]

„On top of that, it is well known that the judiciary in times of stress shows deference on emergency provisions. On the one hand, the limited function of the legislatures and on the other hand the operation of courts in an environment of emergency created a fertile ground for the executive to take the lead in the constitutional system".[146]

Finally, it is interesting to mention the results of the research by Joelle Grogan on the behaviour of governments in 74 countries during COVID-19. Grogan concluded that the likelihood of abuse of emergency powers is not affected by whether a state of emergency was formally declared or whether the executive branch relied on ordinary legislative procedure to combat the pandemic. Success in tackling the pandemic and maintaining the democratic constitutional order has been demonstrated through state policies that prioritize legal certainty and transparency. Grogan emphasises the importance of a swift response from authorities and effective communication between state bodies and all relevant stakeholders.[147]

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140 Lachmayer; Ketteman, *op. cit.*, note 3, pp. 346 and 343.

141 Griglio, *op. cit.*, note 132, pp. 50-51.

142 *Ibid.*, p. 51.

143 Weiss, *op. cit.*, note 51, p. 1859.

144 *Ibid*.

145 Kouroutakis, *op. cit.*, note 1, p. 42.

146 *Ibid.*, p. 37.

147 Grogan, *op. cit.*, note 68, p. 354.

4. DEALING WITH THE COVID-19 PANDEMIC IN CROATIA – OVERVIEW, EU CONTEXT AND LANDMARK CASE LAW OF THE CONSTITUTIONAL COURT

4.1. OVERVIEW AND EU CONTEXT

The Constitution of the Republic of Croatia does not recognize the term „emergency".[148] Instead, it mentions three kinds of states of emergency as viewed in legal theory (Article 17), four if we also count the inability of state authorities to perform their constitutional duties in Article 100 of the Constitution.[149]

Something constitutional authors in Croatia agree on is the fact that the Constitution is unclear on who decides whether a state of emergency has occured. Omejec argued that, while it is indeed likely a legislative oversight, it would be enough to conclude that an emergency state is declared or ongoing simply by the fact that Article 17 is applied.[150]

A 2020 study published by the European Parliament examined normative responses by the 27 member states from pandemic declaration in March 2020 to mid-June 2020 and found that 19 states enacted either a constitutional state of emergency or a statutory emergency regime, or both, while 8 states enabled governments to adopt containment measures either via special or ordinary legislation. The duration of states of emergency ranged between 10 and 90 days and was generally renewable.

The study also showed that the participation of national parliaments in management of the pandemic differed greatly as well. It included special constitutional tools, such declaring and prolonging emergency states where a constitutional emergency was declared, either *ex ante* or *ex post* oversight of special legislative powers constitutionally granted to the executive, but also the normal parliamentary legislative (adopting amendments), budgetary (amendments) and oversight powers (reports on the measures adopted by the government and/or its executive bodies).[151]

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148 Blagojević, A.; Antunović, M., *Izvanredno stanje u kontekstu COVID-a 19: hrvatski ustavnopravni okvir i praksa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 60, No. 1, p. 126.

149 Some authors argue it should not be considered a separate, fourth state of emergency because it can occur in either of the three cases mentioned in Article 17, e.g. Gardašević, Đ., *Ograničenja ljudskih prava i temeljnih sloboda u izvanrednim stanjima*, PhD Thesis, Zagreb, 2010, p. 350, Gardašević also argues that the fourth case could apply not only to the Croatian Parliament, but also to other state authorities, see *Ibid.*, p. 352.

150 More in Omejec, J., *Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja*, Pravni vjesnik, Vol. 12, No. 1-4, pp. 172-196.

151 *States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*, authored by Maria Diaz Crego and Silvia

The pandemic did not only completely disrupt the ordinary functioning of member states, but also that of the European Union and its institutions. Even though it is a whole other topic of analysis, it is worth pointing out that scholars started pointing out the lacking emergency regulation within the EU which led to "creative" practices and how it could be improved so the EU is prepared for such events in the future as well as what we've learned from different member states' experience in dealing with the pandemic.

As the 2024 Jacques Delore Institute policy paper titled „Regulating European emergency powers: towards a state of emergency of the European Union" suggested, the ensuing discussions mostly revolved around which model would be best suited for the EU – the constitutional model or the legislative model.[152]

The paper concluded that the constitutional model would be more appropriate, although it would require consensus of all member states as it requires treaty amendments. This model would require defining what circumstances would constitute an emergency, who would declare it and how, who would manage executive actions, regulation of checks and balances, and precise boundaries on limitations to suspensions of rights and freedoms regulated within the EU (the emergency would likely be managed by the European Commission and oversight would be conducted by the EU Parliament).[153]

The legislative model was deemed to be more flexible and to strengthen the position of the EU Parliament with ever present danger of possible EU Parliament paralysis due to the emergency and the overall lack of urgency and political consensus for adopting the necessary measures. The conclusions of the paper also fear that the EU Parliament could use those to absolve itself of responsibility for dealing with the crisis. Lastly, the paper states that legislative measures have a higher tendency for becoming the "new normal" than executive measures, as they tend to fall under parliamentary oversight and either get confirmed or repealed.[154]

Kotanidis, EPRS, December 2020, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)659385], Accessed 1 April 2025.

152 *Regulating European emergency powers: towards a state of emergency of the European Union*, authored by Julia Fernandez Arribas, Jacques Delore Institute, Policy Paper No. 295, January 2024, available at: [https://institutdelors.eu/en/publications/regulating-european-emergency-powers-towards-a-state-of-emergency-of-the-european-union/], 3 April 2025.

153 *Ibid*., pp. 8-9.

154 *Ibid*., pp. 9-16., Gardašević wrote extensively about this topic and argued that the risk is higher in states combating the pandemic through ordinary governance mechanisms as those have the tendency to work around the "temporary duration" requirement, see Gardašević, Đ., *Pandemija kao stanje „velike prirodne nepogode" i Ustav Republike Hrvatske*, in: Primjena prava za vrijeme pandemije COVID-19,

As the number of decisions and ruling delivered by the Constitutional Court of the Republic of Croatia during the pandemic/epidemic period is too great to present every single one and in sufficient detail to be deemed relevant to the analysis by the reader, this section will focus only on the landmark decisions, i.e. those that contain new, different and/or additional insight on the Court's interpretation perspective when it comes to the anti-pandemic regulation and measures that were subsequently implemented.

Following the World Health Organization's decision to declare global COVID-19 pandemic the Croatian Health Minister declared a state-wide "epidemic" for the entirety of the Republic of Croatia territory on the same day, March 11 2020.[155] The legal basis for the decision was found in Article 2 Paragraph 4 of the Act on the Protection of Population from Infectious Diseases and Article 197 of Health Protection Act, but not the Constitution.

Therefore, Croatia was among the group of countries that dealth with the COVID-19 pandemic using legislation in place beforehand,[156] though some amendments were later made to that legislation as a result of unique characteristics (*sui generis*) of this particular public health emergency.[157] It did not declare a constitutional state of emergency.

As a result of this, the constitutionality of initial decisions made by the executive was not called into question – not until there was a need to adopt legislative

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Barbić, Jakša (ed.)., Zagreb: Hrvatska akademija znanosti i umjetnosti - Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, 2021, pp. 29, 41.

155 It is worth mentioning that the Minister's decision was not published in the Official Gazette as there was no legal grounds to doing so at the time, whereas the Government's decision to declare the end of the epidemic was. An amendment after the epidemic had already been declared made it so the decision is now in the hands of the Croatian Government, not the Minister, and is published in the Official Gazette before going into effect, in accordance with Article 90 of the Constitution. See Constitutional Court Ruling U-II-1800/2021 of June 8, 2021.
The first documented case of COVID-19 occurred on February 25, 2020, with the first documented death reported on March 25, 2020.

156 Countries are usually classified in three categories based on their legislative approach to an emergency: a) constitutional norms of emergency state, b) existing legislation (emergency or regular), or c) new emergency legislation. See Blagojević; Antunović, *op. cit.*, note 148, p. 129, from: Ginsburg, T., Versteeg, M., COVID-19. *States of Emergencies: Part 1*, Harvard Law Review Blog, 2020, available at: [https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/] , April 3, 2025.

157 *Sui generis* classification of an emergency can be dangerous as it provides the basis for hasty legislation because something that is new and unique is usually not regulated well enough and requires special powers to be vested to executive bodies (which is usually done without due political and legal consideration) riddled with non-transparency, inconsistency and a general lack of oversight which usually also tends to be *pro forma* and politically coloured rather than legal, even when talking about courts and constitutional courts. The problematic nature of classifying particular emergencies as "sui generis" states of emergency was discussed by Gardašević, see Gardašević, *op. cit.*, note 154, p. 34.

changes that would broaden the scope of executive's power to provide sufficient and effective response to specific dangers that the COVID-19 pandemic had posed.

It was those legislative amendments that started a "snowball" effect of constitutionality review applications made to the Constitutional Court, both of new and existing emergency legislation.[158]

4.2. LANDMARK CASES OF THE CONSTITUTIONAL COURT

On September 14, 2020 the Constitutional Court delivered its first landmark ruling, the Ruling U-I-1372/2020 and others of September 14, 2020,[159] in which it rejected multiple applications to review the constitutionality of Article 22.a of the Act of the Civil Protection System[160] (the Amendment Act which contained the provision was passed by the Croatian Parliament on March 18, 2020) and Articles 10, 13, 14 and 18 of the Amendment Act of the Act on the Protection of the Population from Infectious Diseases[161] (passed on April 17, 2020).

The Court confirmed previously established view that, regardless of whether a state has declared an emergency and notified the Council of Europe in accordance with Article 15 of the Convention on the Protection of Human Rights or

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158 Analysis of the Constitutional Court's case law shows there were a total of 254 applications made challenging a total of 62 acts in the period from March 2020 to May 2023. However, the actual number of decisions and rulings delivered is much lower due to the Court using the option to join multiple applications under same decisions and opinions if they concerned the same legal matter.

159 Official Gazette, No. 105/2020.

160 The new provision gave substantial decision making power to a special body, the National Civil Protection Directorate of the Ministry of the Interior, presided by the Minister of Interior. In total, the Directorate issued 18 decisions, many of which had serious effects on constitutional rights of both the people and the public institutions (authorities as well as public service institutions). The provision craftily avoids using the term "emergency", presumably so as to avoid any connection to Article 17 of the Constitution.

161 Article 10 amended Article 47 of the Act by adding COVID-19 to the list of infectious diseases against which measures can be adopted according to the Act, introducing self-isolation as a possible measure and giving the Directorate the power to pass the necessary measures under direct oversight of the Croatian Government and in cooperation with the Health Ministry and the Public Health Agency.
Article 13 introduced self-isolation as a possible measure resulting from border health and sanitary inspections.
Article 14 allowed for mandatory self-isolation and quarantine by State Inspectorate sanitary inspection officials.
Article 18, perhaps the most controversial of them all, declared previously made decisions of the Directorate as measures adopted under the newly amended Article 47. The Court explained that there was no retroactive effect as the authority to pass the necessary measures before the amendment in question had already been established under Article 22.a (paragraph 35.2 of the Ruling – the Court stated that the purpose of said declaration was to establish the connection between provisions regarding the same type of measures regulated in two different acts). This argument was highly criticized in the scientific community.

not (paragraphs 20 and 21),[162] all measures limiting rights and freedoms must be taken only when absolutely necessary, have a legitimate public interest cause and be proportional to the risks and dangers the emergency poses in terms of their extent and duration (paragraph 23).

Regarding applications concerning the Parliament not implementing Article 17 of the Constitution to first formally declare an emergency, which would then require that all restricting measures be passed directly by the Parliament with a two-third majority, the Court stated that the Parliament's decision to „activate" Article 17 is primarily a political decision and, therefore, not subject to the Court's review (paragraphs 27 and 28).[163]

It continued by confirming the decision-making powers of the National Civil Protection Directorate as a state authority under previously mentioned Articles 22.a and Article 47. of the two acts in question (paragraph 31).[164]

Considering that the Parliament opted for Article 16 (i.e. to not formally declare an emergency), the Court also reviewed all decisions made by the Directorate from the aspect of legitimate cause and proportionality, basing its competence on Article 125 Paragraph 2. of the Constitution which allows for constitutional review of "other acts" (meaning – acts not passed by the Parliament itself).

The Court rejected the argument that Directorate's decisions, as defined in the Act on the Protection of Population from Infectious Diseases, were not defined in terms of their duration and not subject to judicial review (paragraph 34).

Finally, regarding the regulation of the self-isolation measure (whose constitutionality was called into question by multiple applicants), the Court found that its purpose (legitimate cause) and duration were in accordance with the current

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[162] Blagojević and Antunović recognize three groups of states in terms of application of Article 15 of the Convention: states that declared an emergency and notified Secretary General, states that declared an emergency, but did not notify and those that did not declare an emergency, See Blagojević, Antunović, *loc. cit.*, note 156.

[163] Blagojević, Antunović and Gardašević all agree that both social circumstances (self-isolation, limited movement and transport, limited gatherings, focusing on slowing down the spread of the disease, uncertainties regarding duration and global spread and effects) and legal circumstances (Croatian Government asking the Parliament to delegate them the necessary powers, urgent legislative amendments, difficulties in the functioning of the Parliament resulting in Rules of Procedure amendment introducing a special session regime) occurred that warranted the use of Article 17 of the Constitution to declare an emergency. Gardašević, *Pandemija i Ustav Republike Hrvatske*, Informator, No. 6623, 2020, p. 2., Blagojević; Antunović, *op. cit.*, note 148, p. 132.

[164] For all decisions made by the Directorate during the pandemic see: [https://civilna-zastita.gov.hr/sve-odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2302], 2 April 2025.

scientific and medical data on the disease[165] and proportional. It distinguished between general measures passed through Directorate's decisions – which are subject to constitutionality review – and individual cases of application of said measures by a general medical practitioner or an epidemiologist, which can only be reviewed through means of invididual review, either via inspection or by means of a complaint, a dispute or a constitutional complaint (paragraphs 39.1 and 39.2).[166]

In the second landmark ruling U-II-3170/2020 and others delivered on the same day (September 14, 2020) the Constitutional Court rejected multiple applications regarding constitutionality review of the two decisions made by the Directorate – one to institute mandatory masking and the other to introduce special rules regarding denying access to public transportation to unmasked individuals for the duration of the COVID-19 epidemic.[167]

The Court found that mandatory masking, as regulated in the decision under review, did not meet the minimum severity to be considered in violation of human dignity under Article 23 Paragraph 1 of the Constitution and Article 3 of the Council of Europe Convention (paragraph 9).

Regarding the protection of Article 35 of the Constitution (the protection of person and family life), it explained that the demand of said provision represents not only a negative requirement, baring the state to intervene, but also a positive obligation to intervene when it's necessary to protect the public interest, the latter involving a certain level of judgement by the state (paragraph 9.1).[168]

It confirmed the legitimacy of the cause established in the U-I-1372/2020 ruling and deemed the decisions necessary in a democratic society based on then current level of scientific evidence and World Health Organization recommendations. According to the Court, masking at the time was necessary, despite occasionally causing discomfort in the form of rashes and other forms of skin discoloration, both as a containment measure (to limit the spread of the disease) towards already

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165 Paragraph 39.
For example, the incubation period of the virus was found to be between 2 and 14 days, which explains why the self-isolation measure then lasted 14 days.
The President of the Croatian Government founded the National Scientific Advisory Committee on March 25, 2020, in order to facilitate the complex process of balancing the scope and duration of decisions that were to be made by the Directorate in order to protect public health and prevent further spread of the disease (paragraph 18).

166 This view was repeated in multiple rulings, e.g. U-I-2162/2020 of September 14, 2020 and U-II-6087/2020 and others of February 23, 2021.

167 Constitutional Court Ruling U-II-3170/2020 and others of September 14, 2020.

168 The Court repeated this view in later decisions and rulings, e.g. in Ruling U-II-5709/2020 and others of February 23, 2021 (paragraph 17).

symptomatic people, as well as to protect those who have not yet been exposed to the virus, albeit as a supplemental measure to other measures, such as physical distancing and personal hygiene (paragraph 12).

In the decision U-II-2379/2020 of September 14, 2020[169] the Constitutional Court declared that one segment of the Directorate's decision to regulate working hours of stores, markets and warehouses during the COVID-19 pandemic was unconstitutional during one period of time, before the provisions in question were removed via an amendment. The provisions in question contained "Sunday" as one of the exceptions for when working was not permitted or, on the contrary, when it was permitted, but only for certain types of shops and stores.

Although the Court did not find the grounds to declare the cause of decisions illegitimate, it found the Government's explanation to why Sunday was particularly relevant to the realization of that cause inadequate and, as a result, it did not meet the criterion of necessity (paragraph 13).[170]

As the epidemic slowly began to subside in the summer of 2020, which was obvious by the declining number of total and daily reported infections and deaths, the Directorate began to ease (and eventually completely abolish) most restrictions that were previously imposed and then reinstate them as the second wave of the epidemic began to struck at the end of 2020 and the beginning of 2021. This was also true for later waves of the disease in 2021 and 2022.[171]

Considering the circumstances as well as the scientific evidence on the disease had already changed quite considerably by then, the Constitutional Court deemed it necessary to re-examine those decisions in their renewed form. It was obvious by this point that the Court would acknowledge legitimacy of the cause of vast

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169 This was one of the few occasions during the pandemic in which the Constitutional Court decided to trigger review and deliver a decision on its own initiative (paragraph 9).

170 In fact, using the logic provided by the Croatian Government in response to the Court's request for information and explanation in the proceeding, there were far more reasons to regulate Friday as the busiest market day, i.e. the day when the risk of exposure and spreading of the virus was the highest and, therefore, possibly merited barring sales on that day of the week (paragraph 4).

171 See *infra*. Balancing between strengthening and relaxing the limitations often proved to be a more challenging task than simply imposing and implementing them in the first place. Constitutionality reviews became more and more complex as the decisions later in the epidemic regulated many exemptions and different treatment of various everyday activities. See, for example, Ruling U-II-6267/2021 and others of April 22, 2022, Official Gazette, No. 49/2022, in which there were notable inconsistencies in the Court's argumentation, for example, when it comes to the older population and allowing religious gatherings, on which occasion the Court pointed out the attention the older population gave to following the established epidemiological measures (paragraph 17), despite characterizing that same population as "more vulnerable" in a number of other decisions and rulings, See, for example, Ruling U-II-6278/2021 of April, 12, 2022.

majority of measures implemented by the Directorate and that the main point of contention would be the questions of necessity and proportionality of (individual) measures. The Court based many of its decisions and rulings concerning meeting those requirements by reviewing the argumentations and data provided by the Croatian Government and the Ministry of Health, which constituted the basis for the Directorate's decisions.[172]

Regarding the duration of general measures regulated in the Act on the Protection of Population from Infectious Diseases (Article 47 Paragraph 2),[173] the Court stood by its viewpoint that it is not possible to determine the duration of those measures at the time of their implementation because it depends on the type of disease as well as its progression, as those measures were not legislated specifically for the case of COVID-19.[174]

In December 2021, by which time Croatia was already struck with the fourth wave of the COVID-19 epidemic, characterized mainly by the so-called "delta" strain of the disease, the Constitutional Court was once again faced with multiple applications to review already reviewed articles of the Act on the Protection of Population from Infectious Diseases and the Civil Protection System Act. Applicants argued that 19 months after the declaration of the epidemic enough time has passed to warrant an evaluation and a change in the system of handling the situation. They added that the Parliament was practically unable to supervise the Directorate because it fell under oversight of the Croatian Government and that its role was limited solely to *ex post* reports. It was their opinion that the Parliament should take over the decision making process of dealing with the pandemic. The Court once again gave its opinion in Ruling U-I-5781/2021 and others of December 21, 2021.

The Court noted that the Parliament had, since the epidemic was declared, already – leaning on the latest scientific evidence about the disease – gradually legislated new forms of measures to be taken to combat the epidemic, such as self-isolation, masking and limitations to public gatherings, performances and even private gatherings (paragraph 13). Through those legislative amendments, the Court added, the Parliament displayed its continued political determination to further maintain

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172 An example of such a decision would be the Ruling U-II-6087/2020 and others of February 23, 2021, see paragraphs 13, 14.1 and 17. For example: *„... The Court finds that the Directorate's estimates were founded on expert medical data and research,... are limited in duration and contain an obligation to regularly assess their necessity and proportionality, ..."* (paragraph 17).

173 Such as disinfection, quarantine, travel limitations, or self-isolation, masking, limitations to public gathering and performances, limitations to private gatherings.

174 See Ruling U-I-263/2021 of June 8, 2021 in which the Court was asked to assess the limitation to private gatherings imposed by the Directorate earlier that year.

the current form of emergency management. It was the Court's position that it is up to the Parliament to decide how to implement the power of parliamentary oversight vested to him in Article 80 of the Constitution. It finished by stating that the decisions taken by the Directorate did often lack sufficient reasoning important for judicial and the Court's oversight.[175]

In Ruling U-II-5571/2021 and others of December 21, 2021 the Court rejected numerous applications regarding the Directorate's decision for implementation of a safety measure regarding patient admittance[176] that would require patients to either display their COVID pass,[177] negative COVID-19 test result done recently or another proof of vaccination (with at least a single dose of vaccine) or recovery from the disease. This obligation was also mandated for anyone accompanying the patient to the public health institution, though there were many exceptions to these rules. Primary medical care, medical emergency cases and COVID-19 cases, as well as children under 12, were exempt from this mandate.

The Court reiterated that the decisions taken by the Directorate which, beyond reasonable doubt, limit rights and freedoms, are subject to the Court's constitutionality review and must, therefore, meet and pass the proportionality test of Article 16 of the Constitution. It accepted the Government's opinion that the cause was legitimate, proportional, based on scientific evidence and backed by statistical data (paragraph 12) and rejected the implication that the obligation was discriminatory towards non-vaccinated patients, practically forcing them to get vaccinated.[178]

Another important ruling on applications regarding two Directorate decisions from the same set of decisions as the COVID pass decision regarding patient admittance was the Ruling U-II-5417/2021 and others of 21 December, 2021.

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175 Horvat Vuković and Kuzelj particularly emphasize this as, they argue, it, together with overall non-transparent functioning of the Directorate, enabled the Constitutional Court to legitimize severe limitations to constitutional rights and freedoms. See Horvat Vuković, A., Kuzelj, V., *Constitutionality during times of crisis: Anti-pandemic measures and their effect on the rule of law in Croatia*, 6th International Conference – ERAZ 2020 – Knowledge based sustainable development, Online/virtual, May 21, 2020, Conference Proceedings, p. 62., available at: [https://eraz-conference.com/eraz-2020-59/], April 3, 2025.

176 Official Gazette, No. 105/2021., 108/2021.

177 Though the primary role of COVID pass is to enable easier movement across the borders of Croatia, it can also be used for other purposes in accordance with measures set forth by the Directorate. See Decision on the Establishment of the National EU Digital COVID Pass, Official Gazette, No. 60/2021.

178 The Constitutional Court repeated the ECHR opinion in *Zambrano v. France* (Decision No. 41994/21, October 7, 2021) that *„... as long as unvaccinated patients can obtain the COVID pass via means of recovery or COVID tests as alternatives to vaccination, it does not represent a de facto obligatory legislative measure."* (paragraph 17).

These decisions required all medical and social care institution workers to undergo mandatory testing on site at least twice per week, exemptions of this being workers with proof of vaccination or recovery (unless displaying symptoms). Workers who refused to get tested or failed to provide proof of above said facts were to not be allowed on institutional premises (paragraph 4).

The Croatian Government defended these decisions explaining that the most common strain of the disease at that point was the "delta" strain which, according to then available scientific data, had twice the infection spread rate of earlier strains, despite the effects of the disease caused by it being milder on average.

Again, the Court found both decisions to be in compliance with legitimate cause clause of Article 16 of the Constitution and proportional, meaning: 1) adequate – can achieve the desired legitimate cause, on its own or in combination with other measures, 2) necessary – the legitimate cause is unachievable without it, and 3) reasonable – not arbitrary and achieving balance between limitations to rights and freedoms and the risks and dangers posed by the situation warranting the measure.

As for the applicants' argument that refusing to get tested or provide the necessary proof otherwise limits the right to work of affected workers, the Court argued that disallowing access to the institutional premises to those workers protected life and health of other workers and patients, lowered the risk of the disease spreading, especially among other workers, which in turn protects the integrity of the healthcare system as a whole. It continued by stating that failure to comply in either of the three ways also represented a contractual breach with their employers (healthcare institutions). Therefore, the described testing or its alternatives did not pose an undue burden on the workers, the work process – testing is free, i.e. covered by the employer, quick, easy and painless and occurs before the daily work process even begins – or the worker's right to work. Any possible consequences would have been the result of work regulations, not of anti-pandemic measures (paragraph 17).

By far the most elaborated, and one of the most important decisions, was the Decision U-II-7149/2021 and others of February 15, 2022 (Official Gazette, No. 25/2022). In total, there were 29 applicants who approached the Constitutional Court with questions regarding the constitutionality of the mandatory COVID-19 testing and the displaying of testing, vaccination or recovery proof when entering public institution premises.[179]

[179] The actual title of the decision did not use the term „public institutions", but instead tried defining the scope of who it applied to more thoroughly. The Directorate's decision was published in the Official Gazette, No. 121/2021 and 10/2022.

The Court accepted the applications regarding one particular provision providing higher learning institutions with the option to regulate exemptions from it, while rejecting them in other matters.

The decision in question was announced on November 15, 2021 and it contained multiple exemptions: healthcare institutions, students at higher learning institutions – unless the institution regulated otherwise, school children, persons accompanying children to preschool, etc. (paragraph 5).

Similarly to earlier decisions made by the Directorate regarding mandatory testing and providing proof, this decision also required testing to be done twice a week in an authorized institution or a laboratory. Resources spent on testing by employees were to be refunded by the employer on their request. The decision also provided the option for the employer to fund and organize testing on its own grounds. Finally, it recommended institutions on which the decision did not apply to institute mandatory testing in order to grant access into their premises.

Applicants claimed that the measures regulated in the decision could not meet the high proportionality standards of Article 16 of the Constitution and that the only alternative would be Article 17,[180] which would mean the Parliament would need to be the one to decide on them. They called out the Court for the opinion expressed in the Decision U-I-1372/2020 of September 14, 2020 regarding the Parliament's decision whether to deal with an emergency situation by deciding on the matters concerning limitations of rights and freedoms itself (Article 17) or by assigning that power to the executive through legislative acts (Article 16). They also argued against the Parliament being reduced to *ex post* oversight through reports which they found insufficient and ineffective to protect the rule of law, separation of powers, checks and balances and its citizens against arbitrary actions of the executive branch and its operative bodies (paragraph 36).

The Court found the applicant's arbitrary executive's actions to be of political nature due to the fact that the legal basis for acts that enabled the executive's decision making in the epidemic was Article 16 of the Constitution. The Court believed that the applicants implied that in the case of application of Article 16 acts could be passed with a majority consisting only of the governing political party or coalition, whereas Article 17 application required a higher form of consensus – a two third majority, which always transcends daily political feuds, since no party has

[180] Article 17 of the Constitution instead opts for the concept of "adequate", which is only one of the elements in the proportionality test under Article 16 and a lower standard of scrutiny, Abramović, A., *Ustavnost u doba virusa*, available at: [https://www.iusinfo.hr/aktualno/u-sredistu/ustavnost-u-doba-virusa-41073], 3 April 2025.

had anything close to such a majority in the Parliament at least in the last twenty years.

The Court stated that the Constitution is and should be interpreted as "politically neutral". The principle of separation of powers does not refer to the political relations inside one of the state authorities (in this case, the Parliament), but to the relations between different branches of government (paragraph 39).[181]

The Court repeated that the Parliament already had the necessary tools at its disposal on the basis of Article 80 of the Constitution (supervisory power). It pointed out that dealing with the epidemic requires specific knowledge only medical experts could provide as well as urgent, but continued reaction, both of which the legislative body is not suited for (paragraph 39.2).[182] Of course, all this does not exculpate the executive of any responsibility for its actions – all the measures taken need to be accompanied by proper argumentation and reasoning. The amendment and revision of the decision in question did meet that requirement. Moreover, the Croatian Government's responses to the Court's request for statement in earlier review proceedings showed that the Government closely followed scientific papers on the pandemic as well as statistical data and recommendations by the National Scientific Advisory Committee, comprised of top experts in the fields of epidemiology, others fields of medicine and biology.

As for the proportionality of the decision, the Court found that the argumentation given in an earlier decision regarding mandatory employee testing in healthcare and social care institutions was applicable in this case as well.[183]

Lastly, the Court found that the Government and the Directorate did not provide sufficiently convincing and adequate reasoning behind the possibility given to higher learning institutions to exempt their students from the decision as the main

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[181] The Court pointed out that the relevant acts of the Parliament were all passed (excluding their amendments and revisions) before the epidemic was declared, meaning – during ordinary circumstances, which, in Court's opinion, displayed their intention to assign those powers to the executive as the more "operative" branch of government. Not only that, but the amendments to those acts were passed in March 2020 with more than a two-third majority, proving that it is quite possible to put aside political differences in the view of a threat in the form of a crisis. For example, the amendment to the Civil Protection System Act was passed with 108 votes. Gardašević, *loc. cit.*, note 163, plenary discussion and voting reports available at:
[https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2024679], 2 April 2025.

[182] Gardašević disagrees with this assessment and, instead, views it as the Parliament taking political responsibility for measures adopted dealing with the pandemic, Gardašević, *loc. cit.*, note 16, *cf.* Blagojević; Antunović, *loc. cit.*, note 163.

[183] See *supra* regarding Ruling U-II-5417/2021 and others of 21 December, 2021.

argument was protecting the university autonomy instead of objective and verifiable epidemiological reasons (paragraphs 60.3. and 60.4.).

In May of 2022 the Constitutional Court found itself having to review the constitutionality of two referendum initiatives – one, aimed at amending Article 17 of the Constitution to expressly state epidemic and pandemic as emergency states, and another, aimed at amending and revising the Act on the Protection of Population from Infectious Diseases by taking away powers from the Directorate and assigning them to the Croatian Parliament if the proposed measures involve limitations to constitutional rights and freedoms or represent a pandemic declared by the World Health Organization. It also contained a provision by which all previous measures taken by the Directorate are to be subjected to parliamentary confirmation within 30 days.

It found both referendum initiative proposals to be unconstitutional,[184] stating notable similarities between numerous earlier constitutionality review applications on anti-epidemic legislation and Directorate's decisions. The Court argued that Article 16 of the Constitution can be the legal basis for anti-pandemic legislation and measures, declaring it "obvious" as one of the legitimate causes is the protection of public health, and declared that the actual aim of both initiatives was to make sure the next time the need for a limiting decision arose, as was then the case with the pandemic, the decision is made by the Croatian Parliament by a two third majority in each such case, as well as to "eliminate" the Directorate from the Act's provisions when a pandemic has been declared by the World Health Organization or when a measure is aimed at limiting constitutional rights and freedoms,[185] thus taking away its role in dealing with the pandemic. It concluded that the proposals put forward were not adequate to realize that aim and were, in that sense, redundant and added that the second initiative also meddled in the constitutional relationship between the Parliament and the executive, which is, according to the Court, a "structural characteristic of the Croatian constitutional state".[186]

The Constitutional Court reviewed the constitutionality of provisions of the Act on the Protection of Population from Infectious Diseases for the final time right

[184] See Decision U-VIIR-2180/2022 of May 16, 2022 and Decision U-VIIR-2181/2022 of May 16, 2022, Official Gazette, No. 61/2022.

[185] Which is often difficult to distinguish in practice, so the Court argued it would institute a complex system of duality in handling health crises (Decision U-VIIR-2181/2022 of May 16, 2022, paragraph 26.1).

[186] See paragraphs 15 and 16 of the Decision U-VIIR-2180/2022 of May 16, 2022, paragraphs 25 and 27 of the Decision U-VIIR-2181/2022 of May 16, 2022.

after the end of the epidemic had been declared, in the Ruling U-I-998/2022 of June 27, 2023. However, in that ruling it did not offer any significant new arguments. Instead, it reaffirmed arguments provided in the Ruling U-I-1372/2020 of September 14, 2020. It insisted that the Croatian Parliament already had the necessary constitutional tools to supervise the Government and that it proved its continued support of the current legislative model by further amending anti-epidemic acts as the pandemic required of them (paragraph 10).

5. CONCLUSION

In 2020, the health systems of countries worldwide came under tremendous pressure; the consequences of the COVID-19 pandemic were a massive loss of human life. But so is the halting of economic activities at the world level. In a crisis of such severity, the state authorities found themselves either de jure or de facto in a state of emergency. The executive then naturally appears as a branch of government that can effectively and efficiently respond to challenges. The first question we tried to find an answer to in this paper was related to the definition of a state of emergency. We pointed out certain specificities of the public health crisis. Still, we concluded that its fundamental characteristics do not differ significantly from other types of crises that can lead to a state of emergency.

Then, we questioned the arguments on whether the state of emergency is a legal or a political phenomenon. States of emergency are introduced by law, and most countries' constitutions contain norms that regulate emergency powers. We agreed with theorists like Zwitter and Günther that law has (and should have) a key role in the declaration, duration and abolition of the state of emergency and the return to normality. The law gives legitimacy to the state authorities, which enables better communication with the population, whose cooperation with the authorities in the emergency circumstances brought about by the pandemic was necessary for the successful fight against the disease. It is key to public trust. Numerous studies already exist on how the measures to combat this public health threat affected the constitutional framework in different countries, i.e., constitutional values, the concept of democracy, the principle of separation of powers, and the rule of law. For this reason, it is necessary to specify the constitutional provisions related to states of emergency; the law should serve as an instrument to guarantee the most essential democratic values. In a sense, the law restrains itself.[187]

Although the Croatian Constitution does not recognize the term "emergency", the concept of states of emergency is regulated in Article 17 of the Constitution,

[187] Dyzenhaus, *op. cit.*, note 7, p. 2006.

which provides for three types of states of emergency, of which the most fitting in the context of a public health crisis seems to be "major natural disasters".

The social and legal circumstances described in the paper testify to the fact that there was a basis for declaring an emergency, after which the obligation to adopt restrictive measures would lie with the Croatian Parliament.

Although such a position seems correct from an *ex post* perspective, it is questionable and unprovable whether such a system would have yielded better results than the one applied.

The Republic of Croatia belongs to the group of member states that neither declared a constitutional emergency and instead, faced the pandemic through the application of special legislation, a lot of which was already in place before the pandemic.

The Constitutional Court confirmed that Article 16 of the Constitution also enables the state authorities to deal with the crisis, provided that the measures are transparently adopted, reasoned (explained) and accompanied by an appropriate system of both implementation and supervision. Practice has shown that this was not always the case. However, it doesn't appear that the main culprit was the application of a particular provision of the Constitution.

The analysed case law of the Constitutional Court showed how complex and intertwined with different viewpoints it was to simply review the measures, let alone collect and monitor data and consider, adopt, change and abolish epidemiological measures of various types almost daily.

Although there were certainly decisions that may not have had their practical foothold, the Constitutional Court confirmed that the decisions did largely follow expert opinions and were based on objective statistical indicators, although many of them were accompanied by numerous problems in implementation, which was not the case only in Croatia.

It is completely natural to view restrictions on rights and freedoms from one's own perspective and, therefore, to be extremely critical of them, but those given the authority to act in crisis situations primarily act with collective protection aims, and those can come into conflict with individual rights and freedoms in times of crises.

Finally, the pandemic has caused many problems for the institutions of the European Union, so much so that serious discussions are underway about building a more comprehensive anti-crisis regulation of procedures and measures at the EU level, most of which are down to which model to apply. The constitutional model

appears safer and more complete, although it seems more difficult to achieve because it requires amending the treaties, while the legislative model is more flexible, but also less efficient and resistant to the threat of normalization of crisis legislation because both political decision-making and political oversight are combined in one authority. It also largely depends on the possibility of decision-making within the European Parliament, which can vary decision to decision and is endangered when the functioning of the Parliament is paralyzed.

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