

## MAPPING THE CONSTITUTIONAL TERRAIN OF VULNERABILITY IN THE COVID PANDEMIC: THE CROATIAN CASE

Prof. dr. sc. Sanja Barić\*  
Doc. dr. sc. Matija Miloš\*\*

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### Summary

*In this paper, we explore the underlying theory of the Croatian constitution in the response to the COVID outbreak. We argue that the operative issue imposed by the pandemic, at least in Croatian constitutionalist circles, was how facts should be related to constitutional values, structures, and norms. Although at first blush a replica of our general inability to get some bearing on a terrain of uncertainty in an unforeseen outbreak, we will explore the matter as a specific problem of constitutional theory, aiming to explore its implications for constitutional dimensions of vulnerability. To do so, we draw from the literature to describe the different ways constitutions may be imagined in relation to facts and then apply this insight to the measures enacted by the Croatian state during the COVID pandemic. The result is a treacherous terrain, where the exercise of state power and its restriction stand on thin constitutional grounds, excluding a spectrum of more substantive interpretations of the Constitution. In conclusion, we argue that this map reveals a narrowed basis for identifying and vindicating vulnerability.*

**Keywords:** *vulnerability; constitution; constitutionalism; COVID-19; constitutional theory.*

### 1 INTRODUCTION

At the outset, we go down a well-trodden path: constitutions provide shape. By performing their role, they “constitute”. By relying on the law in the process, they draw a line between the “outside” and the “inside” of a constitutional order,

\* Sanja Barić, Ph.D., Full Professor, University of Rijeka, Faculty of Law; [sanja.baric@pravri.uniri.hr](mailto:sanja.baric@pravri.uniri.hr). ORCID: <https://orcid.org/0000-0001-6496-9062>.

\*\* Matija Miloš, Ph.D., Assistant Professor, University of Rijeka, Faculty of Law; [matija.milos@pravri.uniri.hr](mailto:matija.milos@pravri.uniri.hr). ORCID: <https://orcid.org/0000-0002-3839-0273>.

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between the constitutional and unconstitutional, legal and the illegal, empowered and powerless. In this, they both exclude and contain, creating “a circumscribed space in which likeness dwells, the likeness of natives, of an autochthonous people, or of a nationality, or of citizens with equal rights”.<sup>1</sup> In writing about the constitution as a “crucial boundary” in terms of democracy, Wolin argues, “the modern State as the guardian of boundaries has been rendered paradoxical, if not anachronistic”, both because it is faced by boundary-transcending challenges and because it is no stranger to breaching boundaries in exercising its power.<sup>2</sup> The COVID pandemic has provided examples of both, as it moved beyond boundaries in more than one respect and encouraged governments to exercise power in ways that transcended the ordinary.

On this well-trodden path, it is unsurprising that there were attempts to invoke a constitution in the name of the vulnerable. This was certainly the case in Croatian constitutionalism. The larger decision on whether the pandemic should be qualified as a state of exception apparently dominated the enforcement of the Croatian constitution.<sup>3</sup> The issue, however, was inextricably bound to rights guaranteed by the Constitution, as the constitutional boundary between the “ordinary” and the “exceptional”, most relevant to the pandemic, hinges on the difference between regular and extraordinary limitations of fundamental rights.<sup>4</sup> Hence, the apparent choice between the legally “ordinary” and the “exceptional” also involves the significance of constitutionally guaranteed rights. In Croatia, this choice was framed by the need to protect those identified as most vulnerable to the new virus.<sup>5</sup> Nonetheless, the oft-declared imperative has led to an expansion of the executive power that may be difficult to square with a constitutionally limited government, creating a possible disparity between the legitimate need to protect the vulnerable and the use of the idea of vulnerability to extend power beyond its necessary measure.

In this paper, we will take a closer look at the use of the Croatian constitution in the pandemic. The literature has so far charted with sufficient precision the failures

- 1 Sheldon S. Wolin, “Fugitive Democracy”, in: *Fugitive Democracy and Other Essays*, ed. Nicholas Xenos (Princeton: Princeton University Press, 2016), 101, <https://doi.org/https://doi.org/10.1515/9781400883424-007>.
- 2 Wolin, *Fugitive Democracy*, 102, 104-105.
- 3 Đorđe Gardašević, “Pandemija kao stanje ‘velike prirodne nepogode’ i Ustav Republike Hrvatske”, in: *Primjena prava za vrijeme pandemije COVID-19*, ed. Jakša Barbić (Zagreb: Hrvatska akademija znanosti i umjetnosti, 2021), 23-45; Đorđe Gardašević, “‘Business as Unusual’: Pandemic Concentration of Executive Powers in Croatia”, *Pravni zapisi* 12, no. 1 (2021): 91-122, <https://doi.org/10.5937/pravzap0-32129>.
- 4 The Constitution of the Republic of Croatia, Official Gazette, no. 56/90, 135/97, 8/98 [consolidated text], 113/00, 124/00 [consolidated text], 28/01, 41/01 [consolidated text], 55/01 [correction], 76/10, 85/10 [consolidated text]) and the Amendment to the Constitution of the Republic of Croatia (ballot initiative), Official Gazette, no. 5/14, Decision of the Constitutional Court of the Republic of Croatia no. SuP-O-1/2014 (hereinafter: the Croatian Constitution), Arts. 16 and 17.
- 5 Goran Arbanas, and Sunčana Roksandić, “Ni med cvetjem ni pravice: sličnosti i razlike Zakona o zaštiti osoba s duševnim smetnjama i Zakona o zaštiti pučanstva od zaraznih bolesti - Treba li nam Zakon o zaštiti osoba sa заразним bolestima?”, *Liječnički vjesnik* 143, no. 11-12 (2021): 479, <https://doi.org/10.26800/LV-143-11-12-10>.

of the government to abide by the fundamental act of the Croatian legal order.<sup>6</sup> We will add to these findings by mapping the constitutional terrain of vulnerability. More specifically, it is our claim that the way the Croatian constitution is related to facts impacted the pandemic vulnerabilities that may be identified with the constitutional language and vindicated through constitutional adjudication. This argument builds on the existing scholarship on vulnerability. As noted in the literature, institutions should enable resources to address the different forms of human vulnerability.<sup>7</sup> We take the language enabled by the Constitution, in particular that of fundamental rights, as one such resource. To claim that we have a right and that this right has been violated allows us to articulate our own vulnerability and challenge power.<sup>8</sup> In this paper, we argue that the underlying theory of the Croatian constitution adopted by the Constitutional Court in its pandemic case law reshapes the potential of the constitutional language to address vulnerability. In particular, it excludes a more substantive reading of the Constitution and allows that a range of vulnerabilities be ignored by the dominant executive power.

In the next part of the paper, we will show that the key challenge standing before Croatian constitutionalism in the pandemic was the interaction of facts and constitutional norms. We then draw from constitutional theory to describe how facts and constitutions may interact. We use this framework to explore the different measures enacted in the pandemic. Finally, we conclude by describing the Croatian constitutional terrain of the pandemic as an uneven, sometimes even treacherous ground, whose features are only in part directly related to the pandemic. They, in any case, narrow the potential of the constitutional language to vindicate vulnerability.

## **2 EVALUATING FACTS AGAINST CONSTITUTIONAL LIGHTS: THE PROBLEM**

There is a sense in which any thinking about the pandemic and the constitution involves the interplay between facts and law. Much as any crisis that may require extraordinary governmental action, known to constitutional theory as a state of exception,<sup>9</sup> the pandemic is something out of the ordinary, something that is not necessarily foreseen by laws intended to govern us outside its virus-ridden context.

6 Gardašević, *Business as Unusual*; Gardašević, *Pandemija kao stanje 'velike prirodne nepogode' i Ustav Republike Hrvatske*; Đorđe Gardašević, "Pandemija i Ustav Republike Hrvatske", *Novi informator* 6623 (2020): 1-4; Đorđe Gardašević, "Izvanredna stanja, „velike prirodne nepogode“ i promjene Ustava Republike Hrvatske", in: *Ustavne promjene i političke nagodbe. Republika Hrvatska između ustavne demokracije i populizma*, ed. Arsen Bačić (Zagreb: Hrvatska akademija znanosti i umjetnosti, 2021), 249-275.

7 Martha Albertson Fineman, and Anna Grear, "Introduction", in: *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman, and Anna Grear (Surrey: Ashgate, 2013), 2-3.

8 Michael Goodhart, "Human Rights and the Politics of Contestation", in: *Human Rights at the Crossroads*, ed. Mark Goodale (Oxford: Oxford University Press, 2013), 32.

9 Đorđe Gardašević, *Ograničenja ljudskih prava i temeljnih sloboda u izvanrednim stanjima* (Zagreb: Hrvatska udruga za ustavno pravo, 2014).

We should then not be surprised that a constitution outlines the challenges such as the pandemic as discrete and somewhat fuzzy factual scenarios that should nonetheless be tamed by the law once they occur. The Croatian Constitution warns us of “great natural disasters”, “wars” or a “clear and present danger to the independence and unity of the Republic of Croatia”.<sup>10</sup> How the law should respond to these scenarios and, in particular, how the powers of the state should be regulated in the process, is a larger debate that we shall not engage in here.<sup>11</sup> We use the Croatian discussion on whether the pandemic is a “great natural disaster” provided for in the Constitution to argue that, beyond the apparently crude dichotomy between extra-legal facts and legal norms relied upon by some commentators,<sup>12</sup> the law draws upon and provides normative significance to some facts over others. This is the mechanism at the core of the state’s response to the pandemic and is explored throughout the rest of the paper.

The COVID-19 pandemic almost immediately called forth the “new normal” as far as government-imposed restrictions are concerned.<sup>13</sup> The Croatian authorities were no exception to this. A variety of measures introduced required the citizenry to assume individual responsibility for counteracting the spread of the virus. The measures were supported by the concern for the health sector, in particular doctors and nurses, who were seen as protagonists of a “hero discourse”.<sup>14</sup> The same heroic aura originally accompanied the publicly engaged members of the National Civil Protection Headquarters, a body of the executive power entrusted with defining the applicable pandemic measures, as well as the then-new Minister of Health.<sup>15</sup> The range of measures that ushered in the “new normal” also revealed a staging ground for a range of vulnerabilities: those attributable to anyone who may get infected by the virus, those affecting individuals particularly vulnerable to more serious forms of disease and, finally, vulnerabilities of individual social formations. The latter included the healthcare, educational and social care systems, themselves catering to the needs of the vulnerable.

The original support for the push against the pandemic was eroded as it became evident that principled adherence to medicine did not have an unfettered reign over the measures enforced. The selective application of individual measures and the

<sup>10</sup> The Croatian Constitution, Art. 17(1).

<sup>11</sup> For a broader exploration of these challenges, see Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol: Bristol University Press, 2020); Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (New York: Hart Publishing, 2020).

<sup>12</sup> Marinko Jursić, “Omejec: ‘Na izvanredno stanje ne treba ni misliti, a kamo li ga zazivati!’”, *Večernji list*, 27<sup>th</sup> March 2020, <https://www.vecernji.hr/vijesti/omejec-na-izvanredno-stanje-ne-treba-ni-misliti-a-kamo-li-ga-zazivati-1389637>.

<sup>13</sup> Jeff Clyde G. Corpuz, “Adapting to the Culture of ‘New Normal’: An Emerging Response to COVID-19”, *Journal of Public Health* 43, no. 2 (2021): 344-345, <https://doi.org/10.1093/pubmed/fdab057>.

<sup>14</sup> See more on the “hero discourse” in Shan Mohammed *et al.*, “The ‘Nurse as Hero’ Discourse in the COVID-19 Pandemic: A Poststructural Discourse Analysis”, *International Journal of Nursing Studies* 117 (2021): 103887, <https://doi.org/10.1016/j.ijnurstu.2021.103887>.

<sup>15</sup> Mirela Holy, “Media Framing of the Coronavirus in Croatia”, *In Medias Res* 10, no. 18 (2021): 2825, <https://doi.org/10.46640/imr.10.18.3>.

apparent arbitrariness of their introduction led to public outcries, including attempts to reign in the National Civil Protection Headquarters and, by extension, the whole of the executive branch of power that had taken the lead in the pandemic. This also involved an effort to reimagine the role of the state through the language of the Croatian constitution, as the way the executive power handled the pandemic had been characterised as unconstitutional from the outset.

It is in this context that the interplay of facts and law took place, as is evident from the decision of the Constitutional Court of the Republic of Croatia on whether the pandemic is a “great natural disaster”, one of the exceptional states outlined in the Constitution. Measures involving obligatory facemasks, restrictions of working hours of shops and the outright prohibition of some activities amount to limitations of constitutionally guaranteed rights.<sup>16</sup> What turned out to be much more problematic in Croatia was whether those restrictions were a regular exercise of state power or part of a state of exception. More specifically, the Croatian constitution provides that rights guaranteed by it may be limited only on a legal basis for achieving a legitimate aim and in a proportionate fashion.<sup>17</sup> In addition to this “regular” framework for limiting rights, the Constitution provides that in *inter alia*, “any natural disaster” rights enshrined in the Constitution may be “curtailed” by a two-thirds majority of all representatives in the Croatian Parliament. Such restrictions must be “adequate to the nature of the threat”.<sup>18</sup> This second, exceptional framework for limiting fundamental rights remains unused in Croatia’s pandemic response. Instead, the legislature and the executive applied the regular route,<sup>19</sup> acting as if the pandemic did not involve a state of exception of any kind. The approach chosen meant that the exceptionality of human rights restrictions required by the pandemic measures continued to be a matter of dispute.

Several petitioners addressed the Croatian Constitutional Court, challenging the idea that limitations of constitutional rights motivated by the pandemic do not require a two-thirds majority of all representatives. In a controversial decision, the Court found that the Constitution vested the legislature with the power to choose between “regular” and “exceptional” requirements for limiting constitutional rights.<sup>20</sup> The decision was not controversial only because it turns a constitutional requirement into a matter of political choice, thus mischaracterising a restriction of political power as a matter of political convenience.<sup>21</sup> The finding of the Court also contravenes the text of the Constitution that obligates the parliament to decide with qualified majorities

16 Terkuma Chia, and Oluwatosin Imoleayo Oyeniran, “Human Health versus Human Rights: An Emerging Ethical Dilemma Arising from Coronavirus Disease Pandemic”, *Ethics, Medicine and Public Health* 14 (2020): 100511, <https://doi.org/10.1016/j.jemep.2020.100511>.

17 The Croatian Constitution, Art. 16.

18 The Croatian Constitution, Art. 17.

19 According to Gardašević, this meant that Croatia had opted for a “legislative” rather than a “constitutional” approach to the pandemic. Gardašević, *Business as Unusual*, 100-104.

20 Decision of the Constitutional Court of the Republic of Croatia in case no. U-I-1372/2020 and ors., 14<sup>th</sup> September 2020, Official Gazette, no. 105/20 (hereinafter: CCC state of exception & self-isolation decision), Paras 27-28.

21 See, in this respect, the joint dissent of judges Selanec, Kušan, and Abramović, to the CCC state of exception and self-isolation decision.

required by the Constitution.<sup>22</sup>

Rather than being clearly based in the structure or content of the constitutional document, the Court's finding is founded on a construction of relevant facts that preceded it. The Court prefigures its finding with two summaries, one apparently more factual in nature while the other is more concerned with legal developments abroad. In both cases, however, the Court creates a factual context for its own decision, arguably relying on it, at least in part, to bypass the clear requirements of the constitutional document.

In its first summary, the Court reflects on the worldwide spread of the Coronavirus, noting that the Croatian executive had to act swiftly and efficiently to react to the threat, embodied in a "rapid and exponential rise in the number of those infected".<sup>23</sup> The Court depicted the reaction of the executive as both a responsive and necessary act that was at the same time guided and restricted by scientific knowledge.<sup>24</sup> Besides couching the existence and the decisions of the National Civil Protection Headquarters in this fashion, the Court included a second factual summary, exploring how a range of Member States of the Council of Europe responded to the Coronavirus. Two salient features emerge from this portion of the decision. The Court describes other jurisdictions as lacking a consensus on whether pandemic measures should be introduced through regular or exceptional channels.<sup>25</sup> Secondly, the Court noted that a number of member states derogated from their obligations under the European Convention on Human Rights but that Croatia is not one of them.<sup>26</sup> As with the first factual overview, the Court provides background factors that apparently make the decision of Croatian authorities more palatable, while identifying the alternative, the two-thirds majority required by Article 17 of the Constitution, as equivalent to a facultative state of emergency that may be avoided through legally framed political action.<sup>27</sup>

The Court's depiction of facts downplayed the impact the virus has had on the citizenry as well as the disruptive effect and the problematic legal quality of the measures enacted in response. For Croatian scholars criticising the finding of the Court, the facts of the case should have been evaluated differently. Đorđe Gardašević, a Croatian constitutional law scholar whose main topic of interest is the interplay of human rights and states of emergency, consistently argued that a pandemic causing huge

22 "Unless otherwise specified by the Constitution, the Croatian Parliament shall adopt decisions by a majority vote, provided that a majority of its deputies are present at the session." (Art. 82 of the Croatian Constitution.) Again, Article 17 explicitly provides that a two-thirds majority of all representatives, thus clearly obligating the Parliament in light of Article 82, should adopt restrictions of constitutional rights in a state of exception.

23 CCC state of exception & self-isolation decision, Para 17.

24 CCC state of exception & self-isolation decision, Para 18.

25 CCC state of exception & self-isolation decision, Para 19.

26 CCC state of exception & self-isolation decision, Paras 21-23. On derogation under Article 15 of the ECHR, see Alan Greene, "Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights", *German Law Journal* 12, no. 10 (2011): 1764–1785, <https://doi.org/10.1017/S2071832200017557>.

27 See, in this respect, the concurrence of judge Mlinarić in CCC state of exception and self-isolation decision, Para 10.2.



waves of fatalities and hospitalizations, motivating at the same time unprecedented curtailments of fundamental rights, must be recognised as a state of emergency.<sup>28</sup> In his view, the failure of the Croatian Parliament to enact the pandemic legislation by a two-thirds majority led to a disproportionate strengthening of the executive, with a concomitant lack of transparency, accountability and legitimacy.<sup>29</sup> Judges of Croatia's Constitutional Court that dissented from the Court's decision have reasoned similarly, criticising the Court for its failure to acknowledge the exceptionality of the pandemic in legal terms. This failure has led to measures enacted without sufficient oversight and with troubling constitutional defects.<sup>30</sup>

When seen against the background of comparative experience, the interpretation of facts adopted by the Croatia's Constitutional Court has not taken the country towards a Madisonian interpretation of the state of emergency. As argued by Ginsburg and Versteeg, a majority of the democratic countries have not responded to the pandemic by appealing to a Schmittian sovereign, an executive with the power to govern unilaterally in an emergency. Such jurisdictions have instead adhered to a Madisonian interpretation of limited government, with prominent roles for courts, legislatures and even subnational governmental units. All three actors have regularly responded to the actions of the executive, counteracting and controlling its power.<sup>31</sup> In Croatia, such an interaction largely remained a theory. Although some local officials have protested against specific measures and their enforcement, particularly the so-called "COVID certificates",<sup>32</sup> the reasoning of the Croatian Constitutional Court sanctioned a dominant role for the executive power. The executive largely overshadowed the Parliament, leading to two referendums that unsuccessfully aimed at restoring some of the legislature's power.<sup>33</sup> Hence, in comparative terms, even though the Court's finding did not formally renounce any possibility of oversight over the executive's action, it did take out the bite out of such a control, both in terms of constitutional adjudication and parliamentary oversight.

Notwithstanding the Madisonian failures of the Croatian approach to the pandemic, here we do not want to argue that a Schmittian interpretation of the state of emergency was what gained a foothold in Croatia. Instead, we want to suggest that the Croatian dilemma between "regular" states and those in some way "exceptional" is not a clash between clearly differentiated "law" and "facts". It is more accurately seen as a disagreement over how the law co-opts facts and provides them with normative significance. Factual narratives that ground the legal qualification play a key normative

28 Gardašević, *Pandemija kao stanje 'velike prirodne nepogode' i Ustav Republike Hrvatske*, 24, 41-42; Gardašević, *Pandemija i Ustav Republike Hrvatske*.

29 Gardašević, *Business as Unusual*.

30 Andrej Abramović, "Ustavnost u doba virusa", *IusInfo* (2020).

31 Tom Ginsburg, and Mila Versteeg, "The Bound Executive: Emergency Powers during the Pandemic", *International Journal of Constitutional Law* 19, no. 5 (2021): 1500, <https://doi.org/10.1093/icon/moab059>.

32 "Gradonačelnik Čabra: Nećemo tražiti COVID potvrde, život nastavljamo normalno i bez ograničenja", *Novi list*, 16<sup>th</sup> November 2021, <https://www.novolist.hr/rijeka-regija/gradonacelnik-cabra/>.

33 Matija Miloš, "Susprezanje autonomije političkog predstavništva građanskim inicijativama", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 43, no. 1 (2022): 21-41.

role. This is important for our topic because a different evaluation of facts may include a different evaluation of vulnerabilities. How facts are positioned in relation to the law thus has an impact on which vulnerabilities will be normatively significant. To explore this further in the Croatian response to the pandemic, we first need to look at how constitutional law interacts with facts and the different interpretations of the law this involves. We turn to this task in the next part of the paper.

### **3 MAKING FACTS CONSTITUTIONALLY RELEVANT: LESSONS FROM THEORY**

In the previous part of the paper, we have argued that the Croatian Constitutional Court's finding that the legislature may choose between "regular" and "exceptional" modes of restricting fundamental rights was not only a doctrinal operation. Embedded in the troubling notion that the institutions of government may choose between constitutional requirements is an evaluation of facts. The decision to prioritise the uncertainty brought about by the virus and the heterogeneity of responses to it beyond Croatian borders has led to a downplaying of the impact the restrictive measures have had on citizens and their rights. Furthermore, the claim that the pandemic was not necessarily a state of exception allowed the executive and the legislature to concoct a new category, "special circumstances", inaugurated through ordinary legislation. In this regime, the executive was able to declare the pandemic a "special circumstance" and introduce new human rights restrictions without any substantial legislative oversight.<sup>34</sup> Paradoxically, the facts of the pandemic became exceptional without being exceptional.

As recently argued, particular theoretical claims about constitutions are not intellectual stratagems developed and contested in a vacuum, but, at their core, claims about relevant facts.<sup>35</sup> Of course, constitutional courts, despite being forums of principle,<sup>36</sup> do not have as their primary vocation the development of persuasive constitutional theories. Nonetheless, they cannot avoid engaging with theory. Constitutional courts are, as institutions of government, devoted to ascertaining the meaning of sources of constitutional law and bringing this meaning to bear on facts of individual controversies.<sup>37</sup> In the process, "an issue of fact becomes an issue of law".<sup>38</sup> The constitutional fora do not formulate theories directly, but their work in interpreting the law and attributing normative significance to facts from a current case

34 Gardašević, *Pandemija kao stanje 'velike prirodne nepogode' i Ustav Republike Hrvatske*, 38.

35 TT Arvind, and Lindsay Stirton, "Slaying the Misshapen Monster: The Case for Constitutional Heuristics", in: *The Methodology of Constitutional Theory*, eds. Dimitrios Kyritsis, and Stuart Lakin (New York: Hart Publishing, 2022), 104.

36 Cristina Lafont, *Democracy without Shortcuts. A Participatory Conception of Deliberative Democracy* (Oxford: Oxford University Press, 2020), 235.

37 András Sajó, and Uitz Renáta, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 342, <https://doi.org/https://doi.org/10.1093/oso/9780198732174.001.0001>.

38 Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 157.



or a precedent<sup>39</sup> does require at least implicit theoretical work.<sup>40</sup> Just like theorists, constitutional courts “provide a framework that can integrate new developments into the constitutional order and chart a path for that constitutional order in a still-unfolding future”.<sup>41</sup> In so doing, they draw on some form of constitutional theorizing, as piecemeal and fragmentary as it may be.

In their recent contribution to constitutional heuristics, Arvind and Stirton have argued that theorizing about constitutions involves a twofold approach to facts. We first select the facts that we find of some constitutional significance. We then tease out the implications of the facts selected for the problem the theory is addressing.<sup>42</sup> There can be disagreements on both the scope of relevant facts and their significance, leading to different theoretical outcomes and calls for action.<sup>43</sup> Similar processes occur in constitutional adjudication, even though a (constitutional) court is restricted in what it can draw on by rules of legal reasoning as a form of practical discourse.<sup>44</sup> Insofar as the interpretative work done by constitutional fora reaches into its context to establish precepts for “future action”, it resembles the construction of a tradition that, according to Arvind and Stirton, is comparable to constitutional theories.<sup>45</sup>

According to Arvind and Stirton, the choice of relevant facts and their constitutional weight ultimately hinge on a “constitutional worldview”, i.e. an image of the constitution and its role that is adopted as the foundation of the interpretative enterprise.<sup>46</sup> For instance, one of us has argued elsewhere that the Croatian Constitution was frequently read as a representation of the mandates of liberal constitutionalism. It is because of this underlying constitutional image that Croatia’s Constitutional Court was able to set aside attempts to counteract representative democracy with referendums, prioritising the decisions of the political branches of power over the referendum. A less thick reading of the Constitution would not justify such an interpretation.<sup>47</sup> Similarly, Arvind and Stirton distinguish four different constitutional worldviews, based on two axes. One draws a spectrum between a “formal” constitution, a structure that only empowers and restrains constitutional actors, and

39 On precedent, see Barak, *The Judge in a Democracy*, 159.

40 “When one writes a literary work, he or she must consciously or unconsciously trade on the linguistic forms that make its construction and intelligibility possible. The activity of such writing itself invokes these constitutive rules. Similarly, when one engages in politics, he or she invokes the standards and methods of what it means to be political. But because politics in general is so infused with linguistic qualities, the political actor also invokes the forms that make words compelling (in both senses of the term).” William F. Harris II, *The Interpretable Constitution* (Baltimore: The Johns Hopkins University Press, 1993), 47. Similarly, a theory of the constitution shadows a constitutional interpretation.

41 Arvind, Stirton, *Slaying the Misshapen Monster*, 123.

42 Arvind, Stirton, *Slaying the Misshapen Monster*, 107.

43 Arvind, Stirton, *Slaying the Misshapen Monster*, 108.

44 Renáta Uitz, *Constitutions, Courts and History* (Budapest: CEU Press, 2005), 79-93.

45 Arvind, Stirton, *Slaying the Misshapen Monster*, 109.

46 Arvind, Stirton, *Slaying the Misshapen Monster*, 114.

47 Matija Miloš, “Reading the Constitution as an Integrated Whole: An Exploration of an Interpretative Instrument”, in: *Exploring the Social Dimension of Europe. Essays in Honour of Nada Bodiroga-Vukobrat*, eds. Gerald G. Sander, Ana Pošćić, and Adrijana Martinović (Hamburg: Verlag Dr. Kovač, 2021), 572–573.

a “substantive” one, that aims at achieving particular constitutional imperatives. The other axis differentiates between constitutions intended for a polity oriented by “the common good sustained and realised through the constitutional order” and those for a polity “characterised by “conflict, bargaining and agreement””.<sup>48</sup> The combination of the two axes allows Arvind and Stirton to identify four different constitutional worldviews: the constitution as a truce, the constitution as a rulebook, the constitution as a shield and the constitution as a cornerstone.<sup>49</sup> The four worldviews have different implications for how a constitution relates to facts.

Thus, when we conceptualise the constitution as a shield, we intend it to “protect individuals against aggression by others and against intrusions by the state”.<sup>50</sup> The conception places an emphasis on readings of fact that sustain the constitution as an instrument protecting specific substantive aims, e.g., a particular conception of natural rights, which are placed at the core of an order and take precedence over a more expansive understanding of the good.<sup>51</sup> While this conception limits the scope of the substantive achievements it aims to achieve given that these are defences against unavoidable conflicts, interpreting the constitution as a cornerstone is more ambitious. The constitution is a purposeful instrument meant to move beyond establishing institutions of government and fostering a broader social transformation.<sup>52</sup> By contrast, the conceptions of the constitution as a rulebook and the constitution as a truce place an emphasis on formal structures. The difference between them is that the former imagines the constitution as the framework for institutional action that resolves disputes on substantive issues. The divide between political and legal constitutionalists, with a difference in the emphasis they place on legislatures and courts, serves as an example of the constitution as a rulebook.<sup>53</sup> Constitutions as truces are the means of staving off inevitable conflict and are as such incapable of fostering a lasting agreement or furthering some substantive good.<sup>54</sup>

In ultimate synthesis, each of these four conceptions are risky as each narrows one’s vision in selecting facts and attributing them with constitutional significance. They allow an exclusion of some facts and a different evaluation of those that remain under consideration, narrowing the “constitutional world”.<sup>55</sup> In academic quarters, this may well lead to intractable theoretical divides and conflicting accounts of a constitutional order. When a (constitutional) court is the one selecting between these different accounts, even if only by implication, an additional threat stems from its institutional position. Robert Cover has famously established that courts, when they assume the role of an authorised interpreter in a controversy, act in a jurispathic fashion. The decisions they reach are selected among different meanings that are attributable to a constitutional provision and provide it with a legal sanction. This destroys

48 Arvind, Stirton, *Slaying the Misshapen Monster*, 114-115.

49 Arvind, Stirton, *Slaying the Misshapen Monster*, 114.

50 Arvind, Stirton, *Slaying the Misshapen Monster*, 116.

51 Arvind, Stirton, *Slaying the Misshapen Monster*, 116-117.

52 Arvind, Stirton, *Slaying the Misshapen Monster*, 118.

53 Arvind, Stirton, *Slaying the Misshapen Monster*, 119.

54 Arvind, Stirton, *Slaying the Misshapen Monster*, 121.

55 Arvind, Stirton, *Slaying the Misshapen Monster*, 125-126.

competing meanings or, at the very least, leaves them without visibility and strength of state law.<sup>56</sup> In terms of this paper, if a constitutional court grants one meaning of vulnerability with the strength of the law, other interpretations of the concept may not be able to invoke the Constitution and may thus leave powerless those who are vulnerable. It is thus of some importance to study the underlying structures that animate a constitutional court's engagement with facts. Bringing these to light should also help us establish a court's jurisprudential stance towards vulnerability. With this in mind, we now return to Croatia's response to the pandemic.

#### **4 FACTS, NORMS, VULNERABILITY: EVALUATING THE CROATIAN RESPONSE TO THE PANDEMIC**

In a report on human rights in the Coronavirus outbreak, a civil society organisation usefully collated some of the most prominent forms of vulnerability brought about by the pandemic. In addition to vulnerabilities attached to rights limited by measures later found constitutional,<sup>57</sup> the Report reveals a range of difficulties with enforcing the rights to privacy, free access to information, the access to justice, and the rights to housing, work, health and education. The report also documents a problematic rise in family violence, issues concerning discrimination and stigmatisation of those (possibly) infected as well as difficulties specific to some of the most vulnerable groups, such as the elderly, individuals with disabilities, the homeless, inmates, international protection seekers and the Roma.<sup>58</sup> An additional difficulty was a lack of responsiveness. The unchallenged executive did not call for a dialogue with civil society organisations that might have alleviated some of the concerns.<sup>59</sup> As we will argue here, the serious weaknesses in the Croatian approach to vulnerability can at least in part be traced to the underlying meaning of the Constitution adopted by the Constitutional Court. With its concomitant approach to facts, this meaning has made the constitutional language less receptive to addressing some forms of vulnerability.

The Court has had many opportunities to address the constitutionality of the pandemic measures. In its first significant decision on the pandemic, in which the Court found that the parliament is not obligated to introduce pandemic restrictions of fundamental rights by a two-thirds majority, the Court also decided that self-isolation is a constitutional limitation of the freedom of movement.<sup>60</sup> The Court's case law would later include an array of other measures. Some were applicable to commercial activities. For instance, the executive imposed restrictions on the hospitality industry<sup>61</sup>

56 Robert Cover, "Foreword: Nomos and Narrative", *Harvard Law Review* 97, no. 4 (1983): 4-68.

57 See, for instance, the part of the Report on freedom of movement and voting rights. Ivan Buljan *et al.*, *Utjecaj epidemije COVID-19 na ljudska prava u Hrvatskoj. Ožujak-listopad 2020* (Zagreb: Kuća ljudskih prava Zagreb, 2020), 5-9, 13-14, [https://www.kucaljudskihprava.hr/wp-content/uploads/2020/12/TI-Utjecaj-epidemije-Covid19-na-ljudska-prava-u-Hrvatskoj\\_web.pdf](https://www.kucaljudskihprava.hr/wp-content/uploads/2020/12/TI-Utjecaj-epidemije-Covid19-na-ljudska-prava-u-Hrvatskoj_web.pdf).

58 Buljan *et al.*, *Utjecaj epidemije COVID-19 na ljudska prava u Hrvatskoj*, 15-69.

59 Buljan *et al.*, *Utjecaj epidemije COVID-19 na ljudska prava u Hrvatskoj*, 4.

60 CCC state of exception and self-isolation decision, Paras 38-39.4.

61 Decision of the Constitutional Court of the Republic of Croatia in case no. U-I-2162/2020, 14<sup>th</sup>

and limited working hours for stores on Sundays.<sup>62</sup> In other cases, the Court dealt with limitations imposed on the enjoyment of social rights, most pertinently the organisation of primary healthcare in the pandemic.<sup>63</sup> Other decisions tackled limitations more related to the political life of the country, most notably the restrictive interpretation of voting rights of those presumed to be infected by the virus.<sup>64</sup> Some of the Court's decisions examined the constitutionality of restrictions that straddle the commercial and the political, the private and the public. These include decisions on the obligation to wear facemasks and the organisation of public transport,<sup>65</sup> the obligatory testing and obligatory possession of COVID certificates<sup>66</sup> and restrictions on public gatherings.<sup>67</sup> In some of these cases, the Court has refused to decide on the merits of some cases, specifically when the measures under scrutiny were rescinded before the Court decided to assess their constitutionality.<sup>68</sup> Here we focused only on those decisions that included a reasoning on the merits of the case, allowing us to explore in more detail the implications of the Court's approach to vulnerability. Having said this, the fact that the Court had refused the opportunity to address the possible unconstitutional impact some measures have had before their rescindment indicates a more profound problem with its interpretative approach, to which we will now turn.

To begin with, it may be useful to provide a brief overview of the instruments the Croatian Constitution provides to articulate and address vulnerabilities. The first one is the value-based orientation of the Constitution. Similar to its German counterpart,<sup>69</sup> the Croatian Constitution incorporates a range of "highest values" that are the basis for interpreting the law. These are "[f]reedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system".<sup>70</sup> It takes but a superficial reading of these values to find that human rights

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September 2020, Official Gazette, no. 105/20.

62 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-2379/2020, 14<sup>th</sup> September 2019, Official Gazette, no. 105/20.

63 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-6278/2021, 12<sup>th</sup> April 2022,

64 The Constitutional Court of the Republic of Croatia, notice and warning no. U-VII-2980/2020, 3<sup>rd</sup> July 2020.

65 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-3170/2020, 14<sup>th</sup> September 2020.

66 Decisions of the Constitutional Court of the Republic of Croatia in case nos. U-II-5571/2021 and U-II-5417/2021, 21<sup>st</sup> December 2021, and decision of the Court in case U-II-7149/2021 and ors., 15<sup>th</sup> February 2022, Official Gazette, no. 25/22. With respect to the EU digital COVID certificate in particular, see the Court's decision in case no. U-II-6004/2021, 21<sup>st</sup> December 2021.

67 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-6267/2021 and others, 12<sup>th</sup> April 2022, Official Gazette, no. 49/22.

68 See, for instance, the decision of the Court related to restrictions on state borders. (Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-2027/2020, 14<sup>th</sup> September 2020).

69 Arsen Bačić, "Ustav Republike Hrvatske i najviše vrednote ustavnog poretka", *Zbornik radova Pravnog fakulteta u Splitu* 49, no. 1 (2012): 14.

70 The Croatian Constitution, Art. 3.

are not only one of the values included in the Constitution, but that the constitutional text also enshrines a particular disposition towards human rights as one of its highest normative priorities. Rights must not only be guaranteed in an equal fashion, but “respect for” them must be maintained. Furthermore, it is evident that human rights are in some ways bound to each of the values enumerated in the constitutional text, as all those normative priorities can ultimately be traced to human rights, and, more specifically, dignity as a “mother-virtue” of sorts.<sup>71</sup> According to Bačić, this “projects the image of an aspirational constitutionalism”,<sup>72</sup> i.e. a constitution as a cornerstone rather than a shield for existing freedom or a mere structure for ongoing political processes.

The Constitution does not only facilitate articulating vulnerabilities through constitutional language by the substance of this language, but also by the procedures in place for limiting fundamental rights. The principle of proportionality is their keystone. It mandates that all restrictions imposed on human rights be tailored narrowly in each individual case.<sup>73</sup> The emphasis placed on individual situations does not in itself guarantee that institutions limiting fundamental rights or reviewing the constitutionality of those restrictions will pay due regard to all circumstances of the case, but it offers an opportunity to do so. In an exploration of the interplay of proportionality and vulnerability, Clérico and Aldao argue that proportionality may both stage vulnerabilities in a legally relevant form but may also gloss over them. In a fascinating reading of a case before the European Court of Human Rights, they analyze the approach taken by the majority. The reasoning of the Court was based on the well-known doctrine of the margin of appreciation to apply proportionality in an abstract key. Consequently, when examining the claims raised by the applicant, the Court does not pay regard to “the situation of vulnerability of the woman and her two children, living in poverty”.<sup>74</sup> By contrast, the dissenting judges insisted on a more concrete reading of proportionality, where the state is called to account because of its failure to ensure a social security minimum to those negatively affected by gentrifying policies.<sup>75</sup> Thus, much depends on how the facts of a case are reconstructed in a legal

71 Bačić, *Ustav Republike Hrvatske i najviše vrednote ustavnog poretka*. For a discussion on the fundamental meanings of dignity, see Aharon Barak, *Human Dignity. The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 12-15. Even social justice and the inviolability of property are relevant for dignity given that “[a] taining human dignity in a democratic state (...) presupposes a citizens’ sufficient economic and social security that empowers them to truly be informed and involved participants of a democratic process”. Valentino Kuzelj, “Apologija socijalne države nasuprot institucionalizaciji nejednakosti u neoliberalnom poretku”, *Paragraf* 3, no. 1 (2019): 77-78.

72 Bačić, *Ustav Republike Hrvatske i najviše vrednote ustavnog poretka*.

73 See Art. 16(1) of the Croatian Constitution. Snježana Bagić, *Načelo razmjernosti u praksi europskih sudova i hrvatskog Ustavnog suda* (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2016), 2.

74 Laura Clérico, and Martin Aldao, “An Argument for the Test of Proportionality in Concreto: Silenced Voiced from the Margins to the Center”, in: *Proportionality, Balancing, and Rights. Robert Alexy’s Theory of Constitutional Rights*, ed. Jan-R. Sieckmann (Cham: Springer, 2021), 226.

75 Clérico, Aldao, *An Argument for the Test of Proportionality in Concreto*.

form and proportionality offers a space for this enterprise.

When we examine the pandemic case law of the Croatian Constitutional Court against this background, one can note a disconcerting crosscutting feature. Once the Court found that the Parliament has the power to define the pandemic as a regular state of affairs, it continued to exercise judicial review with a reduced level of scrutiny. Thus, despite the claim that all restrictions of fundamental rights must be proportionate in each case as if there was no state of emergency, almost every restriction introduced because of the pandemic was found to be constitutional with a lack of any thorough scrutiny. Even in a single significant finding of unconstitutionality, the Court approached its task with a complete disregard for the standards of proportionality and the facts of the case. While it did find that prohibiting the stores from working on Sundays did not amount to a necessary restriction of fundamental rights, it provided no substantial reasoning on the matter. The Court merely found that the measure “appears to be” unnecessary.<sup>76</sup> The dissenters have warned that the Court is unduly relaxing its scrutiny, providing no proper supervision of the apparently increasingly more arbitrary National Civil Protection Headquarters.<sup>77</sup>

In 2021, a trio of judges penned a dissent that expressed consternation over the Court’s ignorance of “dramatic facts” when it refused to reconsider the power its earlier interpretation granted to the executive. In particular, the dissenters warned that the Court demonstrates a “serious disconnect from the social reality inhabited by the large majority of citizens. We must emphasise that the Constitution cannot be an abstract laundry list of ideals existing in someone’s empire of self-contained formulations and transcendental legal concepts. The Constitution must be and is a living document that relies on the instruments of the legal order to protect some of the most fundamental interests of each individual, exerting a very active influence on social relations and the living reality”.<sup>78</sup> The words used by the judges reveal a constitution whose meaning became detached from the vulnerabilities brought about by the pandemic. Instead, the constellation of its provisions and their impact have been closely tied to the vision of reality advanced by the political branches of power, in particular the executive.

That the dissenting judges are correct in their assessment becomes clear once we take a closer look at some of the cases in which the Court was expected to examine the claims of unconstitutionality of the Croatian response to the pandemic. In its decision on the power of the parliament to declare a state of emergency, the Court also examined the constitutionality of self-isolation as a restriction on the freedom of movement as well as the reforms of the National Civil Protection Headquarters, whose powers were redefined with a retroactive effect. In both cases, the Court found that the Constitution was not violated despite the serious objections to the contrary voiced by dissenting

76 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-2379/2020, 14<sup>th</sup> September 2020, Official Gazette, no. 105/20, Para 13.

77 See the dissent of judges Selanec, Kušan and Abramović in case no. U-II-2379/2020, 14<sup>th</sup> September 2020, Official Gazette, no. 105/20.

78 See the dissent of judges Kušan, Abramović and Selanec in case no. U-I-5918/2020 and ors., 3<sup>rd</sup> February 2021, 21.



judges.<sup>79</sup> When the Court decided that facemasks may be introduced even though the decision is not supported by a coherent rationale, it again deferred to the executive without insisting on a proper proportionality analysis.<sup>80</sup> In a decision of the Court on the epidemic measures that may be taken with respect to the hospitality industry, the Court found that an enormous transfer of power to the National Civil Protection Headquarters was constitutional without any sustained scrutiny of this transfer.<sup>81</sup> The Court's deferential approach arguably reached its zenith in its decision on the constitutionality of COVID certificates and obligatory testing measures in the public sector. Having affirmed the constitutionality of both measures, the president of the Court, Šeparović, along with one other judge, notes in a concurrence that responding to emergency situations is "inherent in the executive power".<sup>82</sup> This means that the Constitution was effectively transformed into a rubber stamp for the large majority of measures that can be approved by the need for the effective action in the pandemic.

When we juxtapose this case law to the framework of the constitutional world-views we have outlined in the previous part of the paper, we find that the Court's approach to the matters of constitutionality effectively rends the thicker, value-based interpretations of the Constitution asunder. The Court never disavows its earlier, substantive conceptualisations of the Constitution as a whole animated by foundational values. Nevertheless, its Coronavirus cases do not employ this reading in any significant measure. It is thus difficult to recognise the vision of the Constitution as a shield, dedicated to protecting the fundamental sphere of an individual's liberty, and there is no indication that the Constitution reads as a cornerstone, directed to a more ambitious socially transformative project. Granted, cases dedicated to a pandemic can hardly be a site for a sustained interpretation along such lines. It is still worrying that the Court has made little to no effort to protect the core of these thicker readings of the Constitution, all the while allowing the executive to proceed as if the pandemic is an ordinary state of affairs.

The Court's pandemic jurisprudence conceptualises the Croatian constitution as a procedural structure, most similar to the paradigm of the constitution as a rulebook. The Court reduces the meaning of the Constitution to institutional interactions, placing an emphasis on expertise, expediency, effectiveness and political prudence. The reasoning employed vests these values with the executive. The result is a constitution eviscerated of an autonomous existence that would be required by constitutionalism.<sup>83</sup> The fundamental act of the Croatian legal order is instead transformed into a framework

79 See, for instance, the dissent of judge Abramović in CCC state of exception and self-isolation decision.

80 Decision of the Constitutional Court of the Republic of Croatia in case no. U-II-3170/2020, 14<sup>th</sup> September 2020.

81 Decision of the Constitutional Court of the Republic of Croatia in case no. U-I-2162/2020, 14<sup>th</sup> September 2020, Official Gazette, no. 105/20.

82 Concurrence of judges Šeparović and Mlinarić in case no. U-II-7149/2021 and ors., 15<sup>th</sup> February 2022, Official Gazette, no. 25/22, Para 1.

83 Loughlin has argued that constitutionalism as an ideology requires that the constitution develop some degree of autonomy from those to whom it applies. Martin Loughlin, *Against Constitutionalism* (Cambridge: Harvard University Press, 2022), 11.

for effective governance, an administrative constitution.<sup>84</sup> While in part expected in the circumstances of a global pandemic, this interpretation bears consequences for addressing vulnerability.

According to Arvind and Stirton, the constitutional worldview that is adopted influences how facts are related to a constitutional order's continuity, core and canon. Specifically, they shape which facts are relevant to maintaining the existence of a constitutional order in time, which facts form a part of a constitutional order's core, or its identity, and which textual sources can be considered a part of a constitutional order's canon.<sup>85</sup> As we had noted earlier, Croatia's Constitution may be interpreted as a cornerstone or at least as a shield, particularly given the prominent position of the highest values it enshrines as a part of its core. However, given that the Court's pandemic jurisprudence does not take advantage of this potential, the resulting treatment of facts differs from this potential. The Court's decisions do not directly alter the value-laden core of the Constitution, but this core is not brought to bear on the problems raised in its cases. Once the constitution becomes a rulebook, our attention is directed to ascertaining the institutions that are tasked with resolving disputes, rather than the values animating such work.<sup>86</sup> By consequence, the legislation regulating pandemic measures and even individual measures themselves become a competing part of the constitutional canon, with little significant distinction between those sources of law and the constitutional document itself. The wisdom of the executive is seen as particularly well suited for protecting the core of the constitutional order in the circumstances of the pandemic. Finally, the continuity of the constitutional order draws from the continuing existence of the parliament and its power to exert political control over the executive. The circumstances of the pandemic and the comparable responses of other states to it are used to normalise the significant shift of power to the executive. For as long as the legislature has the formal power to resist the shift, aberrations in interpreting the highest values of the Constitution remain irrelevant.

We hasten to add the Court has not become inaccessible to claims of human rights violations, but that its jurisprudence has established a substantially narrowed basis for articulating and vindicating vulnerabilities brought about by the pandemic. By isolating the core of the constitutional order from its interpretation of constitutionality, the Court has relativized the weight of the Constitution's substantive bases for vindicating vulnerability. Furthermore, by not seriously engaging with the procedure imposed by proportionality, the Court offered little critical counterweight to the executive and no guidance on how governing the pandemic should proceed so that the Constitution does not become a collateral victim in the process. The consequences of this process are especially serious given that the Court is seen as an ultimate interpreter of the Constitution. While the Court's approach to the pandemic approach can in part be explained by the self-restraint it demonstrated earlier,<sup>87</sup> the

84 Martin Loughlin, "The Silences of Constitutions", *International Journal of Constitutional Law* 16, no. 3 (2018): 932-934, <https://doi.org/10.1093/icon/moy064>.

85 Arvind, Stirton, *Slaying the Misshapen Monster*, 109.

86 Arvind, Stirton, *Slaying the Misshapen Monster*, 119.

87 See, for instance, Siniša Rodin, "Temeljna prava i dopuštenost ustavne tužbe", in: *Ustavni sud u zaštiti ljudskih prava*, eds. Jadranko Crnić, and Nikola Filipović (Zagreb: Organizator, 2000), 221.

recent strengthening of its deferential attitude means that procedural and substantive instruments for vindicating vulnerability substantially lose their power. They may still be used as arguments beyond the Court's halls and may as such be deployed in political life, but their success will remain uncertain without institutional support. The argument from vulnerability may thus turn out to be overly vulnerable itself.

## **5 CONCLUSION: SIGHTS WITHIN AND BEYOND THE PANDEMIC**

One of the key features of the Croatian Constitution that well predates the pandemic is its emphasis on the rights it guarantees. Human rights are one of the values at the putative core of the Croatian constitutional order. In addition, they form a large majority of the constitutional document and may be restricted only exceptionally and for justified reasons. The pandemic has introduced a breaking point. The strengthened structures of the executive power and the measures they have introduced have gained domination not only in daily politics but before Croatia's Constitutional Court. Imagined as the guardian of the Constitution, the Court has consistently responded to the pandemic by assuming that the Constitution is a rulebook that provides only very thin guidance to the political institutions of the state. As a result, the more substantive visions of constitutional content have been jettisoned, providing a terrain that only partially vindicates the vulnerabilities attached to the pandemic.

In part, the dominant interpretation of the Constitution can be read as a continuation of the executive dominance that preceded the pandemic. Nonetheless, the Court's insistence that the dominance of this branch is not an exceptional state of affairs but the regular functioning of the state has led to a silent rewriting of the constitutional canon. Under the guise of the pandemic, the substantive core of the Constitution has been relativised and its political potential narrowed. The capacity of its language to provide a voice for the vulnerable is not threatened only within the bounds of the Coronavirus crisis but might have troubling repercussions in its aftermath. If the constitutional structures, values and norms are to vindicate their promise as to the full protection of fundamental rights, all actors involved in its interpretation, including the citizenry, will need to address this problem. Furthermore, the vulnerability perspective may be a useful instrument in the toolkit used to explore the impact, the structure and the content of human rights restrictions in the pandemic.

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**Sanja Barić\***  
**Matija Miloš\*\***

Sažetak

## **MAPIRANJE USTAVNOG TERENA RANJIVOSTI U PANDEMIJI KORONAVIRUSA: HRVATSKI SLUČAJ**

U radu se istražuje implicitna teorija Ustava Republike Hrvatske koja je oblikovala pristup hrvatske države pandemiji koronavirusa. Tvrdi se kako je pandemija kao središnje pitanje, barem u hrvatskim konstitucionalističkim krugovima, nametnula problem odnosa činjenica i ustavnih vrednota, struktura i normi. Iako je na prvi pogled tek preslika naše opće nesposobnosti snalaziti se na nesigurnom terenu nepredviđene zaraze, problem se istražuje kao specifično pitanje ustavne teorije. Cilj je rada ispitati njegove implikacije na ustavnu dimenziju ranjivosti. Kako bi se u tome uspjelo, iz postojeće se literature preuzima prikaz načina na koje se ustave može dovesti u vezu s činjenicama. Te se uvide primjenjuje na ustavnost pandemijskih mjera koje je uvela hrvatska država. Time se stvara prikaz nesigurnog terena, na kojem vršenje državne vlasti i njezina ograničenja stoje na tankom ustavnom temelju. On isključuje čitav raspon supstantivnijih tumačenja Ustava. Zaključno se utvrđuje da takva interpretacija pokazuje da je u pandemiji uvelike sužena ustavna osnova za prepoznavanje i otklanjanje ranjivosti.

***Ključne riječi:*** ranjivost; ustav; konstitucionalizam; COVID-19; ustavna teorija.

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\* Dr. sc. Sanja Barić, redovita profesorica u trajnom zvanju, Sveučilište u Rijeci, Pravni fakultet; sanja.baric@pravri.uniri.hr. ORCID: <https://orcid.org/0000-0001-6496-9062>.

\*\* Dr. sc. Matija Miloš, docent, Sveučilište u Rijeci, Pravni fakultet; matija.milos@pravri.uniri.hr. ORCID: <https://orcid.org/0000-0002-3839-0273>.

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