The Croatian "Emergency Constitution" on Test

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1. Regulation of the states of emergency in the Constitution of the Republic of Croatia

Like many other European ex-socialist countries at the end of the 1980s and the beginning of 1990s, Croatia began its complete economic and political transformation with radical constitutional changes. The starting point in the process of acceptance of "new democratic values"—primarily the rule of law, constitutionalism, and human rights—was the adoption of the first democratic Constitution of the Republic of Croatia on December 21, 1990.[1] Since its adoption, the Constitution of the Republic of Croatia has been amended on five occasions, following two distinct procedures: according to its provisions the constitution can be amended either by the Croatian parliament or by the voters directly in a referendum.[2] Both of these

1 Following its adoption, the Croatian parliament passed the Decision on the Promulgation of the Constitution of the Republic of Croatia on December 22. As the original text of the Constitution was adopted and promulgated just before Christmas, it is sometimes also referred to as the "Christmas Constitution." See Constitution of the Republic of Croatia, Official Gazette *Narodne Novine* No. 56/1990.

2 When amending the constitution, the Croatian parliament follows a procedure stipulated in its part IX, Art. 147–150. On the other hand, procedure for amending the constitution in a referendum is laid down in its Art. 87. according to which a referendum may be called by the Croatian parliament (Art. 87 par. 1), as well as by the president of the republic (though only at the proposal of the government and with the counter-signature of the prime minister; Art. 87 par. 2). Consequently, a referendum on a proposal for the amendment of the Constitution (i.e., a referendum on constitutional changes, complete or partial) may be called by the Croatian parliament or by the president of the republic. Nevertheless, constitutional (as well as legislative) referendum may also be initiated through the institute of citizens' initiative—in accordance with Art. 87 par. 3 of the Constitution, the Croatian parliament shall call a referendum on all issues that may be put to a referendum by the parliament or the president of the republic "when so demanded by ten percent of all voters in the Republic of

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procedures have been employed so far. Thus in 1997, 2000, 2001, and 2010, the Constitution was amended in the Croatian parliament. Each of these revisions had different important objectives, such as strengthening the constitutional guarantees of human rights, altering a semi-presidential system of government with a parliamentary one, instituting a unicameral parliament, creating a basis for Croatia's membership in the European Union, etc. However, the constitutional change in 2013 was a result of the first national referendum to amend the constitution, pursuant to a popular initiative (in accordance with the results of referendum, the definition of marriage as a union for life between a woman and a man was included in the constitution).3 The 1990 Constitution text regulated states of emergency in several provisions. While the constitution's revisions amended the original emergency provisions, especially in 2000 regarding the decision-making powers originally concentrated within the institution of the President of the Republic,[4] there are significant similarities in comparison with current constitutional articles that regulate states of emergency.

As far as the current regulation of the states of emergency in the Croatian constitution is concerned, one could firstly point out that the Croatian constitutional framework for emergency situations in general follows the pattern by which nation–states, almost as a rule, incorporate provisions in their constitutional documents that allow for recourse to a state of emergency. Adoption of certain emergency measures is enabled to protect the state and its citizens in the event of a crisis threatening the security of the state, the functioning of its institutions, and the physical existence of its population, such as war, terrorist attacks, major natural disasters, epidemics, etc. Though there are different types of situations that are usually considered as emergencies,[5] as well as numerous related classifications,[6] and considering that various constitutions use different terms for emergency situations (state of emergency, state of siege, state of alarm, state of exception, martial law, etc.), constitutional emergency norms usually enable the government to restrict or suspend certain constitutionally guaranteed

Croatia". The citizens' initiative in Croatia was not part of the original 1990 Constitution, but was introduced later with constitutional changes in 2000.

3 See the Constitution of the Republic of Croatia, Official Gazette *Narodne Novine* No. 85/2010 (consolidated text), 05/2014.

4 Thus B. Smerdel, emphasizing goals of strengthening the constitutional guarantees of democratic development and parliamentary democracy and preventing the concentration of authority, summarizes the profound constitutional reform of 2000: "For this reason the whole system of government was altered in order to check and supervise the president of the republic within the model of parliamentary government" (Smerdel, 2017, p. 197).

5 Noting that the list of such situations is not complete, J. Omejec lists the following cases that are usually considered as emergencies in the doctrine: "1) War, i.e., the imminent danger of war; 2) rebellions, riots and similar internal movements on a larger scale, which may occur in a particular social and political system of the country; 3) major natural disasters, such as catastrophic earthquakes, floods, forest and other fires, epidemic diseases that affect humans (but also flora and fauna), as well as, in recent times, exceptional conditions caused by atomic radiation" (Omejec, 1996, p. 173).

6 See further: Ferejohn and Pasquino, 2004, pp. 210–239.

rights and freedoms, as well as institutional mechanisms of checks and balances, and to concentrate decision-making in central government bodies.[7] Such emergency provisions, which generally allow governments to take those actions that will, in the end, terminate the temporary state of exception and restore a state of normalcy, can be found in some of the most influential constitutions of modern constitutional democracies, such as Art. 16 of the French constitution (1958),[8] upon which the original 1990 Croatian constitution was partially modeled. Such are also two valid provisions of the Constitution of the Republic of Croatia that directly regulate emergency measures, of which the first is Art. 17, which stipulates the following:

> (1) Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster. Such restriction shall be decided upon by the Croatian parliament by a two-thirds majority of all members of parliament or, if the Croatian parliament is unable to convene, at the proposal of the government and with the counter signature of the prime minister, by the President of the Republic.
> (2) The extent of such restrictions must be appropriate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.
> (3) Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or degrading treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience, and religion.

7 Bulmer, 2018, p. 6 *et passim*.

8 *Constitution du 4 octobre 1958;* (Version mise à jour en janvier 2015); Article 16 [State of Emergency] (1) When the institutions of the republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the president of the republic takes the measures demanded by these circumstances after official consultation with the prime minister, the presidents of the Assemblies, and the Constitutional Council. (2) He informs the nation of these measures by a message. (3) These measures must be prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties. The Constitutional Council is consulted with regard to such measures. (4) Parliament meets *ipso jure*. (5) The National Assembly may not be dissolved during the exercise of emergency powers. (6) After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the president of the National Assembly, the president of the Senate, sixty members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It makes its decision by public announcement as soon as possible. It carries out *ipso jure* such an examination and makes its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter. Constitutional text available at: https://www.assemblee-nationale.fr/connaissance/constitution.asp

In addition, in the provisions of Art. 17 that regulates situations in which constitutionally guaranteed human rights and freedoms may be restricted and in doing so it ensures for special standards to be observed, the Constitution of the Republic of Croatia also regulates state of emergency and the enactment of exceptional measures in Art. 101 that allows for the enactment of presidential decrees with the force of law:

> (1) During a state of war, the President of the republic may issue decrees with the force of law on the basis and within the limits of the powers conferred thereto by the Croatian parliament. If the Croatian parliament is not in session, the President of the republic shall be authorized to issue decrees with the force of law in order to regulate all issues imposed by the state of war.
> (2) In the event of a clear and present danger to the independence, integrity, and existence of the state, or when government bodies are prevented from performing their constitutional duties, the President of the republic may, at the proposal of the prime minister and subject to his/her countersignature, issue decrees with the force of law.
> (3) The president of the republic shall submit decrees with the force of law to the Croatian parliament for approval as soon as the latter is in a position to convene.
> (4) If the president of the republic fails to submit any such decree to the Croatian parliament for approval in compliance with paragraph (3) of this Article, or is the Croatian parliament fails to approve it, the decree with the force of law shall cease to be valid.
> (5) In the cases specified in paragraphs (1) and (2) of this Article, the president of the republic shall be entitled to call a session of the government and to preside thereover.

Even though the Croatian constitution does not use the exact term of "state of emergency" (*izvanredno stanje*), according to its Art. 17 par. 1 there are three types of such extraordinary situations: 1) state of war (*ratno stanje*); 2) any clear and present danger to the independence and unity of the Republic of Croatia (*neposredna ugroženost neovisnosti i jedinstvenosti države*), or 3) the event of major natural disaster (*velike prirodne nepogode*):

> (1) Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster....[9]

9 Consolidated text of the Constitution of the Republic of Croatia in English is available at the official website of the Croatian parliament: https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text

According to provisions of the Croatian constitution, the determination of the existence of war depends on a special procedure: it is the Croatian parliament that decides on war and peace in accordance with Art. 81,[10] while the president of the republic according to Art. 101(3) shall, pursuant to a decision of the parliament, declare war and conclude peace. Apart from war, other two types of emergency situations regulated by Art. 17 of the Constitution do not have to be declared explicitly. Nevertheless, as it regards the state of clear and present danger to the independence and unity of the republic, it is important to recall the fact that such state may encompass various forms of imminent danger for state and regime, both of internal and external origin, including serious danger of war, or even *de facto* state of war although it was not declared. Namely, the vast majority of modern wars were not formally declared, including the war in Croatia fought between 1991 and 1995.[11]

Furthermore, Art. 101 par. 2 stipulates the fourth type of extraordinary situation – it is the event in which the government bodies are prevented from regular performing of their constitutional duties (*tijela državne vlasti su onemogućena redovno obavljati svoje ustavne dužnosti*): "(2) In the event of a clear and present danger to the independence, integrity and existence of the state, or when the government bodies are prevented from regularly performing their constitutional duties, the president of the republic may…". Consequently, Art. 101. differentiates between three extraordinary situations: first, the state of war (par. 1); second, immediate danger to the independence, unity, and existence of the state; and third, when the government bodies are prevented from regularly performing their constitutional duties (par. 2). It also follows from the aforementioned provision in Art. 101 par. 2 that these two situations are basically set as alternative conditions i.e., that the existence of clear and present (immediate) danger to the state does not necessarily mean that government bodies are prevented from performing their constitutional duties. Furthermore, the formulation "government bodies" does not necessarily exclusively imply the Croatian parliament, but it encompasses

10 Constitution of the Republic of Croatia, Article 81: The Croatian parliament shall: decide on the adoption of and amendments to the constitution; adopt laws; adopt the central budget; decide on war and peace; adopt documents expressing the policy of the Croatian parliament; adopt the National Security Strategy and the Defence Strategy of the Republic of Croatia; exercise civilian oversight of the armed forces and security services of the Republic of Croatia; decide on alterations of the borders of the Republic of Croatia; call referenda; conduct elections, appointments and dismissals in conformity with the constitution and law; supervise the work of the government of the Republic of Croatia and other holders of public offices reporting to the Croatian parliament, in conformity with the constitution and law; grant amnesty for criminal offences; and perform any such other tasks as may be specified by the constitution.

11 This was rightfully pointed out by B. Smerdel: "Though in this case there is no formal state of war in the legal sense, it is possible that there is a war threat or a situation in which the war is actually being waged against the republic though it hasn't been formally declared. One should also take into account the fact that in years after the II. World War most wars that have been fought were never declared. Not even the Homeland War (as the war in Croatia is often referred to; op. PB) in which the Republic of Croatia was defended 1991–1995 was formally declared" (Smerdel, 2013, p. 306).

all bodies of government.[12] It is interesting to point out that all four types of emergencies were enacted already in original text of the Constitution adopted in 1990.[13]

Whether they refer directly to state of emergency or be it they stipulate various types of exceptions or dangers, constitutional provisions that regulate extraordinary emergency circumstances confer specific powers on different institutions, disrupting the usual mechanism of separation of powers and allowing concentration of decision-making powers especially in hands of the executive. Extension of powers of the executive branch and prompt activation of the so-called crisis management mechanism, which is today probably included in the agenda of nearly every administrator, are consequences of the attack on regime, state institutions, and endangerment of the lives of citizens. As it regards the example of the Republic of Croatia, the constitutional norms in Articles 17 and 101 demonstrate that the competence of enacting emergency measures is divided between the legislative and executive branch of government. First, in situations where the measures restrict individual constitutionally guaranteed freedoms and rights, it is the legislative body, i.e., the Croatian parliament, that has the exclusive power to enact such measures as long as it is able to convene. Such decision must be passed by a two-thirds majority of all members of parliament. The president of the republic is authorized to act only if the Croatian parliament is unable to convene and upon the previous proposal of the government and with the counter signature of the prime minister. Second, in accordance with Art. 101, the president of the republic is authorized to issue decrees with the force of law, but on the ground and within the limits delegated by the Croatian parliament. Only if the parliament is not session, the president of the republic is authorized to regulate all issues required by the state of war.

Finally, there are two more constitutional provisions—Arts. 7 and 100—which are of special significance in the context of the possible application of emergency measures. Namely, pursuant to the provisions of Art. 94 par. 3, the president of the republic is responsible for

12 Emphasizing that there is an agreement on such interpretation among Croatian constitutional lawyers, Đ. Gardašević refers to following authors: Smerdel and Sokol, Ustavno pravo, Narodne novine, Zagreb, 2009.; Bačić A., Odredbe o stanju nužnosti' u Ustavu Republike Hrvatske iz 1990. godine, Zbornik radova Pravnog fakulteta u Splitu, no. 34/45-46, 1997. p. 49-50. See Gardašević, 2010, p. 352.

13 1990 Constitution, Official Gazette *Narodne Novine* No. 56/1990; Article 17 par. 1 [Special Restrictions in State of Emergency] (1) During a state of war or an immediate danger to the independence and unity of the republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the constitution may be restricted. This shall be decided by the Croatian parliament by a two-thirds majority of all representatives or, if the Croatian parliament is unable to convene, by the president of the republic…; Article 101 par. 1 [Decrees] (1) The president of the republic passes decrees with the force of law and takes emergency measures in the event of a state of war or an immediate danger to the independence and unity of the republic, or when government bodies are prevented from regularly performing constitutional duties. During the time the president of the republic is making use of such powers, the House of Representatives may not be dissolved…..

the defense of the independence and territorial integrity of the Republic of Croatia.[14] In accordance with provisions of Art. 100 the president is commander-in-chief of the armed forces of the Republic of Croatia (par. 1), he appoints and dismisses military commanders in compliance with law (par. 2), and, as already pointed out, declares war and concludes peace on the basis of the decision of the Croatian parliament (par. 3).; further, in the event of an immediate danger to the independence, integrity, and existence of the Republic of Croatia, the president of the republic may, with the countersignature of the prime minister, order the employment of the armed forces even if a state of war has not been declared (par. 4). On the other hand, Art. 7, which regulates the position and role of the armed forces in its par. 10, stipulates that under the circumstances specified in Articles 17 and 101 of the Constitution, the armed forces may, if necessitated by the nature of a threat, be deployed to assist the police and other state bodies. In accordance with Art. 7 par. 11, the armed forces may also be deployed to assist firefighting and rescue operations and surveillance and protection of the rights of the Republic of Croatia at sea.[15]

Presidential decrees with the force of law are subject to special conditions, both in terms of consultations with the president of the government, and the fact that they are subject to his counter-signature (meaning that it is de facto co-decisioning), as well as regarding the obligation of submitting decrees to the Croatian parliament for approval. There is a difference regarding the latter obligation. If parliament is not in session, it must be done as soon as it is in a position to convene. Otherwise, i.e., if the parliament is in session, presidential decrees must be submitted for parliamentary approval without delay. In the absence of such approval, the decree with the force of law shall cease to be valid.

Standing orders of the Croatian parliament that govern the internal organization and parliamentary procedure contains a separate section, Part 14, which includes Articles 289–293, regulating the work of parliament during a state of war or in conditions of clear and present danger to the independence and unity of the Republic of Croatia.[16] These provisions,

14 Constitution of the Republic of Croatia, Article 94 (1): The president of the Republic of Croatia shall represent and act on behalf of the Republic of Croatia at home and abroad. (2) The president of the republic shall ensure the regular and balanced functioning and stability of government. (3) The president of the republic shall be responsible for the defense of the independence and territorial integrity of the Republic of Croatia.

15 Constitution of the Republic of Croatia, Art. 7, par. 10 and 11: (10) Under the circumstances specified in Articles 17 and 101 of the Constitution, the armed forces may, if necessitated by the nature of a threat, be deployed to assist the police and other state bodies. (11) The armed forces of the Republic of Croatia may also be deployed to assist firefighting and rescue operations and surveillance and protection of the rights of the Republic of Croatia at sea…."

16 Standing orders of the Croatian Parliament, Official Gazette *Narodne novine* no. 81/13, 113/16, 69/17, 29/18,53/20, 119/20: Decision of the Constitutional Court of the Republic of Croatia, 123/20; consolidated text in English available at: https://sabor.hr/sites/default/files/uploads/inline-files/Croatian-Parliament-Standing-Orders_Consolidated-Text_November-2020.pdf

among other, regulate relations toward the government and the president of the republic, and establish procedures concerning situations of impossibility to convene parliament.[17]

2. Limitations of fundamental rights

Living in a community implies that the absolute freedom of its members cannot exist. It is exactly through adoption of the *sub lege libertas* principle, which altogether determines the space and limits of human activities, that the very existence of the community is made possible. The idea of limiting freedom *per se* must therefore find its place in the constitution and the law of the land in general. In that sense, the concept of restricting rights and freedoms must be placed on equal footing with the definition of freedom itself.[18] The exercise of human rights can conflict with each other or with collective interests. To guarantee the equal rights and freedoms of others, as well as to ensure the realization of the interests of the community, it must be possible to impose limitations of human rights and fundamental freedoms.[19] States are therefore entitled to balance interests and limit some rights if necessary. All of the above applies both in normal circumstances of the life of the state and society, as well as in extraordinary situations when even more severe restrictions and derogations can be justified. Moreover, that is inherent to the state of emergency as its very notion is based on two requirements—the concentration of powers, and limitations to rights and freedoms.[20]

States of emergency are therefore always accompanied by legal possibilities of limiting or even suspending certain human rights and fundamental freedoms. Specific normative form of rationalization of individual freedom limits are derogative clauses, included both in numerous national constitutions as well as in some of the most important international human rights treaties—the United Nations International covenant on civil and political rights (ICCPR, 1976), the Council of Europe European convention for the protection of human rights and fundamental freedoms (ECHR, 1953), and the Organization of American States American convention on human rights (ACHR, 1978). Nonetheless, there is always an extensive or more restrictive catalog of non-derogable rights, i.e., list of those fundamental rights that in no case may be suspended. For example, the ACHR catalog of non-derogable rights (Art. 27) is longer than that of the ICCPR (Art. 4) and the ECHR (Art. 15). In fact, three abovementioned international treaties mention four of the same rights: the right to life, the prohibition of

17 The Parliament Standing Order in this part were amended in October 2020; see Ch. 4 for more information.
18 See Bačić A., 2004, p. 74.
19 See Smerdel, 2017, pp. 228–229.
20 Gardašević, 2010, p. 36.

torture and other forms of inhuman or degrading treatment or punishment, the prohibition of slavery, servitude, and forced labour (and related forms of bondage), and finally, prohibition of *ex post facto* (retroactive) criminal law. Each of those treaties requires from its state parties a formal notification of any derogations made, which implies notifying on the respective treaty regime i.e. which rights have been suspended, indicating the reasons for the derogation, and notifying it when the derogation is definitely terminated. Derogative clauses strive to balance the requirements of the state of emergency and respect for human rights guarantees in other ways as well, particularly by emphasizing requirements for non-discrimination and proportionality of measures. Each derogatory measure must be rationally justified, and it must be in the extent i.e. appropriate to the specific situation.[21]

As already pointed out in previous chapter, Article 17 of the Croatian constitution provides that during a state of war or an immediate threat to the independence and unity of the republic, or in the event of major natural disasters, individual constitutionally guaranteed human rights and freedoms may be restricted. Such derogation shall be imposed by the Croatian parliament by a two-thirds majority of all members. Therefore, the power of deciding upon restrictions on human rights during emergency circumstances is primarily vested in hands of the parliament, i.e., it is exclusive as long as the parliament is able to convene. On the other hand, the corresponding power of the president is of a subsidiary nature. Namely, only in case that the Parliament is unable to convene, such restriction may be decided by the president of the republic, acting at the proposal of the government, and with the counter-signature of the prime minister. The legal force of such restrictions is equivalent to provisions of the constitution. In normal circumstances, laws that elaborate constitutionally guaranteed human rights and fundamental freedoms, also referred to as "organic laws," are passed by a majority vote of all representatives (Art. 83). However, in emergency situations that usually demand severe restrictions of rights and freedoms, such parliamentary decisions must be passed by a two-thirds majority of all representatives, which is also a majority required for amending the constitution (though they are not adopted according to a special procedure of constitutional revision).[22] In

21 On derogative clauses in international human rights treaties, see Bačić P., 2003, pp. 359–370.

22 The legislation on protection of national minorities has to be passed by a two thirds majority vote and also falls into category of organic laws. According to Articles 82 and 83 of the Constitution, the Croatian passes three kinds of laws: 1) ordinary laws, passed by a majority vote provided that a majority of deputies is present at the session; 2) organic laws that elaborate constitutionally guaranteed human rights and fundamental freedoms, the electoral system, the organization, authority and operation of government bodies and the organization and authority of local and regional self-government, passed by a majority votes of all deputies; 3) organic laws that regulate the rights of national minorities, passed by a two thirds majority vote of all deputies. Furthermore, the Constitution also establishes category of constitutional laws, which must be passed according to the procedure for the amendment of the Constitution itself and therefore outranks organic laws in the legislative hierarchy. The Constitution denotes two acts as constitutional laws: the Constitutional Law on the Constitutional Court (Art. 132), and the Constitutional Law on Implementation of the Constitution (Art. 151).

Croatian legal thought, it is also widely adopted that extraordinary emergency decrees enacted by the executive, i.e., by the president of the republic at the proposal of the government and with the counter-signature of the prime minister, have a legal force equivalent to provisions of the constitution.[23]

When deciding upon restrictions on human rights and fundamental freedoms, both the parliament and the president of the republic must adhere to important criteria that are set out in the Constitution. The first criterion relates to the principle of proportionality – the constitution explicitly demands that the extent of such restrictions must be appropriate to the nature of the threat. The second criterion relates to the non-discrimination principle – such restrictions must not result in the inequality of citizens with respect to race, colour, sex, language, religion, or national or social origin. Respective constitutional norms do not stipulate which are the rights that may be subject to restrictions. However, Par. 3 of Art. 17 suggests that it could apply to all rights and freedoms except those for which the constitution provides special protection, namely: right to life, prohibition of torture, cruel or degrading treatment or punishment, legal definitions of criminal offences and punishment, and freedom of thought, conscience, and religion. Restrictions upon enumerated rights cannot be imposed at all, not even in cases of clear and present danger to the existence of the state. In that sense, these rights are absolute.

3. State of emergency in practice

The events that followed the adoption of the 1990 Constitution, starting already from its drafting process, significantly determined the first few years of post-socialist constitutionalism in Croatia. Resolving of the issue on an appropriate role of government bodies in the state of emergency was significantly influenced by the war in Croatia that lasted from 1991 to 1995.[24] The war was never officially declared. One of the results of aggression against Croatia was consolidation of the strong constitutional position of the president of the republic (presidential powers were later significantly and comprehensively limited in constitutional reform of 2000). The head of the executive was given considerable powers, including executive emergency prerogatives. According to Art. 101. par. 1, the president of the republic was authorized to pass decrees with the force of law and to enact emergency measures in the event of a state of war or an immediate danger to the independence and unity of the republic, or when

23 These decrees are also sometimes referred to as decrees with constitutional force; Lauc and Ivanda, 2011, p. 136. See also Smerdel, 2013, pp. 69–70.; Bačić A., 2004, p. 284; Gardašević, 2010, pp. 354–355.

24 See, for example, Bjelajac and Žunec, 2009, p. 231-270.

government bodies are prevented from regularly performing constitutional duties. During the time the president of the republic is making use of such powers, the House of Representatives may not have been dissolved. Further, par. 2 obliged the president of the republic to submit decrees with the force of law for approval to the parliament as soon as it is able to convene. President of the republic was also empowered to autonomously decide on the necessary restrictions of constitutional rights and freedoms according to Art. 17, but exclusively under the condition that the parliament was unable to convene.[25]

In 1991 a number of decrees with the statutory force were enacted by the President, out of which more than twenty regulated highly sensitive matters such as organization and work of judiciary, police activities, criminal acts, social security, public gatherings, etc. Furthermore, some emergency decrees included restrictions of constitutional rights and freedoms. Conformity with the constitution of those decrees was challenged before the Constitutional Court on several grounds: no state of emergency was previously officially introduced as a prerequisite for issuing decrees; the parliament was in session the entire time, meaning that president was not authorized to enact measures; and finally, that some measures had retroactive effect, as they came into power on the day of the issuing. In the procedure of constitutional review, the Constitutional Court in its Decision of June 24, 1992, rejected all applicants' complaints and found presidential decrees to be in conformity with the Constitution. The Court in its reasoning did not engage in extensive elaboration of its standpoints. Instead, it rather shortly concluded the following: presidents' constitutional power of enacting emergency decrees is not limited, and consequently all segments of legislative jurisdiction of the parliament may be regulated; the president independently decides on the existence of a state of emergency, on which no specific decision is needed; the constitutional prohibition of retroactivity does not cover presidential decrees, but rather extraordinary circumstances that completely justify their coming into force on the day of the issuing. Interestingly, as it regards the most problematic question, i.e., the obvious fact that the president issued decrees while the parliament was in regular session, although the constitution strictly prohibits such action, the Court remained practically silent. It only stated that the parliament later approved the presidential decrees.

Such passive, rather deferential position of the Croatian Constitutional Court during the first few years of post-socialist constitutionalism may partially be justified by war circumstances, the gradual adjustment of judges to new constitutional values such as the rule of law and the separation of powers, as well as the fact that the executive branch exerted a significant political pressure on the judiciary. However, in years that followed, the Constitutional Court

25 See footnote 13.

managed to strengthen its position, to develop its interpretational capacity and to eventually establish itself as the guardian of the constitution.[26] Though it is worth pointing out that in the Republic of Croatia, except for the war and the *de facto* state of clear and present danger to the independence and unity of the republic, the state of emergency was never officially introduced, such an assessment of Constitutional Court's operation is generally valid both in extraordinary situations as well as in ordinary times.

4. Experiences of COVID-19 from the aspect of constitutional law

In the search for legitimate actions to combat the pandemic, a state of emergency in Croatia was not declared. In the same time, as we shall demonstrate further in text, it was the executive branch, i.e., the government in first place, that took the initiative from the very beginning.[27] The first official case of COVID-19 was reported in the city of Wuhan (PR China) on December 31, 2019, while the World Health Organization (WHO) declared that the coronavirus outbreak constitutes a public health emergency of international concern already on January 30, 2020.[28] Although in late January there were still no recorded COVID cases in Croatia (the first case was reported on February 25), the Croatian government adopted certain precautionary measures related to the pandemic, including the proposition on creating a special central body with the aim of coordinating all public services in the event of a coronavirus outbreak.[29] Pursuant to the Law on Civil Protection System that regulates Croatian civil protection framework,[30] the Civil Protection Headquarters of the Republic of Croatia was established on February 20 as an expert operational body and the minister of the interior (who was also acting vice president of the government at the time) was appointed chief of the Headquarters. Furthermore, the chief of the Civil Protection Directorate (operating under the Ministry of the Interior) was appointed as his deputy, while the director of the Croatian Institute of Public Health became a new member of the Headquarters, ensuring both direct supervision of its operation by the government and an institutional connection with the public health system.[31] With the Decision issued on March 11, the minister of health de-

26 See further in Bačić P., 2010, pp. 386–424.
27 See Plenković, 2020.; Omejec, 2020.; Abramović, 2020.; etc.
28 See the official WHO webpage: https://covid19.who.int
29 See the official webpage of the Croatian government: https://vlada.gov.hr/vijesti/ministarstvo-zdravstva-osniva-se-nacionalni-krizni-stozer-zbog-koronavirusa/28676
30 Law on Civil Protection System, Official Gazette 82/15, 118/18, 31/20.
31 Koprić, 2020, p. 3. As an additional point worth mentioning here, local and county civil protection headquarters were also formed and included in anti-pandemic combat mainly through monitoring and implementation tasks.

clared a COVID-19 epidemic in the Croatian territory pursuant to the Law on the Protection of the Population from Infectious Diseases.[32] Thus the Croatian government, just like executive branches in most other countries, expeditiously took charge in adopting measures aiming to prevent the spread of disease.

The Croatian parliament soon amended its aforementioned normative framework. The Law on Civil Protection System was amended on March 19, 2020, in an expedited procedure, giving the Civil Protection Headquarters very broad powers to adopt decisions and guidelines to manage the pandemic. Headquarters almost immediately started adopting different emergency measures based on the recent amendments of the Law on Civil Protection System, i.e., its newly added Art. 22a[33] that, among other, authorizes it to make "decisions and instructions" that will be implemented by the civil protection headquarters at regional and local levels. Such measures may be enacted in the event of "special circumstances" that imply unpredictable situations which cannot be put under effective control and in which the "the life and health of citizens" are endangered.[34] Further, the Law on the Protection of the Population from Infectious Diseases was amended on April 18, again in an urgent procedure, authorizing the Civil Protection Headquarters to enact special security emergency epidemiologic measures, which are otherwise ordered by the Minister of Health. Amendments covered the situation of an epidemic of an infectious disease or a threat of such epidemic in relation to which the WHO has also declared a pandemic or epidemic or a threat. Headquarters, in that case, must act in cooperation with the Ministry of Health and the Croatian Institute for Public Health, all under direct supervision of the government. Anti-epidemic measures in question are, for example, quarantines, travel bans, restrictions of movement, as well as new security measures of self-isolation, i.e., the isolation of persons in their own homes or in other appropriate spaces. In practice, it was Civil Protection Headquarters that enacted all such measures.

The executive response to pandemic led by the Croatian government provoked lively public debate in which several problematic issues were highlighted and challenged before the Constitutional Court. First, such actions provoked criticism based on the argument that, according to law, only the minister of health (and not Headquarters) was authorized to order emergency

32 Law on the Protection of the Population from Infectious Diseases, Official Gazette 79/07, 113/08, 43/09, 130/17, 114/18, 47/20.

33 Law on Amendment to the Law on Civil Protection System, Official Gazette 31/20, Art 22a: (1) In the event of special circumstances that imply an event or a condition which could not have been predicted and could not be affected, which endangers the life and health of citizens, property of greater value, significantly damages the environment, economic activity or causes significant economic damage, the Civil Protection Headquarters of the Republic of Croatia makes decisions and instructions implemented by the civil protection headquarters of local and regional self-government units. (2) The decisions and instructions referred to in paragraph 1 of this Article shall be made for the protection of the life and health of citizens, the preservation of property, economic activity and the environment and the harmonization of the treatment of legal persons and citizens.

34 See Decision on restrictions…. adopted on March 19, 2020, Official Gazette 32/20,

measures. Second, since the constitutional emergency framework was not activated, the COVID-19 crisis was managed through the legislative framework, i.e., anti-epidemic procedures foreseen by the Law on Civil Protection System and Law on the Protection of the Population from Infectious Diseases. Both laws that served as the basis for conducting decisions and enacting different measures aimed to prevent the spread of the virus were adopted following procedure stipulated by Art. 16 of the Constitution which – unlike Art. 17, which regulates the emergency regime and provides for laws concerning human rights restrictions to be passed by a two-thirds majority – enables the restriction of human rights and fundamental freedoms in normal circumstances, following standard legislation making procedure provided for specific kind of laws.[35] Decisions adopted by Civil Protection Headquarters were followed by serious complaints of illegality due to faulty legal entitlement, excessive use of "legislative" powers, overall lack of transparency and accountability, etc.[36] The government was repeatedly accused of retroactively giving legality to those measures, as well as for not declaring a state of emergency through the majority it controls in the parliament. Consequently, a number of related constitutional complaints and constitutional review proposals were submitted.

Deciding on the merits concerning aforementioned and similar objections, the Constitutional Court in its Decision of September 14, 2020, *inter alia* confirmed that the executive body (Civil Protection Headquarters) that adopted decisions on restrictions of human rights and freedoms with the aim of containing the pandemic was legally entitled to adopt such measures based on the legislative framework created by the Croatian parliament (Law on Civil Protection System, Law on the Protection of the Population from Infectious diseases). Headquarters had the legal authority to take anti-epidemic measures and their aim – protection of the health and life of citizens by preventing and suppressing the spread of the COVID-19 epidemic/pandemic – is legitimate. The Constitutional Court also held that, as Headquarters operate directly under the supervision of the government, decisions adopted by Headquarters are undoubtedly subject not only to the control of executive, legislative, and judicial authority; they are subject to Constitutional Court review as well. However, according to the Court, in the process of adopting measures to prevent the spread of the virus, Headquarters remained within the limits of its powers as prescribed by the Constitution.[37]

35 Constitution of the Republic of Croatia, Official Gazette 85/2010 (consolidated text), Art. 16: (1) Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. (2) Any restriction on freedoms and rights shall be proportionate to the nature of the need for such restriction in each individual case.

36 Decisions enacted by the Civil Protection Headquarters of the Republic of Croatia aiming to prevent the spread of coronavirus are available at: https://civilna-zastita.gov.hr/odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2304.

37 See Decision of the Constitutional Court in cases no. U-I-1372/2020, U-I-1999/2020, U-I-2075/2020, U-I-2233/2020, U-I-2161/2020, U-I-2234/2020, 14. 9. 2020., Official Gazette 105/2020.

Furthermore, the Constitutional Court of the Republic of Croatia confirmed that the Croatian parliament may adopt derogatory measures based on two constitutional grounds: – Art. 16 in ordinary times, and Art. 17 in emergency situations. However, it is not up to the Constitutional Court to assess whether the parliament should in certain extraordinary circumstances activate Art. 17, regardless of the fact are those circumstances specifically enumerated in that constitutional norm – in fact, to decide whether the COVID-19 pandemic qualifies as a "major natural disaster," or such derogatory measures could be adopted in application of Art. 16 that allows restrictions of rights and freedoms in normal times. The choice between the application of Article 16 or Article 17 is in the exclusive domain of the Croatian parliament as a legislative body, since such decision is transferred to it by the Constitution.[38] Hence, the fact that disputed laws and measures were not enacted based on Art. 17 of the Constitution does not make them unconstitutional.[39]

The Constitutional Court confirmed its standing in several later cases. One of those cases concerned the amendments of the Local Elections Act allowing for postponement of local elections by the government in the event of special circumstances that include an unforeseeable event or situation which currently endangers the legal order; the life, health or safety of the population; and of property of significant value (in fact, that solution is very similar to the one introduced by the Law on Civil Protection System).[40] Furthermore, the Court held that such restriction does not limit the general voting right of voters in local elections nor the right to local self-government which these voters exercise through the election of members of the local representative body. The elections are only postponed while the "special circumstances" last.[41] The other case in which the same standing is confirmed concerns the competence of Headquarters to regulate working hours in catering industry. Namely, the Hospitality and Catering Industry Act was amended in March 2020 in a way that basically the same "special circumstances" clause was added. The Constitutional Court upheld the constitutionality of the amended act, confirming the legal authority of Headquarters as well as the legitimate aim of anti-epidemic measures that in this case, *inter alia*, restricted certain aspects of free enterprise and proprietary rights.[42] Furthermore, the Constitutional Court in numerous other cases decided upon constitutionality of different anti-epidemic measures such as restrictions on public gatherings, sport activities, mandatory wearing of face protection masks, etc.

It is evident that the Constitutional Court decided supportively of the executive and legislative approach towards the anti-pandemic combat in prevailing majority of cases. However,

38 Ibid., par. 27.
39 Three judges gave dissenting opinions, while other two judges gave concurring opinions.
40 See footnote 32.
41 Decision of the Constitutional Court in case no. U-I-1925/2020, September 14, 2020.
42 Decision of the Constitutional Court in case no. U-I-2162/2020, September 14, 2020.

one of those rare examples when it took the opposite stance regards the constitutional review proceedings of the Standing Orders of the Croatian parliament.[43] Namely, Standing Orders were amended in October 2020 to facilitate the special functioning of parliament in circumstances of an epidemic of an infectious disease. The amended article, among other things, limited the number of members of parliament (MPs) who can attend a session of parliament and shortened their debating time limits, while it also provided that meetings of working bodies may be held and broadcasted by using electronic means, that voting as well can be done electronically, etc. However, the Constitutional Court decided to struck down the amendment, emphasizing that, though the newly proposed measures have a legitimate aim which is to protect the health and lives of MPs by preventing and combating the spread of the COVID-19 epidemic/pandemic, any restriction to the exercise of the rights and duties that belong to MPs according to the Constitution must be objectively and reasonably justified; since that was not the case here, the Court decided to repeal the amendment.[44]

43 Decision of the Constitutional Court in case no. U-I-4208/2020, October 20, 2020.

44 Standing Orders of the Croatian Parliament, Article 293b (1): If an infectious disease epidemic, a risk of an infectious disease epidemic or an infectious disease pandemic is declared by the competent authority pursuant to a special law, parliament shall continue its work in accordance with the provisions of the Constitution of the Republic of Croatia and these Standing Orders. (2) The presidency of parliament may decide, in accordance with the decision of the competent authority determined by a special law, on the commencement and termination of the special proceedings of parliament in the cases referred to in paragraph 1 of this Article and shall notify members of parliament thereof. (3) A session of parliament may be held in other rooms of parliament other than the session hall, or outside parliament, if so decided by the presidency of parliament. (4) The presidency of parliament shall determine in which rooms a session will take place, how many members of parliament may be present in each of the rooms in accordance with the epidemiological measures in force and shall define the adequate proceeding. (5) When distributing seats among political groups in the rooms where a session is held, the presidency of parliament shall adhere to the proportionality principle and allocate seats in a manner that corresponds with the share of each political group in the total number of members of parliament. (6) For the purpose of calculating the number of members of parliament who will be present in the rooms where a session is held, all members of parliament who do not belong to a political group shall exceptionally be considered as a political group. If the speaker and all the deputy speakers of parliament are unable to chair a session of parliament for justified reasons referred to in paragraph 1 of this Article, the Speaker of parliament shall designate which members of parliament will chair the session and in which order, applying Article 31 of these Standing Orders. (7) Members of parliament shall speak in the debate for no longer than five minutes and representatives of political groups for no longer than ten minutes. (8) The sponsor of an act or the representative designated by the sponsor, may deliver an introductory speech at the beginning of the debate and a speech at the end of the debate which shall not exceed 20 minutes. (9) A representative of the government, when not the sponsor, may deliver an introductory speech at the beginning of the debate no longer than ten minutes, while each time when given the floor to provide individual explanations during the debate, his/her time shall be limited to five minutes. (10) If a recess is requested in line with the provision of Article 248 of these Standing Orders, the chair may grant a recess that may not exceed five minutes. (11) Meetings of working bodies of Parliament may be held and broadcast by using electronic means, audio and/or video conferencing. (12) Members of parliament who, for justified reasons referred to in paragraph 1 of this Article, cannot be present in the hall where the session is held, shall be enabled to debate and vote by using electronic means, audio and/or video conferencing, as decided upon by the presidency of parliament. (13) Regarding any matter not specifically regulated by this Article, other provisions of these Standing Orders shall apply accordingly.

5. COVID-19 as an economic crisis: Fiscal and monetary measures of crisis management

5.1. Sectoral aid to the economy

a) General

An important operational role in the implementation of direct assistance measures to the economy has been assigned to the Croatian Employment Service (the Employment Service). Within the program of active employment policy from March 2020 until today, the Office has implemented two measures to help the economy: a) Support for job preservation in crisis activities affected by coronavirus (Support) and b) Reduction of working hours (SRV). These measures were designed and implemented based on regular active employment policy measures regulated by a separate legislative instrument, the Civil Obligations Act,[45] and in accordance with the strategic plans and programs of the government of the Republic of Croatia.[46]

It was strategically decided to pay support to employers who were required to pass it on to workers, whether it was the first or the second measure. An employer who meets the prescribed publicly announced conditions would enter into a special contract with the bureau based on which the aid was paid, either for the preservation of jobs or for the reduction of working hours. The balance sheet assets of such employers increased by the amount of paid aid, and they were obliged to prove to the office based on individually concluded contracts that the aid was "redirected" to the salaries of a specific number of employees for a specific period, i.e., must be shown in the cost items for the salary of an individual worker. As the received aid increases the scope of the employer's balance sheet assets, and the employer is not obliged to return them to the office, the peculiarity and asymmetry of mutual obligations is noticeable. The measures should be viewed in the light of the public law restrictions on free enterprise, and the aid paid can be said to be a kind of compensation for the imposed entrepreneurial prohibitions. Certain economic activities, such as catering, tourism, transport, etc., were nearly paralyzed, which inevitably affected labor relations and increased the number of unemployed, while in some sectors, such as informatics, communications, construction, etc., employment increased due to pandemics.[47] The measures have mitigated

45 Labor Market Act, Official Gazette, no. 118/2018 (hereinafter, ZTR).

46 *Arg. ex* art. 34 of the ZTR.

47 Economic Trends, 9/10, 2020, Croatian Chamber of Commerce, p. 5. Available at: https://www.hgk.hr/documents/gospodarska kretanja091020.pdf (Accessed: May 5, 2021).

the increase in the number of unemployed in vulnerable sectors. Unlike some European countries, such as the Federal Republic of Germany or Austria,[48] the Republic of Croatia did not decide to pay a certain percentage of the difference in company income for the same months in the business year before the pandemic, but the support was directed exclusively through active employment policy measures. Both measures concern only employees of employers whose business has deteriorated or been prevented by public law measures.

The conditions and methods of using the funds for the implementation of active employment policy measures in the purview of the Employment Service are adopted, based on Article 36, paragraph 1 of the Labor Market Act, by the Administrative Council of the Employment Service. Due to budget planning and work plans, it was established that he this would occur in December for the following year. The conditions contain an introduction, legislative basis, glossary, active employment policy measures by interventions, general conditions, description of measures by interventions.[49] The measures are classified according to the type of activity and intervention and financial support and are adjusted to the EUROSTAT classification of labor market policies. They are structured in seven main measures and eight sub-measures. The manner of implementation of the conditions and the manner of use of funds shall be determined by a contract between the Employment Service and the user of funds.[50]

b) Support for the preservation of jobs in crisis activities affected by the coronavirus (COVID-19)

Support for the preservation of jobs in activities affected by the pandemic regulatesthe purpose for the measure, the target groups of employers, the target groups of workers, the duration, the amount of the subsidy, the method of selecting beneficiaries, the criteria for selecting beneficiaries, the method of submitting applications and documentation, the obligations of employers, the obligations of the institute, and the payment of funds.[51]The aim of the measure is to preserve jobs for employers whose economic activity has been disrupted due to a special circumstance caused by the coronavirus. Every employer, regardless of the legal form in which it is established, is obliged to keep business books in accordance with the regulations governing accounting. The exact extent of the disruption of the economic activity

48 On the complex structure of economic assistance measures in Germany and Austria, see: https://www.bmwi.de/Redaktion/DE/coronahilfe.html and https://www.aws.at/corona-hilfen-des-bundes/ (Accessed: May 15, 2021).

49 The general conditions for the use of active employment measures in 2021 have been made public and can be found at the link https://mjere.hr/katalog-mjera/opci-uvjeti-mjere-aktivnog-zaposljavanja-2021/.

50 *Arg. ex* art. 36 para. 2 of the ZTR.

51 The conditions and ways of using funds for the implementation of active employment policy measures for 2021 are published on the website of the Office.

of an individual employer can be seen from those business books. However, the aid measure does not authorize the beneficiary to request the payment of the difference, or part of the difference, which is shown in the company's books as a reduction in economic activity within a certain period. On the contrary, it is exclusively dependent on the number of workers and an employer whose business scope has been reduced because of public law measures can only claim support for each individual worker.

To adapt to the new economic situation, on April 2, 2020 the government of the Republic of Croatia adopted a package of measures to help the economy during the coronavirus epidemic, which included provisions on another group of measures to help the economy due to the coronavirus epidemic. Timely and particularly significant measures to help the economy, the implementation of which is the responsibility of the Ministry of Finance and the Ministry of Labor and Pensions, include: a) increasing the amount of support in the sectors affected by coronavirus to HRK 4,000; b) exempting employers who use job support sectors affected by coronavirus from the costs of their contributions, c) exempting, fully or partially, all taxpayers who are banned from working, or if their work is disabled or significantly hindered, from paying public benefits due during April, May and June 2020, and d) postponing the payment of value added tax until the issued invoices are collected.

During the second half of 2020 and the first half of 2021, in accordance with the evolution of the epidemiological situation and economic trends, the board of directors of the employment bureau made decisions on aid for the preservation of jobs, which, due to its short application, were tied to the corresponding month.

5.2. Contract for the award of support for the preservation of jobs in activities affected by coronavirus (COVID-19)

Based on the Active Employment Policy Measures program, the Employment Service is authorized to grant subsidies for the preservation of jobs. They are, based on the provision of Art. 36, paragraph 2 of the Labor Market Act, are awarded to those employers who enter into a special contract with the Employment Service. That public entity fully decides on the form and content of the Contract for the award of support for the preservation of jobs (hereinafter: the Contract). Determining the conditions and ways of using the funds for the implementation of active employment policy measures, the Management Board of the Employment Service drafted a list of contractual clauses. The content of the contract thus formed is unchangeable, and co-contractors do not have the possibility of individual negotiation on a particular contractual provision nor can they point out their proposals in terms of narrowing or expanding the proposed content of the contract. The contract is concluded for the purpose of preserving jobs, i.e., to achieve the public interest; and its conclusion is regulated

by compulsory public law provision of Art. 36 para. 2 of the Labor Market Act, *prima facie*, that one should ask whether it is a legal private business, a legal business of public law, or an administrative contract.

In concreto, the Employment Service does not issue an individual administrative act deciding on someone's request. Moreover, the compulsory provision of Article 36, paragraph 3, explicitly stipulates that the granting of aid within the framework of active employment policy measures is not an administrative matter. As the mentioned contract cannot be classified under the public law regime of administrative contracts, which is confirmed by the recent administrative court practice,[52] it is clear that it is a private law contract. As both contractors are not traders, nor are they part of the relationship between consumers and traders, this is not a commercial or consumer contract, but a civil law contract. From its features, it is possible to determine its legal nature, which is important not only for filling its legal gaps but also for the correct interpretation of its provisions.

The contract form was designed by the Employment Service, so it is a standard (formal or standardized) contract. Given the urgency of measures to support entrepreneurs who have been prevented or hindered from working and the number of contracts that the Employment Service had to conclude with employers, it was necessary to prepare a standard contract form that will be used to conclude numerous contracts. The number of employees and the time period for which the benefit is paid are adjusted to the individual employer who is obliged to provide accurate data on employees. It is clear from the content of the contract that the contractors are mutually committed to specific actions. The primary contractual obligations of the Employment Service are the payment of support to the employer's giro account in a certain amount for each employee in monthly installments for the recognized period and the supervision of whether the employer uses the funds earmarked or pays salaries in accordance with the attached employment contracts. The primary obligations of the employer are: a) to pay the salary to the employee for whom the benefit was paid in accordance with the employment contract, rulebook, collective agreement or special regulation; b) to submit to the Employment Service evidence of salary for the previous month no later than the fifth of the current month; c) to submit to the Employment Service the necessary documentation for the purpose of control; d) to retain the number of workers for whom the support has been paid, unless there is a reduction in the number of workers due to justified reasons.

52 The Administrative Court in Zagreb, in two cases, in the decision Business number: Usug-2/19-6, dated 2 July 2020 and in the decision business number: Usug-1/19-6, dated July 6, 2020, takes the position that these are contracts concluded on the basis of a program of active employment policy measures within the competence of the Bureau and they are not administrative contracts. The dissatisfied party (in this case, the plaintiff), and as it is a potential dispute regarding the concluded civil law contracts, may seek possible protection of their rights before the regular civil court.

The basic features of the Agreement are consensus, causality, commutativity, and collectability. The contract is created by the consent of the will of the contracting parties, the purpose of its conclusion is to preserve jobs, and at the time of its conclusion, mutual actions and party roles are known. In billing contracts, one party compensates for the benefits it receives from the other party. It is clear that the cash benefit paid to an employer is a determined benefit that is reflected in an increase in his assets. The company (employer)[53] is obliged to direct the received support by paying it to the employee through a proportional part of the salary. However, it is precisely this proportional part of the salary that increases the assets of that company because, in the absence of support, it would be forced to pay the entire salary from the source of its own or external capital. However, the contract includes toll legal transactions, so the question of what compensation the employer provides for the acquired benefit, which is reflected in the increase of his property, should be answered in the affirmative: Namely, the obligation to pay the salary to the employee is completely independent of the contract on the grant of preservation of jobs, and the duty to submit evidence and documentation for control could not be considered as a proportionate counteraction of the employer. Therefore, the only question that remains open is whether the obligation to retain the number of workers can be qualified as an obligation, which in turn obliges the other party to pay the agreed support. Reciprocity does not exist in the typical contractual sense of complete bilateral obligation (synalagmatics), because the employer to whom the money is paid does not commit to any action to the Employment Service, but undertakes to retain workers in the specified period. This fulfills the purpose of the said measure of payment of aid for the preservation of existing jobs in activities that are endangered by administrative measures of public authorities. Although the contract differs from the classic model of toll legal transaction, in which there are obviously mutual exchanges of performance and counter-performance, or benefits that the contractors want to achieve with the contract, it is still correct to classify it as toll contracts because it will make it easier to apply the rules, its interpretations, the liability for material and legal defects, and the termination of the contract, which applies to all named collection contracts. Such classification strengthens the characteristics of toll contracts—for example, deviation from the informality of the contract is possible only based on a legal provision or the express will of the contractor; in addition to primary contractual obligations, there are secondary obligations in the form of liability for material and legal defects. If the obligation of the employer to keep the workers were to be exempted, the agreement would be uncollected, because it would contain only the obligation of the public entity to pay the support. The obligation to retain workers is realized for the purpose of payment of support.

53 Although the support measure is most often used by employers organized in the form of a company, it should be noted that the addressees of these measures are also artisans, family farms, and sports associations.

The worker is protected from receiving a business-related termination of the employment contract, and at the same time the Employment Service is financially relieved because the worker will not become the addressee of receiving unemployment benefits precisely for the purpose of paying the support.

A public entity enters into a contract and pays support precisely with the aim of "making it difficult" for the employer to terminate the employment contract, except for justified reasons.[54] The suspicion that the contract has elements of an employment contract is dispelled, because refraining from terminating the employment contract is not compatible with that contract, and the same can be said for the suspicion of connection of an element of the contract in which the Employment Service has "the right to control other contractual obligations" account. It is a specific *sui generis* contract that regulates property relations and achieves a balance between the property interests of the employer and the public entity. Without this contract and the support paid to the employer under it, many workers would lose their jobs and become candidates for receiving unemployment benefits. Precisely because the contract contributes to the preservation of jobs, it can be said that they achieve a balance of property interests of the contractor. The mutual exchange of performance and counter-performance is not as direct as in the case of "classic" civil or commercial contracts, because failure to act or omission of dismissal of employees is a negative action of the employer that may indirectly affect the Employment Service: if the employer violates the contractual obligation and dismisses the employee, such action will directly affect the Employment Service only in the event that the employee, as an unemployed person, registers for it for the benefit of the unemployed. This fact, as well as the fact that employers are financed by state public funds or the European Union, do not deprive the treaty of the character of a property relationship, so, *rerum natura*, the general principles of law and appropriate dispositive provisions of the law of obligatory relations apply to it.

Conclusion of the contract

The Employment Service has published on its website a public call for the use of active employment policy measures in the form of Aid for the preservation of jobs in activities affected by COVID-19. The invitation is addressed to all employers who can be organized as a company, artisans, family farmers (OPG),[55] but also natural persons who are self-employed

54 In Art. 3. paragraph 3, Contracts for the granting of support for the preservation of jobs, exhaustively list the justifiable reasons for reducing the number of workers: expiration of fixed-term contracts, termination of employment contracts at the request of workers, personal termination, retirement, and dismissal for misconduct.

55 The structure and operation of family farms are regulated by the Family Farming Act, Official Gazette No. 29/18.

and who are insured on that basis and are liable to income tax. Therefore, a natural person or legal person as an employer should perform an economic activity and be liable to pay income tax. All other business entities that perform activities in eligible sectors and are subject to income tax are also considered employers. Target groups of employers are sectorally divided by specific activities. Regardless of which activity they perform, it is determined that the right to support can be exercised by micro-entrepreneurs, i.e., employers who employ less than ten employees as well as employers who cannot perform the activity in accordance with the Decisions of the Civil Protection Headquarters (national, county, local self-government units), and who are closed by a decision of the Headquarters or are as suppliers business related to such employers.

The public call for the use of active employment policy measures published electronically on the website of the Employment Service is not an offer or a general offer in terms of the provisions of Art. 253, paragraphs 1 and 254 of the Civil Obligations Act. It does not contain the essential components of the contract, nor can it be read from the sender's will to enter into a contract on the basis of which an unspecified addressee (employer) as a bidder could accept the published conditions by a mere statement. The public invitation announced the assumptions and conditions under which the offer of those employers to submit a bid for concluding a contract and who submit a request for support under the published conditions, will be accepted. Therefore, a public invitation should legally qualify as an invitation to make an offer under published conditions in accordance with the provision of Art. 256 paragraph 1 of the Civil Obligations Act. With it, the Employment Service invites addressees who meet the criteria from the public invitation to submit a bid for concluding a contract in the form of a request for the use of support. A specific employer who wants to be paid support is obliged to request the use of support and clearly state the number of workers for whom support is requested and the period for which it is requested, and attach the documentation specified in the public invitation, i.e., the invitation to make an offer under published conditions. Such a correctly sent request addressed to the Employment Service is an offer because it contains the basic elements of individualization necessary for the creation of the contract and mirrors the sender's (employer's) *animus contrahendi* (Article 253, paragraph 1 of the Civil Obligations Act). Such a legal qualification, however, does not give the employer complete certainty that the support will be paid to him, because the one who invites the offer to be made under the published conditions is not unconditionally obliged to accept every offer. Without the acceptance of the offer, the contract on granting support for job preservation cannot be created as a necessary legal basis for a valid and legal payment of support. Namely, the sender of the invitation to submit a bid may reject the bid for concluding a contract for justified reasons and he may also do so because of unjustified reasons or without a valid reason. He cannot be forced to sign a contract by a lawsuit, but he can be forced to do so on the basis of the provision

of Art. 256, paragraph 2, of the of the Civil Obligations Act, hit the sanction of compensation for damages if it unfoundedly rejects the offer. *In concreto*, this is not a normal civil or commercial transaction and it can hardly be compared that the Employment Service refuses to enter into a contract if the bid is submitted in accordance with the published conditions, invoking the said authority not to accept the bid or not to enter into a contract with the bidder. Any selective treatment of individual employers would not only undermine and jeopardize the achievement of legal policy objectives to help the economy, but would violate the provisions on the duty of indiscriminate conduct of public entities, provisions on competition protection, etc. As a public entity implementing active employment policy measures is not in the role of an ordinary bidder who could unreasonably reject the bid referring to the provision of Art. 256, paragraph 2 of the Law on Obligations, it can be said in principle that every correctly fulfilled and sent offer must be accepted due to the legal and political goals of assistance to the economy and due to public law regulations that frame the actions of the Employment Service. *A contrario*, an unfounded rejection of a bid authorizes the bidder to stand up with a claim for damages. The extent of the damage thus caused should be measured not only by the tenderer's actual cost of submitting the tender, but also by the amount of support for each worker duly requested by the employer.

Determining the moment at which a contract is concluded is important for several reasons. This time is relevant for assessing the existence of a lack of will in concluding the contract, the ability to conclude the contract, since then the rights and obligations between the contracting parties arise.[56] Also, this time can be decisive for the fate of the legal transaction in case one of the contractors goes bankrupt, fulfillment of the contract. At the time that it is assessed whether some acquired rights should be recognized, it can be decisive for the occurrence of tax liabilities, etc. The contract is concluded, based on the provision of Art. 262, paragraph 1 of the Civil Obligations Act, when the user/bidder receives a statement from the bidder that he accepts the bid (the so-called acceptance theory). At that moment, offer and acceptance cease to be individual and separate manifestations of the will and become a contract, i.e., they become their common thing. Acceptance of a bid by which the Employment Service as a bidder declares that it accepts a bid in concreto can be manifested in two ways. The first and usual way is a statement in the form of a notification of the approved request or consent to the offer sent to the employer by the Employment Service (employee or advisor of the Employment Service). The statement or manifestation of the will of the bidder and the bidder is made electronically in different places, so it is a matter of concluding a contract among those present. The moment of perfection of the contract is not affected by the fact

56 For more on this, see Barbić, 1980, p. 66.

whether the bidder read the e-mail or whether he found out about the acceptance, but the decisive objective moment in which the bidder could find out the content of the bid, and that is the logical second in which the bidder received notification that the application for support is approved, i.e., the offer is accepted. This moment is regulated in detail in special legislative instruments that regulate electronic commerce, e.g., an electronic signature or electronic document.[57] The contract is concluded at the moment when the bidder receives acceptance of the bid, provided that the acceptance is received at the moment when it is received by the computer or provider or server of the bidder, or when the acceptance message became available to the recipient.[58] If this notification arrived at the e-mail address of the bidder after the expiration of working hours, it should be assumed that the contract was concluded on the first following day.[59]

Another way of expressing the will of the offerer is the implicit action of paying the funds to the account of the employer.[60] Then the relevant moment of concluding the contract is the day when the funds were transferred to the employer's account, regardless of when the employer found out about it. Since then, the amount paid has become part of the balance sheet assets of the employer, which he freely disposes of. However, on the basis of the concluded contract with the Employment Service, the employer is obliged to direct the said payment to the "items" of the salary cost for workers.

Protection of rights and liability for breach of obligations under the Contract

In any contractual relationship, the contractors may validly and duly fulfill their contractual obligations. *A contrario*, either party may breach a contractual obligation, either by non-performance, by improper performance or delay. Violation of the contractual obligations of one contracting party authorizes the other party, faithful to the contract, to stand up for damages, unilaterally terminate the contract or activate a specially contracted or legal authority related to breach of contract—for example, contractual penalty or the right of retention. The rules of contractual liability are elaborated within the corpus of classical contract

57 Electronic Commerce Act, Official Gazette, no. 173/03, 67/08, 36/09, 130/11, 30/14, 32/19. Law on Electronic Document, Official Gazette, no. 150/05. Regulation (EU) no. Regulation (EU) No 910/2014 of the European parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC, Official Journal of the European Union L 257/73. (this regulation replaced the previous Electronic Signature Act, which was in force until August 17, 2017).

58 *Arg. ex* art. 15 of the Electronic Commerce Act.

59 Namely, the consultant of the institute as a person who processes the received application for support or decides on the acceptance of support can work overtime and due to the expanded scope of work send electronically a notification of approval of support or consent to the offer in the evening. In such circumstances, it should be assumed that the contract was concluded on the first following day (Barbić, 1980, p. 66).

60 *Arg. ex* art. 262 para. 2 of the Civil Obligations Act.

law, so they also apply to this agreement. However, the question arises whether there are any deviations from these rules or whether there are any special rules of liability arising from the agreement itself. From the previous analysis of its content, determination of its legal nature and characteristics, a negative answer can be seen. The very fact that the office has published on its website special substantive and procedural legal rules or conditions under which each applicant (employer/bidder) should submit is irrelevant. Namely, contractual liability is not affected by the rules published by the office on its website, for example, that the employer may object to the submitted notification on the assessment of the request within eight days of receiving the notification sent to the Central Office of the Employment Service.[61]

When it was established that the office had paid the support without a valid basis or the applicant did not meet the set conditions, in practice the employer was usually obliged to make a refund in installments or installments through out-of-court settlements. If the employer does not agree to such a settlement, which is exceptional in practice, proceedings will be initiated before the competent court. If the Employment Service refuses to conclude the contract or rejects any objection, employers may seek legal protection before the competent court by filing a lawsuit against the Employment Service.

In the event of a breach of contract, the faithful may use means provided by the general rules of the law of obligations. The Civil Obligations Act does not contain a provision that explicitly states and defines all presumptions of liability for damage, but our doctrine and jurisprudence agree that the general presumptions of liability in our law: subjects, harmful action, damage, causation, and wrongfulness, and up to liability for damage can only come if all these assumptions are met cumulatively.[62] The general rules on non-contractual liability for damages apply accordingly to liability for breach of contract.[63] According to the rules on non-contractual liability, which are applied by analogy to contractual liability, as a rule, any illegal action (the breach of contractual obligations) is liable according to the principles of subjective presumed liability.[64] This means that the guilt of the debtor for breach of contract is rebuttably presumed, and the mildest form of guilt, simple negligence.[65] The debtor acted with ordinary negligence if he or she did not use the attention of a good businessperson.

61 The central office is obliged to respond to the complaint within 10 days. The most common reasons for filing a complaint are: meeting the conditions of falling turnover, number of workers, exceeding the deadlines for submitting applications, belonging to eligible employers, workers meet the criteria of the target group, performing an acceptable activity, etc.

62 For more on this, see Klarić and Vedriš, 2014, p. 583 *et seq*. On the necessity of cumulative fulfillment of the stated assumptions, see the decision of the Supreme Court of the Republic of Croatia: VSRH Rev-635/08 of September 8, 2009.

63 Art. 349, the Civil Obligations Act.

64 Arg. ex art. 1045. ZOO. General rules on the subjective breach of contract are the rule, but objective liability is also extremely possible when specifically provided by law.

65 Arg. ex art. 10 para. 1 and 2 of the Civil Obligations Act.

Namely, although employers do not necessarily have to be traders, for example, a sports association or a family farm, this criterion in assessing due diligence should be applied equally to both parties. Irrespective of whether the employer is a craftsman or operates in the form of a company or some other form, he is obliged to approach the conclusion of the contract and fulfill the contractual obligations with the care of a good businessperson. The institution in this regard, should not enjoy the privilege of reducing attention (the attention of a good host) or bear the burden of increased attention (the attention of a good expert).

With regard to the amount of damages, the creditor is entitled to compensation for ordinary damages and lost profits.[66] However, if the contract is breached intentionally, through gross negligence or fraud, the creditor is entitled to the entire damage, both foreseeable and unforeseeable damage.[67] If the creditor or the person for whom he is responsible has contributed to the occurrence or amount of damage, or aggravation of the debtor's position, the compensation is proportionally reduced because then it is a shared responsibility, and it is provided by the rule that the party alleging breach of contract reasonable measures to reduce the damage caused by that violation, otherwise the other party may request a reduction in compensation.[68]

The debtor is released from liability for damage if he proves that he could not fulfill his obligation, that he was late in fulfilling the obligation due to external, extraordinary, and unforeseen circumstances arising after the conclusion of the contract that he could not prevent, eliminate, or avoid (force majeure).

If, after concluding the agreement, the Employment Service subsequently learns about the facts that would have an impact on the realization of the support, it is authorized to terminate it unilaterally, and to undertake activities to collect the claim from the employer. The question remains whether the Employment Service may do so because the requested documentation has not been submitted to it or the employer is late in doing so. In the case of minor breaches of contractual provisions, termination should be avoided as the most radical sanction and more lenient solutions should be sought, as the question of the validity of such termination arises.

5.3. Shortening working hours (SRV)

The SRV measure has been in force since June 1, 2020. The conditions and methods of using the funds for the implementation of the SRV measure prescribe the objectives of the measure, target groups of employers, target groups of workers, duration of the measure, amount of support for reducing working hours, submission of requests, obligations of

66 Art. 1089, Civil Obligations Act.
67 Art. 346, paragraphs 1 and 2 of the Civil Obligations Act.
68 Art. 346, paragraphs 4 and 347 of the Civil Obligations Act.

contracting parties.[69] The aim of the SRV measure is to preserve jobs among employers whose work has been temporarily reduced due to a special circumstance caused by the coronavirus. The addressees or target group of the measure are employers who perform economic activity and employ ten or more workers. Micro-entrepreneurs employing less than ten workers did not address these measures.

The SRV measure applied to all workers, regardless of whether they are employed for a definite or indefinite period of time, who are employed by employers from the target group of employers. However, it did not apply to workers who were "owners, co-owners, founders, board members, directors, or procurators" of the company (employer). It was determined that the threshold for participation in the share capital of the company in the amount of 25% is the threshold for the use of the measure. Namely, a member of the company who is also an employee of the company and is a shareholder in a company that exceeds the prescribed threshold cannot use the benefits of this support, while a worker who has a share below the prescribed limit is classified as a target group. Workers who are also members of the supervisory or management board as employee representatives may use this measure. As the company law governing relations in capital companies does not provide for the possibility that the management of capital companies consists of employee representatives, employees who are also members of the management of joint stock company (d.d.) and limited liability company (d.o.o.), or its procurators are not the addressees of the SRV measure.

The state financial assistance is awarded for the temporary introduction of full-time work of workers lasting less than the monthly fund of hours, but not less than 70% of the monthly fund of hours, in the amount of up to HRK 2,800 per month net per worker. The value of the amount of net compensation for part-time work is calculated according to the formula: up to HRK 4,000 (€530) divided by the monthly fund of full-time hours for the month for which support is requested, multiplied by the number of hours for which support is provided.[70]

The basic criterion when applying for part-time support is the expected decline in the total monthly working hours of all employees employed by the employer on a full-time basis in the month for which support is requested by at least 10%. In addition to the basic criterion, the employer must prove the connection between the impact of the COVID-19 epidemic on business and the expected decline in the total monthly working hours fund. This connection is evidenced by the decrease in revenue/receipts in each month for which support is requested of at least 20% compared to the same month last year and one of the following reasons: a)

69 Conditions and ways of using funds for the implementation of the SRV measure are publicly published on the institute's website: https://mjera-orm.hzz.hr/skracivanje-radnog-vremena/.

70 A table on the amounts of co-financing depending on the number of working hours and the percentage of working time can be found in the SRV (Reduction of working hours) support document itself and is its integral part. It is publicly available on the Institute's website.

decrease in orders by terminating or amending the contract with the buyer/customers on the fall of orders for the month for which support is requested; b) inability to contract new jobs during the COVID-19 epidemic; c) impossibility of delivery of finished products or contracted and paid raw materials, raw materials, machines, tools, and d) impossibility of new orders of raw materials, raw materials, tools and machines necessary for work.

6. Summary

The COVID-19 pandemic with its far-reaching socioeconomic consequences undoubtedly represents a crisis of historic proportions. Spreading around the world rapidly and with unexpected intensity, it created a sort of global state of emergency and it forced both states and the international community to make prompt and drastic moves. Since the outbreak began at the end of 2019, or in March 2020 when the WHO declared the pandemic, until today, living in *de iure* or *de facto* state of emergency became a reality for the citizens of almost all the countries in the world. For legal theory that primarily requires reflection on numerous and different measures by which public authorities responded to the pandemic threat with the aim to protect the society, while these actions almost without exception included severe limitations of human rights and fundamental freedoms. It is therefore understandable that such measures opened many problematic questions, and exposed weak spots in crisis management mechanisms and procedures of nation states as well as of the international community.

Complex problems connected with "constitutionalism under extreme conditions" constitute permanent topics of interest for scholars of comparative constitutional law. The global alert caused by pandemic reminded us of some old questions, and it also opened numerous new questions concerning changes that affect public law in times of extraordinary pressure on constitutions and constitutional law, as well as on other branches of law.[71] Emergency measures must have provisional character, while the existence of threat must be real. Combating the pandemic, some states declared the state of emergency, while others—the Republic of Croatia being one of them—avoided to do so, opting instead to act on basis of previously existing normative framework, mostly public health legislation that already contained certain crisis management mechanisms.

Emergency situations require taking any action deemed necessary to protect national security, maintain law and order, and protect citizens' lives and properties, enabling state authorities to respond effectively to imminent danger and to restore normal conditions.[72]

71 Albert and Roznai, 2020, pp. 1–13.
72 Bulmer, 2018, p. 6 *et passim*.

Therefore it can be concluded that the purpose of such measures is in fact conservative as they are aimed to eliminate the threat to the system and restore it to its previous state. Furthermore, it means that executive bodies are not permitted to use emergency powers in order to permanently change the elements of constitutional system. Such belief was traditionally placed among essential components of a liberal constitutional democratic government.[73]

Constitutionalism in extreme conditions functions in different ways. Comparative overviews of constitutional and legal frameworks for dealing with emergency situations, delegation of legislative and overall decision-making power to the executive, as well as of actual executive responses in situations that constitute clear and present danger for the state and the preservation of its population, such as the recent one necessitated by the COVID-19 pandemic, offers answers to the questions that stress the necessity of prompt and effective response to imminent danger at all levels of governance, while also noting the perilous challenges for democratic societies inherent in states of emergency.

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73 Ferejohn and Pasquino, 2004, pp. 210–239.

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