

Serbian Legal Disharmony During the COVID-19 Pandemic

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1. Introduction

The state of emergency has always been a demanding topic for constitutional lawyers and scholars who study constitutional law. The ongoing COVID-19 pandemic (2020–2022) has rendered this topic extremely relevant. Worldwide, the public has seen the pandemic as a sudden, unexpected *vis major*, a black swan event fraught with unknown knowns, unknown unknowns, and a subset of known knowns.¹ In the sociological sense, the pandemic is in every way a disaster—an event (or a series of events) harming or killing a significant number of people or otherwise severely undermining our daily lives in civil society.²

All the states acknowledging the pandemic faced challenges to their legal systems' function. In this state of emergency, governments attempted to combine their responsibility for the people with the public adherence to established rules, a balancing act that signifies the constitutive role states play in protecting society. The Serbian people respected the temporary containment measures (e.g., closing schools, banning large public gatherings, etc.) with unconditional acceptance of the need to protect society as a whole. The civil society (or the family) cannot act alone in this situation; it needs the State.³ Because governments facing

1 Perić-Dilgenski, 2020, p. 627. Philosopher-epistemologist Nassim Nicholas Taleb coined the phrase “black swan event” to describe how what we know to be true changes with the acquisition of new knowledge, just as Europeans once “knew” that all swans were white—until explorers discovered black ones in Australia (Taleb, 2007).

2 Mitrović, 2020, pp. 612–613.

3 Tsekeris and Zeri, 2020, p. 499.

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exceptional threats must respond quickly, they necessarily operate in a gray zone as they balance freedoms with health and security concerns. However, considerations of rights must be part of the (rapid) policy-making process.⁴

In many countries, changes in the legal systems rested to some degree on the “isolationist” ethic⁵ and concerned, above all, the enactment of measures (acts) derogating from the normal regime of human rights. The extent of the derogations varied. In some countries, restrictions on human rights were moderate, not drastically different from ordinary circumstances. In others, they were strict, with temporary but complete suspensions of some human rights (e.g., freedom of movement in complete lockdowns). Of course, over time, all countries have adapted their measures to the circumstances. Hence, the topic of modifications to the legal system has regained its relevance globally.

The modification of legal systems has raised numerous questions needing answers. The central legal question from which all other questions derive is whether state authorities and holders of public powers have acted constitutionally and legally in their pandemic responses. The answer given by various constitutional courts has been both affirmative and negative, depending on the country. In some countries, including Serbia, the courts waited for the crisis to settle down and the state of emergency to ease (or end) before considering the constitutionality of the government’s actions. The second set of questions relating to the legal system and the COVID-19 pandemic are essentially factual or non-legal. They primarily relate to the science of the pandemic (e.g., epidemiology, equipment and practices for protection and prevention, etc.) from the perspective of assessing what human rights restriction measures should be introduced and when to achieve the desired goal of containing the pandemic and saving human lives.

For Serbia, modifying the legal system meant introducing highly restrictive measures limiting human rights (among the strictest in Europe). The strict measures had a basis in the Constitution. However, in some cases, the constitutional limits of human rights derogation were overridden, and the Constitutional Court, as guardian of the Constitution and human rights, failed to weigh in with a timely response. Specifically, there was a mass practice of unauthorized public authorities and others restricting human rights. Those orders and acts commonly remained in force until newer, likewise unconstitutional acts replaced them.

Finally, the third set of questions relates to the misinterpretation of human rights and their “adaptation” to needs and circumstances. There were many instances of human rights violations relating to trials (directness, etc.), prohibitions of retroactivity, and the principle of *ne bis in idem*,

4 Macfarlane, 2020, p. 299.

5 Lockdowns, quarantines, and other epidemiological measures introduced around the world to prevent the virus transmission have been pushed by a peculiar “isolationist” ethic aimed at saving both human lives and health systems (Janković, 2020, p. 1008.).

res iudicata, and others. These violations undermined legal certainty and left citizens feeling threatened not only by the deadly contagion but also by their own leaders and communities.

2. Regulation of the state of emergency

2.1. How the Constitution regulates the state of emergency

In the Republic of Serbia, “state of emergency” (*vanredno stanje*) is a constitutional category—the most relevant provisions regulating it are enshrined in the Constitution. The Serbian Constitution also regulates the state of war (*ratno stanje*), another formal state of necessity. There is also a legal category for third form of crisis: the emergency situation (*vanredna situacija*). The State declares an emergency situation for natural disasters, extraordinary events, or dangers to the people, environment, or property, both localized and nationwide. The main difference between a state of emergency and an emergency situation is the degree of perceived danger. A state of emergency would be declared for a grave threat that will cause a greater departure from the ordinary state functions than an emergency situation. Emergency situations could be declared for specific dangers, not just the risks and threats of disasters and emergencies.⁶

Provisions on the state of emergency are found in Part Eight of the Constitution (“Constitutionality and Legality”).⁷ The same part regulates the state of war.⁸ Provisions relating to the state of emergency are also found in two other constitutional articles. The provisions on parliamentary decision-making mandate that the National Assembly, by the majority vote of all deputies (at least 126 of 250), “shall declare and call off the state of emergency” (otherwise, laws are adopted by a “relative majority” of at least 64 votes).⁹ The Constitution regulates in detail the derogation from human rights in the states of emergency and war.¹⁰

The state of emergency is regulated differently by the 2006 and 1990 Constitutions. The differences stemmed from the need to regulate the state of emergency more precisely and establish additional human rights guarantees. The 2006 revision was intended to restrict the almost-unlimited rights of the executive branch (the president of the Republic) during a crisis. Under the 1990 Constitution, the president could unilaterally declare a state of emergency and adopt (all) acts and measures required by that state, in accordance with the Constitution and law (Article 83, Paragraph 8) when circumstances arose that endangered the security

⁶ Jugović, 2012, p. 240.

⁷ Article 200 of the Serbian Constitution

⁸ Article 201 of the Serbian Constitution

⁹ Article 105 of the Serbian Constitution

¹⁰ Article 201 of the Serbian Constitution

of the state, human rights, or the operation of state authorities. The 2006 Constitution distinguished between the state of war and the immediate threat of war. The newer Constitution also determined (defined) when a state of emergency could be declared: "When a public danger threatens the survival of the state or its citizens." The public danger must be of such high intensity that the very continuance of the State is at stake. The law prescribes declaring an emergency situation for public dangers of lesser intensity.

The theory underlying the constitutional distinction holds that a state of emergency regulated by the supreme law must strike a balance between two values: (1) the urgent need to preserve the society and state as effectively as possible in situations of crisis and (2) the need to prevent any abuses of power; minimize sacrifices of liberty and legality; and respect the inviolability of human rights.¹¹ The state of emergency is an extraordinary, exceptional situation that can affect any state, temporarily disrupting the normal constitutional order due to unpredictable circumstances that undermine fundamental social values.¹²

Some legal scholars have criticized the constitutional solution for its inadequate determination of "public danger"¹³ and the preconditions for declaring one,¹⁴ which could result in the abuses of power during a crisis. Nevertheless, it would be impossible to provide an entirely precise and complete list of conditions for declaring a state of emergency. Emergencies are, by their nature, unpredictable. Endeavoring to create such a list would be "an unattainable aim that would contradict the institutional logic of that legal order" that must retain some degree of flexibility to preserve its usefulness. The institution of the state of emergency should encompass all the unpredictable circumstances that might endanger the regular functioning of the constitutional order.¹⁵

In Serbian law, distinguishing between a state of emergency and an emergency situation is challenging but possible using the formal criteria. The former is a constitutional category, and the latter a legal one. Different bodies or authorities are empowered to declare them. The legislative branch declares a state of emergency, and several different bodies could declare an emergency situation. According to the substantive (content) criterion, the emergency situation constitutes a lower-level emergency state.¹⁶

¹¹ Simović and Avramović, 2010, p. 252.

¹² Simović and Avramović, 2010, p. 252.

¹³ Marković, 2006, p. 77.

¹⁴ Venice Commission, Opinion no. 405/2006, 2007, p. 20.

¹⁵ Simović, 2020, p. 4. The constitution-makers used the formulation provided for in the ECHR: derogation from human rights is allowed in a "public emergency threatening the life of the nation" (Article 15, Paragraph 1)

¹⁶ Jugović, 2012, p. 241. See Simović and Avramović, 2012, pp. 503–516. Under the Act on Disaster Risk Reduction and Emergency Management (2018), an emergency situation is declared when the risks, threats, and consequences of a disaster are of lower intensity and cannot be prevented nor eliminated through the regular activity of the relevant authorities and services (Article 38).

With its recent decision, the Constitutional Court further defined the state of emergency by determining its constitutive elements: (1) constitutional condition: “public danger threatening the survival of the state or its citizens”; (2) object of protection: “state or its citizens”; (3) means or mechanisms of protection: “measures derogating from the constitutionally guaranteed human and minority rights”; and (4) aim: effectively overcoming a public danger and urgently restoring the normal constitutional order.¹⁷

Overall, the efforts of the Serbian Constitution writers to regulate the institution of a state of emergency were sound in principle since they provided an alternative way to proclaim a state of emergency if the Parliament were unable to convene. That solution should minimize any abuses and provide democratic legitimacy for the declaration of a state of emergency while allowing prompt and efficient decision-making.¹⁸

2.2. The state of emergency at the sub-constitutional level

The Republic of Serbia has no law in place governing the state of emergency; it is regulated only by the Constitution. There is also no law on the state of war except the Defense Act, which governs the legal regime in wartime and some issues concerning the state of emergency. That Act defines both the state of emergency and the state of war. Extending the constitutional definition, the state of emergency is defined as “the state of public danger wherein the survival of the state is threatened and comes as a consequence of military or nonmilitary challenges, risks, and threats to security.”¹⁹ Given that the state of war has not been defined by the Constitution, it had to be done by the law: “the state of danger wherein the external armed actions endanger the sovereignty, independence, and territorial integrity of the country, or the peace in the region, and which requires mobilization of forces and means for defense.”²⁰

The third category of the modifications to the legal system on the emergency situation is a legal category, with its legal frame comprising several laws.²¹ The laws governing the state of emergency-related issues can be termed “ordinary,” as they are enacted through the standard legislative procedures of the Parliament. Serbia has no category of organic laws (cardinal law); rather, the Constitution recognizes all laws as having equal legal force. (There is one constitutional law for enforcing the Constitution and one “special” law, still pending enactment, concerning the autonomous provinces of Kosovo and Metohija). In a state of emergency, regulations

¹⁷ Constitutional court – IUo-42/2020 (May 21, 2020).

¹⁸ Simović, 2020, p. 5.

¹⁹ Article 4, Paragraph 1, item 6, of the Defense Act

²⁰ Article 4, Paragraph 1, item 7, of the Defense Act

²¹ “Emergency situation” has been identically defined in the laws: Act on Public Health, Act on Protection of the Population from Infectious Diseases, Act on Disaster Risk Reduction and Emergency Management.

having the force of law are enacted, practically replacing the everyday legal provisions. Those regulations establish different rights and obligations than those in the ordinary legal order.

2.3. Various types of the state of emergency

There are three different emergency statuses identified in the Constitution and Serbian law. A “state of emergency” is declared if the competent authority assesses that a public danger threatens the survival of the state or its citizens. The danger must pose a threat to the public good or public interests, not private or individual interests. The public danger must be of such large scale that it threatens the survival of the State and its citizens. Thus, the state of emergency is the most severe form of crisis—a public danger threatening the existence of the State and the lives of citizens. A less severe form of crisis would be declared an “emergency situation.” If the danger persists or spreads and the imposed measures produce no results, that would trigger the declaration of a state of emergency. Finally, there is the “state of war,” a crisis typically caused by external armed actions.

Legally, it is possible to declare more than one these three at the same time. Practically speaking, there would be no need to declare the states of war and emergency concurrently because the two are equal in terms of their potential for restricting human rights under the Constitution. However, “state of emergency” and “emergency situation” are not equal. In 2020, Serbia declared a state of emergency countrywide due to the COVID-19 pandemic, with an emergency situation concurrently being declared by several local governments (towns and municipalities). In these instances, the local governments lacked clear criteria for declaring emergency situations. They mainly used the number of COVID-19 infections to assess whether the situation should be declared an emergency situation. Thereafter, the emergency situations remained in force despite the varying number of infections.

The authority to declare the states of emergency and war rests with the National Assembly.²² The Serbian Constitution does not prescribe who proposes the declaration of these states of necessity; the law does so. Interestingly, states of emergency and war can be declared on a proposal of the same subjects despite their differing threats to the State and the citizens—aggression and public danger. The proposal is submitted jointly by the president of the Republic and the Government on the receipt of the defense minister’s report on the risk and threat assessments and information on the current of expected consequences. The president of the Republic and the Government can propose that a state of emergency be declared for an entire state territory or just a part of it (the same is not possible for the state of war).²³ The third form of legal system

²² Serbian Parliament (*Narodna skupština*)

²³ Articles 87–88 of the Defense Act

modification, the emergency situation, can be declared by the Government (countrywide), a provincial government (e.g., the autonomous province of Vojvodina), or a municipal president or mayor, all on the proposal by a special body of an “emergency management headquarters.”²⁴

Serbia has an alternative constitutionally provided authority to introduce a state of emergency: the National Assembly. However, with its being a cumbersome body of 250 MPs, its forte is not rapid decision-making. Thus, it is not well suited to handling emergencies such as the spread of infectious disease or escalating war actions. Therefore, the writers of the Constitution provided alternatives for who could declare the states of emergency and war. Individual office holders, the respective presidents of the Republic, the National Assembly, and the Government, can make a joint decision on the declaration of the states of emergency or war when the National Assembly cannot convene. Serbian law does not set the criteria for assessing whether the National Assembly can convene. However, the Constitutional Court views the matter as a factual rather than a legal question, considering it sufficient for the president of the Parliament to issue a notification of the Assembly’s inability to convene the “competent authorities,” which happened during the COVID-19 pandemic.²⁵

A state of emergency can be declared for a maximum period of 90 days, which can be extended for not more than 90 days, limiting the maximum duration to 180 days.²⁶ The same subject is empowered both to declare and extend a state of emergency. The duration of the state of war is not limited since it would be impossible to predict how long war or the threat of war might last. There is also no need for specific decisions regarding its extension.

The power to enact measures during the states of emergency and war lies with the same authority that decides on their declaration, meaning either the National Assembly or the prime minister jointly with presidents of the Republic and the Assembly. The allowed exception to this rule refers to enacting measures in the state of emergency: if the Assembly cannot convene, the Government enacts these measures with the co-signature of the president of the Republic.

This setup indicates that during a declared crisis, the competencies of the legislative authority grow if it can convene. If not, the executive branch’s power grows and the legislative branch’s power declines. This is a commonplace occurrence in times of crisis since the Parliament generally cannot respond as swiftly or efficiently to circumstances because of its size and procedural rules.

The Constitution makes no provisions for creating a separate body during a state of emergency. However, following the declaration of the COVID-19 pandemic, the Government

²⁴ Article 39 of the Act on Disaster Risk Reduction and Emergency Management

²⁵ Constitutional court – IUo-42/2020.

²⁶ The decision on the declaration of a state of emergency due to the COVID-19 epidemic (March 15, 2020) did not specify the duration of the emergency regime; it was terminated by a subsequent decision (May 6, 2020).

established the Crisis Response Team as an advisory body. (The law provides for the existence of Republic, provincial, and local emergency management headquarters).

The legislative and executive authorities in the states of emergency and war have several powers. They can declare and revoke those states, enact measures (acts) derogating from constitutionally guaranteed rights, and confirm or suspend those measures. These measures are legal acts that have the force of laws (decrees with the force of law) and hence the power to amend existing laws. Factually, this ability modifies the legislative procedure in that a law can be amended by enacting a new law or through a regulation having the force of law being enacted in a procedure other than the legislative one. This practice is only possible during the states of emergency or war.

Serbia has no detailed procedural provisions on enacting measures during the states of war and emergency. The Government session passes decrees out of the state of necessity and other acts in line with the Rules of Procedure. These actions are usually proposed by the relevant ministry (e.g., police or health), which might seek opinions or proposals from the Crisis Response Team or appropriate institutions (e.g., security services, clinical centers, etc.). There have been no more specific provisions on the enactment of measures in the state of war by the presidents of the Republic, the Assembly, or the Government), nor are there any concerning the manner of decision-making on the states of emergency or war if the Assembly cannot meet. This raises the following procedural questions: (1) are decisions adopted by a majority vote (at least two) or a unanimous vote (all three); (2) must all three presidents vote or can two presidents make a decision; and (3) how is a decision made if any of the three is prevented from deciding or is discharged from office? None of these questions has been decided because the precipitating circumstances have not yet arisen, but a legal gap remains to be addressed.

To prevent the state of emergency from becoming repressive and nondemocratic under the guise of preserving the existence of the State and its citizens, the Constitution sets out certain limits for the “disruption of powers” in favor of the executive power. The executive branch is empowered to make decisions only upon confirmation of the Parliament’s inability to convene. The impossibility of the deputies to assemble must be reliably established (this question is not regulated, assumingly from the Speaker). The next guarantee is that measures restricting human rights in the state of emergency must last no longer than 180 days, and the National Assembly must approve measures passed by the executive organs. The same applies to the decision to declare a state of emergency. Additionally, measures enacted in the state of war are also subject to confirmation by the Parliament as soon as that organ convenes. Crucial guarantees are the constitutional limitations relating to the departure from the ordinary regime of human rights. The enumerated human rights (absolute rights) cannot be limited, but all other rights are subject to restriction only to the extent necessary or to the minimum extent possible.

2.4. Quasi-state of emergency

As an example of a quasi-state of emergency, we can consider the restriction of a human right during the COVID-19 epidemic despite the Constitution forbidding such restriction. The Constitution provides absolute protection of the freedom of religion; even in times of emergency or war, freedom of religion cannot be limited on the grounds of crisis circumstances. Therefore, derogation from this freedom is not allowed if the constitutionally set conditions are not met (e.g., the protection of lives, health, morals, security, and others, under Article 43). However, freedom of movement and assembly are not absolute rights under the Constitution. Thus, during a state of emergency (e.g., at times during the COVID-19 pandemic), certain movements and gatherings could be legally restricted (temporarily). Nevertheless, some people considered the COVID-19 restrictions to be a violation, in a form of limitation²⁷, of the freedom of religion because they were prevented from performing certain rites on-site at religious facilities during holidays (e.g., some Christians were upset that the preventive measure kept them from special services on Easter).

The following sections will discuss other examples of a quasi-state of emergency measures during the COVID-19 pandemic at the lower and local levels involving the actions of lower-tier authorities such as ministers, municipal presidents, local crisis management headquarters, and even completely unauthorized individuals (e.g., green market managers).

3. Limitations of fundamental rights

3.1. Limitations of fundamental rights generally

The constitutional system of human rights limitations rests on two mechanisms. One involves human rights for which no derogation is possible in either ordinary or extraordinary circumstances. Some constitutional rights (e.g., the right to life, dignity, and personality development, the inviolability of physical and mental integrity, and others) are legally inviolable. Other constitutional rights can be limited but only temporarily and only on the grounds set out in the Constitution (e.g., to protect the citizen security, morals, life, health, and others). These limitations are generally enforced in accordance with the law. There are 17 human rights distinguished as additionally protected even during the states of emergency or war. That additional constitutional protection means that their legal protections always remain, even in

²⁷ The Serbian Constitution does not allow a restriction of a freedom of religion in a state of emergency (see Article 202).

times of emergency or war. The same reasons apply for their limitations (if any are allowed by the Constitution) whether or not a state of emergency or war has been declared.

The Constitution states that authorized subjects may “prescribe measures.” This seems to suggest that in the states of emergency and war, anyone might enact measures (legal acts) under certain circumstances to ensure the survival of the state and its citizens. However, we have seen that there are clear limits, both temporal and spatial, for derogations from the ordinary regime of human rights.

3.2. Limitations of fundamental rights during a state of emergency

This section will describe the limitations of fundamental rights during a state of emergency from the general to the specific. More general are those constitutional provisions that govern the beginning and end of measures limiting fundamental rights; more specific are those concerning individual human rights.

Human rights derogation measures are valid until a decision has been adopted to terminate them. Their maximum duration is 180 days. In addition, the measures automatically cease to be valid when the state of emergency or war is terminated. The Constitution provides another guarantee for the constitutionality and fundamental human rights protection. If the National Assembly is not the entity enacting the measures derogating from human rights in the state of emergency, it must confirm those measures as soon as it can convene. If the Assembly is in session, it must confirm the measures within 48 hours of their enactment or the measures cease to be valid.

The Government has a duty to submit the enacted measures for confirmation to the Assembly. If it fails to do so, the measures cease to be effective within 24 hours of the commencement of the first Assembly session (when it is possible to hold it). The same detailed constitutional provisions on the confirmation of measures do not exist for the state of war; the provision is only made for the Assembly to confirm the measures jointly adopted by the presidents of the Republic, Assembly, and Government when they can convene.

The Constitution defines the limits of the restriction of fundamental human rights in general terms for states of emergency and war. Derogation from the human rights guaranteed in the Constitution is permissible only to the extent it is necessary. This implies that if less restrictive means can achieve same the purpose as the rights limitation, a more stringent limitation or suspension (temporary revocation) will not be imposed. For example, if the purpose of a limitation could be achieved by an overnight lockdown, a 24-hour prohibition of movement would not be introduced. The next condition is that human rights derogation measures are not discriminatory; they cannot make distinctions among the citizens based on race, sex, language, religion, national affiliation, or social origin.

Moreover, there are also quite specific constitutional limits for the enacting authorities in the states of emergency and war. The Constitution provides a list of 17 nonderogable human rights in states of crisis. Those rights include the right to life, dignity, a court trial, citizenship, and other personal rights.²⁸ Simply put, the emergency state does not alter these rights, and their legal status does not change during times of war or emergency. Thus, some rights can never be limited or suspended because the Constitution does not make such provisions, such as the right to life. There is no death sentence under ordinary or state of emergency circumstances. However, others rights can be limited based on the grounds specified in the Constitution, not based on the declared state of emergency or war. For example, freedom of expression can be restricted only to the extent necessary to protect the rights and reputations of others, court authority, and others, as prescribed in the Constitution.²⁹ The declaration of a state of emergency or war does not in itself constitute permissible legal grounds for limiting the freedom of expression. The necessity for its restriction must be clearly reasoned in the spirit of basic constitutional values.

A state of emergency was in effect in Serbia from March 15–May 6, 2020, because of the COVID-19 pandemic. During that period, the legal system was subject to changes and human rights to restrictions, not only by governmental decrees having the force of laws but also by bylaws enacted by ministers and other office holders. The Constitutional Court received many initiatives to review the constitutionality and legality of specific acts (decisions, orders, rules).

The Constitutional Court was also asked to review the constitutionality of the decision to declare a state of emergency issued by the presidents of the Republic, the Assembly, and the Government. Its decision (IUo-42/2020) was that the three presidents acted in compliance with the Constitution. However, it dismissed the initiatives for the constitutional review of that decision and presented its views in the reasoning statement as if it had rendered the decision on the act's merits (upholding or rejecting the declaration). In another decision (IUo-45/2020, from October 28, 2020), the Court established that some articles of the two Government decrees adopted in the state of emergency were inconsistent with the Constitution and the confirmed international treaty. The Constitutional Court held that those provisions violated human rights in that the principles *ne bis in idem* and *res iudicata* had been infringed. On the basis of the two decrees, both misdemeanor and criminal proceedings were conducted for the same factual circumstances, with the result that citizens were held liable in respect of the same act for both a misdemeanor and a criminal offense.

²⁸ Articles 23–26, 28, 32, 34, 37–38, 43, 45, 47, 49, 62–64, and 78 of the Serbian Constitution

²⁹ Article 46 of the Serbian Constitution

4. The state of emergency in practice

Until the COVID-19 pandemic, the Republic of Serbia had (formerly, the jurisdiction of Yugoslavia) had not declared a state of emergency since ratifying the Constitution of 2006. Its first such declaration on March 15, 2020, raised many legal doubts. Darko Simović enumerated some of the most essential issues:

- The emergency state was introduced before the proclamation of the epidemic in the territory of Serbia (the state of emergency was declared on March 15 and the epidemic on March 19) and seemed sudden given the mild restrictive measures in place at the time.
- The Serbian Constitution does not specify an epidemic as “threatening the survival of the state or its people,” calling into question the constitutionality of declaring a state of emergency due to the virus.
- The timing of the state of emergency was problematic given the parliamentary elections having been scheduled for April 26, 2020; the elections could not have been postponed without the proclamation of the state of emergency, nor could they be held under the restrictions.
- Declaring a state of emergency was seen as a political move by the minister of defense rather than a health-related decision.
- The National Assembly was unable to convene to confirm the state of emergency, which meant that for a month and a half, the Government, along with the president of the Republic, determined without any supervision the human rights derogation measures; of the 250 deputies, only eight asked the Parliament to convene, suggesting that the Parliament agreed to its own marginalization.
- The declaration of a state of emergency did not include a specific duration, contrary to the constitutional authorities’ obligation to ensure the termination of the state of emergency as soon as possible.³⁰

Given that the highest legislative and executive state authorities have been constitutionally conferred the right to limit human rights, a concerning fact was the silence and inactivity of the Constitutional Court regarding the state of emergency due to the COVID-19 pandemic. The Constitutional Court is the one authority that could control the measures issued by the executive power and protect citizens’ rights. The body’s inaction aroused public distrust, as people doubted the constitutionality of numerous acts, including the declaration

³⁰ Simović, 2020, pp. 9–11.

of a state of emergency, the Order Restricting and Prohibiting Movement, the decree on misdemeanor violations of that Order, and trial by Skype.³¹

Serbia's regulations to contain COVID-19 have been undergoing daily changes.³² Special health regulations have been adopted by competent authorities but also by people with no competence in epidemiology or public health. There have been numerous problems with prescribing and applying special health regulations.

There have been two specific periods for the special health regulations in the Republic of Serbia: the period under the state of emergency and the period after the state of emergency was lifted. During the state of emergency was instated because of COVID-19, the Government, with a co-signature of the president of the Republic, generally enacted regulations providing for special health rules. Those regulations also defined the measures derogating from human rights. The measures primarily referred to restrictions on the freedom of movement, entry to or exit from the Republic of Serbia, prohibitions on leaving specific institutions, quarantine measures, facility closure, and similar matters. However, some measures were prescribed at the local level, with these primarily relating to the orders from the local emergency management headquarters. With measures to contain and prevent the spread of COVID-19 also having been enacted locally (at town or municipality level), it was difficult to incorporate all the special health regulations that had been or were still in force. Additionally, it was difficult for citizens to know which special measures were in force, such as curfews.

4.1. Paradoxes during the state of emergency

Determining what was allowed or forbidden in the Republic of Serbia during the state of emergency was next to impossible for anyone who was not a legal scholar. Legal certainty was low during the state of emergency and remained elusive after its lifting. State officials often provided misleading information through the media, suggesting that specific actions were permitted while they were legally prohibited. There were also instances of citizens who trusted the state officials acting contrary to the existing special rules only to be punished by the courts when their behaviors were classified as misdemeanors.

The Constitution of the Republic of Serbia makes it a rule that laws and other general acts become effective no earlier than the eighth day after they are published. It provides exceptions allowing their earlier entry into force only on particularly justified grounds determined at the time of their adoption.³³ During the epidemic, and particularly the state of emergency,

³¹ Marinković, 2020, pp. 148–149.

³² These regulations were the *lex specialis* for COVID-19.

³³ Article 196, Paragraph 4, of the Serbian Constitution

this exception was valid precisely in respect of regulations' entry into force. They generally entered into force from the moment they were published in the *Official Gazette of the Republic of Serbia*. This meant that citizens had little time to familiarize themselves with new regulations and frequently were unaware the regulations had changed.

The situation was even worse for the regulations adopted at the town or municipality level, which were primarily orders from the emergency management headquarters. According to the emergency management headquarters, in some towns and municipalities, special rules of conduct applied that had been or were still in force. These rules and measures could refer to special local health regulations. For example, some local self-government units limited the working hours of hospitality facilities, mandated wearing masks in open public spaces, etc. Some emergency management headquarters imposed fines (misdemeanors) for breaches of the orders, despite having no authority to do so. Some towns and municipalities published their orders on the respective websites of the local emergency management headquarters and some in their official gazettes. However, many of the local orders were not published anywhere, leaving the citizens unaware of changes in the rules. In any case, emergency management headquarters cannot instate such bans and restrictions in case of infectious disease epidemics because it is not within their competence.

Some local self-governments declared an emergency situation (e.g., Belgrade and Novi Sad)³⁴ because of COVID-19. Thus, some legal issues arose with special health regulations applicable in those local self-government units. Concerned citizens drew the Citizen Protector's attention to the inadequate dissemination of information on the imposed measures and their implementation, which led to breaches of those same measures and the initiation of court proceedings. The Protector of Citizens concluded that it would be appropriate that competent public authorities provided citizens, particularly those from vulnerable social groups, with complete and understandable information by directly addressing the citizens and using the public information means to prevent the spread of fear and panic among the citizens.³⁵

Failure to comply with "special health regulations" qualifies as a criminal offense or a misdemeanor, but that was not explicitly regulated. The same act (e.g., curfew violation) could either as a criminal offense or a misdemeanor.³⁶ A greater problem emerged because the adopted health regulations allowed two penal proceedings to be conducted for a single

34 See Decision on Declaring the Emergency Situation in the Territory of the City of Belgrade and Decision on Declaring the Emergency Situation in the Territory of the City of Novi Sad

35 See "Special Report on the Activities of the Protector of Citizens During the State of Emergency," Belgrade, 2020

36 For more details, see Milić, 2021, pp. 97–114.

act committed (criminal proceedings and misdemeanor proceedings). The bylaws³⁷ included a provision that curfew violation could be subject to the initiation and completion of a misdemeanor proceeding, even if proceedings against the perpetrator had already been instituted or were ongoing for a criminal offense comprising the same elements as the misdemeanor, regardless of the prohibition from Paragraph 3 of Article 8 of the Misdemeanor Act. It is legally unacceptable for bylaws to make such a provision and to have the act itself prescribe the violation of the law. Therefore, the enacting authorities of that bylaw (the Government, with the president of the Republic as a co-signatory) were aware that they were violating the act of higher legal force.³⁸

These bylaws (and others) were in breach of the Constitution of the Republic of Serbia which prescribes that no one can be prosecuted or punished for a criminal offense after having been acquitted or convinced by a final judgment or for which the charges had been rejected or the proceeding suspended by a final judicial decision. Nor may judicial decisions be revised to the detriment of the defendant in proceedings on extraordinary legal remedies. The same prohibitions apply to all other proceedings conducted for other acts punishable by law.³⁹ This legal set-up was also subject to review by the Constitutional Court, which decided that such provisions in the special bylaws had not, at the time of their being in force, been consistent with the Constitution and the confirmed international treaty.⁴⁰ Now, a question undoubtedly arises of the compensation for damages to persons who suffered losses due to the implementation of unconstitutional regulations. This situation has not yet been resolved – it means that court's procedures not finished yet.

Special rules, restrictions, and prohibitions of movement (curfews) applied for elderly persons, although these constantly changed during the state of emergency. Persons aged 65 or over (or 70 or over, depending on the location) could leave their residences only for a limited number of hours and only to purchase food or supplies. This discriminatory treatment was justified by the high rates of mortality from COVID-19 for the elderly; limiting their exposure was intended to reduce their risk. However, this regulation was fraught with issues. First, restricting vulnerable people's movements to certain hours could not be effective unless the "curfew" ensured that the vulnerable people would not be in contact with those considered less vulnerable; however, other people were allowed to move freely and potentially infect

37 Decree on the Misdemeanor of Violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, no. 39/2020) and Decree on Measures During the State of Emergency (*Official Gazette of the Republic of Serbia*, nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, and 60/2020.)

38 For some legal issues see Milić, 2021, pp. 246–256.

39 Article 34, Paragraph 4, of the Serbian Constitution

40 See Constitutional Court Decision, no. IUo-45/2020

those vulnerable people. Second, what about the elderly's other critical needs, such as hospital or doctor visits? Third, what were the psychological consequences of the imposed isolation of vulnerable people? Finally, how does this special treatment not differ from discrimination?

4.2. Right to fair trial, freedom of movement, and freedom of religion

During the state of emergency, the Serbian courts were strict about imposing sanctions for violations of special health regulations. In the first such judgment, a defendant who breached the self-isolation measures was given the maximum imprisonment sentence of three years.⁴¹ This judgment seemed to give other courts in Serbia permission to impose strict penalties to persons for violating the special health regulation. Many State officials made media statements calling for the courts to impose harsh sanctions for such violations. While their statements should not have swayed the courts, that was not always the case. The Criminal Procedure Code explicitly prescribes the conditions for imposing detention. This should ensure logical and consistent proposals from the public prosecutor and the orders from the court for detention if certain statutory conditions are met. However, in the state of emergency, the Ministry of Justice recommended that the public prosecutor's offices seek detention for all persons who violated the self-isolation measures.⁴² Many detained persons made plea agreements with the public prosecutor's office admitting to the criminal offense, and the court accepted those agreements. In addition to being criminally sanctioned, the defendants were all to be recorded in the criminal register and could face legal consequences because of the conviction. However, many of those detained persons had not committed a criminal offense because (1) at the time their alleged crimes, violating the self-isolation measures was not legally recognized as a crime; (2) the violations related to regulations that were inconsistent with the Constitution and laws; or (3) the authorities issuing the regulations were not competent to issue or implement special health regulations.

The persons who violated the health regulations were detained, contrary to positive regulations, in three special "detention units."⁴³ Regardless of their having violated special health regulations and having been ordered detention, those persons should have been tested for coronavirus infection before being referred to the respective detention units and appropriate health measures taken toward them. However, it is impossible to obtain reliable data on whether that occurred.

41 See <https://www.podunavlje.info/dir/tag/nepostupanje-po-zdravstvenim-propisima-za-vreme-epidemije/> (Accessed: April 19, 2021).

42 See <https://www.mpravde.gov.rs/sr/obavestjenje/29543/poosttravanje-sankcija-za-lica-koja-prekrse-mere-samoizolacije-.php> (Accessed: March 10, 2021).

43 See, Milić, 2020, pp. 89–105.

After lifting the state of emergency, the public prosecutor's office abandoned criminal prosecution against some persons. The court rendered the acquittal judgments when it found that the defendants did not break the law by violating special health regulations. It seems likely that the convicted persons who entered into plea bargain agreements would have been freed from their alleged criminal liability if their cases had been delayed until after the state of emergency was lifted. In that eventuality, the courts' determination that the regulations did not meet the Constitution's conditions meant they should not have been held criminally liable.

During the emergency, defendants were allowed⁴⁴ to take part in the main hearing without being physically present in the courtroom by using technical means for image and sound transmission (the so-called Skype trial). This solution was not in line with the Criminal Procedure Code. The bylaw enacting authority failed to recall the Constitution of the Republic of Serbia's⁴⁵ position that any person charged with a criminal offense and available to the court has the right to be tried in the presence of the accusers and cannot be punished without the opportunity to a hearing and a defense.⁴⁶

The adoption of special regulations also affected the performance of religious rites. Pursuant to the Constitution of the Republic of Serbia,⁴⁷ everyone has the freedom to manifest their religion or religious beliefs. This includes practicing religious rites, attending worship services or teachings individually or with others, and manifesting religious beliefs in private or public. However, the freedom to manifest one's religion or beliefs can be limited by law as necessary in a democratic society to protect the lives and health of people, the morals of democratic society, citizens' freedoms and rights guaranteed by the Constitution, and public safety and order or to prevent causing or inciting religious, national, or racial hatred. In respect of this constitutional protection, it is possible to draw two key conclusions: (1) freedom to manifest one's religion or

44 See Regulation *Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog*, March 15, 2020, *Official Gazette of the Republic of Serbia*, no. 49/2020

45 See Article 33 of the Serbian Constitution

46 The Constitutional Court has received multiple initiatives to institute the review of constitutionality and legality of acts adopted during the COVID-19 epidemic. The initiatives against the Decree on Measures During the State of Emergency (*Official Gazette of the Republic of Serbia*, no. 31/20) and the Decree on Misdemeanor of Violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, no. 39/20) were accepted, and these acts declared partially unconstitutional (Constitutional Court decision no. IUo-45/2020 of October 28, 2020). The provisions of Article 2 of the Decree on Misdemeanor...and those of Article 4d, Paragraph 2, of the Decree on Measures... provided that for certain offenses for not observing the prohibition of movement, a misdemeanor proceeding may be instituted and completed despite the offender's already having been a subject to a criminal proceeding for a criminal offense comprising the elements of that misdemeanor. The Constitutional Court established that this violated the prohibition from Paragraph 3 of Article 8 of the Misdemeanor Act, the constitutional and legal principle of *ne bis in idem*, and the International Covenant on Civil and Political Rights and the ECHR (Article 4 of Protocol no. 7).

47 See Article 43 of the Serbian Constitution.

beliefs can be limited by law—and, therefore, not also by an act of a lower legal force; (2) this limitation can be imposed only for the reasons explicitly defined in the Constitution.

Pandemic regulations must consider the constitutional protections of the performance of religious rites. The Government rendered a conclusion⁴⁸ with the following recommendations to churches and religious communities for the duration of the state of emergency and the pandemic to efficiently contain the virus and prevent the endangerment of people's lives and health: (1) perform the rites in religious facilities and open spaces without in-person attendance by the congregations; (2) perform funeral-related rites with only the minimum number of people present, observing of the prescribed preventive (e.g., masks, social distancing). In all respects, this Conclusion was a mere recommendation, not binding on anyone. However, it nevertheless affected "some persons" as if it had been mandatory, particularly because many state officials made frequent statements advising this way of performing the religious rites.

The Conclusion did not solve the problem of exercising religious rites during the pandemic. Some towns and municipalities prohibited religious rites involving groups of people within homes,⁴⁹ while churches and religious communities were ordered to perform them in compliance with all epidemiological measures.⁵⁰ There were also such orders in towns or municipalities allowing the performance of worship services within religious facilities by the clergy without the presence of the congregation.⁵¹ These bans and restrictions were prescribed by local emergency management headquarters who lacked the authority to do so. This suggests that those respective orders violated the Serbian Constitution.

In addition to some health regulations being inconsistent with the Constitution, there were also specific restriction or prohibition measures imposed that were inconsistent with Serbian law. These measures primarily concerned special health regulations lacking a legal basis law or those implemented by public authorities lacking the legal power to impose such restrictions. The Serbia has a law in place that regulates the protection of the population from infectious diseases, the Act on the Protection of the Population against Infectious Diseases.⁵²

48 Government Conclusion no. 53-2868/2020, *Official Gazette of the Republic of Serbia*, no. 43 of March 27, 2020.

49 See <http://www.malizvornik.info/?p=15750&lang=lat> (Accessed: May 5, 2021)

50 See http://www.loznica.rs/cms/mestoZaUploadFajlove/Naredba%20o%20oukidanju_20200427_0001.pdf (Accessed: May 5, 2021)

51 See <https://www.tvinfobosilegrad.co.rs/vesti/drustvo/3670-u-dimitrovgradu-zabranjeno-obelezavanje-zadusnica> (Accessed: May 5, 2021).

52 This law governs the protection of the population against infectious diseases, including the specific health issues. It defines the infectious diseases that endanger the health of the population of the Republic of Serbia and the prevention and containment of which are of general interest to the Republic of Serbia. It also defines the implementation of epidemiological surveillance and monitoring measures, the manner of their implementation, and provision of funds for their implementation, enforcement controls, and other issues relevant to protecting the population against infectious diseases.

The legal basis for prescribing measures in the period of the epidemic is found in this law. However, during the epidemic, some of the measures prescribed had no basis in this Act: the mandatory quarantine measure (self-isolation at home for infected persons), the duty to identify yourself as an infected persons, the ban on infected persons visiting social welfare institutions, and others. The regulations were revised and amended on two occasions in 2020⁵³ make it possible to prescribe measures that would otherwise be illegal.

In Serbia, many persons were subject to motions for instituting misdemeanor proceedings for violating special health regulations, with the misdemeanor warrants issued by public authorities and individuals without the authority to do so.⁵⁴ Legally, only sanitary inspectors had been considered legally competent to prosecute (and issue warrants for) the misdemeanor offenses of violating epidemiological measures. However, Serbia did not have enough sufficient sanitary inspectors, so the communal police often handled this. It means, they unlawfully prosecuted and issued warrants for persons who violated the special health regulations. Even after the illegality of the communal police's was made public, the practice continued for more than half a year. That was one reasons for the amendments to the Act on the Protection of the Population against Infectious Diseases to broaden the scope of the powers of communal police. Currently, communal police officers have the same specific authority as sanitary inspectors to prosecute the misdemeanor offense of not complying with special health regulations in an epidemic. Although this legal amendment was justified by the shortage of sanitary inspectors, that begs the question of whether every public authority should have only those powers for which it is "competent" since, by the logic of the amended law, everyone can do everything—even if they have no understanding of science, epidemiology, or even the law.⁵⁵ The potential for abuse is worrisome.

5. Experiences of COVID-19 from the perspective of constitutional law

Considering the pandemic and the danger it poses to the population, it is logical for the State to enact regulations aimed at containing the virus. Indisputably, the Constitution of the Republic of Serbia and particular laws also allow the adoption of special regulations to prevent and contain infectious disease, but only by authorized bodies or individuals following a legally stipulated procedure. Naturally, there are limitations to this.

⁵³ It refers to these laws: Act on Amendments to the Act on Protection of the Population from Infectious Diseases (*Official Gazette of the Republic of Serbia*, no. 68/2020, and later no. 136/2020).

⁵⁴ For the legal consequences of misdemeanor sanctions see, Ristivojević and Milić, 2021, pp. 99–100.

⁵⁵ See Milić, 2021a, pp. 253–271.

We must emphasize that specific limitations and prohibition measures prescribed in the state of emergency in the Republic of Serbia were noncompliant with the Constitution and particular laws. Even after the state of emergency had been lifted, some of the measures continued to be prescribed against the law or by unauthorized bodies or individuals.

The enacting bodies considered the enactment of the special health regulations to contain the infection justified. As a rule, the epidemiological situation justified every enacted special health regulation. However, the adoption of some special health regulations that imposed specific prohibition or limitation measures was not justified. Only after Serbia introduced the state of emergency did it declare, a few days later, COVID-19 an infectious disease epidemic. Logically, they should have done these in the opposite order because the declaration of an epidemic would justify the declaring a state of emergency.

The state of emergency in Serbia was introduced when the number of infected persons was still insignificant. The same was true for the so-called curfew and other measures. This raises questions about the justification of the imposed prohibition and limitation measures. Given that the National Assembly was unable to meet during the state of emergency, it had no legislative activities to that end. Instead, the rules of conduct were being ordained by the legal acts lower by force than law. Therefore, in Serbia, the rules of conduct in the state of emergency were primarily regulated by bylaws, and that practice being continued even after the state of emergency was lifted. We still see the rules of conduct applicable during the epidemic being predominantly regulated by bylaws. There is no doubt that the process of amending and adopting bylaws is simpler than passing laws, and efforts to react quickly are commendable given the rapidly changing epidemiological circumstances. However, bylaws should not be used to regulate rules of conduct that should otherwise be regulated by laws.

5.1. Measures with common and narrow impacts

It is extremely difficult to account for all the measures prescribed in Serbia from the point when COVID-19 was pronounced an infectious disease epidemic. Some measures affected the entire population of Serbia, while others affected only specific groups.

The measure that most affected all Serbian citizens was the “restriction and prohibition of movement of persons”—the so-called curfew. This measure was unconstitutional⁵⁶ because it was prescribed by the minister of the interior,⁵⁷ who lacked the authority to issue such

⁵⁶ See Simović, 2020, p. 17.

⁵⁷ *Naredba o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije*, Official Gazette of the Republic of Serbia, no. 34 of March 18, 2020; no. 39 of March 21, 2020; no. 40 of March 22, 2020; no. 46 of March 28, 2020; and no. 50 of April 3, 2020.

an order. According to the Constitution of the Republic of Serbia,⁵⁸ when the National Assembly is not able to convene, measures derogating from human and minority rights may be prescribed by the Government in a decree co-signed by the president of the Republic. Therefore, the curfew could have been prescribed legally only by the joint action of the Government of the Republic of Serbia and the president of the Republic as a co-signatory, which it subsequently did once authorities of public administration “realized” that the measure ordained by the minister was unconstitutional. Although the minister’s order had been enacted contrary to the Serbian Constitution, many Serbian citizens were subjected to criminal or misdemeanor prosecution, convicted, and punished. The Constitution stipulates⁵⁹ that any decree derogating from human and minority rights that the National Assembly did not issue must be submitted by the Government to that body for confirmation within 48 hours of its adoption—as soon as the National Assembly is able to convene. Otherwise, the derogation measures cease to be valid 24 hours from the commencement of the first session of the National Assembly held after the declaration of the state of emergency. The National Assembly confirmed the decrees passed by the Government with the president as a co-signatory during the state of emergency declared on March 15, 2020⁶⁰; however, it did not and could not have confirmed the interior minister’s order.

There were also other regulations, decrees, and orders (and even unpublished quasi-legal acts) that restricted the rights and freedoms of specific persons, such as persons in social care institutions (the so-called homes for the elderly). The minister of health issued the Order Prohibiting Visits and Restricting Movement in the Facilities of Residential Care Institutions for the Elderly,⁶¹ which banned visits to all social care institutions accommodating elderly persons while also prohibiting the care homes’ residents from leaving. Not only was the issuing process inconsistent with the law, but the Order’s enactment meant that elderly people in care homes were “deprived of their liberty” for over a year. The Order has undergone revisions and amendments. As of March 2022, persons within social care institutions can receive visitors who are fully vaccinated against COVID-19 and meet other specific conditions.⁶²

During the state of emergency, all persons deprived of liberty were prohibited from receiving visitors and leaving detention institutions for any reason. While this prohibition

⁵⁸ See Article 200 of the Serbian Constitution

⁵⁹ See Article 200 of the Serbian Constitution

⁶⁰ See the law *Zakon o potvrđivanju uredaba koje je Vlada uz supotpis predsednika Republike donela za vreme vanrednog stanja*, *Official Gazette of the Republic of Serbia*, no. 62 of April 29, 2020.

⁶¹ See the Order *Naredba o zabrani poseta i ograničenju kretanja u objektima ustanova za smeštaj starih lica*, *Official Gazette of the Republic of Serbia*, no. 28 of March 14, 2020; no. 66 of May 7, 2020; no. 87 of June 19, 2020; and no. 7 of February 3, 2021

⁶² For details on vaccination, see Ristivojević, 2020, p. 196.

might seem justified, the problem was that it was impossible to precisely identify who made that decision or the start and end date of its validity because it was not published anywhere.

Particularly unacceptable in legal terms is that the emergency management headquarters in some local self-governments were ordaining various bans and limitations while lacking the authority for doing so. There was also a portion of the prohibition measures prescribed by green market directors, social welfare center directors, people involved with enforcing criminal sanctions, and others.

5.2. Changes on various issues (immigrants, elections, media freedoms, etc.)

Over the past few years, various amended regulations and concluded international agreements have made the Republic of Serbia a final destination state for many immigrants. Serbia has several asylum and reception centers housing large numbers of immigrants. During the state of emergency, several special health regulations were adopted, exclusively applicable to them. Two are described below.

1. The Government, by means of a decree⁶³ co-signed by the president of the Republic, made it possible for the Ministry of the Interior to essentially seal the reception and asylum centers by closing all the approaches to open spaces or facilities and preventing the refugees from leaving without special permission. The decree also ordered the mandatory stay of specific persons or groups within specified spaces or facilities (migrant reception centers and the like). Supervision and security were increased at the facilities to (temporarily) prevent the free movement and self-initiated departure of persons who might be carrying the COVID-19 virus—although the refugees were not tested to see whether they were infected, because it was not obligatory. In exceptional and justifiable cases (e.g., visits to physicians), asylum-seekers and other immigrants were allowed to leave the asylum and reception center for a specified period of “leave” with special permission from the Commissariat for Refugees and Migration of the Republic of Serbia.
2. The minister of health adopted the Order Restricting the Movement on Approaches to Open Spaces and Facilities of Migrant Reception Centers and Asylum Centers,⁶⁴ banning access to open spaces or facilities of migrant reception and asylum centers. In other words, no one was allowed in or out without special permission, and even

⁶³ Uredba o merama za vreme vanrednog stanja, *Official Gazette of the Republic of Serbia*, nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, and 60/2020

⁶⁴ See the Order *Naredba o ograničenju kretanja na prilazima otvorenom prostoru i objektima prihvatnih centara za migrante i centara za azil*, *Official Gazette of the Republic of Serbia*, no. 66/2020.

then, the time was limited. This Order had no valid legal grounds. It undoubtedly limited the refugees' freedom of movement and, like the interior minister's so-called curfew Order, was not (nor could it have been) confirmed by the National Assembly.

The introduced state of emergency and the epidemiological situation in Serbia also impacted the election for deputies in the National Assembly. On March 4, 2020, the president of the Republic adopted a Decision⁶⁵ calling for the elections for deputies to the National Assembly to be held on June 21, 2020. However, a state of emergency was in force at that time, along with a variety of other special health regulations (e.g., a ban on entries into the country, the so-called curfew, and other measures). Many of these regulations precluded a safe, free, and fair election. Therefore, the Republic Electoral Commission adopted a Decision⁶⁶ to immediately suspend all electoral activities related to the election of National Assembly deputies until the state of emergency was lifted. The same Commission adopted, on May 11, 2020, the Decision⁶⁷ to resume the implementation of electoral activities in the process of election of deputies to the National Assembly, while the president of the Republic amended the Decision on the elections to the effect of scheduling the elections for 21 June 2020.⁶⁸ Ultimately, the elections were delayed by seven weeks.

Media freedom is guaranteed under the Constitution,⁶⁹ which stipulates that no censorship applies in the Republic of Serbia. However, a competent court is allowed to prevent the dissemination of information and ideas through media to the extent necessary in a democratic society to prevent calls for a violent overthrow of the constitutional order or a violation of the territorial integrity of the Republic of Serbia; warmongering or instigation to direct violence; advocacy of racial, ethnic, or religious hatred; and discrimination, hostility, or violence. Despite this constitutional regulation, the Government has attempted to restrict reporting on the true situation and consequences of COVID-19. It adopted a Conclusion⁷⁰ empowering the Crisis Response Team for Infectious Disease Containment, headed by the prime minister, to be the sole entity responsible for informing the public about the extent of the crisis. Thereafter, all pandemic-related communications—deaths, infections,

⁶⁵ See the Decision *Odluka o raspisivanju izbora za narodne poslanike*, *Official Gazette of the Republic of Serbia*, no. 19 of March 4, 2020, and no. 68 of May 10, 2020

⁶⁶ *Rešenje o prekidu svih izbornih radnji u sprovođenju izbora za narodne poslanike Narodne skupštine, raspisanih za*, April 26, 2020. *Official Gazette of the Republic of Serbia*, no. 32 of March 16, 2020

⁶⁷ See the Decision *Rešenje o nastavku sprovođenja izbornih radnji u postupku izbora za narodne poslanike Narodne skupštine, raspisanih za*, March 4, 2020, *Official Gazette of the Republic of Serbia*, no. 69 of May 11, 2020

⁶⁸ See the Decision *Odluka o izmeni Odluke o raspisivanju izbora za narodne poslanike*, *Official Gazette of the Republic of Serbia*, no. 68 of May 10, 2020

⁶⁹ Article 50 of the Serbian Constitution

⁷⁰ Government Conclusion no. 53-2928/2020, *Official Gazette of the Republic of Serbia*, no. 48 of March 28, 2020

hospitalizations, and the like—collected by city mayors, municipality presidents, commanders of emergency management headquarters, healthcare institutions, and others had to be submitted to the Crisis Response Team. The Conclusion⁷¹ labeled as “misinformation” all unofficial information shared with the public about health measures, treatments, or epidemiological data, and warned that there would be legal consequences for any other party providing such information. This Conclusion caused widespread discontent among the media, nongovernmental organizations, opposition-party representatives, individuals. Thousands of medical personnel even mounted a petition demanding the release of accurate data. The widespread pushback seems to have been the main reason that the Conclusion remained in force for less than a week.⁷²

The Crisis Response Team did not exist at that time in the formal and legal sense, giving rise to the question of how it could be possible for a formally and legally nonexistent body to have any power. It wasn't until October 29, 2020, that the Government adopted the Decision Setting Up the Crisis Response Team for the Containment of Infectious Disease COVID-19.⁷³ The Decision set up the Crisis Response Team's formal and legal existence, giving it the specific powers it has used to issue recommendations, statistics, and daily press releases to the media. An unofficial team doing the same work had actually been doing the same work before then, but legally it did not exist because it had not been formed by the Government. State officials have stated that the Crisis Response Team was formed even before October 29 by a Government Conclusion, but that Conclusion was never published anywhere.⁷⁴

6. COVID-19 as an economic crisis: fiscal and monetary crisis measures management

The COVID-19 pandemic is destroying the global economy in an unprecedented manner. Serbia has not been immune from this, partly due to its still-developing economy compared to developed countries.⁷⁵ Under the Serbian Constitution, funds for financing the powers held by the Republic of Serbia, autonomous provinces, and local self-government units come from

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⁷² The Government adopted the Conclusion no. 53-3010/2020, *Official Gazette of the Republic of Serbia*, no. 50 of April 3, 2020, which repealed the Conclusion on restricted reporting.

⁷³ *Odluka o obrazovanju Kriznog štaba za suzbijanje zarazne bolesti COVID-19*, *Official Gazette of the Republic of Serbia*, no. 132 of October 30, 2020

⁷⁴ See Milić, 2021a, pp. 253–271.

⁷⁵ Mugano, 2020, p. 738.

taxes and other revenues established by law. The obligation to pay taxes and other duties is general and based on the economic capacity of taxpayers.⁷⁶

The disastrous epidemiological situation continued in Serbia for nearly two years, with unsurprising economic consequences for both the State and Serbian citizens. For the State, economic consequences were reflected primarily in the reduction or (non)collection of revenues from taxpayers who were financially unable to pay their debts because of the pandemic (e.g., illness, job loss or furlough, etc.). The State adopted regulations to postpone the payment of some tax liabilities for a specified time⁷⁷ and temporarily exempted specific types of goods from customs duties.⁷⁸ (For example, companies doing humanitarian work or donations were exempted from paying VAT and value-added taxes.) Those decisions have undoubtedly affected national, provincial, and local budgets. At the same time, the State also had to spend money on efforts to prevent the spread of infections and contain the pandemic, including constructing COVID-hospitals, purchasing vaccines, and providing financial assistance to citizens.

To alleviate the economic consequences of the pandemic, the Republic of Serbia set up a Coordination Body to implement the Program of Economic Measures to Reduce Negative Effects of COVID-19 Infectious Disease Pandemic and to Support the Economy of the Republic of Serbia.⁷⁹ Its tasks included coordinating the implementation, addressing open questions, making decisions, and proposing economics-related measures to the Government. The president of the Coordination Body is the minister of finance.

For citizens, the economic consequences were particularly severe for those in healthcare and specific industries dependent on travel, such as hospitality, tourism, and related services. Citizens engaged in these industries were almost entirely prevented from working during the state of emergency. Further, while it is difficult to give even an approximate account of the proportion of people in Serbia who work in the gray zone (without a contract with the employer), those people have also suffered severe economic consequences in the pandemic. “Public sector” employees seem to have suffered the least economically (so far).

Many Serbian citizens (and small- and medium-sized companies that agreed not to fire more than 10% of their employees) were granted financial support to mitigate the economic

⁷⁶ Article 91 of the Serbian Constitution

⁷⁷ See the Decree *Uredba o postupku i načinu odlaganja plaćanja dugovanog poreza i doprinosa u cilju ublažavanja ekonomskih posledica nastalih usled bolesti COVID-19*, *Official Gazette of the Republic of Serbia*, no. 156 of December 25, 2020

⁷⁸ See the Decision *Odluka o uslovima za izuzimanje od plaćanja carinskih dažbina za određenu robu*, *Official Gazette of the Republic of Serbia*, no. 48 of March 31, 2020

⁷⁹ See the Decision *Odluka o obrazovanju Koordinacionog tela za sprovođenje Programa ekonomskih mera za smanjivanje negativnih efekata prouzrokovanih pandemijom zarazne bolesti COVID-19 i podršku privredi Republike Srbije*, *Official Gazette of the Republic of Serbia*, no. 52 of April 7, 2020

consequences of the pandemic. In March 2020, the Republic of Serbia committed to giving its adult (18+) citizens residing in Serbia a one-time financial aid grant of €100 (in dinars), although a month later, this was changed to benefit only pensioners and welfare recipients.⁸⁰ Another special law⁸¹ was adopted that gave citizens two disbursements of €30 (in dinars). Private sector businesses were allowed to exercise specific fiscal benefits and receive direct payments from the budget of the Republic of Serbia.⁸² Loan programs were expanded in some sectors (e.g., agriculture).⁸³ The State also gave grants to some sporting organizations since their events had to be postponed.⁸⁴

The Constitution of the Republic of Serbia forbids discrimination⁸⁵ direct or indirect, on any grounds, including race, sex, nationality, social origin, birth, religion, political or other beliefs, property status, culture, language, age, or mental or physical disability. However, it also states that it is not discriminatory for the Republic of Serbia to introduce specific measures to achieve the full equality of individuals or a group of individuals in a substantially unequal position compared to other citizens. Additionally, Serbia's Anti-Discrimination Act⁸⁶ defines "discrimination" and "discriminatory treatment."⁸⁷ In this context, we need to

80 Legal basis for this payment was in this Decree: *Uredba o formiranju privremenog registra i načinu uplate jednokratne novčane pomoći svim punoletnim državljanima Republike Srbije u cilju smanjivanja negativnih efekata prouzrokovanih pandemijom bolesti COVID-19 izazvane virusom SARS-CoV-2*, Official Gazette of the Republic of Serbia, no. 60/2020. The Decree was adopted by the Government with the President of the Republic as a co-signatory. Later it was revised; see "Vučić: Malu izmenu o isplati 100 evra uveli smo slušajući tajkune koji ne žele tu pomoć," *Danas*, April 24, 2020 <https://www.danas.rs/vesti/politika/vucic-malu-izmenu-o-isplati-100-evra-uveli-smo-slusajuci-tajkune-koji-ne-zele-tu-pomoc/> (Accessed: March 13, 2022).

81 *Zakon o Privremenom registru punoletnih državljana Republike Srbije kojima se uplaćuje novčana pomoć za ublažavanje posledica pandemije bolesti COVID-19 izazvane virusom SARS-CoV-2*, Official Gazette of the Republic of Serbia, no. 40 of April 22, 2021

82 See the Decree *Uredba o fiskalnim pogodnostima i direktnim davanjima privrednim subjektima u privatnom sektoru i novčanoj pomoći građanima u cilju ublažavanja ekonomskih posledica nastalih usled bolesti COVID-19*, Official Gazette of the Republic of Serbia, no. 54 of April 10, 2020, and no. 60 of April 24, 2020

83 See the Decree *Uredba o finansijskoj podršci poljoprivrednim gazdinstvima kroz olakšan pristup korišćenju kredita u otežanim ekonomskim uslovima usled bolesti COVID-19 izazvane virusom SARS-CoV-2*, Official Gazette of the Republic of Serbia, no. 57 of April 16, 2020

84 See the Decree *Uredba o utvrđivanju Programa finansijske podrške sportskim organizacijama u otežanim ekonomskim uslovima usled pandemije COVID-19 izazvane virusom SARS-CoV-2*, Official Gazette of the Republic of Serbia, no. 144 of November 27, 2020

85 Article 21 of the Serbian Constitution

86 *Zakon o zabrani diskriminacije*, Official Gazette of the Republic of Serbia, no. 22 of March 30, 2009.

87 This means any unjustified differentiation or unequal treatment or omission (exclusion, limitation, or preferential treatment) in relation to individuals or groups, members of their families, or persons close to them, overt or covert, on the grounds of race; color; ancestry; citizenship; national affiliation; ethnic origin; language; religious or political beliefs; sex, gender identity, or sexual orientation; property status; birth; genetic characteristics; health, disability, marital, or family status; previous convictions; age; appearance; membership in political, trade union, or other organizations; and other actual or presumed personal characteristics. See Article 2 of the Anti-Discrimination Act.

examine two measures concerning the financial incentives to persons vaccinated against COVID-19.

In 2020, the Republic of Serbia saw a change in the legal regulation of public immunization when the National Assembly supplemented the Act on the Protection of the Population against Infectious Diseases. Thus, the legal basis was set for the health minister to recommend or even mandate immunizations for all persons or specific categories of persons in the event of an infectious disease epidemic. To contain the spread of COVID-19 caused by the SARS-CoV-2 virus, the Republic of Serbia recommended extraordinary immunization against COVID-19 throughout the population.⁸⁸ To encourage those who were reluctant, the State offered financial incentives:

1. They offered financial aid to all individuals who received the vaccine to encourage broader vaccinations rates⁸⁹; approximately 80% of a population must be vaccinated to achieve the herd immunity threshold for the new variants of COVID-19. All citizens of the Republic of Serbia aged 16 or above who received at least one dose of the COVID-19 vaccine by May 31, 2021, were entitled to payment of 3,000 dinars as a reward for their contribution to preventing its spread. The Medicines and Medical Devices Agency of Serbia issued the medical use permit confirming the vaccine's safety, efficacy, and quality.
2. They granted employed persons the right to salary compensation (100% of the salary compensation base granted to employees) who were vaccinated against COVID-19 but still caught it and had to miss work because of it. The compensation was also given to people for whom a COVID-19 vaccination was medically contraindicated. In both cases, the employees needed to provide a physician's medical report on their temporary inability to work and appropriate certificates from competent health institutions.⁹⁰

This provision of financial assistance could be justified by its inarguable contribution to protecting the population and upholding citizens' constitutional right to health. However, some people questioned whether this discriminated against persons who did not want to get vaccinated out of fear, lack of trust (in the science, the State, vaccines in general, e.g.,), or some ideological stance. (Serbia has a mandatory childhood immunization policy for many vaccine-preventable diseases such as measles, rubella, mumps, rotavirus, etc.)

⁸⁸ See the Order *Naredba o sprovođenju vanredne preporučene imunizacije protiv COVID-19*, *Official Gazette of the Republic of Serbia*, no. 155 of December 24, 2020

⁸⁹ See the Decree *Uredba o podsticajnim merama za imunizaciju i sprečavanje i suzbijanje zarazne bolesti COVID-19*, *Official Gazette of the Republic of Serbia*, no. 46 of May 7, 2021

⁹⁰ See Government Conclusion no. 53-4228/2021, *Official Gazette of the Republic of Serbia*, no. 46 of May 7, 2021.

Economic support measures were also prescribed by some local self-governments. For example, at its session of January 29, 2021, the City Council of the City of Novi Sad adopted a Decision on granting financial assistance (100,000 dinars per deceased person) to the families of the citizens from the territory who died of COVID-19 and were buried in the same territory.⁹¹

The National Bank of Serbia also adopted some pandemic-relief measures.⁹² (The National Bank of Serbia is constitutionally recognized as the central bank of the Republic of Serbia, although it remains independent and under the supervision of the National Assembly.) The measures it prescribed largely involved deferrals in meeting payment obligations, such as these:

1. Lessors were required to offer lessees a suspension of debt payments (moratorium).⁹³
2. Banks were required to offer their debtors (natural persons, farmers, entrepreneurs, and companies) a suspension of debt payments (moratorium).⁹⁴

These measures were only temporary. However, that does not mean that the State was inactive in enacting or revising specific regulations concerning the budget or tax liabilities. For example, on November 12, 2020, it adopted the Act Amending the Act on the 2020 Budget of the Republic of Serbia.⁹⁵ Its Explanatory Memorandum clarified that its adoption was in direct response to the epidemiological situation.⁹⁶ In 2021, there were also revisions and amendments to the Act on the 2021 Budget of the Republic of Serbia, in part because of the current epidemiological situation.

7. Summary

Since the Republic of Serbia declared the epidemic of COVID-19 (ongoing), its legal rules have changed significantly. It declared a “state of emergency,” and some local self-governments concurrently declared “emergency situations.” The Republic of Serbia had no legislation

91 See <http://www.novisad.rs/obaveshtenje-o-podnoshenju-zahteva-za-dodelu-pomotshi-porodicama-preminulih-gradjana-od-zarazne-bole> (Accessed: May 5, 2021).

92 Article 95, Paragraph 1, of the Serbian Constitution

93 See the decision *Odluka o privremenim merama za davanje lizinga u cilju očuvanja stabilnosti finansijskog sistema*, Official Gazette of the Republic of Serbia, no. 33 of March 17, 2020

94 See the decision *Odluka o privremenim merama za očuvanje stabilnosti finansijskog sistema*, Official Gazette of the Republic of Serbia, no. 33 of March 17, 2020

95 *Zakon o izmenama i dopuna Zakona o budžetu Republike Srbije za 2020*, Official Gazette of the Republic of Serbia, no. 135/2020

96 See *Explanatory Memorandum to the Act (2020)*, <https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/mml/viewAct/12260> and <https://tinyurl.com/548s3zx6> (Accessed: February 10, 2021)

in place to act as the *lex specialis* for COVID-19. However, various bodies enacted regulations in response to changing circumstances and new information, building up a set of new laws on rights and obligations in the time of the epidemic.

The Constitution of the Republic of Serbia stipulates who has the authority to declare a state of emergency and when and through what procedure they may do so. However, during Serbia's state of emergency, some measures derogating from constitutionally guaranteed human rights were subsequently found to violate the Constitution and certain protected rights. While it is difficult to single out the most egregious of these, an obvious contender would be the so-called curfew constraining people's freedom of movement.

Although the state of emergency in the Republic of Serbia was lifted in May 2020, terminated, special rules applicable to the state of the epidemic remained in force, such as the Act on the Protection of the Population against Infectious Diseases and a variety of bylaws, as well as local decisions made by both authorized and unauthorized bodies. The abundance of bylaws has contributed to the impression that Serbia now governs its rules of conduct only through a handful of laws. The Constitutional Court has declared a number of the special regulations unconstitutional, and many are currently being reviewed for constitutionality and legality.

This chapter also highlighted some of the problems with many of the special regulations. First, some were enacted by bodies with no authority to enact such regulations (e.g., the so-called curfew). Second, some were applied from the date of their publication in the *Official Gazette*, leaving many citizens unaware that there had been a new or revised measure enacted (and some were not published at all). The overall effect was that most citizens found it extremely difficult to know which rules applied at any given time, especially since state officials often reported conflicting information to the media. Third, some local self-governments (emergency management headquarters) enacted their own regulations that remained unpublished and illegally prescribed misdemeanors for violations of those ever-changing regulations.

At the start of the pandemic, Serbia had an insufficient number of sanitary inspectors, who once were the only ones authorized to enforce laws and special regulations for containing an infectious disease. Therefore, less-qualified entities were given the same authority (e.g., national and communal police). This meant that the police could initiate misdemeanor proceedings and issue misdemeanor warrants against violators of the special regulations—even when it was often impossible to know what regulations were in effect and the regulations themselves were not legal because of the enactors' lack of authority or incorrect procedure. Thus, the courts have had to suspend many misdemeanor proceedings and determine compensation for those falsely charged.

Many people breached various special regulations (willingly or unwittingly). Of these, many were detained, and others convicted and punished in criminal or misdemeanor proceedings. The courts imposed strict penalties during the state of emergency, and some of the proceedings were later deemed unlawful (e.g., trial by Skype). Interestingly, there was very little attention paid at the time to questions of the constitutionality or legality of various special regulations. (Similarly, few have examined the negative consequences of applying those disputed regulations.) Eventually, legal scholars and others began to openly question the special laws' constitutionality and legal basis, especially the regulations involving unauthorized bodies or improper procedures. Once this debate surfaced, many of the special regulations were amended to make them lawful. However, these changes did not undo the negative effects of the improper regulations.

Ultimately, unconstitutional and illegal acts could lead to considerable costs to the State in the material sense if it is determined that citizens and legal entities that suffered losses because of such regulations are entitled to compensation.

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