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SERBIA AND COVID-19: THE STATE OF EMERGENCY AS A STATE OF UNCERTAINTY

***Abstract**:*

In this paper, I aim to demonstrate that the outbreak of the COVID-19 crisis has only intensified the deterioration of Serbian constitutional order and has weakened its democratic institutions. The central argument is that the state of emergency declared in mid-March 2020, as well as the other measures imposed on the citizens affecting their human rights, has been problematic from both procedural and substantial aspects. The paper discusses the consequences of those measures for the quality of democracy and the rule of law in Serbia.

***Key words**: Covid-19, state of emergency, constitutionality, rule of law, human rights.*

INTRODUCTION

The COVID-19 pandemic reached Serbia in a sensitive political moment, at the very beginning of the parliamentary election campaign scheduled for late April 2020. An important part of oppositional political parties decided to boycott the elections, citing, among other reasons, non-democratic context in which elections are taking place and inability to present their programs to the constituencies because the government effectively controls TV channels with nation-wide coverage. Indeed, the existing research has already demonstrated that detected imbalance between the three branches of government in favor of the executive, has gained a new dimension. Not only does the executive power *de facto* have supremacy over the parliament, but the parliament itself, i.e., its ruling majority, has made an effort to further abuse and even make its own procedures meaningless (Tepavac & Glušac 2019, 97). In this form of executive aggrandizement, elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences (Bermeo 2016, 10). Coppedge (2017) identifies this gradual concentration of executive power as a key pattern of contemporary autocratization. Such gradual process may indeed be more dangerous than sudden regime change, as it comes with less obvious warnings.

Even more worrisome trend in Serbia is that the supremacy of the executive power in Serbia has gone beyond *de facto* „supremacy" over parliament, having most direct impact on collapsing the entire system of separation of powers (Tepavac and Glušac 2019, 98). The executive in Serbia has mastered clandestine tactics like harassment of media, repression of the opposition, and the general subversion of horizontal accountability mechanisms.

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In this paper, I aim to demonstrate that the outbreak of the coronavirus crisis only intensified the deterioration of Serbian constitutional order and has weakened its democratic institutions. The central argument is that the state of emergency declared in mid-March 2020, as well as the other measures imposed to the citizens affecting their human rights, has been problematic from both procedural and substantial aspects. This particularly applies to measures restricting the freedom of movement.

The paper discusses the consequences of those measures, and especially the manner in which they have been made for quality of democracy and the rule of law in Serbia. It does not deal with Serbia's response to Covid-19 pandemic in terms of effectiveness of the measures from medical perspective, especially because it is too early to assess that, given the crisis in still going on.

1. The state of emergency

Serbia is a prime example of how the state can change its response to the crisis for 180 degrees within couple of weeks. During one of the first official press conferences about COVID-19, held at the Presidency on February 26, Mr. Branimir Nestorović, MD, well-known pediatric pulmonologist, and later a member of the Crisis Headquarters for Combating the Outbreak, defined COVID-19as „the most ridiculous (virus) in the history of humanity" (YouTube 2020).

On March 4, the elections were formally announced to be held on April 26. A day later, tens of thousands of people gathered at the local committees of the ruling Serbian Progressive Party (SNS) to submit their signatures for the electoral list. The first official case of coronavirus was officially recorded in Serbia on March 6. Already on March 15, Serbia declared the state of emergency (SoE), as the most exceptional measure on the disposal of the state. It goes without saying that, as most countries, Serbian legal system foresees a plethora of mechanisms and measures designed to fight different threats to public health, including infectious diseases. To that end, from the perspective of good and effective governance, it is indeed worrisome that Serbian authorities declared the SoE, without previously trying to exhaust all other less restrictive legal regimes, such as the emergency situation, as provided for by the Law on the Protection of the Population from Infectious Diseases and the Law on Emergency Situations. However, from the angle of democratic procedures and the rule of law, it is not only the reasons for declaring the SoE that are worrisome, but also the way it was declared.

As per Article 200 of the Constitution, the SoE in Serbia may be declared only in exceptional circumstances, that is, when „the survival of the state or its citizens is threatened by a public danger". Given that this provision does not indicate whether a survival is threatened by internal or external cause, it should be read to encompass both. To that end, Serbian Constitution belongs to the group of 56% of world's constitutions that include both types of threats (Rooney 2019). In fact, according to the data gathered by

Rooney (2019), only 15% of states restrict the use of emergency powers only following an attack by a foreign entity.

According to Article 200, it is the jurisdiction of the National Assembly to proclaim the state of emergency. However, the National Assembly did not declare the state of emergency. It was declared with the triple signature of the President of the Republic, Prime Minister and Speaker of the National Assembly, which is allowed by the Constitution, but only if „the National Assembly is not in a position to convene". While the Constitution does not specify under which occasions the National Assembly is prevented from convening, it was expected that the Speaker would provide the reasons for not convening to the public, given that exception to the exception was used in this case. Interestingly, MPs showed little initiative to convene in this important moment, when crucial decisions had to be made. The majority of MPs, with the exception of several opposition MPs, remained silent on the lack of Parliament's substantive involvement in the process (Tepavac & Branković 2020, 28).

A week after the SoE was declared, the Speaker finally addressed the public explaining the plenary session of the Parliament could not be scheduled due to the Government's ban on all gatherings above 50 people in indoor public space (N1 2020). This ban was introduced on the same day as the SoE, with the Minister of Interior's Order that prohibited all indoor gatherings in public places (MoI 2020a) as one of the anti-corona measures. However, this explanation of the Speaker can indeed be considered absurd, given that the mentioned constitutional provision refers to the factual impossibility of gathering of MPs. No act of the Government or any executive body may be an obstacle to holding a session of the highest legislative body. In fact, with such reasoning the Speaker actually provided the best evidence for completely distorted relations between the branches of power in Serbia. More importantly, the reasons presented are far from reaching the constitutional threshold.

The Constitution further stipulates that when the decision on the state of emergency has not been passed by the National Assembly, the National Assembly shall verify it within 48 hours from its passing, that is, as soon as it is in a position to convene. The National Assembly did not verify the decision on the state of emergency within 48 hours. Thus, the verification is left for some better times, i.e., when it would be in a position to convene.

Indeed, after more than 45 days of silence, Serbian Parliament finally revived from hibernation to claim its place in the decision-making process. It was the President Vučić on Pink TV that announced that the Parliament would convene. In a matter of couple of days, all safety precautions for the plenary session of 250 MPs were prepared, including protective gear and barriers to enable the respect of physical distancing. Again, it remained unexplained why this could not have been done before the declaration of the state of emergency, to enable the National Assembly to hold a session. In fact, at the moment when the National Assembly finally met on April 28, the daily number of infected with COVID-19 was 222,

comparing to 48 cumulative cases on March 15 when the SoE was declared (Government of Serbia 2020).

The National Assembly met on April 28 upon the invitation of the Speaker, with two items on the agenda: the verification of the decision to declare the SoE and the Bill confirming the decrees adopted by the Government with the President's co-signature. The second item was necessary, given that the Constitution prescribes that in cases when the measures providing for derogation from human and minority rights have not been prescribed by the National Assembly, the Government shall be obliged to submit the decree on measures providing for derogation from human and minority rights to be verified by the National Assembly. The National Assembly adopted both acts. On May 6, the second session was held, again with two items of the agenda: Proposal to lift the state of emergency and the Bill concerning the validity of the decrees that the Government adopted during the SoE with the President's co-signature. Both documents were adopted and the SoE was lifted on the same day - May 6.

Measures derogating human and minority rights adopted during the SoE ceased to be valid with the abolishment of the SoE. However, that does not mean they have not had any effect. Quite contrary, those measures caused heated discussion among lawyers, scholars and the civil society, for both procedural and substantive reasons. Before concentrating on those key measures and their effect, it is useful to provide some background on human rights and the rule of law in the context of the state of emergency.

2. When the state of emergency becomes a zone of lawlessness

The widespread of COVID-19 and a consequent introduction of the state of emergency in a number of countries, inspired many to recall Carl Schmitt's famous maxim „Sovereign is he who decides on the exception" (Schmitt 2005, 5). There is, indeed, a dark history of using emergency powers to violate human rights. This is epitomized by Schmitt's theory itself, which he used to proffer an expansive reading of Article 48 of the Weimar Constitution which was ultimately used to arrogate the extant constitutional order and establish the Third Reich (Greene 2020).

It should be reminded that „a state of exception" in Schmidtian terms refers to any kind of severe economic or political disturbance that requires the application of extraordinary measures, i.e., measures beyond the law, as *necessitas non habet legem* (necessity knows no law). Those measures are exercised before a legal order could be established. Nonetheless, in most modern states, including Serbia as described above, the state of emergency is not constitutionallydesigned as a zone of lawlessness. Most states of emergency are exercised in order to defeat the threat and restore normalcy, i.e., most emergencies, in fact, have lots of law (Greene 2020). Thus, Schmitt seems to be less useful in analyzing emergency responses to COVID-19. Legal voids in contemporary legislations can, at most, amount to *legal black holes*-zones of discretion created by law but within which there is little to no legal constraints on the decision maker; or *legal grey holes*-zones of discretionary power

where appears to be legal oversight and judicial review of this discretion but such judicial oversight is so light touch as to be non-existent (Dyzenhaus 2009). Nonetheless, as argued by Greene, these legal holes can potentially evolve into Schmidtian „zones beyond law", because:

Legal black holes reduce the capacity of judicial oversight of emergency powers. Legal grey holes, however, risk legitimizing exceptional powers by cloaking them in a thin veil of legality that is the result of an overly deferential judiciary and light-touch review. This can further increase the propensity of such powers becoming permanent (Greene 2018).

Although at present this is not the case in most European states, in Serbia it might be. In the course of „the war against the invisible enemy" (MoD 2020), as the President of the Republic called the state's efforts to suppress COVID-19, Serbia introduced measures presented to the public as restrictions to the freedom of movement and the freedom of assembly. However, when those legal measures are more closely analyzed, it seems that they in fact present derogations of the rights that cannot be limited, neither by international human rights standards, nor the Serbian Constitution.

There were two key legal documents derogating human rights during the SoE: The Government's Decree on Measures during the State of Emergency and The Minister of Interior's Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia. Their provisions directly affected the freedom of movement and the freedom of assembly, which fall within the group of rights that may be restricted during the state of emergency, as per Article 202 of the Constitution. Nonetheless, some of the measures have also indirectly albeit manifestly restricted the right to fair trial and the rights of persons deprived of liberty. Those rights cannot be limited, according to the Constitution and the international human rights treaties.

The European Convention on Human Rights allows derogations from certain human rights (Hafner-Burton, Helfer & Fariss 2011; McGoldrick 2004).Article 15 of the Convention stipulates that: „In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". The same Article also imposes an obligation of a High Contracting Party to inform the Secretary General of the Council of Europe of the measures which it has taken and the reasons therefor.

Serbia did inform the Secretary General of the Council of Europe about derogating from its obligations under the Convention (MFA 2020). However, it did that on April 6, that is, more than three weeks after declaring the SoE. Another problem is that *Note Verbale* addressed to the Secretary General did not mention expressly the articles (i.e., which rights) affected by derogation. Moreover, *Note*

Verbale lacked any additional explanations guiding through the specific measures which have been adopted. It did not contain any reference to the relevant Convention provisions. It is true that there is no prescribed form for the notification of derogation (European Commission on Human Rights 1959); thus, the mentioning of specific Convention articles is not required. However, Council of Europe's European Commission on Human Rights, pointed out, as early as 1959, that sufficient information which would enable the High Contracting Parties and the Commission to „appreciate the nature and extent of the derogation from the provisions of the Convention" (European Commission on Human Rights, 1959, para. 80) is necessary, along with the requirement that the notification is made without delay and that the notification contains the reasons that led the state to derogate from its obligations (Zghibarta 2020). Serbia's *Note Verbale* has lacked these elements. More problematic, the Government's Decree on Measures during the State of Emergency and the Minister of Interior's Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia have also lacked these essential elements.

A11 Initiative (2020), Belgrade-based NGO focusing on social and economic rights, provided a usefully list of things these regulations missed to define:

- They fail to provide an adequate answer to the question whether and why the introduction of the state of emergency and derogation measures was justified, necessary and legitimate (ECtHR, Mehmet HasanAltan v. Turkey, para. 94);
- They do not explicitly predict which human and minority rights guaranteed by the Constitution are derogated (HRCtee, General Comment No.29, para. 10);
- They do not define in a sufficiently precise manner which derogation measures have been introduced, their nature and content (HRCtee, General Comment No.29, para. 10);
- They fail to provide a detailed explanation why any of the measures has been introduced concerning certain categories of population, vulnerable groups, particular geographical area or certain legal institutes, which raises the question of the use of discriminatory criteria (ECtHR, A. and Others v. The United Kingdom, para. 190);
- They do not provide the possibility for individuals to bring an effective and efficient remedy to the competent judicial authority against the derogation measures that personally affect them (ECtHR, Aksoy v. Turkey, para. 76 and para. 78; Brannigan and McBride v. The United Kingdom, para. 59);
- They do not explicitly stipulate that the right to an effective and efficient remedy has been abolished in relation to the derogation measures affecting each individual individually (ECtHR, Aksoy v. Turkey, para. 76 and para. 78; Brannigan and McBride v. The United Kingdom, para. 59).

The Order of the Minister of the Interior on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia introduced a complete restriction of movement for the 65+ population along with a daily curfew from 8p.m. to 5a.m. for everyone else was introduced on March 18 and lasted, with frequent changes (YUCOM 2020a, 4), until the end of the SoE. During several weekends, special curfews were imposed lasting for more than 48 hours, including 60 hours from April 10 to 13, and the longest one, introduced around the Orthodox Easter (April 16-20), prohibiting citizens to leave their homes for 84 hours (except some daily windows to walk pets for physiological purposes). Although these measures were officially introduced under the veil of restriction of the freedom of movement, they have effectively presented derogation measures from the rights of persons deprived of liberty. According to the case-law of the European Court of Human Rights and the UN Human Rights Committee, all persons forbidden to leave home for 24 hours are deprived of their liberty within the meaning of Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) (A11 2020).

The Decree on Offense for Violation of the Order of the Minister of the Interior on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia introduced misdemeanor liability for curfew violation, despite the fact that such an offence is already recognized as criminal in the Criminal Code (Tepavac and Branković 2020, 29). With that, the perpetrators could have been punished for the same act in both offense and criminal proceedings, which is a violation of the *nebis in idem* principle (Danas 2020; YUCOM 2020a).

Beyond the procedural aspects of its implementation, this Order has suffered from even greater substance problem - it has restricted human rights. Derogations from constitutional human rights guarantees can only be made by the Government with co-signature of the President (in time when the National Assembly cannot convene), and not by the ministries. The mandate to introduce measures derogating from human and minority rights cannot be delegated to any other state authority, including the ministries (BCHR 2020). The trade of jurisdiction between the highest state authorities is forbidden.

As part of anti-corona measures, Serbia also closed its borders. All those arriving in Serbia received instructions for so-called obligatory self-isolation (isolation at home) of 14-28 days, depending on the country they were coming from. The police controlled whether citizens respected the instruction. Those who did not were charged for criminal offence of failure to comply with health regulations during the epidemic (Article 248 of the Criminal Code) and were detained pending the trial. The problem was that the regime and duration of self-isolation changed several times within only two weeks (March 16 – April 1). Not all citizens were properly informed on the substance and duration of their obligations when they entered the country. In fact, some of them were instructed to self-isolate even before any legal act

prescribing such obligation was adopted. In those cases, constitutionally guaranteed prohibition of retroactive effect of laws and other general acts (Article 197 of the Constitution) was violated.

Judiciary also underwent changes overnight, also supported by „suggestions" coming from the government to insist on detention for all citizens who violate the (self)isolation measures. Novelties in this branch of power include restricting the work of the courts to priority cases, introducing urgent prosecution proceedings and, particularly, online trials for Covid-19 related offences via Skype, which had caused more problems than it had solved (YUCOM 2020b, 11-13).

Finally, the Order of the Minister of Health Restricting Movement on Roads Leading to Asylum and Reception Centre and their Facilities prohibited access to the Centre grounds and facilities and the Centre residents from leaving the Centers except for justified reasons (e.g., to see a doctor). The groups of CSOs filed an initiative with the Serbian Constitutional Court to review the constitutionality and legality of this Order, arguing that it is incompatible with Article 27 of the Serbian Constitution, because it amounts to a restriction of the right to liberty and security of the residents of asylum and reception Centers, who are practically deprived of liberty given the duration of the measure, the way it is implemented and penalty for non-compliance (BCHR 2020b).They argued that this measure did not fulfil the proportionality requirements either. Furthermore, the duration of prohibition to leave the asylum and reception centers had not been strictly limited in time (BCHR 2020b).

CSOs have also claimed the Order is incompatible with Article 21 of the Serbian Constitution, which prohibits discrimination on any grounds, given that it did not even provide a written explanation of why the authorities deem that refugees, asylum seekers and irregular migrants accommodated in asylum and reception centres are at greater risk of spreading the virus than the rest of Serbia's population now that the state of emergency has been lifted (BCHR 2020b). The UN High Commissioner for Human Rights warned about the dangers of exclusion of certain minority groups from individual rights and increased discrimination against migrants during Covid-19 pandemic (OHCHR 2020).

3. A way forward

Prior studies have showed that governments are more likely to violate fundamental human rights during states of emergencies (Richards and Chad Clay 2012). Neumayer (2013) demonstrated that this relationship only applies for autocracies, to a lesser extent for hybrid regime and not at all for democracies. The most recent report by Freedom House (2020) categorizes Serbia as hybrid regime. Serbia's response to COVID-19 fits perfectly into such categorization. According to the Freedom House's methodology, in this type of regime „democratic institutions are fragile and substantial challenges to the protection of political rights and civil

liberties exist" (Freedom House, n.d.). That has exactly been manifested in Serbia during the fight against COVID-19.

Almost every measure that has some influence on human rights adopted during the state of emergency was controversial, either from procedural or substantial aspects, or usually both. As shown in this paper, even the very state of emergency was declared in a constitutionally „exceptional" way. Many measures derogating from human rights guaranteed by the Constitution were adopted by either non-competent authority, such as ministries, or they prescribed restrictions of human rights in a vague manner, causing legal uncertainty and allowing a wide space for interpretations. Despite official claims that only limitations of the right to freedom of assembly and the right to freedom of movement were introduced, the regulations adopted during the state of emergency manifestly caused for derogations from the right to liberty and security, the right to a fair trial and even the rights of persons deprived of liberty. That has been particularly worrisome as the right to a fair trial and the rights of persons deprived of liberty are among those rights that may not be restricted under any circumstances, according to the Constitution.

The Serbian Constitution has regulated the state of emergency in a sufficiently detailed manner, preventing the government to consider it as a zone of lawlessness. It also provides almost no room for legal black or grey holes. However, during the state of emergency declared due to the COVID-19 pandemic, the Government has demonstrated little regard of constitutional provisions. It is essential that the Constitutional Court proves it is the protector of the Constitution, and not of the Government. Unfortunately, with its first decision related to the state of emergency, the latter was proved. In late May 2020, the Court dismissed all filed initiatives challenging the constitutionality of the Decision on Declaring a State of Emergency (Constitutional Court 2020). Such decision of the Court provoked very negative reactions and severe criticism by constitutional lawyers and civil society (Jovanović 2020). It remains to be seen how the Court will respond to several initiatives challenging the constitutionality of measures restricting human rights during the state of emergency. If morning shows the day, the Constitutional Court will most probably support the Government instead of the citizens and the constitutional order.

The well-thought-out decisions of the Constitutional Court in this matter are not only needed to protect the legal order and reiterate the centrality of human rights in democratic society, but also to pave the path for the future. The existing research has demonstrated that it is almost 60% more likely to experience a substantial decline of democratic regime attributes after the state of emergency (Lührmannand Rooney 2019, 18). Serbia is in critical moment with having general elections just after the state of emergency. Such context presents „an opportunity structure for leaders to dismantle democratic institutions and resistance to autocratization" (Lührmannand Rooney 2019, 18). Among other things, there are two sets of constraints on incumbents that, in theory, should prevent them to misuse the power in such

circumstances - efficient public administration and accountability relationships. The former encompasses the rule of law and an impartial public administration which should limits incumbents' access to state resources (Merkel, 2010). Merkel (2010) argues that with these two in place, even though they hold the most powerful state office, incumbents cannot arbitrarily use state resources for their personal ends or without following a prescribed set of procedures. However, in the Serbian context, one does not have to think long or hard to come up with a rich list of instances when that happened in the last few years. The latter, i.e., accountability relationships, serves to constrain the power of elected officials in democracies (Mechkova, Lührmannand Lindberg 2017; O'Donnell 1998). The structural accountability problems in Serbia have already been well documented (Tepavac & Glušac 2019; Vladisavljević 2019; Bieber 2018). In other words, those two sets of constraints only formally exist in Serbia. Dismantling of democratic institutions and other prerogatives of democracy was under way well before COVID-19, which has only accelerated it.

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UNIVERZITET U BEOGRADU – INSTITUT ZA FILOZOFIJU I DRUŠTVENU TEORIJU
dr Luka Glušac, naučni saradnik

Poziv za održavanje predavanja na međunarodnoj naučnoj konferenciji

Poštovani kolega Glušac,

Ovom prilikom Vas pozivam da održite predavanje na temu posledica vanrednog stanja uvedenog tokom pandemije COVID-19 na kvalitet demokratskih institucija i vladavine prava u Srbiji na međunarodnoj naučnoj konferenciji„Bezbednosne krize u 21. veku i kako njima upravljati?“ koja će biti održana13. i 14. oktobra 2020. godine.
Konferenciju zajednički organizuju Centar za analizu rizika i upravljanje krizama (Beograd), Hrvatska udruga za međunarodne studije (Zagreb), Institut za razvoj i međunarodne odnose (Zagreb) i Libertas međunarodno sveučilište (Zagreb).
Zbog trenutnih prilika, konferencija će biti održana online. Radni jezik konferencije biće engleski, te Vas molim da pripremite predavanje na tom jeziku. Predavanje će nakon konferencije biti štampano u celosti u zborniku radova, nakon standardne akademske procedure.
U nadi da ćete moći da učestvujete u radu konferencije i održite predavanje, srdačno Vas pozdravljam.

U Beogradu, 4. maja 2020. godine

prof. dr Zoran Keković
predsednik Uređivačkog odbora