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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**INTERIM REPORT**

**ON THE MEASURES TAKEN IN THE EU MEMBER STATES  
AS A RESULT OF THE COVID-19 CRISIS  
AND  
THEIR IMPACT ON  
DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS**

**Adopted by the Venice Commission  
at its 124<sup>th</sup> online Plenary Session  
(8-9 October 2020)**

**on the basis of comments by**

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## I. Introduction

1. By letter dated 1<sup>st</sup> July 2020, the President of the European Parliament, Mr David Sassoli, requested a report from the Venice Commission on the measures taken in the EU Member States as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights. This request followed the support provided by the Conference of Presidents of the European Parliament (in their meeting of 11 June 2020) to the proposal made by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to seek a report from the Venice Commission on this issue.
2. Mr Nicos Alivizatos, Ms Veronika Bílková, Mr Oliver Kask, Mr Rafael Rubio, Mr Kaarlo Tuori and Mr Ben Vermeulen acted as rapporteurs for this report.
3. In the preparation of this report, the Venice Commission has relied on the comments of its rapporteurs; its recently adopted [Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections](#) (hereinafter, the “2020 Reflections”); its [Rule of Law Checklist](#); its [Compilation of Opinions and Reports on States of Emergency](#); its [Observatory of the state of implementation of declarations of states of emergency and of emergency legislation in Venice Commission member states](#) as well as on relevant case-law from constitutional courts and courts with equivalent jurisdiction, which can be found in the [CODICES](#) database of the Venice Commission. The Venice Commission has also relied on other Council of Europe documents, including the Parliamentary Assembly of the Council of Europe’s [Report by the Committee on Legal Affairs and Human Rights on the Impact of the Covid-19 pandemic on human rights and the rule of law](#); the work on [Democratic governance and Covid-19](#) by the Council of Europe’s European Committee on Democracy and Governance (CDDG); and the Council of Europe’s Congress of Local and Regional Authorities’ [Toolkit for Member States on Respecting Democracy, Rule of Law and Human Rights in the Framework of the Covid-19 Sanitary Crisis](#). The European Parliament’s *Briefings* carried out by the European Parliamentary Research Service *on States of emergency in response to the coronavirus crisis: situation in certain Member States*;<sup>1</sup> the *Working Document on Democracy, Rule of Law and Fundamental Rights Monitoring Group* (DRFMG) presented by the DRFMG Chair to LIBE on 13 July 2020;<sup>2</sup> the *European Parliament Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences* ([2020/2616\(RSP\)](#)) and the *Bulletins* prepared by the European Union Agency for Fundamental Rights (FRA) since the beginning of the Covid-19 crisis on the Fundamental Rights Implications of Covid-19<sup>3</sup> were also a valuable source of information.
4. The present Interim Report was examined by the Commission members through a written procedure replacing the sub-commission meetings and was subsequently adopted by the Venice Commission at its 124<sup>th</sup> online Plenary Session (8-9 October 2020).

## II. General remarks

5. The outbreak of Covid-19 has generated a global health crisis that has not been witnessed for a century, since the Spanish flu pandemic in 1918-1920. A dangerous virus has successfully managed to spread with ease and at great speed around the globe. This is a new element to contend with and the current health crisis has led to calls for greater international cooperation and coordination.

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<sup>1</sup> [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)649408](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649408);  
[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)651914](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)651914);  
[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)651972](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)651972);  
[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)652002](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)652002)

<sup>2</sup> [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/LIBE/DV/2020/07-13/1204406EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/07-13/1204406EN.pdf)

<sup>3</sup> <https://fra.europa.eu/en/themes/covid-19>

6. Due to the pandemic, States are faced with the difficult task of having to find a balance between fundamental freedoms and principles of democratic decision-making on the one hand, and (prevention of the risk to) health policies and positive obligations that flow from the right to life as well as the necessity to effectively end this health crisis, on the other. In this interim report, the Venice Commission will not deal substantively with this complex issue.

7. When the World Health Organization (WHO) declared, on 11 March 2020, that the outbreak of Covid-19 had reached the level of a global pandemic and called for countries to take urgent and aggressive action to stop the spread of the virus,<sup>4</sup> countries around the world took action to deal with this health crisis. In Europe, some countries opted to declare a state of emergency while others chose a different approach to deal with this health crisis. All actions taken by countries, whether through the declaration of an emergency or equivalent, will have had an impact to a lesser or greater degree on the state of democracy, the rule of law and human rights. These will be analysed below.

8. The request from the European Parliament to the Venice Commission is to focus on the measures taken by EU Member States as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights. To this end, the request identifies the following main areas: checks and balances, parliamentary oversight, period of emergency measures and elections during the period of an emergency situation. These main areas are sub-divided into questions addressing concerns with respect to identifying effective safeguards where EU Member States adopt exceptions, derogations or restrictions to the exercise of human rights. They concern assessing the necessity and proportionality of possible limitations to parliamentary scrutiny that may create a risk for democracy, the rule of law and fundamental rights; identifying the necessary mechanisms in place to ensure a full *ex post* parliamentary scrutiny of the emergency measures taken once they are lifted; investigating whether criteria assessing legislation adopted during a period of emergency go beyond what is necessary and proportionate; and considering whether elections can be held during an emergency situation respecting constitutional and international standards on free and fair elections.

9. This report will first refer to international and regional human rights standards that apply during emergency situations, then turn to the relevant national law and practice in EU Member States and then to the scrutiny and oversight of emergency measures. A separate chapter has been devoted to elections in this report due to the specificity of electoral rights. This specificity includes the right to periodic elections and the balance to be struck between the risks to the right to free elections arising, on the one hand, from the postponement of elections and, on the other from holding them under restrictive conditions.

### **III. International and regional human rights standards**

#### **A. International and regional instruments**

10. International human rights law which, as stated by the Office of the United Nations High Commissioner for Human Rights, encompasses nine core universal international human rights instruments,<sup>5</sup> seeks to ensure that State Parties apply the core or absolute human rights at all times – including during times of crisis or emergency situations. All EU Member States are parties to six of the nine core international human rights instruments i.e. the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination against

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<sup>4</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>5</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). Of the three others – the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the International Convention for the Protection of All Persons from Enforced Disappearance (2006) and the Convention on the Rights of Persons with Disabilities (2006) – the latter has been acceded to by 26 out of the 28 EU Member States, whereas the other two enjoy less of a success in Europe.

11. On the European regional level, there is the European Convention on Human Rights (1950) and the Charter of Fundamental Rights of the European Union (2009). All EU Member States are also Member States of the Council of Europe, hence parties to the European Convention on Human Rights (1950) and all EU Member States are automatically parties to the Charter of Fundamental Rights of the European Union which, unlike the ECHR, contains a number of social rights, many of which are based on the Council of Europe's European Social Charter (1961). As regards the latter, which is gradually being replaced by the revised European Social Charter (1996), 22 EU Member States (and the UK) are parties to the former and 19 out of 27 are parties to the latter. The European Social Charter, also referred to as the Social Constitution of Europe, is a Council of Europe treaty and serves as a counterpart to the ECHR and guarantees fundamental social and economic rights. The Covid-19 crisis has shown the importance of ensuring progress with respect to social rights and particularly the development of universal public health services – it is crucial that the European Social Charter is used to shape human-rights compliant responses to the Covid-19 crisis and to take stock once the crisis is over.<sup>6</sup>

## **B. Exceptional situations - in general**

12. The global outbreak of Covid-19 has created an international public emergency situation. Such a situation may involve restrictions and exceptions to human rights as foreseen in human rights treaties and in the domestic legal order of most EU Member States, which have their own bill of rights<sup>7</sup> as well as derogations from normal human rights standards.

13. In this context, the Venice Commission, in its 2020 Reflections, has identified three main instruments under international human rights law that accommodate exceptional situations: the first is exception to human rights, which excludes from the specific scope of such human rights certain actions taken in times of emergency. For instance, Article 4.3 of the ECHR stipulates that the prohibition of forced and compulsory labour, enshrined in Article 4.2 does not extend to “*any service exacted in case of an emergency or calamity threatening the life or well-being of the community*” (par. c)). The existence of an emergency or calamity is the main precondition for the application of exceptions. This application, moreover, may not collide with other protected rights and interests. In the case of Article 4.2 of the ECHR, for instance, that means that the term “*any service*” has to be interpreted in the light of the ECHR as a whole and the impact of the service on the enjoyment of other human rights must be considered. Thus, Article 4.2 may not be used to justify a “service” which would consist of an inhuman or degrading treatment or which would completely deny the person the enjoyment of his or her right to family life (e.g. quarantining people over a period of years).

14. The second instrument is limitation to human rights, the possibility to do so is laid down in restriction clauses, which allow States to restrict certain non-absolute human rights in order to protect other rights or important interests. Limitations are subject to the tests of legality (prescribed by law), legitimacy (pursue a legitimate aim) and proportionality (proportionate to the aim, necessary - needed to reach the aim - and temporary.<sup>8</sup> For instance, Article 10.2 of the

<sup>6</sup> <https://www.coe.int/en/web/european-social-charter/social-rights-in-times-of-pandemic>

<sup>7</sup> See Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, item G.

<sup>8</sup> See UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), *General Comment 29, States of Emergency (article 4)*, 31 August 2001, para 5.

ECHR stipulates that the right to freedom of expression “*may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*”. The European Court of Human Rights (ECtHR) and other international human rights bodies, as well as national courts, have developed a rich case-law specifying the content of each of the elements of the test of legality and proportionality.<sup>9</sup>

15. The third instrument is a *derogation to human rights*, the temporary suspension of certain human rights guarantees<sup>10</sup> resorted to in a state of emergency. Derogations are more radical measures than exceptions and limitations and may be used only in exceptional circumstances of “*war or other public emergency threatening the life of the nation*” (Article 15.1 of the ECHR). Derogations are subject to the conditions of necessity, proportionality and temporariness. They also entail procedural obligations (declaration of a state of emergency, notification under human rights treaties) that make oversight easier and more robust. Again, there is a rich case-law related to derogations at the international and national level.<sup>11</sup>

16. In the context of the Covid-19 crisis, until now, only three EU Member States have derogated from international and regional human rights instruments during this crisis: Estonia<sup>12</sup>, Latvia<sup>13</sup> and Romania.<sup>14</sup> All three have sent notifications under Article 15 of the ECHR. The Council of Europe’s Treaty Office has created a special webpage to that effect entitled “[Notifications under Article 15 of the Convention in the context of the Covid-19 pandemic](#).” These three countries have also notified the United Nations about derogating from the ICCPR.<sup>15</sup>

### C. State of emergency

17. The notion of a state of emergency and the circumstances that might give rise to a declaration of such a state are primarily defined by domestic law. In the present report, “state of emergency” should be understood in this sense, even if international law imposes certain limits. In particular, if emergency measures entail derogation from human rights, then the exceptional situation justifying such derogation needs to meet the definition of “*public emergency which threatens the life of a nation*” (Article 4 ICCPR and Article 15 ECHR).

18. A state of emergency is premised on the dichotomous scheme of normalcy and exception. The “sovereignty approach” sets out that a state of emergency lies outside legal regulation and is not subject to it; whereas the “rule of law approach,” prescribes that a state of emergency is itself a legal institution subject to legal regulation, although the rules applicable to it might be different from those applicable in normal times. Current international law as well as virtually all national legal orders adhere to the latter approach: even the state of emergency is regulated by

<sup>9</sup> See Venice Commission, *The Bulletin: The Criteria of Limitation of Human Rights in the Practice of Constitutional Justice*, 2004.

<sup>10</sup> See Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*. See also Higgins, Rosalyn, *Derogations Under Human Rights Treaties*, *British Yearbook of International Law*, Vol. 48, 1976-77, pp. 281-320; Cowell, Frederick, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, *Birbeck Law Review*, Vol. 1, 2013, pp. 135-162.

<sup>11</sup> See ECtHR, *Derogation in time of emergency*, *Fact Sheet*, April 2020; J. Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992; R. Higgins, *Derogations Under Human Rights Treaties*, *British Yearbook of International Law*, Vol. 48, 1976-77, pp. 281-320.

<sup>12</sup> Article 15 ECHR notification from 20 March to 18 May 2020.

<sup>13</sup> Article 15 ECHR notification from 16 March to 10 June 2020 (with communications regarding the withdrawal made on 16 April 2020, 15 May 2020 and 3 June 2020).

<sup>14</sup> Article 15 ECHR notification from 18 March to 15 May 2020 (with communications regarding the withdrawal made on 3, 15, 22, 28 April, 4, 13 May 2020).

<sup>15</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)

law, albeit through a more flexible legal regime.<sup>16</sup>

19. In this respect, the Venice Commission has stated that “[t]he concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail.”<sup>17</sup> The rule of law consists of five fundamental principles: legality, legal certainty, prevention of abuse (misuse) of powers, equality before the law and non-discrimination and access to justice – the content of which will not be developed here.<sup>18</sup>

20. In order to be legitimate, a state of emergency must take into account the nature, severity and duration of the extraordinary situation. These aspects should determine the type, the extent and the duration of the emergency measures that the country may lawfully resort to.

21. All emergency measures, derogations and limitations are subject to three general conditions, those of necessity, proportionality in the narrow sense and temporariness (all in essence being elements of the principle of proportionality in the broader sense). These conditions have been regularly applied, and interpreted, in the case-law of the ECtHR, the Court of Justice of the EU and various constitutional (and other) courts of the EU Member States. The very existence of grounds for a declaration of a state of emergency has been subject to judicial review as well. However, such review in general took place to a more limited degree due to judicial self-restraint, especially in the context of assessing the derogation from human rights instruments.

22. During states of emergency, countries often introduce shifts in the distribution of powers to deal with the crisis at hand.

23. In this respect, the principle of *necessity* indicates that during the state of emergency – declared or undeclared – only such limitations to human rights and shifts in power that are necessary to help overcome the exceptional situation may take place. At the same time, the purpose of these limitations and shifts in power must in essence consist in overcoming the emergency and returning to normalcy. Additional limits to human rights and shifts in the powers that would not be in any way linked to the emergency situation cannot be justified on those grounds.

24. The principle of *proportionality (in the narrow sense)* indicates that shifts in the redistribution of powers must be proportionate, in their scope and extent, to the nature and severity of the threat to be overcome. Thus, even such shifts which might be adequate (or, rather, useful) to help overcome the emergency situation, but which would clearly go too far, making for instance long-term changes in the structure of the State powers, would not be acceptable under the principle of proportionality.

25. The principle of *temporariness* indicates that any shifts in the distribution of powers must be limited in time to the period of the emergency situation. The termination of this state (at the latest) should entail the return to normalcy. At the same time, any emergency measure should be suspended as soon as it is no longer necessary and proportionate.

26. It must be emphasised that the assessment of the three conditions (necessity, proportionality and temporariness) with regard to emergency measures is not a once-and-for

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<sup>16</sup> See Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, paragraph 8.

<sup>17</sup> CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, paragraph 44.

<sup>18</sup> See Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

all issue. As the situation evolves over time, it is important that the measures reflect this evolution (they may become stricter if the situation worsens or less strict if the situation improves).<sup>19</sup> In some instances, however, the exceptional circumstances which triggered the declaration of the state of emergency, might not be fully overcome during this state and they might require a *longer-term revision* of the applicable legal framework and the distribution of powers within the state. In such a case, two main principles apply – the principle of acquired rights and the principle of checks and balances.

27. The principle of *checks and balances* demands that the different powers in the state need to be endowed with different competences, so that none of them has a monopoly over state power, and that they need to be able to check on each other. When making longer-term revisions, States must ensure that shifts in the distribution of power will not interfere with the separation of powers and their mutual control.

28. It is also important for the legal regime applicable to a state of emergency (whether declared or not) to make a distinction between the activation and the actual application of emergency measures. Activation only entails the authorisation that certain emergency measures may be taken in general if the concrete situation so requires; application means that the measures in fact have been taken. This distinction is important, because the principles of necessity and proportionality apply differently in these two stages.

29. In addition, two types of emergency powers have been identified: (1) constitutional (which may be considered a *de jure* state of emergency) and (2) extra-constitutional (which may be considered a *de facto* state of emergency). Emergency powers under the first type are based on a written constitution, on unwritten constitutional principles or on a (organic) law based on and enacted in line with the constitution – according to which the country officially (as foreseen by law) declares a state of emergency and may enact emergency measures. Under the second type, the executive authorities act in an emergency on the basis of legislation not expressly referring to the state of emergency. In that case, the authorities enact emergency measures without having officially declared a state of emergency.

30. The first type is more likely to provide better guarantees than the second. Even if the second type does not necessarily constitute a violation of international or constitutional law, the absence of a formal declaration may preclude a state from resorting to certain measures provided in international human rights instruments. It is good practice for a declaration of a state of emergency to precede the activation and use of emergency measures. This also applies to emergencies that fall outside the scope of Article 15 of the ECHR and Article 4 of the ICCPR. States that have not declared a state of emergency should also follow a similar set of rules for introducing emergency measures.

31. The Venice Commission therefore is in favour of a system of *de jure* constitutional state of emergency powers (the first type), which provides for better guarantees of fundamental rights, democracy and the rule of law and better serves the principle of legal certainty deriving therefrom than a system of a *de facto* extra-constitutional state of emergency (the second type).<sup>20</sup>

#### **IV. National law and practice**

##### **A. Member States having declared a state of emergency**

32. A declaration of a state of emergency is subject to the rules of the domestic legal order of a country. These rules must be clear, accessible and prospective. The basic provisions regarding

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<sup>19</sup> Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, paragraph 7.

<sup>20</sup> See Venice Commission, CDL-STD(1995), *Emergency Powers*, 1995, p.30.

the state of emergency and the resulting emergency powers should ideally be included in the constitution, clearly indicating which rights are derogable and which rights are not.<sup>21</sup> This is all the more important as emergency powers often restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law.<sup>22</sup>

33. Countries have either one or several emergency regimes. If there are several, their differences must be clearly set out in law. It is important that in all emergency situations, the state opt for the least restrictive regime.

34. A declaration of a state of emergency may be issued by parliament or by the executive. Ideally, it should be declared by parliament or by the executive subject followed by immediate approval by parliament. In urgent cases, immediate entry into force could be allowed – however the declaration should be immediately submitted to parliament, which can confirm or repeal it.

35. During the height of the Covid-19 crisis in Europe in the spring of 2020, nine EU Member States had declared a state of emergency, whatever its legal formulation, under the relevant provisions in their

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<sup>21</sup> This has been supported by the Venice Commission before in its CDL-STD (1995) *Emergency Powers*.

<sup>22</sup> See Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, paragraph 26.

constitutions: Bulgaria,<sup>23</sup> the Czech Republic,<sup>24</sup> Finland,<sup>25</sup> Estonia,<sup>26</sup> Hungary,<sup>27</sup> Luxembourg<sup>28</sup>, Portugal,<sup>29</sup> Romania<sup>30</sup> and Spain.<sup>31</sup>

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<sup>23</sup> *Constitutional provisions (Bulgaria)*

*Article 57*

(3) Upon declaration of war, of a state of martial law or another state of emergency, the exercise of particular citizens' rights may be temporarily restricted by a law, with the exception of the rights provided for in Articles 28, 29, 31 (1), (2) and (3), Article 32 (1), and Article 37 herein

*Article 84*

The National Assembly shall exercise the following powers:

12. acting on a motion by the President or by the Council of Ministers, declare a state of martial law or another state of emergency in the entire national territory or in a part thereof;

*Article 100*

(5) The President shall declare a state of war in the event of an armed attack against Bulgaria or in response to a need to urgently honour international commitments, or shall proclaim a state of martial law or another state of emergency whenever the National Assembly is not sitting. In such cases, the National Assembly shall be convened forthwith to pronounce on the decision.

<sup>24</sup> The Government of the Czech Republic declared the state of emergency (*nouzový stav*), i.e. the second type of the state of emergency known in the legal order, by its Decision (*usnesení*) No. 194 issued on 12 March 2020. The state of emergency was declared by virtue of Articles 5-6 of the Constitutional Law on the Security of the Czech Republic for a period of 30 days, effective as of 12 March 2020 2 pm. On 7 April 2020, the Chamber of Deputies approved of the extension of the state of emergency until 20 April 2020 (Decision 1012). On 28 April, the Chamber further extended it until 17 May (Decision 1105). On 17 May 2020, the state of emergency ended.

*Constitutional provisions (Czech Republic)*

*Article 2*

(1) If the Czech Republic's sovereignty, territorial integrity, or democratic foundations are directly threatened, or if its internal order and security, lives, health or property are to a significant extent directly threatened, or if such is necessary to meet its international obligations on collective self-defence, a state of emergency, condition of threat to the State, or state of war may, in accordance with the intensity, territorial extent and character of the situation, be declared.

(2) A state of emergency or condition of threat to the State is declared either in a restricted area or for the entire territory of the State; a state of war is declared for the entire territory of the State.

*Article 5*

(1) The government may declare a state of emergency in cases of natural catastrophe, ecological or industrial accident, or other danger which to a significant extent threatens life, health, or property or domestic order or security.

(2) A state of emergency may not be declared on grounds of a strike held for the protection of rights or of legitimate economic and social interests.

(3) If delay would present a danger, the Prime Minister may declare a state of emergency. Within 24 hours of the announcement thereof, the government shall either ratify or annul his decision.

(4) The government shall inform the Assembly of Deputies without unnecessary delay that it has declared a state of emergency, which the Assembly of Deputies may annul.

*Article 6*

(1) A state of emergency may be declared only for the stated reasons, for a fixed period, and in relation to a designated territorial area. Concurrently with its declaration of the state of emergency, the government must specify which rights prescribed in individual statutes shall, in conformity with the Charter of Fundamental Rights and Basic Freedoms, be restricted, and to what extent, and which duties shall be imposed, and to what extent. Detailed provisions shall be laid down by statute.

(2) A state of emergency may be declared for a period of no more than 30 days. The stated period may be extended only with the prior consent of the Assembly of Deputies.

(3) A state of emergency ends upon the expiry of the period for which it was declared, unless the government or the Assembly of Deputies decides to annul it prior to the expiry of that period.

*Article 10*

If during a period of a state of emergency, a condition of threat to the State, or a state of war, the conditions in the Czech Republic do not permit the holding of elections by the deadline prescribed for regular electoral terms, the deadline may be extended by statute, however for no longer than six months.

*Article 11*

During a period when the Assembly of Deputies is dissolved, the Senate shall be competent:

a) to decide on the extension or termination of a state of emergency, to declare a condition of threat to the State or a state of war, and to decide on the Czech Republic's participation in defensive systems of international organizations of which the Czech Republic is a member;

b) give consent to sending the armed forces of the Czech Republic outside the territory of the Czech Republic or to the stationing of the armed forces of other states within the territory of the Czech Republic, unless such decisions are reserved to the government.

*Article 12*

A decision to declare a state of emergency, a condition of threat to the State, or a state of war shall be made public by means of the mass media and shall be promulgated just like a statute. It enters into effect at the moment provided for in the decision.

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<sup>25</sup> In Finland the government announced, on 16 March 2020, in cooperation with the President of the Republic, a state of emergency as a result of the Covid-19 outbreak, on the basis of a health emergency (Section 3, item 5) and an economic emergency (Section 3, item 3), as defined in the Emergency Powers Act.

<sup>26</sup> In Estonia, whose legal order knows three types of state of emergency (an emergency situation, state of emergency, serious state of emergency), the first, least severe form was declared.

*Constitutional provisions (Estonia)*

§ 65 – THE RIIGIKOGU

14) declares a state of emergency in the national territory pursuant to §129 of the Constitution;

§ 78 – THE PRESIDENT

17) makes proposals to the *Riigikogu* to declare a state of war, to order mobilisation and demobilisation and, pursuant to §129 of the Constitution, to declare a state of emergency;

§ 104

The Procedure for the passage of laws is provided in the *Riigikogu* Procedure Act

16) the State of Emergency Act

§ 106

Issues regarding the budget, taxation, financial obligations of the national government, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence may not be submitted to a referendum.

§129.

In the case of a threat to the Estonian constitutional order, the *Riigikogu* may, acting on a proposal of the President or of the Government of the Republic and by a majority of its members, declare a state of emergency in the entire national territory for a period not exceeding three months.

Detailed arrangements regarding a state of emergency are to be provided by law.

§ 130

In a state of emergency or a state of war, the rights and freedoms of individuals may be circumscribed, and duties may be imposed upon individuals in the interests of national security and public order under conditions and pursuant to a procedure provided by law. The rights and freedoms enshrined in §8, §§ 11,18, paragraph 3 of § 20, § 22, § 23, paragraphs 2 and 4 of § 24, § 25, § 27, § 28, paragraph 2 of § 36, § 40, § 41, § 49 and paragraph 1 of § 51 of the Constitution may not be circumscribed.

§ 131

The *Riigikogu*, the President, and representative bodies of local authorities may not be elected, nor may their authority be terminated during a state of emergency or a state of war.

If the term of office of the *Riigikogu*, the President or representative bodies of local authorities should expire during a state of emergency or a state of war or within three months after the termination of a state of emergency or a state of war, that term is extended. In these cases, new elections are called within three months following the termination of the state of emergency or the state of war.

§ 161

The right to initiate amendments to the Constitution rests with not less than one fifth of the members of the *Riigikogu* and with the President.

Amendments of the Constitution may not be initiated, and the Constitution may not be amended during a state of emergency or a state of war.

<sup>27</sup> *Constitutional provisions (Hungary)*

ART 53

(1) In the event of a natural or industrial disaster endangering life or property, or in order to relieve the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

(2) During a state of danger, the Government may adopt a decree with which it may – as determined in a cardinal Act – suspend the application of certain Acts, derogate from the provisions of Acts, and take other extraordinary measures.

(3) The decree of the Government pursuant to paragraph (2) shall remain in force for fifteen days, except if the Government – on the basis of an authorization from Parliament – extends the effect of the decree.

(4) The decree of the Government shall cease to have effect upon termination of the state of danger.

<sup>28</sup> *Constitutional provision (Luxembourg)*

Article 32. § 4

However, in the case of international crisis, the Grand Duke can, if there is urgency, act [prendre] in any matter [concerning] the regulations, likewise in derogation of existing legal provisions. The duration of the validity of these regulations is limited to three months.

<sup>29</sup> *Constitutional provisions (Portugal)*

Article 19 (SUSPENSION OF THE EXERCISE OF RIGHTS)

1. Entities that exercise sovereignty may not jointly or separately suspend the exercise of the rights, freedoms and guarantees, save in the case of a state of siege or a state of emergency declared in the form provided for in the Constitution.

2. A state of siege or a state of emergency may only be declared in part or all of Portuguese territory in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbance of democratic constitutional order, or public disaster.

3. A state of emergency is declared when the preconditions referred to in the previous paragraph are less serious, and may only cause the suspension of the some of the rights, freedoms and guarantees that are capable of being suspended.

4. Both the choice between a state of siege and a state of emergency and the declaration and implementation thereof must respect the principle of proportionality and limit themselves, particularly as regards their extent and duration and the means employed, to that which is strictly necessary for the prompt restoration of constitutional normality.

5. Declarations of a state of siege or a state of emergency shall set out adequate grounds therefore and specify the rights, freedoms and guarantees whose exercise is to be suspended. Without prejudice to the possibility of renewals subject to the same limits, neither state may last for more than fifteen days, or, when it results from a declaration of war, for more than the duration laid down by law.

6. In no case may a declaration of a state of siege or a state of emergency affect the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of the criminal law, accused persons' right to a defence, or the freedom of conscience and religion.

7. Declarations of a state of siege or a state of emergency may only alter constitutional normality in accordance with the provisions of the Constitution and the law. In particular, they may not affect the application of the constitutional rules concerning the competences and modus operandi of the entities that exercise sovereignty or of the self-government organs of the autonomous regions, or the rights and immunities of the respective officeholders.

8. Declarations of a state of siege or a state of emergency grant the public authorities the competence to take the steps that are necessary and appropriate for the prompt restoration of constitutional normality.

#### *Article 134 (PERSONAL COMPETENCES)*

In the practice of personal acts, the President of the Republic has the competences:

d) To declare a state of siege or a state of emergency, in compliance with the provisions of Articles 19 and 138;

#### *Article 138 (Declaration of a state of siege or of a state of emergency)*

1. Declaration of a state of siege or a state of emergency requires prior consultation of the Government and authorisation by the Assembly of the Republic, or, if the Assembly is not sitting and it is not possible to arrange for it to sit immediately, by its Standing Committee.

2. When a declaration of a state of siege or a state of emergency is authorised by the Assembly of the Republic's Standing Committee, that declaration will then have to be confirmed by the Plenary as soon as it is possible to arrange for it to sit

#### *Article 161*

The Assembly of the Republic has the competences

l) to authorise and confirm declarations of a state of siege or a state of emergency

#### *Article 162 (Competence to scrutinise)*

In the exercise of its scrutiny functions the Assembly of the Republic has the competences:

b) To consider the manner in which a declaration of a state of siege or a state of emergency has been applied;

#### *Article 166.5*

5. The remaining acts of the Assembly of the Republic shall take the form of resolutions, as shall those of the Standing Committee provided for in Article 179(3)(e) and (f).

#### *Article 172 (dissolution)*

1. The Assembly of the Republic may not be dissolved during the six months following its election, during the last six months of the President of the Republic's term of office, or while a state of siege or a state of emergency is in force.

#### *Article 179 (Standing Committee)*

2. The Standing Committee has the competences to:

f) Authorise the President of the Republic to declare a state of siege or a state of emergency, declare war or make peace.

#### *Article 197 (Political Competences)*

1. In the exercise of its political functions the Government has the competences:

f) To pronounce on declarations of a state of siege or a state of emergency;

...

#### *Article 289 (Circumstances in which revision is restricted)*

No act involving the revision of the Constitution may be undertaken during a state of siege or a state of emergency

#### <sup>30</sup> *Constitutional provision (Romania)*

#### *Article 93 – EMERGENCY MEASURES*

(1) The President of Romania shall, according to the law, institute the state of siege or state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament's approval for the measure adopted, within five days of the date of taking it, at the latest.

(2) If Parliament does not sit in a session, it shall be convened de jure within 48 hours from the institution of the state of siege or emergency and shall function throughout this state.

#### <sup>31</sup> *Constitutional provisions (Spain)*

#### *Article 55*

1. The rights recognized in Articles 17 and 18, clauses 2 and 3, Articles 19 and 20, clause 1, subclauses a) and d) and clause 5, Articles 21 and 28, clause 2, and Article 37, clause 2, may be suspended when the proclamation of a state of emergency or siege (martial law) is decided upon under the terms provided in the Constitution. Clause 3 of Article 17 is excepted from the foregoing provisions in the event of the proclamation of a state of emergency.

2. An organic law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the Courts and proper Parliamentary control, the rights recognized in Articles 17, clause

36. In two countries, a state of emergency was declared by parliaments (Bulgaria,<sup>32</sup> Portugal<sup>33</sup>) and in seven countries, the government had done so (Czech Republic,<sup>34</sup> Estonia,<sup>35</sup> Finland, Hungary,<sup>36</sup> Luxembourg,<sup>37</sup> Romania<sup>38</sup>, Spain<sup>39</sup>).

37. Another five EU Member States had declared a state of emergency under their ordinary laws: France,<sup>40</sup> Germany<sup>41</sup>, Italy,<sup>42</sup> Latvia<sup>43</sup> and Slovakia.<sup>44</sup>

38. In this category, some countries have opted to refer to ordinary laws in this crisis to declare a state of emergency, although their constitutions have detailed provisions covering various types of states of emergency. They have done so either for historical reasons or to avoid applying a repressive mechanism or for other reasons, such as having a mechanism that expressly refers to the risk of an epidemic as a reason to declare a state of emergency (e.g. France, Germany, Slovakia, respectively). In France, notably, a law created the “state of health emergency (*l'état*

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2, and 18, clauses 2 and 3, may be suspended as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.

Unjustified or abusive use of the powers recognized in the foregoing organic law shall give rise to criminal liability inasmuch as it is a violation of the rights and liberties recognized by the law.

*Article 116 paragraphs 1 and 2*

1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations.

2. A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply.

<sup>32</sup> Bulgaria's National Assembly declared a state of emergency on 13 March 2020.

<sup>33</sup> Portugal's Parliament authorised the President of the Republic to declare a state of emergency based on the existence of a public calamity and referred to the World Health Organization announcement on the Covid-19 pandemic.

<sup>34</sup> The government of the Czech Republic declared a state of emergency (*nouzový stav*), i.e. the second type of state of emergency known in the legal order, by Decision (*usnesení*) No. 194 issued on 12 March 2020.

<sup>35</sup> The government of Estonia declared an emergency situation on 12 March 2020.

<sup>36</sup> The government, under Article 53.1 of the Fundamental Law, declared a state of danger in the entire territory of Hungary, in relation to the Covid-19 outbreak. Government Decree 40/2020 (11 March) on the declaration of state of danger entered into force on 11 March 2020.

<sup>37</sup> A state of crisis was declared by Regulation of the Grand Duke (*Règlement grand-ducal*) on the basis of Article 32.4 of the Constitution.

<sup>38</sup> The Romanian president issued Decree 195/2020 on 16 March 2020 proclaiming a state of emergency under the Constitution.

<sup>39</sup> The Spanish government declared a state of alarm under Article 116 of the Constitution together with Organic Law 4/1981 on 14 March 2020.

<sup>40</sup> In France, a state of emergency was declared by decree in the Council of Ministers under a law that established a state of health emergency, specifically focused on organising the powers and competences of the authorities, and by which the legislator also empowered the executive to act by ordinance on certain matters (Act 2020-290 of 23 March 2020). Venice Commission - Observatory on emergency situations:

<https://www.venice.coe.int/files/EmergencyPowersObservatory/FRA-E.htm>

<sup>41</sup> The *Bundestag* declared, on 27 March 2020, an epidemic situation of national significance with the amendment to the Federal Infection Protection Act (§ 5 I IfSG).

<sup>42</sup> In Italy, a state of emergency was declared on 31 January 2020.

<sup>43</sup> Latvia's government adopted Order No. 103 on 12 March 2020, declaring an emergency situation regarding the Covid-19 (<https://likumi.lv/ta/en/en/id/313191-regarding-declaration-of-the-emergency-situation>). The legal base of this declaration was:

1. the Communication of 11 March 2020 of the World Health Organisation that COVID-19 has become a pandemic;

2. Section 4, Paragraph one, Clause 1, Sub-clause "e" of the Civil Protection and Disaster Management Law (<https://likumi.lv/ta/en/en/id/282333-civil-protection-and-disaster-management-law>);

3. Section 4, Section 5, Paragraph one, and Section 6, Paragraph one, Clause 1 and Paragraph two, Section 7, Clause 1, and Section 8 of the law On Emergency Situation and State of Exception (<https://likumi.lv/ta/en/en/id/255713-on-emergency-situation-and-state-of-exception>);

4. Section 3, Paragraph two of the Epidemiological Safety Law (<https://likumi.lv/ta/en/en/id/52951-epidemiological-safety-law>).

<sup>44</sup> In Slovakia, the government declared an “extraordinary situation” for the entire territory of the country on 11 March 2020, with Resolution No 111. On 13 March 2020.

*d'urgence sanitaire*),” which organises the powers and competences of the authorities and empowers the executive to act by ordinance for certain matters. Other countries have opted for a hybrid solution to deal with the Covid-19 crisis, following a mixture of measures introduced under ordinary legislation and some under constitutional provisions (e.g. Italy).<sup>45</sup>

39. It is important that a declaration of a state of emergency always be issued for a specific period of time, that it is not excessively long, and terminated before the expiry of the period if the emergency has been overcome and exceptional measures are no longer needed. It is also important that either the declaration or another decision or regulation sets out the powers to be activated and their territorial scope.

40. As stated above, the Venice Commission supports this type of constitutional *de jure* state of emergency.

### **B. Member States not having declared a state of emergency**

41. Fourteen EU Member States have not declared a *de jure* state of emergency during the Covid-19 crisis, notably: Austria, Belgium, Croatia, Cyprus, Denmark, Greece, Ireland, Lithuania, Malta, Netherlands, Poland, Slovenia, Sweden and the UK.

42. Most EU Member States in this category resorted to ordinary legislation (mostly public health law) to deal with the Covid-19 crisis. All of them have also resorted to special measures to deal with this crisis. The constitutional frameworks in which special measures were taken varies from one country to the next. Some countries have provisions in their constitutions on the state of emergency, but not all of them have resorted to it (e.g. Cyprus, Greece, Ireland, Lithuania, Netherlands, Poland). Some have adopted new laws amending existing legislation to deal with the Covid-19 crisis or to provide a legal basis for emergency measures (Austria and Malta). Others have opted to refer to ordinary laws although their constitutions have detailed provisions covering various types of states of emergency (e.g. Netherlands, Poland). And one country has relied mainly on recommendations rather than laws, but then supplemented these by modifying certain existing laws to apply to the Covid-19 crisis (Sweden).<sup>46</sup>

43. Some countries have mechanisms designed to respond to states of emergency (Cyprus, Greece, Ireland) and others have several emergency mechanisms that differentiate between different types of threats (Lithuania<sup>47</sup>). Some countries have resorted to ordinary legislation to quickly respond to the crisis due to very strict conditions required by the constitutional framework (Greece) while others did so due to existing laws designed to specifically deal with infectious diseases (Cyprus, Netherlands). In another country, the government requested parliament to urgently pass legislation allowing for emergency powers during the Covid-19 crisis (UK<sup>48</sup>).

44. On the hand, the principle of normalcy leads to resort to emergency powers only when necessary. On the other hand, as already said, a *de jure* constitutional state of emergency is preferable to a *de facto* state of emergency based on ordinary legislation., which may reduce safeguards.

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<sup>45</sup> See the European Parliament's *Briefings* carried out by the European Parliamentary Research Service *on States of emergency in response to the coronavirus crisis: situation in certain Member States*.

<sup>46</sup> See the European Parliament's *Briefings* carried out by the European Parliamentary Research Service *on States of emergency in response to the coronavirus crisis: situation in certain Member States*.

<sup>47</sup> Lithuania adopted special emergency measures based on the *Law on Civil Protection* and the *Law on the Prevention and Control of Contagious Diseases in Humans*, rather than on Article 144 of the Constitution (thus, without a declaration of a formal state of emergency).

<sup>48</sup> [Coronavirus Act of 2020](#) gives the UK Government a wide range of emergency powers to tackle the Covid-19 crisis, but most of the Covid-19 lockdown laws were imposed by regulations under the Public Health Act 1984 (they take effect prior to a parliamentary vote).

## C. Procedural aspects

### a. How were measures introduced and for what period of time?

45. The Covid-19 crisis has brought about the most extensive set of emergency measures ever seen in the modern post-World War II history of Europe and the world. Most States have enacted special measures either within an officially declared state of emergency or, in many cases, outside such a state (as seen above), involving (to varying degrees) the imposition of temporary restrictions on certain rights and freedoms, such as the right to privacy, freedom of movement, freedom of religion, assembly and of association, the right to and freedom of education, and the right to engage in work. However, if the emergency situation permits, it is important that the procedure for the adoption of emergency measures be inclusive for civil society, whether before the proposal reaches parliament or at the same time as it is being discussed in parliament.<sup>49</sup> The Venice Commission has criticised in the past the adoption of legislation without a proper opportunity for discussion in either parliament or by civil society.<sup>50</sup>

46. Nearly all EU Member States have introduced *temporary* (i.e. with time limits) emergency measures to deal with the Covid-19 crisis (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden), mainly through ordinary legislation. The first emergency measures were generally introduced for a period of 15 days to approximately one month across all EU Member States, and were then renewed at least once.

47. Only a few EU Member States did not prescribe a time limit for a state of emergency (or equivalent) (Croatia, Hungary). In Croatia, although the legislation does not provide for a time limit, the Civil Protection Authority may introduce measures only where there are special circumstances endangering the lives and health of citizens. In Hungary, the Government Decree on the declaration of a state of danger does not have a sunset clause indicating when it will cease to apply and will continue until the threat that caused its introduction has ceased to exist – which will end only with a new governmental decree (which in this case entered into force on 18 June 2020). However, the government on that same day declared a state of health crisis that introduced a state of epidemiological preparedness on the entire territory of Hungary. According to the information received on 6 October 2020, during a state of danger, the Government of Hungary may adopt decrees imposing emergency measures which are only in force for 15 days, unless the Government, on the basis of an authorisation by the National Assembly, extends these decrees (Article 52.3 of the Constitution). Although the National Assembly does not seem to be compelled to add a time-limit to this extension, according to the information received on 6 October 2020, the National Assembly has the power to revoke the authorisation, either in general or in respect of a specific measure, accorded to the Government at any time it sees appropriate.

48. In this respect, the Venice Commission recommends that declarations or measures that have no specific time limit, including those whose suspension is made conditional upon overcoming the exceptional situation, should not be considered as lawful if there is no regular review of the situation.

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<sup>49</sup> See Venice Commission, Rule of Law Checklist, 1.5.iv.

<sup>50</sup> See e.g. Venice Commission/ODIHR, CDL-AD(2018)013, Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which directly affect NGOs (Hungary), Venice Commission CDL-AD(2016)026 Opinion on the Act on the Constitutional Tribunal (Poland).

## b. Prolongation of the state of emergency

49. As the regime of emergency powers affects democracy, fundamental and human rights as well as the rule of law, review of the declaration and prolongation of the state of emergency, as well as of the activation and application of emergency powers is vital. Both parliamentary and judicial control should be possible: parliamentary scrutiny if the decision is issued by the executive and judicial review if it is issued by the parliament or the executive.<sup>51</sup>

50. The state of emergency was prolonged at least once in almost all the EU Member States that had declared it. In some, the state of emergency was prolonged by a Presidential decree (Portugal, Romania (the latter prolonged the state of alert for the fourth time on 14 September 2020 for 30 days)), in others by the Parliament (Bulgaria, France, Luxembourg); or by the Chamber of Deputies (Czech Republic (twice)), or the government (Estonia) or Congress (Spain).

51. Although it should be possible to prolong the declaration for as long as is necessary to overcome the exceptional situation,<sup>52</sup> the Venice Commission has stated that *“the longer the emergency regime lasts, the further the state is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools”*.<sup>53</sup>

## D. Substantive aspects

52. A declaration of a state of emergency in EU Member States, whatever the concrete legal form of this state may be, will often entail a *shift in the distribution of powers*.

53. At the horizontal level, the powers of the executive tend to be temporarily strengthened. On the one hand, the executive is granted new, stronger powers that State authorities under normal circumstances would not have (e.g. the power to suspend or further restrict certain human rights). On the other hand, the executive may be granted certain powers that under normal circumstances would belong to the other powers, mostly the legislative (e.g. the power to issue normative acts).

54. At the vertical level, the state of emergency may entail a temporary centralisation of powers (e.g. the transfer of certain powers from federal/regional units to the central authorities in federal/regional States).

55. In the Czech Republic, a state of emergency entails the strengthening of powers of the government and other executive bodies. The new competences are enumerated in the legislation and they are limited in scope and time. In France, a statutory authorisation, based on Article 38 of the Constitution, may allow the executive branch to benefit from legislative powers. The duration of the legislative mandate is set by law. In Italy, the Government has powers provided by special laws (such as Law no. 833/1978, establishing the National Health Service) as well as constitutional power to issue decree-laws which should be approved by Parliament within sixty days. In Lithuania, in the state of emergency, the Government enjoys the powers provided for in the Law on the State of Emergency.

56. At the same time, there are countries, such as Germany, which either do not provide for the possibility to derogate from the normal division of powers during a state of emergency. In Latvia,

<sup>51</sup> Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, paragraph 79.

<sup>52</sup> Venice Commission, CDL-AD(2020)014, *Report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, paragraph 78.

<sup>53</sup> CDL-AD(2016)037-e, *Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016*, Opinion No. 865/2016, 12 December 2016, par 41.

during the Covid-19 crisis, all the branches of power (the President of Latvia, the Chairperson of the *Saeima*, the Prime Minister, the President of the Constitutional Court, and the Chief Justice of the Supreme Court) agreed in an unprecedented joint session on common basic principles of State activities to manage the emergency situation.<sup>54</sup> This co-operation was intended to ensure the respect for the principle of the separation of powers and the continuous functioning of institutions.<sup>55</sup>

57. The shifts in the distribution of powers usually take place within a declared *de jure* state of emergency. Yet, exceptionally, they may take place outside this state as well. This is so mostly in countries in which the legal order does not contain the institution of the formal (*de jure*) state of emergency. In its 2020 *Reflections*, the Venice Commission recalled that “a system of *de jure* constitutional emergency powers can provide better guarantees for fundamental rights, democracy and the rule of law, and better serve the principle of legal certainty, deriving therefrom”.<sup>56</sup>

58. As stated above, the concrete content and extent of emergency redistribution of powers is foreseen by the domestic legal order of each country. The main principles should be enshrined at the constitutional level – either in the constitution itself or in a special law of higher legal force (e.g. a constitutional/organic law on the state of emergency). This is the case for instance in the Czech Republic (the Constitutional Law on the Security of the Czech Republic), France (Article 38 of the Constitution), Lithuania (Article 144 of the Constitution), the Netherlands (Article 103 of the Constitution, implemented by organic law) or Spain (Article 116.2 of the Constitution and Organic Law 4/1981, which should be developed by other legal (government) acts). The detailed regulation should then be contained in other legal and sub-legal acts. In view of the risk of misuse of emergency powers, the regulation of these powers should be as detailed as possible and should not contain open clauses (e.g. granting the executive the power to adopt “any other measures that might be necessary to counter the emergency situation”). In its *Checklist on the Rule of Law*, the Venice Commission recalled that when legislative power is delegated by parliament to the executive, the objectives, contents, and scope of that delegation of power should be explicitly defined in a legislative act.<sup>57</sup> The regulation should be in place prior to the declaration of the state of emergency and it should not, to the extent possible, be amended during a state of emergency.

## V. Scrutiny and oversight of emergency measures

59. All emergency measures adopted during a formal state of emergency or outside it must be subject to *effective safeguards*. In its 2020 *Reflections*, the Venice Commission stressed that “it is essential that both the declaration and possible prolongation of the state of emergency, on the one hand, and the activation and application of emergency powers on the other hand be subject to effective parliamentary and judicial control”.<sup>58</sup> Such review should also extend to any shifts in the distribution of powers that might take place during (or outside) a state of emergency.

60. Internal review, which is carried out primarily by parliament and by the judiciary should moreover be complemented by external review, exercised by international judicial, quasi-judicial or other bodies (the ECtHR etc.).

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<sup>54</sup> <https://likumi.lv/ta/en/en/id/313400-basic-principles-of-activity-of-state-constitutional-bodies-in-an-emergency-situation>

<sup>55</sup> For instance, the Constitutional Court of Latvia did not interrupt its work, including its public hearings with participation of the parties, but continued the hearings by digital means remotely.

<sup>56</sup> Venice Commission, CDL-AD(2020)014, *Reflections on Respect for Democracy, Human Rights and the Rule of Law During States of Emergency*, 25 May 2020, paragraph 24.

<sup>57</sup> Venice Commission, CDL-AD(2016)007, *Rule of Law Checklist*, Study No. 711/2011, 16 March 2016, para 1.4.iii.

<sup>58</sup> Venice Commission, CDL-AD(2020)014, *op. cit.*, paragraph 14.

## A. Parliamentary oversight

61. As a result of the Covid-19 crisis, parliaments around the world have found themselves in a balancing act: on the one hand, protecting their members and staff against a health threat while, on the other, maintaining a semblance of normalcy by not deserting the premises – fulfilling its role in checking and challenging the work of government – which is all the more important in times of crisis.

62. It is essential that parliaments exercise oversight over emergency measures. This is, as the Venice Commission recalled in its 2020 Reflections, “*important for the realisation of the rule of law and democracy*”.<sup>59</sup> By the same token, the Parliamentary Assembly of the Council of Europe, in its Recommendation 1713(2005), noted that “*exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights*”. If a state of emergency is declared by the executive, then parliament must be entitled to either approve or discontinue it. A certain time period, usually not exceeding a couple of weeks, must be established for its reaction. Moreover, “*the question of by whom, how and when an emergency rule is to be terminated cannot also be left to executive enjoying its increased power. It must be the function of the Parliament*”.<sup>60</sup>

63. Parliamentary oversight is particularly important in cases where legislative powers are temporarily transferred to the executive. Any legal acts issued by the executive should be subject to a subsequent parliamentary approval and should cease to produce effects, if they do not secure such approval within a certain period of time.

64. However, during the Covid-19 crisis, parliaments in EU Member States seem to have been relegated to a secondary role. Beyond the fulfilment of their constitutional obligations in declaring or renewing a state of emergency (and the possibility of affecting its content), where it exists (Czech Republic, Spain), and adopting new laws for the situation (Denmark, Ireland), parliaments in many countries have been sidelined, leaving governments, in general, free to take the lead in rapidly introducing emergency measures to deal with the Covid-19 crisis. Three different situations have been identified:

(1) Parliaments that have continued their work as usual, by merely changing some of their procedures, but continuing with their normal functions (Austria, Croatia, Denmark, Estonia, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Slovakia, Sweden);

(2) parliaments that have suspended their ordinary activities (legislative) and focused only on the review of Covid-19 related activities (e.g. Bulgaria, Greece). Examples on how parliament’s role as a forum has been diminished can be seen, for instance, by some parliaments (Finland, Italy, Spain) having had to turn to their existing committees or having established a special parliamentary committee (Belgium) to receive information from the government during the Covid-19 crisis on a weekly basis – rather than placing parliament in the centre of the debate. In many countries, decree laws were passed by governments without the participation of parliament (which have in some cases been submitted to parliament for subsequent approval). In order to be more efficient, some governments have created parallel structures to parliament, although not totally excluding parliament. A technocratic approach seems to have been adopted by governments in this crisis, choosing informal procedures (e.g. meetings etc.), which strengthen the role of government at the expense of parliament. This effectively relegates parliament to its very narrow function of checking the work of government on Covid-19 related matters through committees.

(3) Finally, some parliaments have suspended their activities entirely, handing nearly all power over to government (Cyprus, Czech Republic).

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<sup>59</sup> Venice Commission, CDL-AD(2020)014, *op. cit.*, paragraph 80.

<sup>60</sup> Venice Commission, CDL-STD(1995)012, *Emergency Powers*, 1995, p. 24.

65. There is a need to consider whether this reduction in parliament's role is linked to the need for a quick response (in which the need for reaching an agreement could be considered as constituting an obstacle) or to the material impossibility (as a consequence of the health situation, which may exclude physical meetings for some time) of parliament to perform its normal and intended role.

66. Although the responses have been quite diverse, they may be classified into four categories:

- Total closure;
- Limitation of its role, by only supervising the state of emergency and the approval/validation of the emergency legislation related to it;
- Elementary democratic functions, not necessarily related to the Covid-19 crisis;
- Integral maintenance of its functions.

67. Discarding total closure and the unjustified attack on the checks and balances system of parliamentary democracy, consideration must be given to what extent the reduction in the role of parliament affects the functioning of democracy.

68. In general, the reaction has been for parliaments to maintain their normal activity or to reduce it to what is strictly essential (commonly linked to the Covid-19 crisis). The presumption is that entirely suspending parliamentary scrutiny even under these circumstances, in addition to being politically questionable, would be constitutionally blameworthy: during these exceptional times the activity of State organs cannot be suspended.

69. Initial responses have been the suspension of parliament's work and its reduction to the vote on the state of emergency (where it was necessary), and in some cases to its follow-up. However, parliaments have been increasing their functions in increments, towards "scrutiny" tasks, validation of emergency legislation in response to the situation, and exceptionally to assignments not related to it. In some countries, such as France, special monitoring committees have been established to deal with the emergency situation and in others, such as Spain, existing committees have been used to carry out this work.

70. Parliamentary law across the European Union has shown great flexibility that has allowed parliaments to adapt to the situation, thanks to the general existence of broad consensus that has allowed these changes to be made, which would have been unthinkable under normal circumstances.

71. Decisions on the functions and functioning of parliament during the health crisis have been taken by different bodies and have followed various procedures, which were not always previously in place (undermining legal certainty). Modifications have been introduced with amendments to the Regulations of Parliament (Romania) or decisions of the bureau of Parliament or the presidency of Parliament (Spain). The first and most important one is related to the parliamentary function. The cause of the suspension, due to logistics or linked to functions, affects the response. Accordingly, for the decision to remove all non-essential activities, a definition is needed of what and who should be considered essential and under what procedure. It would be important to modify the regulation (and this must be done in advance, outside an emergency situation) to link the declaration of a state of emergency to a change in the functioning of parliament.

72. In conclusion, the Covid-19 crisis should not be used as an opportunity to render governments more powerful at the expense of parliaments and at any rate not permanently. In order to prepare for the future, serious consideration should be given to identifying the best scenario and ensure that the necessary regulatory framework is in place to fulfil it as well as identify to what extent some of these measures could be maintained over time, regardless of whether or not there is an emergency. Parliament should be the centre of a country's political life,

and in order to maintain this status, the necessary tools and mechanisms must be in place to ensure this. Continuation of the work of parliament should be considered an essential requirement during a crisis, and steps – for instance, in allowing and improving digital meetings of parliament when physical meetings are impossible – must be taken to maintain parliamentary work without difficulty in such situations in the future.

73. Improvements introduced by a number of parliaments in EU Member States have been identified that reinforce the role of parliament and could extend beyond a state of emergency:

- The use of digital tools to continue parliamentary sessions when physical meetings are impossible.
- The use of telematic registration as a means of introducing legislative proposals and monitoring initiatives in parliament.
- The use of technology in parliamentary commission hearings of those who live outside the country, and whose testimony may be of interest to the parliamentary commission's aims.
- The consolidation of telematic channels of citizen's participation by structuring channels to receive these proposals that enables society, especially the groups, to access and use them, and establish a mechanism of accountability motivated by their use.

74. Another element of parliaments' response to the Covid-19 crisis that might be retained and developed is remote work (teleworking) of public employees at the service of parliament. This would require guidelines which allow both the review of the effectiveness of their work and ensure the means that institutions must provide to their employees in order to make this measure effective. The Dutch Assembly, the Estonian Parliament, the French National Assembly and the Spanish Parliament have taken such action to reduce the presence of staff at work to the bare minimum.

75. However, parliaments need to hold their plenary sessions and should not allow the temporary replacement of deputies<sup>61</sup> or reduce their attendance (even if proportionally). This is because discussion, the exchange of ideas and personal, face-to-face contacts are crucial in feeding the debate. This ensures the effectiveness of political pluralism and democracy. It must be remembered that some of the most important parliamentary policies are produced through informal discussions, often behind the scenes: much of that has been swept away in favour of more formalised online discussions. In addition, this affects the rights of deputies, because only in-person attendance can fully guarantee the identity, immediacy, or freedom of the parliamentarians that is indispensable for the exercise of their functions. Also, the absence of these guarantees directly affects citizens by upsetting their right to representation, since it is through their delegation that parliamentary functions are carried out – this can be exacerbated in uninominal systems, where the voters' perception may well be that if their representative is not present, they are not represented. However, this does not address the extent to which a crisis may alter the normal functioning of a parliament.

76. Among the solutions adopted by EU Member States that may inspire others, there is the proportional limit of the number of attendees, such as was done in Spain;<sup>62</sup> their rotation; the

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<sup>61</sup> Finland, Denmark, Sweden, Norway, Portugal and the Lower House in the Netherlands consider the case of deputies with temporary licenses, while France, Belgium and Nordic countries allow this temporary replacement in the case of ministers. (García- Escudero, 2010: p.87)

<sup>62</sup> Spain has chosen because the interactions between the different parliamentarians must be carried out in person while all other attendees have been able to follow the session remotely without impairing the parliamentary function.

reduction to essential staff (those who had to intervene) such as was done in France,<sup>63</sup> or the reduction of the minimum quorum that they have established, such as was done in Germany, where the *Bundestag* has done so by introducing temporary modifications to the rules of interpretation of the regulation in Section 126a of the Rules of Procedure of the German *Bundestag* (reducing it to a quarter of the members for plenary sessions). Others, such as the Belgian Parliament, have amended their Rules of Procedure<sup>64</sup> to allow members, under certain conditions, to be considered “present” in the Commission or in plenary, even if they are not physically present, and to vote at those meetings.

## **B. Judicial (internal) review and external review**

77. Judicial review of emergency measures is another guarantee against the risks of the abuse of power by the executive. The rights to a fair trial and to effective legal remedies, as enshrined in Articles 6 and 13 of the ECHR, continue to apply during a state of emergency. This means that individuals hit by emergency measures must be able to challenge these measures in court. Again, a varying degree of discretion may be granted to the executive, depending on the circumstances but this may not lead to the factual denial of individual rights. The judicial system must provide individuals with effective recourse in the event State authorities interfere with their human rights.

78. Judicial review may be carried out by civil or administrative courts as well as criminal courts when dealing with penalised violation of emergency legislation/measures. The highest courts, especially the constitutional court (or a court with an equivalent jurisdiction), where these exist in the country, should also be involved. This court must have the power to order interim measures, on request by either a substantial number of minority MPs or the Head of State.<sup>65</sup>

79. In its 2006 *Opinion on the Protection of Human Rights in Emergency Situations*, the Venice Commission stated that “*the domestic courts must have full jurisdiction to review measures of restriction and derogation for their legality and justification, and for their conformity with the relevant provisions of the ECHR*”.<sup>66</sup> This is fully applicable to emergency measures adopted in the current Covid-19 crisis. Some acts pertaining to the state of emergency, most typically its very declaration, may be excluded from judicial review or subject to limited (formal) review only. Moreover, the judiciary may grant larger discretion to the executive in the decision-making process on measures necessary to counter the emergency. Yet, it must never let the executive act without any restraints and any scrutiny.

80. As mentioned above, internal review (by parliament and by judicial review) should be complemented by external review, carried out by international judicial, quasi-judicial or other bodies (e.g. ECtHR).

81. So far, emergency measures adopted during the Covid-19 crisis have not been considered by the European courts and other international (quasi-)judicial bodies. In fact, some of these bodies have themselves been affected in their activities by the emergency situation. National constitutional (and other) courts have been more rapid to react to the new situation and there is already some national case-law, albeit still rather limited in its scope, on the emergency measures adopted during the current Covid-19 crisis.

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<sup>63</sup> The Conference of Presidents at its meeting on March 24 modified the operating rules of the control sessions to the Government in the sense of reducing the number of questions and, therefore, the presence of both ministers and deputies. (<http://www2.assemblee-nationale.fr/15/la-conference-des-presidents/releve-de-conclusions/reunion-du-mardi-24-mars-2020>)

<sup>64</sup> <https://dekamer.be/FLWB/PDF/55/1100/55K1100004.pdf>

<sup>65</sup> Venice Commission, CDL-AD(2020)014, *op. cit.*, paragraph 88.

<sup>66</sup> Venice Commission, CDL-AD(2006)015, *Opinion on the Protection of Human Rights in Emergency Situations*, Opinion No. 359/2005, 4 April 2006, paragraph 36.

82. As concerns *the grounds for the declaration of a state of emergency*, there is international case-law under Article 15 of the ECtHR and Article 4 of the ICCPR, as well as national case-law related to the state of emergency declared in connection to the Covid-19 crisis. The latter is, however, quite limited, both due to the short time which has passed since the outbreak of the Covid-19 pandemic and because, in many EU Member States, no state of emergency has been declared in this context.

83. The ECtHR has repeatedly elaborated on the conditions under which States may derogate from the ECHR under its Article 15. In *Lawless v. Ireland*, it held that “*the natural and customary meaning of the words “other public emergency threatening the life of the nation” is sufficiently clear; /.../ they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*”.<sup>67</sup> In the case at hand, which referred to the state of emergency declared by Ireland in 1957 in connection to the fight against terrorism, the ECtHR concluded that the grounds for this declaration were present. Applying the same test, the (then) European Commission on Human Rights reached the opposite conclusion with respect to Greece, which had declared the state of emergency following the *coup d’Etat* in the country in 1967.<sup>68</sup> However, this case is quite exceptional, as in general the European institutions tend to grant a wide margin of appreciation to States in the assessment of whether the conditions for the application of Article 15 of the ECHR are met.<sup>69</sup>

84. The same is true for national courts with respect to the declaration of the state of emergency (which may, but does not need to, entail a derogation under Article 15 of the ECHR). The courts either find that the declaration is outside the scope of judicial review or subject it to only limited review, granting large discretion to the executive. For instance, in its decision rendered on 28 April 2020, the Czech Constitutional Court concluded that the declaration of the state of emergency issued by the Czech Government on 12 March 2020, was an act of governance which, as such, is not subject to judicial review and lends itself only to the political “review” by the Chamber of Deputies (the lower House of Parliament).<sup>70</sup> The Court did not, however, exclude the possibility of judicial review of the declaration which, in its view, “*could be annulled [by the CC], if it contradicted the fundamental principles of the democratic Rechtsstaat /.../ or involved the change of essential features of the democratic Rechtsstaat*”.<sup>71</sup>

85. In some non-EU countries, the declaration of the state of emergency has been subject to some form of judicial review. For instance in Serbia, the Constitutional Court, in its decision of 21 May 2020, concluded that the Covid-19 pandemic could be considered a “*public danger that threatens the survival of the state or its citizens*” in the sense of Article 200.1 of the Constitution and that the conditions for the declaration of the state of emergency were thus met. Based on this finding, the Court declined to examine the legality and constitutionality of the declaration of the state of emergency any further.

86. The *principle of necessity* is a well-established principle of international, European and national law. It has been repeatedly interpreted and applied by international (quasi) judicial bodies and by national courts.<sup>72</sup> Any measure involving limitations to or derogations from human rights or any other emergency measures must be necessary in the given situation.

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<sup>67</sup> ECtHR, *Lawless v. Ireland*, Application No. 33257, 1 July 1961, paragraph 28.

<sup>68</sup> ECmHR, *Government of Denmark v. the Government of Greece, Government of Norway v. the Government of Greece, Government of Sweden v. the Government of Greece, Government of the Netherlands v. the Government of Greece*, Applications Nos 3321/67, 3323/67 and 3344/67, 5 November 1969.

<sup>69</sup> ECmHR, *Greece v. United Kingdom*, Application No. 176/56, 26 September 1958, p. 176; ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, paras 212-214; *Brannigan & McBride v. United Kingdom*, Application Nos 14553/89 and 14554/89, 26 May 1993, paragraphs 41-66.

<sup>70</sup> Czech Republic, Constitutional Court, *Decision Pl. ÚS 8/20*, 28 April 2020.

<sup>71</sup> *Ibid.*, paragraph 27.

<sup>72</sup> See S. Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Council of Europe, 1997.

87. The 1984 UN *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*,<sup>73</sup> explain that in the context of the limitation clause, the term “necessary” means that the limitation: (a) is based on one of the grounds justifying limitations recognised by the relevant article of the ICCPR, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim.<sup>74</sup> For the derogation clause, the *Siracusa Principles* note that “*the severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent*”.<sup>75</sup> The principle of necessity should always be assessed in an objective manner and take into account what the State authorities knew or could and should have known at the moment when they adopted the relevant measures.

88. The ECtHR has repeatedly dealt with the principle of necessity. For instance, in *Aksoy v. Turkey*, it concluded that although Turkey was entitled to derogate from the ECHR due to the terrorist threat in the South-East part of its territory, the measure allowing the State authorities to detain terrorist suspects for 14 days without judicial intervention could not be considered as necessary. The ECtHR found that “*this period is exceptionally long and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture /.../. Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable*”.<sup>76</sup>

89. The Venice Commission is not aware of any cases in which the Covid-19 related measures would have been found unnecessary by national courts or, in fact, in which the test of necessity would be applied.

90. The *principle of proportionality*, in the narrow sense, is another well-established principle of international, European and national law. Similar to the principle of necessity, of which it is often considered to be a part of, it applies in a different context and there is a rich case law, by international (quasi) judicial bodies and by national courts, related to its application and interpretation. Much has been written about it in the legal doctrine as well.<sup>77</sup>

91. The international human rights bodies have mostly invoked the principle of proportionality while applying and interpreting the limitation and derogation clauses. Proportionality is a part of the “*necessary in a democratic society*” test of the limitation clauses. It determines how far a State may go when interfering with non-absolute human rights in order to protect certain legitimate interests, which means it may use and for how long the limitations should stay in place (overlapping in the last part with the principle of temporariness).<sup>78</sup> Proportionality also applies to the derogation clauses, where it helps determine whether States have suspended certain human rights “*only to the extent strictly required by the exigencies of the situation*” (Article 15 of the ECHR).

92. The ECtHR has occasionally found that certain measures adopted by States to counter various emergencies have not met the condition of proportionality. For instance, in *A. and Others*

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<sup>73</sup> UN Doc. E/CN.4/1985/4 (1985), *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984.

<sup>74</sup> *Ibid.*, paragraph 10

<sup>75</sup> *Ibid.*, paragraph 51.

<sup>76</sup> ECtHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, paragraph 78. See also ECtHR, *Demir and Others v. Turkey*, Application Nos 71/1997/855/1062–1064, 23 September 1998.

<sup>77</sup> See, for instance, E. Crawford, Proportionality, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012 (online); M. Newton, L. May. *Proportionality in International Law*. Oxford University Press, 2014.

<sup>78</sup> See also L. Lopez Guerra, *El principio de proporcionalidad en la jurisprudencia del tribunal europeo de derechos humanos*, CDL-JU(2019)004, 23 January 2019; G. Scaccia, Proportionality and the Balancing of Rights in the Case-law of European Courts, *Rivista di Diritto Pubblico Italiano, Comparato, Europeo*, Vol. 4, 2019, pp. 1-34.

*v. United Kingdom*, the ECtHR concluded that the derogating measures adopted by the UK after the terrorist attacks of 11 September 2001 “were disproportionate in that they discriminated unjustifiably between nationals and non-nationals”,<sup>79</sup> finding violation of Article 5.1 of the ECHR (Right to Liberty and Security). Yet, in general, the ECtHR has shown a certain deference to States in cases relating to a state of emergency. In the very same *A. and Others Case*, it refrained from considering other grounds of alleged disproportionality of the UK emergency measures invoked by the applicants, thus making it possible for the UK to comply with the judgment by simply extending the measures to everyone (to UK citizens and non-citizens alike).

93. A similar self-restraint has been shown so far by national courts considering Covid-19 related measures. For instance, in the Czech Republic, proportionality of emergency measures has been challenged before courts. Yet, so far, both the Constitutional Court and ordinary courts have limited their review to formal aspects of the emergency legal acts, declining to engage in a substantive review. Other national courts have developed a more pro-active approach. For instance, in Portugal, a court decided on 16 May 2020 that compulsory confinement of a person, without sufficient evidence that this person was infected, without weighing the values of public health against personal freedom, and without the possibility of staying at home, violated the principle of proportionality, and ordered the immediate termination of the measure. In France, on 18 May 2020, the Council of State declared the general and absolute closure of places of worship was disproportionate. And in an interim decision of 6 September 2020, the Council of State dealt with the compulsory wearing of face masks in public places. The case began with two individuals seizing the administrative courts of Strasbourg and Lyon respectively to challenge the obligation to wear a face mask in public places in Lyon and Villeurbanne as well as in Strasbourg and in 12 other municipalities in the department of Bas-Rhin. By two decisions, the courts limited the obligation to wear face masks in these cities to places and times characterised by a high population density. The State had asked the Council of State to overturn these decisions. The Council of State decided that the wearing of a face mask can be imposed on large areas, so that this obligation is consistent and easy to apply by all citizens. However, these extended perimeters must be delimited and justified by the existence of several areas of a high risk of contamination. Wearing a face mask can therefore be imposed on densely populated cities, but must be limited to only the city centre in less densely populated municipalities.

94. Proportionality of emergency measures has been subject to judicial scrutiny at the national level in previous emergency situations as well. For instance, in its decision of 22 December 2015, the French Constitutional Council considered the proportionality of a house arrest imposed on terrorist suspects, and concluded that the measure was not disproportionate and, hence, did not violate human rights.

95. The *principle of temporariness* is closely linked to the principles of necessity and proportionality and is, in fact, sometimes considered as a part of one of them. By their very nature, emergency measures should apply temporarily, for the period necessary to counter the emergency or a particular aspect thereof. The Siracusa principles are explicit on the requirement of temporariness with respect to derogations, noting that “a state party availing itself of the right of derogation pursuant to Article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation”.<sup>80</sup> They also stress that “on the termination of a derogation pursuant to Article 4 all rights and freedoms protected by the Covenant shall be restored in full”.<sup>81</sup>

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<sup>79</sup> ECtHR, *A. and Others v. the United Kingdom*, Application No. 3455/05, Grand Chamber, 19 February 2009, paragraph 190.

<sup>80</sup> UN Doc. E/CN.4/1985/4 (1985), *Siracusa Principles*, *op. cit.*, paragraph 48.

<sup>81</sup> *Ibid.*, paragraph 50.

96. The ECtHR has accepted relatively long-term states of emergency involving derogation, however on the condition that the need for this state and for individual emergency measures be subject to regular review.<sup>82</sup>

97. Exceptional circumstances that trigger the declaration of a state of emergency may sometimes result in longer-term revisions of the applicable legal framework and the distribution of powers within the State. Such long-term revisions are not necessarily unlawful, as long as they meet the principles of acquired rights and of checks and balances and do not deviate from the European standards of democracy, human rights and the rule of law. Examples of measures that would hardly fulfil these criteria include the declaration of an unlimited state of emergency, a long-term transfer of legislative powers to the executive or the exclusion of emergency measures from parliamentary or judicial scrutiny.

98. In conclusion, for EU Member States, the review of emergency measures should be based on the application of the European standards of democracy, human rights and the rule of law. For human rights, the crucial benchmarks will be those set in the ECHR and the case-law of the ECtHR as well as in other international instruments applicable to the relevant country. As to the rule of law, the Venice Commission's 2011 *Report on the Rule of Law*<sup>83</sup> and the 2016 *Checklist of the Rule of Law*,<sup>84</sup> together with the instruments on the rule of law adopted in the EU,<sup>85</sup> should be used in the assessment. For democracy, the common constitutional heritage, as interpreted by the ECtHR and the Venice Commission, would apply. This entails that a State may not invoke a lower state of protection of human rights or a lower state of the rule of law or democracy in this State in the pre-emergency period as a justification for non-compliance, or lower compliance, with the standards during the emergency. Rather, a lower state of respect for the standards prior to the emergency should result in a more careful scrutiny to make sure that the emergency is not misused to adopt measures further derogating from the standards.

### C. Other

99. Ombudsman institutions, in countries where they exist, and National Human Rights institutions, on the basis of their mandate to promote and protect human rights, may provide a crucial contribution to flagging human rights issues during times of emergency and assist citizens affected by emergency measures. They may therefore effectively complement parliamentary and judicial control.<sup>86</sup>

100. In addition to parliamentary scrutiny and judicial review, scrutiny by the free media is essential. The ability for media to work and report properly during the Covid-19 crisis and provide timely, accurate and reliable information to the public will depend on the limitations placed on the freedom of expression.<sup>87</sup> The principles of necessity and proportionality require special care with respect to activating and applying measures which affect the freedom of the media.<sup>88</sup>

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<sup>82</sup> ECtHR, *Brannigan and McBride v. the United Kingdom*, Application Nos 14553/89 and 14554/89, 26 May 1993, paragraph 54. See also E. Crysler, *Brannigan and McBride v. UK: A New Direction on Article 15 Derogations under the European Convention on Human Rights?* *Revue belge de droit international*, No. 2, 1994, pp. 603-631.

<sup>83</sup> Venice Commission, CDL-AD(2011)003, *Report on the Rule of Law*, Study No. 512/2009, 4 April 2011.

<sup>84</sup> Venice Commission, CDL-AD(2016)007, *Rule of Law Checklist*, Study No. 711/2011, 16 March 2016.

<sup>85</sup> See, for instance, COM/2014/0158 final, *Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law*, 2014.

<sup>86</sup> Venice Commission, CDL-AD(2020)014, *op. cit.*, paragraph 90.

<sup>87</sup> Council of Europe, Congress of Local and Regional Authorities' Toolkit for member states on Respecting Democracy, Rule of Law and Human Rights in the Framework of the Covid-19 Sanitary Crisis: <https://www.coe.int/en/web/congress/covid-19-toolkits>

<sup>88</sup> Venice Commission, CDL-AD(2020)014, *op. cit.*, paragraph 91.

## VI. Elections

### A. Introduction: principles to be considered

101. International standards, as reflected in Article 3 Protocol 1 to the ECHR, Article 25.1.b of the ICCPR and the Code of Good Practice in Electoral Matters,<sup>89</sup> include the fundamental principles of universal, free and secret suffrage, but also of periodicity of elections and stability of electoral law. Moreover, democratic elections are not possible without the respect for human rights, in particular, the freedom of expression and of the press, the freedom of circulation inside the country, the freedom of assembly and the freedom of association for political purposes, including the creation of political parties. Restrictions to such rights as enshrined in the ECHR and the ICCPR must have a basis in law, be in the general interest and respect the principle of proportionality.

102. Holding elections in emergency situations may be problematic from the point of view of free suffrage, and in particular in view of the freedom of voters to form an opinion, as well as with regards to the respect for human rights during the electoral process – notably during campaigns. Respect for universal suffrage may also be questionable where voters are prevented from voting for security reasons, for instance for reasons of health risks.

103. Not holding elections may be problematic from the point of view of the right to periodic elections: the application of emergency regulations could be a way to keep the incumbents in power.

104. Adopting new rules during emergency situations raises the issue of stability of electoral law, and, if derogating from the normal division of powers, those of legality and the separation of powers.

105. In extraordinary circumstances, such as the current Covid-19 outbreak, there are inevitable limitations to either the periodicity of elections or other principles of elections, such as universal suffrage (some voters may be prevented from voting, for reasons of health; or there might be obstacles to holding elections for the diaspora, at least in some countries), or free suffrage. As discussed in the *2020 Reflections*<sup>90</sup> and pointed out by the IFES,<sup>91</sup> holding elections during extraordinary measures or pandemics leads mostly to lower turnout and thus lesser legitimacy of elections, specifically as most vulnerable groups risk not to take part in elections and thus the distribution of mandates could differ from the preferences in the society.

106. The principle of proportionality is therefore the key: apart from respecting the principles of legality and public interest, restrictions should be proportionate to their objective. In particular, any restriction aimed at ensuring the holding of elections on time should be balanced with the limitation of the right to free elections due to the emergency situation, and, *vice versa*, the postponement of elections should be balanced with the risk of holding them during the emergency situation. Measures taken should also be aimed at ensuring trust in democratic institutions.

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<sup>89</sup> Venice Commission, [CDL-AD\(2002\)023rev-cor](#), Code of Good Practice in Electoral Matters.

<sup>90</sup> Venice Commission, [CDL-AD\(2020\)014](#), Report - Respect for democracy, human rights and the rule of law in emergency situations – Reflections.

<sup>91</sup> [https://www.ifes.org/sites/default/files/ifes\\_covid-19\\_briefing\\_series\\_legal\\_considerations\\_when\\_delaying\\_or\\_adapting\\_elections\\_june\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid-19_briefing_series_legal_considerations_when_delaying_or_adapting_elections_june_2020.pdf).

107. This report will therefore answer the questions raised on the basis of these considerations, which have been developed in more detail in the Report on respect for democracy, human rights and the rule of law during states of emergency, the content of which will not be repeated.<sup>92</sup>

108. Account must be taken that the practical experience obtained during the Covid-19 crisis in EU Member States is limited, due to the short period of wide restrictions not allowing elections to take place. In later stages of the extraordinary measures, elections have been held in a widely accepted manner. Some postponement of elections has taken place in Germany, France, Italy, Spain, Austria, the Czech Republic and Poland. In Italy, a referendum was postponed.

### **B. Should elections be held during a period of emergency?**

109. The law and practice in the EU Member States are very diverse. The most widespread response worldwide has been to delay elections, which happened in at least 47 countries (a quarter of the countries in the world).

110. While international law is silent, many constitutions provide for the postponement or the possibility to postpone elections during emergencies, for example by extending the term of parliament. In the EU, this is the case in Croatia, Italy, Germany, Greece, the Netherlands,<sup>93</sup> Poland, Lithuania, Slovenia, Spain, and Hungary.<sup>94</sup> In some of their constitutions, an emergency situation precludes the dissolution of parliament, e.g. Germany, Spain, Portugal, Poland, and Hungary.

111. In practice, Austria, France (for the second round only) and Spain decided to postpone their local elections; the Czech Republic postponed the legislative elections; Croatia, on the contrary, called an early legislative election during this time. Poland initially decided to carry out the presidential elections with compulsory postal voting to suspend them later and ended up holding the two rounds of the presidential elections at the polling station. In Romania, the Government decided to implement several measures in connection with the local elections which were postponed to 27 September 2020.

### **C. Should elections due to be held be postponed?**

112. When a conflict arises between the constitutional obligation to call elections and the emergency situation, there is pressure to go ahead with the election or to create a conflict, apparent or real. According to a decision taken by the French Constitutional Council on 17 June 2020 (n° 2020-849 QPC), in spite of the legislative gap, the initial postponement of the second round of elections, originally scheduled for 22 March 2020, was legal.

113. A number of elements should be established before delaying an election:

- The authority with the ability to delay and establish electoral dates.
- The legislative framework that allows flexibility or modification of electoral procedures.
- The establishment of new key deadlines, such as voter registration and campaign duration.

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<sup>92</sup> Venice Commission, [CDL-AD\(2020\)014](#), Report - Respect for democracy, human rights and the rule of law in emergency situations – Reflections; see also [CDL-PI\(2020\)003](#), Compilation of Venice Commission Opinions and Reports on States of Emergency.

<sup>93</sup> As to the Netherlands, this possibility is limited to an extension of one year. The reasons for such an extension are not limited to an emergency situation.

<sup>94</sup> In Hungary, this only applies where a “state of national crisis” or a “state of national emergency” has been declared. For the Covid-19 crisis, Hungary has only declared a “state of danger”.

- The authority for the Electoral Management Body to develop the legal framework for these procedures.
- The provisions in the legal or regulatory framework requiring certain forms of accessibility, inclusion or consultation.
- The regulatory or constitutional framework regarding the transfer of power and the situation in which the government remains after its mandate.
- The rules for the continuity of power or its provisional replacement (caretaker government).

114. The institutional consequences of a postponement are an element to take into serious consideration. The more the normal functioning of the state institutions is affected, the less the postponement is acceptable and the shorter it should be. The situation is particularly problematic when parliament has already been dissolved, as was the case in a non-EU Member State, North Macedonia. Problematic situations might also arise in case of early elections due to the death of the incumbent (e.g. Czech Republic) or the inability of cooperation (boycott) in the outgoing parliament, as well as when the legitimacy of the previous elections is dubious. In these cases, the postponement of elections should be considered carefully and as a last option. In general, however, parliament should continue working up to election day, but the capacity of the authorities that remain in office to adopt structural measures, not linked to the emergency situation (amendments to the constitution, organic laws or other important reforms), must be limited.

115. Referendums should, in principle, be postponed, in particular when initiated by the authorities, in order to ensure that the campaign is held under ordinary rules in conformity with international standards. However, if they are initiated by part of the electorate, the emergency situation should not serve to postpone them *sine die*.

#### **D. Amendments to electoral legislation in case of emergency: conformity with international standards**

116. The principle of stability of electoral law is a guarantee for legal certainty: changes of the fundamental rules of the game should take place well in advance of elections (one year at least), and the rules should not be changed during the game - "any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election".<sup>95</sup>

117. Nevertheless, late changes of electoral legislation, which would not be appropriate in an ordinary situation, are justified in an emergency situation if they are necessary to the holding of elections in conformity with international standards. It is, however, suitable to adopt them outside such situations and they should not be applicable to one specific emergency only, but have a general character in order to ensure legal certainty. When adopted during an emergency situation, the changes should be as limited as possible and proper information should be given to the citizens (see below).

118. At any rate, the legal framework for elections should be unambiguous, understandable and transparent, and its implementation must be impartial and unbiased.

119. Such changes can affect the date of the elections, waiving requirements for registering or nominating candidates, campaign modalities of voting and counting, or the requirement of collecting supporting signatures (if this is not possible online).

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<sup>95</sup> Venice Commission, [CDL-AD\(2005\)043](#), Interpretative Declaration on the Stability of the Electoral Law, II.5; apart from this declaration, see already Venice Commission, [CDL-AD\(2002\)023rev-cor](#), Code of Good Practice in Electoral Matters, II.2; Rule of Law checklist, [CDL-AD\(2016\)007](#), II.B.4.

120. These changes should not lead to any undue restrictions to the right to free elections. Adopting them following a wide debate and by a large consensus is a guarantee against such abuses and for trust in the electoral process and its legitimacy.

121. In the EU, legislation was amended in Poland and France or is in the process of being amended (Netherlands), while other countries such as Spain did not make any changes to their legislative framework.

### **E. The competent authority**

122. According to the Venice Commission, the *specific rules on the postponement of elections* should not be adopted by the executive branch of power nor by a simple majority in parliament but laid down in the constitution or an organic law.<sup>96</sup>

123. It is also recommended that the decision to postpone the elections be decided by parliament, if it exceeds a certain duration. "If the postponement concerns only part of the country or if the elections are to be postponed only for a short period (less than two months), a decision can be made by the election administration or the government. Where, by contrast, a postponement is for more than six months, this should be decided by the legislative body. One option is to require a qualified majority in the parliament for the longer postponement of elections. However [...] only one institution should be competent to decide on the matter. Different stakeholders, including political parties, election management bodies and experts (e.g. in pandemic, health authorities) have to be consulted beforehand."<sup>97</sup>

124. These decisions, and all those that affect these extraordinary electoral processes, must be adopted in a transparent and, where possible, consensual way, taking into account the exact circumstances thoroughly (for an epidemic: health information, the country's capacity, the levels of expansion of the disease...). They must be open to independent review, preferably before a court of law.

125. The following elements of practice during the Covid-19 crisis may be of interest. In Poland – a last-minute change proposed by the government to introduce postal voting exclusively was rejected by the Senate. The government then decided to postpone the election and the new schedule was established by the President of the lower house. In the Czech Republic, the government decided to suspend a special election, but on 1 April 2020, the original Government decision to suspend the by-elections was declared null and void by the Supreme Administrative Court (Pst 19/2019 – 12). The Court concluded that the competence to suspend elections was reserved to parliament (§ 10 of the Constitutional Law on the Security of the Czech Republic). In Austria, the provincial parliament decided to postpone the elections in Vorarlberg while the Governor and the provincial parliament postponed the elections in Styria and, to date, these decisions have not been submitted to parliamentary scrutiny or judicial review. In Spain, the presidents of the regions decided to postpone the regional elections in the Basque Country and in Galicia and fixed a new date. In France, the Government decided to postpone the second round of municipal elections.

### **F. The duration of the postponement**

126. The principle of proportionality requires that the duration of a postponement be as short as possible. Although the criterion chosen is returning to "normalcy"; in the case of an epidemic,

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<sup>96</sup> Venice Commission, [CDL-AD\(2020\)014](#), Report - Respect for democracy, human rights and the rule of law in emergency situations – Reflections, paragraph 119.

<sup>97</sup> Ibid.

there is however a danger that holding elections too soon will contribute to spreading the disease. In addition, it is likely that the longer the delay, the more governments in office that aspire to re-election could be harmed when the economic consequences begin to be noticed.

127. The law should provide for a maximum duration of any decision to postpone elections as well as for a total maximum duration for such postponement. A new postponement should be submitted to the same procedural constraints as the first one, including judicial review.

128. However, in case elections are held before the end of the emergency situation, political parties must have enough time to change their campaigning methods, due to the specific restrictions affecting rallies and demonstrations.

129. After the worst part of the Covid-19 crisis had passed, some countries held elections (even during the period of emergency, but with a better health situation). The duration of the postponement was as follows:

- Poland - 2 months (presidential elections)
- The Czech Republic - 2 months (senate elections in one district, in replacement of the senator who had died in January)
- Austria - 3 and 6 months (local elections in Styria and Vorarlberg)
- France - 3 months (local elections)
- Spain - 3 months (regional elections in Galicia and the Basque country)

### **G. Under which conditions can elections be held under emergency situations?**

130. Elections are not a one-day event, but comprise an entire process. International standards, including equality of opportunity, the freedom of voters to form an opinion and the freedom of assembly and expression, must be ensured throughout this process. As already mentioned, the call for elections during states of emergency is prohibited in some countries.<sup>98</sup> However, there does not seem to be legislation about their holding when they were already called.

131. For the organisation of voting, additional financial resources to guarantee the safety of the voting process are required. Masks, hand disinfectant, larger rooms for voting, if possible, voting facilities outdoors, are usually required. As the personnel of the polling station committees must be protected, additional time might be required to recruit more members and provide them with training.

### *Campaign*

132. Certain campaign aspects, such as rallies or door-to-door visits, may be limited. However, efforts should be made to compensate, as far as possible, these limitations by promoting the campaign in the media (advertising, debates) including social media.<sup>99</sup> Where small outdoor events are allowed, the possibility of holding rallies is given, e.g. for municipal elections.<sup>100</sup> For presidential elections, the lack of possibilities to hold large-scale rallies may be easily replaced by online events or campaigning in the media. For parliamentary elections, the adjustment might be the most difficult and often requires more time. As the use of the

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<sup>98</sup> Extending the term of parliament (Croatia, Italy, Estonia, Germany, Greece, Poland, Lithuania, Slovenia, Spain and Hungary (only for a state of national crisis or a state of emergency)) or prohibiting the dissolution of parliament (Germany, Spain, Portugal, Poland, Hungary (only for a state of national crisis or a state of emergency)).

<sup>99</sup> Venice Commission, [CDL-AD\(2020\)014](#), Report- Respect for democracy, human rights and the rule of law in emergency situations – Reflections, paragraph 103.

<sup>100</sup> In Romania, a maximum of 100 people will be able to take part in election rallies and demonstrations, in full compliance with rules of hygiene and voters will be obliged to disinfect their hands before entering and leaving polling stations.

Internet and social media has extensively shown, many voters would perhaps follow the campaigning without being present at rallies. Thus, the traditional media together with social media and Internet campaigning may be considered to substitute the limitations on public gatherings to some extent.

133. This requires strict adherence to the obligations of neutrality of the authorities and the media. There is also a risk that the campaign will exclusively focus on the pandemic and its management, but this might be unavoidable.

#### *Voting modalities*

134. In addition to guarantees for the respect of international standards, high participation is a key element to ensure the legitimacy of the election and must be a priority. In the last EU elections, participation rose in Poland, but declined in France, Spain, and the Czech Republic. The type of election, the possibility to vote by mail and its promotion may partly explain this. Voting by mail was multiplied by 4.5 in Poland and increased by 50% (Galicia) and 140% (Basque Country) in Spain.

135. The voting modalities directly affect participation. All remote voting modalities (postal voting, internet voting, mobile ballot boxes, proxy voting) as well as early voting, increase it in particular in case of pandemics; however, they involve different risks in terms of free and secret suffrage. As stated in the Code of Good Practice in Electoral Matters, for example, postal voting should be allowed only where the postal service is safe and reliable, very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited and mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud.<sup>101</sup> Internet voting must be secure, reliable, efficient, technically robust, open to independent verification and easily accessible to voters.<sup>102</sup> Observation of all forms of remote voting is difficult. This may lead to mistrust. It is therefore important to reach consensus on these modalities.

136. The need for consensus also relates to the increase of the number of election days, which has taken place in many countries. Such extension leads to wider possibilities to organise the voting in the usual facilities with less voters at the same time and more time to disinfect the facilities. On the other hand, the difficulties in keeping the safety of the voting material as well as in observing the voting process may lead to distrust.

137. For example, in Poland, the Government had proposed to turn to all-postal voting for the presidential elections, but objections were made about the safety and reliability of this change, which eventually did not take place *inter alia* due to the opposition by the senate. France tried to re-authorise postal voting, after 45 years, but the Government finally rejected this change. Proxy voting was simplified by allowing powers of attorney to be extended to two voters, where previously it was one per person, and those voters no longer need to justify why they need to vote by proxy when submitting the official application form.

#### *Information to voters*

138. In times of uncertainty, information about registration and voting in communication media and polling stations is key. It is important to inform voters about the measures taken to avoid the desertion of polls and guarantee that the processes are developed securely and with certainty,

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<sup>101</sup> Venice Commission, [CDL-AD\(2002\)023rev-cor](#), Code of Good Practice in Electoral Matters, I.3.2.

<sup>102</sup> Council of Europe, [Recommendation CM/Rec\(2017\)5 of the Committee of Ministers to member States on standards for e-voting](#).

and that results are accepted by the population. Hence, the need to avoid complicated processes, to improve transparency and more generally to ensure the application of the legislation.

#### *Sanitary measures to guarantee the exercise of the vote*

139. In addition to the application of existing regulations, such as the safety distance, the use of face masks and face shields, screens for polling station staff, frequent handwashing, cleaning, disinfection and ventilation of polling places - overcrowding should also be avoided by increasing the number of polling places and their dimensions establishing them in outdoors whenever possible, with an extended day schedule or setting shifts or special places for the population at risk with extra security measures (prioritising those groups when they are voting in the regular polling places). 140. It is recommended that practical measures be taken to shorten the stay inside the polling station and to avoid unnecessary contacts.<sup>103</sup>

141. It may be envisaged to reduce the number of observers and party proxies without reducing the possibilities for proper observation. Other measures to protect staff could be to establish a security screen and a device at the polling station (such as a tray or similar) where voters can deposit their identity document without the need of manipulation by staff at the polling station, to use gloves, to establish entry and exit routes, etc.

142. This may imply the involvement of specific staff and/or cooperation from the police and civil protection. It should also be borne in mind that the organisation of elections requires extra resources. This may affect electoral financing rules, as was the case in Poland.

## **VII. Conclusions**

143. All actions taken by EU Member States to address the Covid-19 crisis, whether through the declaration of a state of emergency (or equivalent) or not, will have had an impact to a lesser or greater degree on democracy, the rule of law and human rights.

144. These actions taken in a crisis are articulated through the introduction of emergency measures. Where emergency measures are rule of law-compliant, they will have built-in guarantees against abuse, specifically with regard to the principle of proportionality under its various aspects. This principle is key particularly in the electoral field, where the impact of any postponement of elections must be balanced with the risks for free and universal suffrage arising from holding them during an emergency situation. Respect for this principle must be subject to effective, non-partisan parliamentary scrutiny and to meaningful judicial review by independent courts at a national and European level.

145. Where this is in place and respected, the dichotomy between normalcy and exception, at the base of a declaration of a state of emergency, will then not necessarily entail a dichotomy between effective action to deal with the emergency and democratic constitutionalism, or between protection of public health and the rule of law.

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<sup>103</sup> For example, voters could be informed about their exact table in advance.