

EU LEGAL SYSTEM AND CLAUSULA REBUS SIC STANTIBUS

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ABSTRACT

We are witnesses and participants of Copernican changes in the world which result in major crises/challenges (economic, political, social, climate, demographic, migratory, MORAL) that significantly change “normal” circumstances. The law, as a large regulatory system, must find answers to these challenges. Primarily, these circumstances relate to (i) the pandemic - Corona 19, which requires ensuring economic development with a significant encroachment on human freedoms and rights; (ii) globalization, which fundamentally changes the concept of liberal capitalism as the most efficient system of production of goods and services and democracy as a desirable form of government; (iii) automation, robotics, artificial intelligence, and big data are changing the ways we work, live, communicate, and learn in a Copernican manner. The law should serve to shape the relationship between people in order to realize a life of love and freedom. This is done to the greatest extent through the constitutional engineering of selected institutions. The legal system focuses on institutions that have a raison d'être in their mission, which is read as “ratio legis”, as a desirable normative and real action in the range of causal and teleological aspect. Crisis situations narrow social cohesion and weaken trust in institutions. It is imperative to seek constitutional engineering that finds a way out in autopoietic institutions in allopoietic environment. We believe that the most current definition of law is that = law is the negation of the negation of morality. It follows that morality is the most important category of social development. Legitimacy, and then legality, relies on morality. In other words, the rules of conduct must be highly correlated with morality - legitimacy - legality. What is legal follows the rules, what is lawful follows the moral substance and ethical permissibility. Therefore, only a fair and intelligent mastery of a highly professional and ethical teleological interpretation of law is a conditio sine qua non for overcoming current anomalies of social development. The juridical code of legal and illegal is a transformation of moral, legitimate and

legal into YES, and immoral, illegitimate and illegal into NO. The future of education aims to generate a program for global action and a discussion on learning and knowledge for the future of humanity and the planet in a world of increasing complexity, uncertainty and insecurity.

Keywords: *morality, legitimacy, legality, autopoiesis, clausula rebus sic stantibus*

“There is a lot of accumulation of vaccine stocks in rich countries. Global vaccination campaign is the greatest moral test of today”.

Antonio Guterres, UN Secretary General

1. INTRODUCTION

“The motto of Croatia’s EU presidency – ‘A strong Europe in a world of challenges’ – could not have better predicted the events we would all witness in early 2020 – the COVID-19 pandemic that altered the dynamic, technique, and to an extent the content of our activities and priorities.”¹ This is the first time in history that all EU member states have simultaneously encountered an emergency² crisis affecting core values of democracy, human rights, and the rule of law as such. For all member states, including the Republic of Croatia, the COVID-19 pandemic poses a considerable moral, social, political and legal challenge in terms of how to effectively and humanely respond to the crisis while ensuring that measures undertaken do not impinge on the interest of protecting democracy (and its values of pluralism, tolerance, and freedom of thought), the rule of law, and human rights as core values informing all EU member states. In legal theory, a state of emergency is an exceptional situation, a state of crisis or danger representing a “threat” to the constitutional order of a country, inevitably leading to restriction or suspension of fundamental rights and freedoms of individuals. In the case of the COVID-19 pandemic, Council of Europe member states have a wide margin of appreciation as to whether or not something constitutes a “public emergency threatening the life of the nation.”³ The Republic of

¹ Plenković, A., *Virtualni sastanak članica Europske unije*, 19 June 2020, [<https://hr.n1info.com/biznis/a519198-celnici-zemalja-clanica-na-virtualnom-sastanku-prvi-put-o-oporavku-eu-a/>], Accessed 5 March 2021.

² *Clausula rebus sic stantibus* – the changed circumstances clause (extraordinary, unpredictable, insurmountable circumstances).

³ Article 15 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16; European Court of Human Rights, Council of Europe (hereinafter: Convention), states: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by

Croatia has not declared a state of emergency⁴ nor issued a notification of the derogation under Article 15 of the Convention.⁵ Our parliamentary majority decided to treat this “new situation” within the scope of “regular situation,”⁶ but under the category of “special circumstances.”⁷ Strategies for curbing the pandemic have not been agreed upon on the level of the EU – they are instead a matter of each state’s discretion. Thus, the crisis has put the state and government in the limelight of fighting the pandemic – a fight requiring daily deliberation of legal and just application of “checks and balances” in decision-making. We face an unprecedented slowing down of the globalization process with Europe as a “global player,” the closing of borders, regions and even continents, and a growing awareness of the importance of the nation state.⁸ In states with multi-level governance such circumstances bring forward the problem of division of competences on the principle of subsidiarity. It is necessary to curb the spread of new polarizations and mutual tensions and turn to one’s values as drivers and foundations of future progress. All upcoming changes on the global and European level require fair and smart national strategies and policies aligned with these changes. Adapting to emerging changes is hampered by a representative body operating as a “chatroom,” which makes it seem weak, political parties and politicians who lost public confidence, and a passive and confused public lost in a pervasive sense of social powerlessness. We need to build a democracy whose purpose is to promote and respect universal human values, freedom and equality for all, while respecting human rights, freedom and justice that are also moral categories and must apply to everyone. It is now more imperative than ever to create smart policies up to date with scientific achievements. As a country in transition, Croatia must not blindly and mechanically copy suggested European solutions and others’ goals, but instead look for economic and legal solutions helping us achieve autopoiesis through self-organization and self-education. The emphasis is on self-organization and self-reference, where quality action can only be achieved through teamwork,

the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

⁴ Article 17 of the Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10 i 5/14; hereinafter: The Constitution

⁵ As of 7 April 2020, eight states have issued notifications of derogation from the Convention, as follows: Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, and Romania, after their competent authorities declared their respective states of emergency. Finland, Italy, Lithuania, Hungary, Portugal, Slovakia, Serbia, and Spain also declared states of emergency, but failed to issue a notification of the derogation from the Convention. A third group of Council of Europe member states, including Croatia, failed to do either of those.

⁶ Article 16 of the Constitution.

⁷ Article 22 (2) of the Civil Protection Act (hereinafter: CPA), Official Gazette No. 82/15, 118/18 and 31/20.

⁸ Current events regarding joint activities of the European Commission in the purchase of vaccines.

and individual differences do not hamper, but promote autonomy (while respecting morality, legitimacy and legality).⁹ Autopoiesis allows the morally and intellectually superior to lead technological advancement, economic and political development. We are currently facing a true test of democracy, and with that in mind, the authors of this paper will take into account the reactions of the Council of Europe (as the *acquis* of the Council of Europe, i.e. conventional law)¹⁰ and our executive and legislative authorities, and attempt to detect if we are heading in the right direction in “governing” and safeguarding the fundamental values of our democratic society in the wake of these unpredictable circumstances.

2. INSTRUCTIONS – MEASURES FOR PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS DURING THE PANDEMIC

On 7 April 2020, the Council of Europe issued an information document entitled “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis”.¹¹ The purpose of this document is to offer member states a tool for dealing with the current, unprecedented situation and the massive-scale crisis in a way that upholds fundamental values of democracy, rule of law and human rights. States are given the option of derogation during states of emergency (Article 15 of the Convention). It is important to note that derogation under Article 15 of the Convention does not depend on a formal declaration of a state of emergency or any other similar regime on a national level. Each derogation must have a clear basis in domestic law to protect from arbitrariness and must be necessary for dealing with the state of emergency. However, no action contrary to the main Convention requirements of legality and proportionality can be justified. The Council of Europe notes that even in states of emergency the rule of law must prevail. The term “law” refers not only to laws passed by the parliament, but also to those passed by the executive authority, provided they are consistent with the constitution. The legislature may also pass emergency regulations designed to combat the crisis that go beyond existing ones.¹² The duration of the state of emergency should be limited, and governments may be empowered to issue decrees having the force of the law. Regulations adopted during this time must have a so-

⁹ Lauc, A., *Metodologija društvenih znanosti*, Pravni fakultet Osijek, 2000, p. 444.

¹⁰ Lauc, Z., *Acquis Vijeća Europe i hrvatska lokalna samouprava, Ustavne promjene Republike Hrvatske i Europska Unija*, Sveučilište u Splitu, Pravni fakultet Split, Split, 2010, p. 74-97.

¹¹ [<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>], Accessed 5 March 2021.

¹² These must be in accordance with the Constitution and international standards and, if applicable, reviewed by the Constitutional Court.

called “sunset clause” whose duration is overseen by the government. The principle of necessity requires that emergency measures achieve their goal with minimum deviation from the normal rules and process of democratic decision-making.¹³ The executive authority must act quickly and effectively, for which purpose decision-making processes may be simplified and some checks and balances relaxed, as long as this is constitutionally advisable and allowed. The parliament, however, must retain its power to oversee the executive, while also maintaining the main function of the judiciary and the Constitutional Court. There is also a possibility of difficulties and restrictions in the conduct of elections, referendums and election campaigns. Member states must ensure an adequate level of medical care to persons deprived of liberty and to all other persons under state protection. States are required to ensure equal access to health institutions and medicinal products and to inform citizens about the pandemic and imposed measures. Such measures have an unprecedented influence on the right to freedom and safety, as well as the right to fair trial. Restriction of movement and deprivation of liberty must be strict and necessary in comparison to other, less restrictive measures. In the functioning of the judiciary (while respecting the right to fair trial), special care must be taken in urgent procedures (family and labor disputes, pre-trial detention etc.). Restriction of the right to privacy, freedom of conscience, freedom of expression and association is permitted only if it is based on law and proportional to a desired legitimate goal, which includes health protection.¹⁴ Any restriction, regardless of whether it requires derogation, must be in accordance with the law and relevant constitutional guarantees, and proportional to the desired goal. Observing the conventional requirement of proportionality is only possible by achieving balance between force and prevention. Ensuring freedom of the press is also emphasized, as well as “smart” and ethical use of modern technology. Following these “technical” guidelines issued to all states, the European Parliament adopted on 4 November 2020 the Resolution on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights.¹⁵ Council of Europe member states, all 47 of them, as parties to the Convention, have adopted similar anti-pandemic measures to avert the spread of COVID-19 infection in the circumstances of a global pandemic. Depending on epidemiological data and understanding of the potential danger of the virus in a particular state, such measures vary in scope and intensity.

¹³ The principle of necessity is not invoked directly in the context of institutional exceptional measures, but may be derived from conditions of proportionality and necessity of extraordinary measures in the sphere of human rights – see Venice Commission, *Opinion on the Draft Constitutional Law on “Protection of the Nation” of France*, CLD-AD(2016)006, paragraph 71.

¹⁴ This includes restrictions of religious ceremonies, weddings, funerals etc.

¹⁵ [https://www.europarl.europa.eu/doceo/document/B-9-2020-0343_EN.html], Accessed 5 March 2021.

Still, despite being enforced to protect people's lives and health in circumstances of uncontrolled spread of the infection, they are undeniably restrictive of certain human rights and freedoms.¹⁶ As vaccinations started throughout the European Union, on 27 January 2021, the Council of Europe adopted Resolution 2361 (2021),¹⁷ which, among other things, found it necessary to “ensure that citizens are informed that the vaccination is not mandatory and that no one is politically, socially, or otherwise pressured to get themselves vaccinated, if they do not wish to do so themselves” and to “ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated.” Citing Resolution 2337 (2020) on democracies facing the COVID-19 pandemic, the Council of Europe Assembly reaffirmed that, as cornerstone institutions of democracy, parliaments must maintain their triple role of representation, legislation and oversight in pandemic circumstances, and thus called on member-state parliaments to exercise these powers, as appropriate, also in respect of the development, allocation and distribution of COVID-19 vaccines. The Council of Europe Assembly determined it was necessary to ensure compliance to the principle of equitable access to healthcare in order to make COVID-19 vaccines available to citizens regardless of gender, race, religion, legal or socio-economic status, ability to pay, location and other factors that often contribute to inequities within the population; that it is necessary to develop strategies for the equitable distribution of COVID-19 vaccines within member States, to ensure that persons within the same priority groups are treated equally, with special attention to the most vulnerable people; to promote neutrality in access to COVID-19 vaccines between states; to refrain from stockpiling COVID-19 vaccines and allow everyone to evenly procure vaccines for its population and avoid manipulation of vaccine prices; to ensure that every country is able to vaccinate their health-care workers and vulnerable groups; to ensure that Covid-19 vaccines whose safety and effectiveness has been established are accessible to all who require them in the future.¹⁸

3. REVIEWING ADOPTED MEASURES

In this crisis situation, responses in averting the COVID-19 pandemic are accompanied by increased (expanded) powers of the executive at the expense of the legislature. The unprecedented reach of the adopted measures, their scope and how quickly they are introduced also highlights the importance of controlling their influence on

¹⁶ Omejec, J., *Primjena Europske konvencije o ljudskim pravima u doba koronavirusa*, Informator, No. 6622, Zagreb, 2020, p. 1.

¹⁷ [<https://pace.coe.int/en/files/28773>], Accessed 5 March 2021.

¹⁸ Đuras, I., *Zabrana diskriminacije necijepljenih*, IUS-INFO, Zagreb, 2021, [<https://www.iusinfo.hr/aktualno/u-sredistu/44524>], Accessed 5 March 2021.

human rights with respect to the principle of legality and proportionality. In a crisis situation, the existence of mechanisms for reviewing (controlling) adopted measures is also necessary. When this is done by a court, it takes into account the legality¹⁹ and proportionality²⁰ of adopted measures, whether they adequately respond to the extraordinary circumstances, whether they are used for the intended purpose, if their scope is limited, whether they are subject to strict guarantees, whether they involve any kind of justifiable discrimination, and whether they were devised in accordance with the law and the Constitution. There are currently only a small number of cases related to the COVID-19 pandemic that have been decided by national courts of EU member states. Reviewing the quality of laws enacted during emergency circumstances and their implementation in practice are key to preventing possible violations of these rights. The Constitutional Court of Bosnia and Herzegovina, in its decision of 22 April 2020, found that forbidding minors and persons over the age of 65 to leave their homes constitutes a violation of their right to freedom of movement, because the restrictions had not fulfilled the requirement of proportionality, while authorities did not clearly define why they believe certain age groups are at higher risk of becoming infected or infecting others. Similarly, authorities did not consider the option of introducing less restrictive measures, the measures did not have a strict time limit, and there was no obligation to regularly review their necessity. The Constitutional Court of Kosovo, in its decision of 23 March 2020, found that certain movement restrictions were not prescribed by law because they were not in accordance with the constitutional requirement that restrictions of rights and freedoms may be introduced only on the basis of a law enacted by the Assembly. The decision of the Frosinone District Court of 15 June 2020 established that the order of 31 January 2020 by which the Italian Council of Ministers declared a state

¹⁹ There must be clear and accessible rules on when measures may be introduced and for which state of emergency. Legal effects and the basis for their adoption must be clearly stated, as well as the scope of the powers granted and situations in which it applies (for more details, see report related to the principle of legality, “Rule of Law Checklist,” Venice Commission, 106th Plenary Session, 11-12 March 2016 [[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)]), Accessed 5 March 2021. Any law or measure must have a clear enough scope so that the public can understand what is required of them and to adapt their behavior accordingly.

²⁰ “The principle of proportionality requires that States only take measures which are strictly required by the emergency situation. Where exceptional powers are introduced, they must only be used for the reasons for which they were granted. ... Emergency measures should be limited in duration. ... The burden must be on the executive to demonstrate the necessity of any extension. ... Proportionality is also relevant to the ways in which measures are applied and enforced. Criminal sanctions should be used as a last resort to enforce restrictions on rights imposed to respond to the pandemic and fines should not be unreasonably high. Further, emergency powers must not be enforced in a discriminatory manner.” Advice on Individual Rights in Europe, The AIRE Centre: Covid-19 and the Impact on Human Rights - An overview of relevant jurisprudence of the European Court of Human Rights, p. 158-159, 2020 AIRE Centre [<https://www.rolplatform.org/wp-content/uploads/2020/10/covid-guide-eng.pdf>], Accessed 5 March 2021.

of emergency was contrary to the Italian Constitution. An order of the Administrative Tribunal in Strasbourg of 20 May 2020 temporarily repealed the ordinance of the City of Strasbourg requiring all persons over the age of 11 to wear a mask when walking around the city. The Tribunal cited Article 8 of the Convention and principles of legitimate aim and proportionality, and decided that this measure was not justified by a strong reason relevant to local circumstances in Strasbourg. On the basis of the same principles, this ordinance was repealed on 2 September 2020 and local authorities were invited to amend it.²¹ The Supreme Court of the USA ruled in an action brought by the Roman Catholic Diocese just before the onset of these measures in Croatia, in which it explicitly states that it is not justified or allowed to annul basic human rights during a declared pandemic, as done by the governor of New York whose measures restricted places of worship in the red zone to a maximum of 10 people, and those in the orange zone to 25. This was only a temporary measure, but the court injunction remains in force pending decision by the Court of Appeals for the Second Circuit, reviewing the justification for disputing the Governor's order. The decision in question is Roman Catholic Diocese of Brooklyn v. Cuomo²², ruled by a 5:4 majority vote, for which (liberal) justice J. Sotomayor filed a dissenting opinion, stating: "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily."²³ In February 2021, the Supreme Court of the USA issued another decision regarding the ban on gatherings within religious buildings, including indoor religious services, in the case South Bay United Pentecostal Church v. Governor of California.²⁴ In this most recent case, the court decided to (temporarily) repeal the total ban on religious services in churches, but upheld the state's power to restrict the number of worshippers in churches at religious services to 25% of their capacity. The court also upheld a part of the governor's order to ban singing and clapping during indoor religious services. Justices Kagan, Breyer and Sotomayor (the so-called liberal wing of the supreme Court) filed a joint dissenting opinion opposing the Court's decision, pointing out: "Justices of this Court are not scientists. Nor do we know much about

²¹ The AIRE Centre, *op. cit.*, note 20, p. 164.

²² Supreme Court of the United States, The Roman Catholic Diocese of Brooklyn, New York, Applicant v. Andrew M. Cuomo, Governor of New York, on application for injunctive relief, 592 U. S. 2020 No. 20A87 Per Curiam, 25 November 2020 [Lower Court: United States Court of Appeals for the Second Circuit, Case Numbers: 20-3590], [https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf], Accessed 8 March 2021.

²³ Sotomayor, J., dissenting, *ibid.*, p. 3.

²⁴ Supreme Court of the United States, South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, et al., on application for injunctive relief, 592 U. S. 2021 No. 20A136 (20-746), 5 February 2021, [https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf], Accessed 8 March 2021.

public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic."²⁵ By a preliminary ruling No.1 BvQ 28/20 of 10 April 2020, the Federal Constitutional Court of Germany upheld the ban on religious services ordered by the State of Hessen, challenged by a Catholic who wanted to attend mass and Easter services.²⁶ The court found a particularly severe infringement of the applicant's freedom of religion, but in the end concluded that mass gatherings in churches would seriously endanger public health and people's lives. So, after "weighing possible consequences," the Court denied the request, pointing out that the disputed regulation should be regularly reviewed, which means it is not a decision on the merits, but a request for an interim measure.

4. A STATE OF EXCEPTIONAL (CHANGED) CIRCUMSTANCES

"There are occasionally situations that, like lightning, cast a sudden light on the center of political power. These are states of emergency ..."²⁷ Hegel defined long ago: measure = optimum. In other words, finding the best solution in the given circumstances. For constitutional rulings, it means sophisticated seeking of the right measure of "checks and balances," or balance between the needs and interests of individuals and the missions of the collective.²⁸ Discussions on a state of emergency did not bypass Croatia, quite on the contrary – despite the fact that more than a year has passed since declaring the COVID-19 pandemic, and the fact that the Constitutional Court has issued decisions on the adopted measures/laws, the state of emergency is still a hot topic of public discussion. There is no doubt that in an ideal political system the rule of law (which is disrupted in crisis situations), as the ultimate value of the constitutional order, would be most consistently up-

²⁵ Kagan, J., dissenting, *ibid.*, p. 1, [https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf#page=10], Accessed 8 March 2021.

²⁶ [https://www.bundesverfassungsgericht.de/e/qk20200410_1bvq002820.html], Accessed 8 March 2021.

²⁷ Schmitt, C., *Politische Theologie*, Leipzig 1934 p. 11 .

²⁸ Lauc, Z., *MORALITET – LEGITIMITET – LEGALITET = Trojstvo konstitucionalnog inženjeringa, HAZU 30-godišnjica Ustava RH (1990-2020); Ustavne promjene i političke nagodbe - Republika Hrvatska između ustavne demokracije i populizma*, HAZU, Zagreb, 2020, in press.

held if all relationships that could possibly arise in states of emergency were normatively regulated in advance. Real life, however, does not behave this way, and precisely because of the unexpected nature and scope of states of emergency, regulating them in advance would be ineffective.²⁹ Such situations are disruptions of social life that cause a discrepancy between normal and abnormal, between what is regulated by law and what occurs in specific, newly-occurred non-regulated circumstances. This means the executive must act by “new” means, based on special powers granted in order to preserve new relations altered by the emergency. “From the perspective of constitutionality and legality, it is a matter of modifying the existing order by creating a specific but legally regulated order that is expected to end and allow a return to the previous state as soon as circumstances return to normal.”³⁰ All countries have faced two key phenomena: first, that this situation demands a modification of the legal order, requiring specific regulation (so-called special legality), and second, that the executive “enters” the domain of the legislature, resulting in restriction of fundamental human rights and freedoms. States of emergency require not only restrictions of certain rights and freedoms, but also a reaction with the aim of preservation and survival of the political community as such.³¹ Protection of public health has led to restrictions of rights and freedoms of individuals³² by decision of the executive, as well as a temporary suspension of requirements for continued checks and balances of the executive. According to Prof. Smerdel, in addition to its normal constitution, every democratic state has in reserve a “crisis constitution,” allowing it to defend from attacks and preserve democracy during difficult times.³³ As mentioned above, Croatia has not declared a state of emergency by “activating” Article 17 of the Constitution, but treats this situation as a state of exceptional circumstances.³⁴

²⁹ “If, and when legislative provisions exist, they regulate in advance only those measures whose effectiveness in a given emergency is determined on the basis of highest probability.” Omejec, J., *Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja*, Pravni vjesnik Pravnog fakulteta u Osijeku, p. 172-196, 1996, p. 173.

³⁰ *Ibid.*, p. 174.

³¹ “In an emergency, the welfare of the nation should be the supreme law (*Salus rei publicae suprema lex esto*).” Smerdel, B., *Ustavno uređenje europske Hrvatske, II. izmijenjeno i dopunjeno izdanje*, Narodne novine, Zagreb, 2020 p. 126.

³² “... An individual’s right to sneeze is inviolable, restricted only when circumstances demand it, or in case of emergency, as is the case with the pandemic caused by the COVID-19 virus in 2020” *Ibid.*, p. 124.

³³ “This highlights the need to respect legal standards: the principle of proportionality in the restriction of rights (Article 16 (2) of the Constitution of the Republic of Croatia), a test of public interest, a test of justifiability of individual measures in a democratic society and other means (tools) of independent judiciary in the process of protecting constitutional rights.”

³⁴ Omejec, J., in an expert review: “*Zašto članak 17. kada imamo članak 16. Ustava*,” (“Why Article 16 when we have Article 16 of the Constitution”) [<https://www.vecernji.hr/vijesti/omejec-na-izvanredno->

5. DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

With regard to the necessity of “activating” Article 17 of the Constitution, the Constitutional Court found that decisions on whether particular measures to combat the COVID-19 pandemic will be made under Article 16 or Article 17 of the Constitution are the exclusive domain of the Croatian Parliament. The Constitution left the aforementioned choice to the Croatian Parliament as the legisla-

stanje-ne-treba-ni-misliti-a-kamo-li-ga-zazivati 1389637], Accessed 25 February 2021, states, among other things, that “the existing state is not such as to merit activation of Article 17 of the Constitution. The Constitution contains a general Article 16 with the same disposition as Article 17. The difference is that Article 16 is more broadly defined (referring to restriction of all rights and freedoms, not just those guaranteed by the Constitution), and has been in continuous use as a general provision. The Law on the Protection of the Population from Infectious Diseases has already passed the test of constitutionality (Constitutional Court Decision No. U-I-5418/2008 of 30 January 2014), incorporating Article 16 of the Constitution. This law allows strong restriction of constitutional rights and freedoms, particularly freedom of movement ... This law gives government the power, at the competent minister’s proposal, to declare each new infectious disease as one whose prevention and control is of interest to the Republic of Croatia, and to decide appropriate measures ... In this respect, by establishing the Civil Protection Headquarters [hereinafter: Headquarters], whose powers have been further broadened by the Parliament by amendments to the Civil Protection Act, the Government has acted in compliance with the cited provision. Decisions being made by the Parliament under Article 17 of the Constitution to control the coronavirus pandemic are a far worse choice than the existing model based on Article 16 of the Constitution. First, the Constitution defines a number of less restrictive and more appropriate measures than declaring a state of emergency. Second, the manner of declaring a state of emergency is not clearly defined in Article 17 ... The proper interpretation is that a state of emergency is declared by a reasoned decision on restricting enumerated constitutional rights and freedoms, adopted by a 2/3 parliamentary majority, and which is in essence a derogation from these Articles of the Constitution for the duration of the state of emergency (similar to Article 15 of the Convention). Once this decision is adopted, the 2/3 majority requirement for further restrictions of rights and freedoms is lifted. Natural disasters and infectious diseases have disparate and incomparable legislative, administrative, and judicial regimes. Implementation of Article 16 of the Constitution proves that all necessary measures can be adopted within the “normal” democratic legal order. A deviation from Article 16 of the Constitution would be necessary only in the event that in the coming period, due to force majeure, operation of the Croatian Parliament is forcibly interrupted. Having established this constitutionally relevant fact, the Constitutional Court would also confirm that conditions are met for the state to begin operating under a modified constitutional regime, in which the President of the Republic and the Government (also) assume the capacity of the legislature. This means a state of emergency can be declared by their decision ... This scenario should not even be considered at this moment, let alone invoked. Croatia is a representative democracy. Its representative body (the Croatian Parliament) is authorized and required – through its constitutional and legislative instruments – to regulate the preconditions for overcoming the present crisis within the framework of the Constitution, preserving and protecting the best democratic tradition as our country’s foundation. They are effectively protected by keeping under parliamentary control the general legislative framework for managing the current health crisis, which inevitably results in severe restrictions of individual and collective rights and freedoms. As a representative body of the people, and within its function as seat of legislative power, the Parliament must firmly hold the reins of public health within the limits of Articles 16 and 69 of the Constitution, for as long as it is able to convene.”

tive authority. The Constitutional Court has no authority to order the Croatian Parliament to choose one or the other constitutional option of restricting human rights and fundamental freedoms. So, according to the Constitutional Court, the fact that disputed laws (and measures) were not adopted under Article 17 of the Constitution does not make these laws unconstitutional. Regarding the Headquarters' authority to adopt measures/decisions, with respect to legitimate aim and proportionality, the Constitutional Court found that the Headquarters is an expert, operative and coordinating body for enforcing measures and activities of civil protection in disasters and catastrophes, operating under direct supervision of the Government. So, it is unquestionably a body with executive powers, given that this inevitably stems from provisions of the CPA which, among other things, regulate the status, composition, and authorities of the Headquarters, as well as supervision of its activities. Given the fact that the COVID-19 pandemic is a case of extraordinary circumstances and that it is a new infectious disease threatening the health of the population, the Constitutional Court has found that a new legal framework has been established, under which the Headquarters (along with the Minister of Health) is empowered to adopt decisions/measures for preventing the spread of the virus. Therefore, the Constitutional Court decided that the Headquarters had and still has legal authority to adopt measures in accordance with the law. The Constitutional Court, however, pointed out that this does not imply that Headquarters' decisions are not subject to control by the executive, legislative and judicial authorities. This is because, as mentioned above, The Headquarters operates under direct supervision by the Government. With respect to legitimate aim, the Constitutional Court has found that measures envisaged by the law and adopted by the Headquarters have the same goal – protecting the health and lives of citizens by preventing and mitigating the spread of the COVID-19 pandemic. So, the legitimacy of the aim sought by these measures is unquestionable. The Constitutional Court found that the Croatian Parliament acted within its constitutional powers when it enacted laws and amendments to laws that, with the aim of preventing the spread of infection in order to save people's lives and health, allow, among other things, adoption of measures restricting fundamental human rights and freedoms. With respect to the legal nature of the measures/decisions adopted by the Headquarters and the Constitutional Court's authority to decide on their constitutionality and legality, and taking into account the fact that certain measures/decisions undeniably restrict fundamental human rights and freedoms (and can, in certain cases, threaten the very essence of law), the Constitutional Court found that measures are considered "other provisions" under Article 125, indent 2 of the Constitution. Regarding the measure of self-isolation, the Constitutional Court found it indisputable that the measure represents a restriction of certain rights and freedoms, above all freedom of movement. Given that the

measure of self-isolation is stipulated by the relevant provision of the law, the Constitutional Court found that the legality of its adoption is, in principle, constitutionally solid. The Constitutional Court also justified the legitimacy of the aim sought by imposing the measure of self-isolation in individual cases. In other words, temporarily forbidding movement (self-isolation) to persons reasonably suspected to have been exposed to the risk of infection with COVID-19 aims to prevent the possibility of spreading the disease. Regarding restriction of operation of catering facilities, the Constitutional Court pointed out that the constitutionality and legality of individual Headquarters' decisions under Article 9a of the Hospitality and Catering Industry Act, including their proportionality, can only be assessed in special Constitutional Court proceedings. Regarding the necessary measure on mandatory use of face masks during the COVID-19 epidemic and the Decision on the organisation of public transport during the COVID-19 pandemic, the Constitutional Court found that imposing the obligation to use face masks, as mandated by disputed decisions of the Headquarters, is a necessary measure adopted to protect the health of citizens. This is because in special circumstances calling for urgent measures to protect the lives and health of citizens the state is obligated to take such measures in accordance with its powers. In such cases public interest (protecting the lives and health of citizens) outweighs individual citizens' rights, and they are obliged to respect and observe measures (preventive, safety, etc.) imposed by authorities to protect lives and health of the entire population. Regarding working hours and manner of operation of shops, the Constitutional Court found that, when adopting the disputed measure, the Headquarters violated the principle of proportionality. In conclusion, the above stances can be summarized as the Constitutional Court's assessment that given the present circumstances, and from the perspective of the Constitution and the Convention, certain rights or freedoms may be restricted only if absolutely necessary, whereby the intensity of the restriction should never put into question (jeopardize) the essence of a particular right. In addition, restrictions must be based on solid legal grounds, have a legitimate aim that promotes public interest and respect the requirements of proportionality, so that their scope and duration are proportional to the nature of the need for restriction in each individual case.³⁵

³⁵ To date, according to available sources, of all Constitutional Courts whose jurisprudence is usually followed by the Constitutional Court of the Republic of Croatia, because of its significance for developing European and global constitutional court doctrine, none have made a decision on merits in these matters. Several interim measures/injunctions have been ordered, but no decisions on merits. Croatia is an exception in this regard. Constitutional Court orders Nos. U-I-1372/2020 et al., U-I-2162/2020 et al., U-II-3170/2020 et al., U-II-1373/2020 et al., U-II-1312/2020 et al., U-II-2027/2020 and U-II-1430/2020 and Decision No. U-II-2379/2020 of 14 September 2020. The Constitutional Court also issued the following Order No. U-II-5709/2020 and U-II-5788/2020 of 23 February 2021, rejecting the request for assessment of the Decision on necessary epidemiological measures restricting gatherings

6. THE ROLE OF EXPERTS

To help states (governments) achieve responsibility during the pandemic, a possibility was given to appoint experts or expert bodies with a purely advisory role. It is key that chosen experts act professionally and ethically (*lege artis* and *bona fide*). So, for example, it is possible to assign an ombudsman to monitor imposed measures and warn of potential violations of human rights and freedoms. As another possibility, it is advised to appoint workgroups composed of experts in certain fields.³⁶ For example, in South Africa, a former Constitutional Court judge was named as special judge on a COVID-19 “mission” to advise the government regarding the implementation of regulations and adopted measures. Interdisciplinary cooperation with independent experts from various fields (health, technology, economics, etc.) should aid the application of principles of legality and proportionality. Cooperation with experts should also contribute and help ensure decisions are based on scientific knowledge, serve their intended purpose (protecting health), and minimally restrict rights and freedoms. However, we have witnessed certain disagreements and dilemmas in the collaboration of our Government and its appointed Scientific Council, which has done little to help citizens feel they are in (relatively) “safe hands.”³⁷ On the contrary, it has further impaired the already weakened citizens’ trust in the ethics and morality of their joint operation and crisis management. It should also be noted that the media played a major role in fostering distrust in the Government and the Scientific Council³⁸, failing to

and introducing other necessary epidemiological measures and recommendations in order to prevent the spread of COVID-19 through gatherings, while Order No. U-II-6087/2020 and U-II-6160/2020 of 23 February 2021 rejected proposals to initiate proceedings to assess constitutional and statutory compliance of these measures. Order No. U-II-5920/2020 et al. of 3 February 2021 rejected proposals to initiate proceedings to assess constitutional and statutory compliance of the following measures: Decision on temporary ban and restriction of border crossings, Decision on necessary epidemiological measures restricting gatherings, Decision on the organization of public transport. Šeparović, M., *Concurring opinion on Constitutional Court Order No. U-II-5709/2020 and U-II-5788/2020* of 23 February 2021: “Legally irrelevant statements by individuals are circulating in public, claiming it is a ‘fact’ that a pandemic is a natural disaster, and as such merits activating Article 17 (1) of the Constitution. Such claims wholly ignore the relevant legal framework, while also ignoring that ‘natural disaster’ is a legal category par excellence, and that only as such can it be constitutionally relevant, and only then does it imply legal consequences.”

³⁶ On 25 March, the Prime Minister issued the Decision on the Establishment of the Scientific Council for the Suppression of the COVID-19 Disease Epidemic Caused by the SARS CoV-2 Virus. The Scientific Council was founded as a multidisciplinary body composed of prominent Croatian scientists from Croatia and abroad – public health experts, molecular biologists, epidemiologists, infectologists and virologists – to exchange opinions on measures imposed to combat the COVID-19 infection.

³⁷ [<https://www.jutarnji.hr/vijesti/hrvatska/dramatican-apel-26-znanstvenika-i-doktora-ovo-su-nase-preporuke-za-suzbijanje-epidemije-15035240>], Accessed 15 March 2021.

³⁸ [<https://net.hr/danas/hrvatska/tko-zapravo-donosi-mjere-i-kreira-nase-zivote-plenkovic-je-okupio-znanstvenike-oni-tvrde-da-su-nezavisni-ali-glavnu-rijec-vodi-netko-drugi/>], Accessed 15 March 2021.

acknowledge the fact that appointing such an advisory body is among the “tools” recommended to all EU member states, and instead only reporting on the composition of its membership, accompanied by personal opinion and interpretation of its (advisory and independent) role.

7. MORAL CROSSROADS AND A CRISIS OF DEMOCRACY

The word “pan-demic” comes from Ancient Greek words *pan* (all) and *demos* (people) and indeed the entire population (world) has been affected by it in the same way – we are all equal before the virus. The EU Charter of Fundamental Rights states: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. ... Human dignity is inviolable. It must be respected and protected.”³⁹ The effects of this pandemic have caused a loosening of moral restraints and some long-delayed reforms and changes in society.⁴⁰ “The pandemic has shown that we are capable of not always making economic considerations our first priority. We have done the right thing morally, and decided to prioritize health at almost any economic price.”⁴¹ This pandemic has uncovered all the systemic weaknesses of the ruling ideology, including the belief we can manage human and moral values through the technological process. However, there can be no true progress without moral progress. The “recipe” for overcoming chaos and hopelessness and creating civilized communities (from local to supranational) rests on legal professionals, as social science technologists, using their highly professional, rational and ethical teleological interpretations to autopoietically shape constitutional standards of conduct and insisting on their fair and rational application. In the current pandemic, the Constitution and its guaranteed rights and freedoms are the basis for all further action, whereby Constitutions and constitutional rights have proven their freedom-winning function. The principle of legality guarantees that every law will embody certain moral standards of respect, fairness, and predictability, which are important aspects of the rule of law. Now more than ever, moral defensibility (good-bad), legal effectiveness (input-output) and political feasibility of individual regulations must be ensured. Constitutional values and principles have allowed a more subtle interpretation and

³⁹ Official Journal of the European Union No. 2012/C 326/02, [https://eur-lex.europa.eu/eli/treaty/char_2012/oj], Accessed 15 March 2021.

⁴⁰ “In the midst of every crisis, lies great opportunity.” Einstein, A.

⁴¹ Markus, G., German philosopher, in an interview for Der Spiegel, [<https://www.dw.com/en/how-coronavirus-pandemic-has-spurred-change-in-germany/a-54500973>], Accessed 15 March 2021.

application of the law (as witnessed in adopting pandemic-related measures).⁴² So, the Constitutional Court had to strike a balance in each specific situation, finding the optimal model of achieving morality-legitimacy-legality of the authorities' decisions based on the rule of law. In this new situation it is important to ensure reliability and validity and seek consistent criteria and benchmarks.⁴³ The credo of constitutional engineering is creating relations between people to achieve a life in love and freedom. We live in a time when knowing is no longer enough, and knowing how becomes necessary. We need to change the paradigm of valuing profession instead of knowledge. Knowledge is power. If ignorance and power prevail, the world is in danger as arrogance and disregard take hold. In other words, current institutions should be "reset" (refreshed), especially through the filter of morality and legitimacy, using autopoietic technology to unlearn what has been learned. As a result of this pandemic crisis, we now also face a crisis (deficit) of democracy and a moral crisis. There is no honesty, empathy, correctness, respect. This is because democracy and justice have been marginalized and excluded as the only true corrective forces of society. In the midst of crisis as a "state of emergency," "recipes" suggesting reduction, even suspension of democracy are on the rise. This culminated in the current pandemic crisis, requiring a reconfiguration of desired behavior for both the individual and society in so-called "exceptional circumstances," promoted by authoritarian constitutional engineering, and weakening of the "true democratic constitution." The solution, however, is in the division of power (horizontal and vertical), in democratic checks and balances, in constitutional court rulings, in promoting human rights and freedoms, the rule of law, and a moral, legitimate, and legal government⁴⁴. All this will not be possible without the synergy of Government and Parliament, and self-organized teams of people who are motivated and trained to possess and keep developing moral, intellectual and social capital. Institutions are made up of actual people whose motivation, morality, ethics, training (knowledge and skills), team networking, and social sensitivity are paramount in determining the content and process of decision-making and action. The resilience of democracy is characteristically dependent on the health of its institutions – vital components protecting minorities and contributing to resolving political disagreements in a peaceful and orderly manner. "Assumptions of an omnipotent (untouchable) government have proved

⁴² The best example of this is the principle of proportionality, which is a part of Croatian constitutional order, emphasizing that regulations must always be proportional to their aim.

⁴³ "Reliability means ensuring equal functioning in space and time for all, and validity means responding adequately, understanding the essence. Criteria are vantage points for evaluating the quality of results, and benchmarks are quantities measuring how well criteria are met." Lauc, *op. cit.*, note 28, p. 10 and 11.

⁴⁴ *Ibid.*, p. 29.

counterproductive, confusing legality and legitimacy while neglecting morality.” Values and standards of the European Union should be recognized and developed in the context of Croatian statehood.⁴⁵ All the more so because (as witnessed in this pandemic), despite globalization, the nation-state (left to its own devices) has emerged as the fundamental unit of international relations. “Such a society, as any other, needs moral values like transparency in activities, honesty, responsibility, solidarity and, above all, vigilance against corruption and bribery.⁴⁶ Modern sovereignty implies strengthening (the morality, legality, legitimacy of) oneself. It has now become apparently clear that human rights and fundamental freedoms must not only be legally proclaimed, but also rationally justified, to align with the ethical and moral dignity of man.⁴⁷

8. CONCLUSION

We chose this topic to contribute to the premise that the global vaccination campaign is today’s greatest moral challenge, which perfectly complements our inquiry into the correlation of morality-legitimacy-legality. In other words, for all instances of the institute of changed circumstances (*clausula rebus sic stantibus*), we must seek, among other things, optimal legal regulation providing an autopoietic institutional framework on a global, European, national, regional, and local level of social and state constitutional organization. Law should serve to shape relations between people to achieve a life of love and freedom, which is consistent with law’s mission as the negation of the negation of morality. It is an art to find balance, or the right measure (*optimum is the measure*) between contradictions in protecting rights and freedoms of individuals and the legal order, public morality and health (Article 16 of the Constitution). Only by a holistic, interdisciplinary approach (both/and, not either/or) and highly professional and ethical teleological interpretation can we overcome said contradiction, protecting people’s health without compromising the rule of law. The solution is in the division of power (horizontal and vertical), in democratic checks and balances, in constitutional court rulings, in promoting human rights and freedoms, the rule of law, and a moral, legitimate, and legal government. In great crises, a lot that has been latent becomes manifest. This is a time of autopoietic restructuring of institutions, fol-

⁴⁵ In the words of former Constitutional Court President Jasna Omejec, “the legal system has turned into a ‘patchwork’ of unclear and contradictory solutions and new institutions foreign to Croatian tradition.” Smerdel, *op. cit.*, note 31, p. 552.

⁴⁶ Tomašević, L., *Etike „trećeg lica“ i moralne vrednote*, Katolički bogoslovni fakultet, Sveučilište u Splitu, Split, 2015, p. 162.

⁴⁷ By no coincidence, Article 1 of the Constitution of the Federal Republic of Germany places the utmost value on human dignity, emphasizing inviolable and inalienable human rights as the foundation of every human community, peace and justice.

lowing necessary, deep scientific analyses (quantum physics, epigenetics, automatization, robotics, artificial intelligence, big data), while renouncing revolutionary endeavors and discerning what to keep, and what to upgrade, both normatively and in practice. An important role surely belongs to the future of education aiming to generate a program for global action and discussion on knowledge and learning for the future of mankind and the planet in an increasingly complex, uncertain and insecure world. The “recipe” for overcoming chaos and hopelessness and creating civilized communities (from local to supranational) rests on legal professionals, as social science technologists, using their highly professional, rational and ethical teleological interpretations to autopoietically shape constitutional standards of conduct and insisting on their fair and rational application. A special place and role belong to constitutional courts, which is why we presented the existing case-law of the Constitutional Court of the Republic of Croatia. EU law (*acquis communautaire* & *acquis* of the Council of Europe), along with the law of member states, should be sophisticatedly multi-layered on the principles of subsidiarity and proportionality. Values and standards of the European Union should be recognized and developed in the context of Croatian statehood. All this is only possible by nurturing high-quality knowledge, motivation and team self-organization. The emphasis is on self-organization and self-reference, where quality action can only be achieved through teamwork, and individual differences do not hamper, but promote autonomy (while respecting morality, legitimacy and legality). Autopoiesis allows the morally and intellectually superior to lead technological advancement, economic and political development. To achieve this, we must learn to love ourselves and our country first, to learn to love our betters and learn from them, building a society of love and freedom that will equitably participate in the life of the European Union.

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