Vilnius University Press

Contents lists available at Vilnius University Press

Teisė
2022, Vol. 123, pp. 24–37

ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2022.123.2

Competition of State Powers During the COVID-19 Pandemic

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The aim of this article is to analyse what kind of powers deriving from the rule of law can be extended to public authorities in response to the global COVID-19 pandemic, what is the balance of powers between the legislative and the executive whilst imposing measures controlling the virus, and what role is played by the constitutional courts whilst deliberating on constitutional disputes involving public authorities.
Keywords: Legislative power, parliamentary control, executive power, pandemic, COVID-19, lockdown, constitutional court, constitutional control.

Valstybės valdžių įgaliojimų konkurencija COVID-19 pandemijos metu

Straipsnyje analizuojama, kokių remiantis teisinės valstybės principu įgaliojimų kyla valstybės valdžios institucijoms reaguojant į pasaulinę COVID-19 pandemiją, kokia yra įstatymų leidžiamosios ir vykdomosios valdžių galių pusiausvyra, nustatant viruso valdymo priemones, ir kokį vaidmenį vaidina konstituciniai teismai spręsdami valstybės institucijų konstitucinius ginčus.
Pagrindiniai žodžiai: parlamento įgaliojimai, parlamentinė kontrolė, vykdomoji valdžia, COVID-19, karantinas, Konstitucinis Teismas.

Introduction

Countries across the world are still fighting against threats to public health, other human rights and freedoms, and economies caused by the COVID-19 pandemic. After the coronavirus was detected at the turn of 2020 in China and spread to other parts of the world, the executive authorities of all countries

Received: 09/02/2022. **Accepted:** 14/04/2022

were forced to take urgent and effective measures to stop the spread of this contagious disease and to cope with the implications of the pandemic. In view of the situation at hand and the legal regulation enshrined under domestic law, some European States immediately introduced the state of emergency (European Parliament, 2020); others opted for softer measures to prevent and control the spread of the virus, while others were in favour of softer restrictions of recommendatory nature. The softest and least restrictive measures were chosen by Sweden, the example of which is often analysed as an extreme alternative option of fighting against the coronavirus. In its information of the Swedish strategy to fight against the spread of COVID-19, the Swedish public health agency refers to only general types of precautions, recommendations of keeping distance and staying at home (Swedish public health agency, 2020). Regardless of the chosen type of legal regime to control the pandemic – an extraordinary situation, a state of emergency, confinement, lockdown, etc. – the executive authorities obviously could (and would) respond to the situation at hand more vigorously. The legislature has not always contributed to the control of the situation. The regular relationships and interactions between branches of government and between the different levels of government in federal and decentralised States have been altered (Serna de la Garza, 2020). A dominant view is that executive power necessarily expands during a time of crisis, and many fear that this concentration of power will persist even after the emergency is over (Ginsburg & Versteeg, 2020). Thus presumably, although the state of emergency always stands for a certain redistribution of powers within the state in favour of the executive, considering that the legal measures taken to prevent the spread of the pandemic and implications for the public health to a large extent restricted other human rights and freedoms, the declaration of the state of emergency (or other extraordinary legal regime) and the choice over specific measures calls for the mandatory involvement of the parliament. These and other problems are not only in the focus of the interests of foreign authors, such as Rainer Arnold (Arnold, 2020a; Arnold, 2020b), Ronan Cormacain (2020), Tom Ginsburg and Mila Versteeg (2021), and Keith D. Ewing (Ewing, 2020), but also fall in the field of analysis of Lithuanian legal science: Toma Birmontienė and Jolita Miliuvienė (Birmontienė, Miliuvienė, 2020a; Birmontienė, Miliuvienė, 2020b), Valentinas Mikelėnas (2021), Egidijus Šileikis (2020), Vaidotas Vaičiaitis (2020), Dovilė Barysė, Gintaras Švedas, Gintautas Valickas, Kristina Vanagaitė K. (2021) etc.

The aim of this article is to analyse what kind of powers deriving from the rule of law can be extended to public authorities in response to the global COVID-19 pandemic, what is the balance of powers between the legislative and the executive whilst imposing measures controlling the virus, and what role is played by the constitutional courts whilst deliberating on constitutional disputes involving public authorities. To achieve the set goal, it is important to investigate the competences of the Government to act in times of a pandemic, to establish whether they are in line with the powers of the Parliament to act and control the decisions of the government, and whether they disregard the powers of the parliament itself. The role of constitutional courts in exercising control over the constitutionality of executive and legislative acts during a pandemic, whether the measures taken to manage the pandemic are lawful and ensure compliance with the democratic imperatives of the rule of law and the protection of human rights, also must be analyzed. The Relevant constitutional jurisprudence of Austria, Spain, France, Italy, Slovenia, Lithuania etc. should be considered. The main methods of the research are *inter alia* systematic analyses of the scientific literature, legal acts, and constitutional jurisprudence.

1. The limits of powers enjoyed by the Government during the pandemic

It should be noted that during the deliberation of measures for handling the spread of the global pandemic, two options may be exercised – relevant actions and decisions may be taken by the Government or by

the Parliament which, due to objective reasons, may not act as quickly as the executive authorities. The powers of the President in this case depend on the form of governance and the legal tradition chosen in the state, but in any event acts by the President shall also be classified as acts of the executive. Certainly, public authorities had to take decisions in an extraordinary emergency unknown to many countries, the solution of which could, therefore, justify legal regimes of various severity – ranging from the introduction of an extraordinary situation or the state of emergency to recommendations for the public. Some States even created a new type of special regime, unknown to the national legislation before the pandemic, conferring important powers to the executive with limited checks and balances. For instance, in France, the existing regimes of the state of emergency and the state of exceptional circumstances seemed to be not enough to deal with the pandemic, so the new regime called the "state of a health emergency" was established, allowing the Government to adopt general measures instead of individual ones applied in a "normal" state of emergency scenario (Platon, 2020). Regardless of the type of the legal regime chosen to deal with the situation, the constitutional principles of the balance of powers within the rule of law suggest that, when establishing such special legal regimes, it is necessary to maintain the balance between the powers extended to the executive to efficiently handle the extraordinary situation, on the one hand, and a potential abuse of powers by the executive, on the other (Gross & Aoláin, 2006). Therefore, the pursuit of ensuring the proper functioning of a mechanism of checks and balances usually requires the engagement of not the executive alone but also of the parliament whenever there is any special legal regime being introduced or abolished in a state, as well as whenever the parliament is approving extraordinary measures that are being undertaken by the executive authorities to deal with an extraordinary situation in the state; the involvement of the parliament is, therefore, mandatory, and so are additional parliamentary scrutiny measures over and above the common oversight measures in normal times (Gross & Aoláin, 2006). Imposition of the special legal regime triggered by the extraordinary situation does not, in its own right, provide the executive branches of government a *carte blanche*; the legality of every single decision made by them may be subject to judicial review to assess whether the measures taken to handle the extraordinary situation were necessary and proportionate to the goals to be achieved. The principle of legality always requires that the executive be bound by law in the measures it takes to combat the crisis.

In accordance with the constitutional architecture of an individual state, the powers undertake the roles designated to them within the framework of the power of the state and are expected to perform only such functions which have been prescribed to them by the Constitution; every authority has a clearly defined remit within which to operate. Under the constitutional principle of the separation of powers, no public authority may waive its powers under the Constitution or assign them to any other authority; a public authority may not take over the powers extended to other authorities by the Constitution. No exceptions to this rule are allowed even in extraordinary situations, unless these have been prescribed in advance.

The Lithuanian case study shows that as the legislative branch of power, the parliament was not always actively involved in the deliberation of the imposition of measures meant to deal with the pandemic, which, *inter alia*, restricted human rights and freedoms. Following the official declaration by the World Health Organisation of a global pandemic, the Government went on to immediately declare an extraordinary situation, later imposing a lockdown and adopting legal acts that described mandatory rules of behaviour deemed as necessary to prevent a threat to the public interest and the constitutional value of individual and public health. It took the Parliament more than two weeks to respond to the situation and to the decisions already made by the Government, and to introduce the necessary legislative amendments which *post facto* legitimised the legal acts adopted by the Government.

In contrast to other European States, such as Italy, France, and Portugal, where the legislature may commission the Government to adopt legal acts having the effect of the law, there is no delegated legislation in Lithuania. This results from a different constitutional tradition adopted by the Constitutional Court when defining the official constitutional doctrine. When deliberating on any provisions enshrined in the Constitution, the Constitutional Court has repeatedly stressed that the parliament has no right to commission the Government or any other authority to perform its own constitutional competence (Ruling of 13 December 2004, case No. 51/01-26/02-19/03-22/03-26/03-27/03; Ruling of 29 September 2015, case No. 19/2013). This prohibition shall be respected when adopting regular and extraordinary decisions. It follows that if the Government may resort to any actions to stop the spread of the pandemic and to protect public health, it can only do so within its remits defined by the legislature. This means that by adopting sub-statutory acts dedicated to deal with the pandemic, the Government may not act *ultra vires*; instead, it shall respect the Constitution and its own remit prescribed by the laws. If the Government fails to respect the laws albeit an extraordinary situation at hand, such a failure will deny the constitutional principle of the rule of law defining the hierarchy of legal acts (Ruling of 23 May 2007, case No. 70/06).

The laws effective in Lithuania provide for the possibility to the Government at the time of a pandemic to institute a special legal regime, the imposition of which does not require a parliamentary approval or enactment of a law. Such a legal regulation is provided in the Law of the Republic of Lithuania on Civil Protection, determining governmental powers to declare an extreme situation, and the Law of the Republic of Lithuania on Prevention and Control of Human Contagious Diseases providing the possibility for the Government to declare a state of quarantine. Such a possibility provided freedom of discretion for the Government to act as it deemed fit – under the valid laws, the decision to introduce a special legal regime did not need to be reviewed and approved by the parliament, which would have been the case if the state decided to impose a constitutional regime of the state of emergency. This allowed the Government to respond to the situation at hand immediately, as soon as the available data allowed to assume that the domestic and global epidemiological situation was a source of concern. In spring 2020, following the decision to declare the lockdown in the whole territory of Lithuania, the number of recorded infections stood at 7 (Sveikatos apsaugos ministerija, 2020). By the same token, it also meant that the Government, following the introduction of the lockdown regime, could prescribe only such measures to be applied during the lockdown and only to such an extent as was permitted by the said laws.

It shall be noted that the legal regulation whereby the Government, in particular, was given full authority to declare and abolish special legal regimes in response to threats to public health shall not, in its own right, be interpreted as anti-constitutional in terms of the rule of law or the principle of separation of powers, given that in such extraordinary times as the executive branch of power the Government can act more effectively and faster than the legislature in order to prevent the situation or to eradicate consequences thereof. The need and possibilities for executive authorities to act quickly and ensure a more flexible response is emphasised also in the study conducted by the Council of Europe titled "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for Member States" in its sub-section 2.4, even if this would bring about the need to establish more flexible decision-making procedures or review the mechanisms of checks and balances (Council of Europe, 2020). The situation caused by the pandemic called upon the governments to take immediate action. In such a situation,n the refusal to act or intentional abstain of action could be considered as non-compliance with constitutional responsibilities. David E. Pozen and Kim Lane Scheppele analyse the opposite phenomenon faced by Brazil and partly the United States of the

Governments on not taking any actions to halt the spread of the virus or even denying the situation of the pandemic (Pozen & Scheppele, 2020). The Government is in a better position to assess all the circumstances and is democratically accountable for such assessments. However, the Government must choose the proper way to act in selecting the appropriate measures (regime) to protect the society from the pandemic threats. But although most constitutions authorise the circumstantial delegation of powers to the executive, it is nevertheless sensible to know in advance the prior conditions and controlling mechanisms over such delegations (Riberi, 2020). Thus, the requirements deriving from the Constitution do, however, warrant to ensure not only an effective functioning of the Government, but also that the measures chosen by the latter could not be qualified as the functioning of the Government *ultra vires*.

Presumably, the legal regulation which does not provide for any actions by the legislature is insufficient to allow to preclude that in the face of an extraordinary situation that triggers restrictions on human rights and freedoms, all possible avenues have been explored to ensure the legitimacy and justification for the restrictions. The legislature may and shall stipulate for a specific mandate to the Government to declare and abolish the lockdown, but any such resolution by the Government should be approved by the parliament.

Just like any other country, Lithuania was taken by the pandemic by surprise, as the existing legal regulation relevant to the management of extreme situations did not provide for the appropriate measures, the implementation of which would contribute to the efficient containment of the spread of the coronavirus. Hence, the Government, in its attempts to prevent any further threat to public health, resorted to some measures which effectively restricted some human rights and freedoms that are now to be regarded as being in conflict with the Constitution, because the laws had not given the Government the right to impose this kinds of restrictions (for instance, by its resolution the Government imposed restrictions to engage in specific economic operations although, the law provided only for a possibility to introduce specific conditions for economic operation; it was decided to limit the provision of health care services, except immediately necessary care; a mandatory isolation of 14 days was imposed, though only 7 days of forced isolation could be imposed upon a person under the law effective at the time, etc.) (Birmontienė & Miliuvienė, 2020b). However, considering the severity of the situation at hand and the necessity to act immediately, it shall be assumed that this situation may not be interpreted as abuse of powers extended to the Government or as an attempt to avail of the given situation in order to expand its remit vis-à-vis the parliament, despite some European examples to the contrary. The most salient example is that of Hungary (Győry & Weinberg, 2020). But even after announcing an extraordinary situation or in the face of a threat of an unknown, extremely contagious virus, the imperatives of the rule of law may not be compromised.

It is noteworthy that having identified the insufficiency of legal regulation for handling the pandemic, the Government should have, as one of the subjects with the right of legislative initiative under the Constitution, in parallel to other legal acts stipulating measures for fighting the pandemic, put forward by its own motion any relevant legislative amendments to the parliament. This course of actions would have better reflected the principles of separation of powers and the rule of law. Meanwhile, one could have got an impression that the Government was seizing the pandemic situation for its own sake to take over some powers from the legislature, which was too slow to call up a sitting, although such a scenario of a takeover is not foreseen under the Constitution. The Constitutional Court of the Republic of Lithuania on November 25, 2021 (Decision No. 22 KT191-S177/2021, 2021) accepted a request of a group of members of Seimas (parliament), which challenged some provisions of the act of the Government (Resolution No 651, 2021) related to the introduction of the so called "green pass". The petitioner *inter alia* stated that the Government had no power to adopt the measures restricting constitutional rights and freedoms, as

under the Constitution this competence belongs exclusively to the legislator. It was expected (parliament) regarding the disputable provisions of the act of the Government (Resolution No 651, 2021), so it is expected that Constitutional Court will develop the constitutional doctrine and *inter alia* decide on the constitutionality of the powers of the Government to adopt decisions restricting certain human rights in times of a pandemic and ensuring the balance of powers. Nevertheless, the answer of the Constitutional Court concerning the shared powers of parliament and government was postponed for an indefinite period, as prior to the examination of the mentioned constitutional justice case the Government had abolished the challenged legal regulation, and unfortunately the Constitutional Court has decided to terminate the proceedings (Decision No. KT17-S17/2022, 2022).

There are certain requirements deriving from the constitutional principles of the rule of law and proportionality that shall apply to the contents of the regulatory solutions adopted by the Government to tackle the pandemic. Whilst regulating human rights and freedoms and imposing restrictions with much broader than usual powers, the Government was availing of the delegation of the legislature only because of an exceptional, extraordinary situation, the coercive measures adopted by it shall be clearly formulated and limited in time, while the adopted regulatory framework shall not pave the way for applying such measures in the absence of an extraordinary situation and shall have clear sunset clauses; such measures should be defined in a comprehensive legal act not applicable in ordinary situations (Cormacain, 2020).

2. Parliament's right and duty to act while dealing with an emergency situation

Irrespective of the legal regime selected to deal with the pandemic – the introduction of a state of emergency as an extremely meticulously regulated and strictest measure or another legal regime, such as a lockdown – legal acts should provide for the duty of the legislature to be involved at the time of declaring such a situation. This assumption is based on the idea that the introduction of any special regime will presumably restrict human rights and freedoms.

The concept of restriction of human rights and freedoms is used because individuals shall agree to any restrictions of their rights and freedoms and shall express their consent via their democratically elected representatives at the parliament. Therefore, representatives of the nation, by acting on behalf of the entire nation, should express its consent to and change the usual course of business within the state by restricting human rights and freedoms, as the case might be, in particular where such restrictions of human rights and freedoms are to be assumed from the introduction of a special legal regime (Arnold, 2020a).

It follows from the classical constitutional doctrine of restricting human rights and freedoms that one of the legitimate preconditions for restricting human rights and freedoms is that such restrictions may only be imposed by the law. The legitimisation of governmental legal acts in this regard, therefore, should be based on a functional link between the expression of the sovereign will of the nation and the functioning of a state authority (Arnold, 2020a). This does not mean, though, that the Government may not be authorised to declare an extraordinary situation, lockdown or any other special legal regime and define any applicable measures as long as the regime lasts, particularly in view of the fact that it has the possibility to do the same in a timelier fashion, when such governmental authority is derived from the law specifying explicitly as to when and under what circumstances the Government shall be entitled to avail of such authority. This could be regarded as a change or imbalance in the distribution of competences between public authorities, when the executive is given some additional powers (Venice Commission, 2020). Even in an extraordinary situation, *inter alia* the spread of a contagious disease,

the constitutional principles of legitimacy, separation of powers, responsible governance, respect for human rights and freedoms shall prevail.

Sub-statutory legislation adopted by the Government may explicate the provisions of the laws and prescribe the enforcement procedure. This means, *inter alia,* that when facing a threat to public health or other constitutional value, the Government may be commissioned to decide on such statutory measures restricting human rights and freedoms that shall be selected in each case. The legislator can grant the regulatory discretion regarding the balancing of interests, the assessment of the severity of the situation, if the Government follows the limits set out by the law. However, given that the measures intended to deal with the extraordinary situation, or measures that the state is forced to take upon the introduction of a lockdown, are related to the restriction of human rights and freedoms, it no longer suffices for the law to include broad provisions stipulating that upon introduction of one or other special legal regime some freedom, e.g., of movement or economic operations, may be restricted.

The principles of legal certainty and legal security, forming the part and parcel of the constitutional principle of the rule of law, call for a law imposing restrictions of human rights and freedoms to be very explicit and understandable to a public authority enforcing it and any individual; therefore, very broad statutory provisions may not constitute a legitimate basis to justify and legitimise any actions undertaken by the executive authority of the state (Arnold, 2020b, p. 41). The more fundamental rights are interfered with, the more the authorisation must be determined (Arnold, 2020b, p. 34). The law should, therefore, explicitly prescribe the scope, types of and criteria for such limitations, justifying restrictions of human rights and freedoms. Therefore, despite the severity of the situation encountered, it could be constitutionally unacceptable for an unlimited parliamentary authorisation for the Government to rule further by decrees, as it happened in Hungary (Gárdos-Orosz, 2020, p. 160), thus melting the boundaries of the separation of powers. In accordance with the law, only the Government would be competent and have the authority to adopt decisions effectively restricting human rights and freedoms. In the absence of the regulatory framework at the level of the law, the adoption of the relevant laws shall be undertaken as top priority (or in parallel to other actions). Moreover, it shall be added that the regulatory framework enshrined in the laws shall not prevent the Government from taking effective actions in immediate response when facing an imminent need to protect constitutional values that are at stake (Arnold, 2020b, p. 41).

Therefore, the situation where the Government is the only subject capable of deciding on the introduction of legal regimes or imposing measures, *inter alia,* leading to restrictions of human rights and freedoms, which was the case in Lithuania following the introduction of lockdown, may not be regarded as compliant with the requirements of the rule of law and ensuring the functioning of the democratic principles. By the way, it can be noted that even parliamentary States met the problem of inefficient work of the Parliament while handling the consequences of pandemic. Keith D. Ewing, in his contribution concerning the assessment of the pandemic legal regulation, poses the questions of "Who is governing Britain?" and "What is Parliament for?" (Ewing, 2020).

Legal provisions regulating the declaration of an extraordinary situation, the introduction of a lockdown, and special measures applicable during these situation could be construed as questionable in terms of their compliance with the Constitution if they do not provide for the parliamentary authority a review of the legitimacy of the governmental resolutions and the scale of the measures selected, i.e. the authority to approve or overrule, as the case might be, resolutions by the Government, in particular when the restrictions imposed are applicable in respect of large groups of people. In this way, only the constitutional imperative of the protection of human rights and freedoms would be ensured on the understanding that the restrictions of human rights and freedoms shall be laid down by the law and would thus ensure the constitutional principles of the rule of law and the separation of powers.

The fact that the laws stemming from resolutions adopted by the Government are subject to a *post factum* parliamentary review and result in a new regulatory framework being adopted which, when applied retroactively, could justify the measures imposed by the Government, may not be regarded as an appropriate exercise of the requirements deriving from the principles of the rule of law. First, the rule of thumb is *lex retro non agit*, except for laws easing up the situation of an individual. In the given case there are no intentions of easing up the legal situation of individuals; quite to the contrary, measures that are being imposed to fight the coronavirus do exactly the opposite – they restrict human rights. It follows that the legislator does not enjoy any legal possibilities to apply the legal regulation adopted by the legislature retroactively only for the purpose of justifying the actions by the Government. Secondly, the parliament which deliberates and enacts relevant legislative amendments only after the Government has introduced restrictive measures to fight against the coronavirus may feel under some pressure to prescribe such regulatory framework as fits the Government, making this situation incompatible with the principles of democracy and the rule of law. In the face of a pandemic, the parliament shall be proactive by its own right, follow the situation as it unfolds, and respond quickly by adopting relevant legislative amendments.

Naturally, even against the backdrop of an extraordinary situation within a state, *inter alia,* the one caused by the spread of a dangerous contagious disease, all the necessary conditions must be put in place to enable the parliament to function in a business-as-usual or any other safe way for the purpose of exercising its powers enshrined in the Constitution. Therefore, it is the duty of the parliament which adopts its own rules of procedure to regulate its functions in a way that enables adoption of decisions, *inter alia,* in times of a pandemic. It is noteworthy that an extraordinary situation within the state may be neither a cause for restricting or suspending the functioning of the parliament, nor an excuse by the parliament to not convene for ad-hoc sittings and thus violate the imperative of the uninterrupted continuity of parliamentary activities. It is noteworthy that only at the end of December 2020 in Lithuania the legal regulation concerning the work of the Parliament in the Seimas Statute was adopted, enabling the parliament to work in a remote way.

3. The role of the Constitutional Court as a guardian of an adequate balance of powers in times of the pandemic

The Constitutionals Courts are the arbiters in disputes over the separation of powers between the legislative and the executive and must deal with the task of finding out whether by taking actions the national authorities did not overstep each other's remit, whether they did not exceed the powers granted to them by the Constitution and were not acting *ultra vires*. Despite the severe threat to public health caused by the pandemic, public authorities may not act in contradiction with the underlying principles of democracy, and the fact of whether these have been respected can be subject to a test by a constitutional court. The latter ones, as all other state institutions, had to adapt themselves to the conditions of the pandemic, but most of them never stopped functioning. Some of them, for instance the Constitutional Court of Italy, postponed a few hearings at the beginning, then moved to the written procedures or shifted the proceedings to the virtual form (Resnik, 2020). Judicial protection within the coronavirus crisis was and is of the highest importance and a pillar of the democratic rule of law (Arnold, 2020a, p. 38). The access to judicial protection reveals that a democracy keeps functioning during a pandemic (Münchow, 2020, p. 51), as the absence of it indicates an abuse of state powers.

By exercising a constitutional control of legal acts adopted during the pandemic on their compliance with the Constitution, constitutional courts ensure respect for the abovementioned democratic imperatives of the rule of law. In particular, they have been prominent actors, playing a variety of roles,

ensuring the procedural integrity of legislative and constitutional schemes and assessing the pandemic-fighting measures to ensure the proportionality of rights restrictions (Ginsburg & Versteeg, 2020). The pandemic management instruments that are in place in some countries, imposing restrictions of rights and freedoms of those who are not vaccinated from COVID-19, raise legitimate doubts as to the proportionality of such measures. The temporary application of such pandemic management measures provided by law in the Decision of the French Constitutional Council of 5 August 2021 (Decision No 2021-824 DC, 2021) were declared as not being unconstitutional.

In the constitutional jurisprudence of many European States, the measures undertaken to stop the spread of the virus are to be regarded as necessary, while the legitimacy and reasonability of the goal pursued by them shall be beyond question. Holger Hestermeyer, speaking of the German Federal Constitutional Court, underlines that "[w]hile the Court is careful not to question the health-related necessities of the pandemic response, it ensures that rules and their application continues to respect considerations of fundamental right" (Hestermeyer, 2020). The imposition of such measures may not limit democracy and the imperatives of the rule of law. Hence, the ultimate task of constitutional courts considering constitutional justice cases is to strike the right balance between the goal of ensuring public health and other human rights and freedoms, and to assess whether (1) the human rights and freedoms have been restricted proportionately, and (2) whether these restrictions were imposed legitimately. In other words, in the event of any dispute arising, the constitutional courts which will decide whether restrictive measures imposed by executive authorities were appropriately justified by the law.

Constitutional courts of some European States have already been dealing with cases challenging the legitimacy of COVID-19 measures; in other constitutional courts, issues of this kind are still pending. Yet a larger proportion of such claims have been dismissed on several grounds (Arnold, 2020a, p. 31). The cases already deliberated by constitutional courts show one prevailing trend of European constitutional oversight bodies of being rather strict when it comes to the regulatory framework in times of the pandemic. In the majority of the constitutional case law so far, acting *ultra vires* by the executive and the proportionality of the measures imposed were legal grounds based on which anti-COVID-19 regulatory compliance with the Constitution has been challenged. These were legal acts adopted by the executive authorities proclaiming the state of emergency or imposing restrictive measures that have become an object of constitutional scrutiny. Most measures adopted in various countries to deal with the pandemic were usually justified in terms of their proportionality (Ruling No. U-VII-2980/2020, 2020; Ruling No. U-III 22/20, 2020; Decision No. U-I-83/20, 2020). Compliance to the proportionality requirement is subject to assessment criteria, so when searching for a balance of values between the protection of health and the restriction of human rights and freedoms, one of the underlying constitutional values – the right to health care – would prevail. Meanwhile, whenever the issue at hand was of alleged acting *ultra vires* by the executive, constitutional courts demonstrated a position of principle, as did the Slovenian Constitutional Court (Decision No U-I-79/20, 2021). The issue of the division of powers between state authorities in determining measures to manage a pandemic has also been partly addressed by the Italian Constitutional Court in the Decision of 24 February 2021 (Decision No. 37/2021, 2021). The Court ruled that the legislation adopted at a regional level to manage the pandemic was unconstitutional as of the extent of the restrictions on human rights and freedoms set out in it as compared to those imposed by the central authorities.

Among the first constitutional courts to adopt a decision that the measures taken by the Government to fight against the spread of COVID-19 were anti-constitutional was the Constitutional Court of Austria. In its decision of 14 July 2020, it underlines that sub-statutory legal regulation, according to which the entry into public places was generally forbidden for the purpose of preventing the spread

of COVID-19, was unlawful because it lacked a clear legal authorisation expressly providing for such a far-reaching interference with the right to free movement (the law authorises the regulator to limit such freedom by banning entry to specified places) (Ruling No. V 363/2020-25, 2020). Thus, although the Austrian Federal Minister of Social Affairs, Health, Care and Consumer Protection had the authorisation to limit the freedom of movement of Austrian citizens by way of imposing a restriction on movement, it expanded the scope of the restriction by prohibiting visits to specified public spaces, and by doing so introduced a legal regulation that was competing against the legal regulation established by the legislature. In this ruling, the Austrian Constitutional Court also stressed out the importance of the requirement of legal certainty while establishing restrictive legal regulation as it concerns the laws authorising the executive to act, as well as the necessity to provide supplementary rule-of-law safeguard measures, such as time limits of application. While assessing the constitutionality of challenged legal regulation, the Constitutional Court showed a broad understanding of the ongoing COVID-19 situation by pointing out that "it is typical of crisis situations like the one at hand that measures to combat the cause, effects and spread of the disease have to be taken under enormous time pressure and, as such, under conditions of uncertainty, as knowledge about the disease can largely be gained only step by step, and both the effects and the spread of COVID-19 are necessarily the subject of forecasts". But also, the constitutional guardian stressed the obvious inevitability of that "even in such situations, the Constitution will, as always, guide the legislature and the executive in any measures taken to cope with the situation, in particular by means of the principle of legality". In other words, it means that urgent circumstances cannot lead to the misuse of constitutional provisions and imperatives of the rule of law.

The Plenum of the Constitutional Court of Slovakia, already in its decision of 13 May 2020 on the admissibility of the petition asking to assess the legal regulation about interfering with the protection of personal data while applying COVID-19 measures, emphasised the importance of the aforementioned necessary involvement of the Parliament when adopting restrictive measures during pandemic, by saying that the Constitution does not allow the protection of the individual to be regulated only by infra-statutory regulation issued by an executive authority. The right to determine the limits of fundamental rights and freedoms is entrusted exclusively to the National Council of the Slovak Republic. The Constitutional Court also stressed that in adopting measures aimed at preventing further spread of the disease, the legislator must pass legislation which is clear, unambiguous and which provides sufficient legal guarantees against the misuse of personal data: the more narrowly the legislator restricts the rights of the individual, the more precise it must be in formulating its intentions (Decision No. PL. ÚS 13/2020, 2020).

The decision adopted by the Ukrainian Constitutional Court of 28 August 2020 is also worth mentioning. It recognises the provisions of the Cabinet of Ministers' resolution introducing the national lockdown as anti-constitutional, also because regarding certain groups of individuals, *inter alia* judges, such measures were used to reduce pay for judges, thus risking the independence of judges (Ruling No. 10-r/2020, 2020). The Constitutional Court recalled the rule of the restrictions of human rights and freedoms only by law – a legal act adopted by the Parliament and not by a resolution of the executive, and only in cases specified in the Constitution. Hence, even though such restrictions of payments, *inter alia* to judges, under the resolution of the executive were not possible under the Constitutional, the Constitutional Court believes that they must be of a temporary nature and defined strictly by the law. It is now up for the public authorities to learn a lesson for the future, given that the first wave of the pandemic ravaging the world in spring 2020 is far from being the only one.

Undoubtedly, similar issues will be dealt by other European constitutional courts and beyond as they are also involved in the response to the pandemic. Even though they might be tasked with deliberating the legal regulation that is no longer valid as measures restricting human rights and freedoms,

in a changed situation, are no longer going to be applied, decisions by such constitutional courts will be of extreme significance for the purpose of defining the limits of authority for the Government and the parliamentary duty to be involved in response to other extraordinary situations.

There is yet another issue to be answered: whether the jurisprudence developed in the cases inspired by the pandemic are not going to adjust classical principles of restricting human rights and freedoms invoked upon by constitutional courts, the European Court of Human Rights, and the Court of Justice of the European Union as the underlying principles of the restrictions.

Conclusions

1. During the outbreak of the global pandemic, the executive powers in many countries took action to prevent the spread of the coronavirus in order to protect public health. It was absolutely necessary to act and react quickly. However, the analysis presented in the article shows that the role of the legislative is of the utmost importance in adopting measures for containing the spread of the virus. The measures imposed by the Government to deal with and control the pandemic restricted human rights and freedoms to a large extent; therefore, it is vital that, even in times of emergency, decisions taken by the Government would be subject to parliamentary scrutiny as, under the Constitution, restrictions on human rights and freedoms may only be possible if they are prescribed by the law, with the requirements stemming from the constitutional principles of the separation of powers and the rule of law having been assessed.
2. The arguments discussed in the article prove that the Government may act only in the framework set by the legislature, which has the obligation to establish a sufficiently clear and exhaustive legal regulation, providing for the right of the Government to impose restrictive measures in the well-defined circumstances and according to the criteria set by the parliament.
3. Constitutional courts have played a vital role while adjudicating on the distribution of powers between the legislature and the executive during the assessment of the legal regulation in time of the pandemic. The analysis of the examined constitutional jurisprudence suggests that, in order to ensure the implementation of the imperatives of the rule of law, the parliament must be involved; hence, the constitutional principle of the continuity of parliamentary activities should pave the way for the smooth functioning of the parliament even in times of a pandemic. A situation where the Government is the sole entity deciding at its own discretion to impose special legal regimes and measures, *inter alia*, those leading to restrictions on human rights and freedoms, may be regarded as non-compliant with the principles of the rule of law and the effective functioning of democratic principles. These lessons have to be learned for the future.
4. The trends emerging in the jurisprudence of constitutional courts lead to the assumption that, where state powers and constitutional values compete against each other during the COVID-19 pandemic, the imperatives stemming from the rule of law mean that vital human rights (the right to health, the right to life) and freedoms should be prioritized and taken care of and protected in compliance with the abovementioned requirements.

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Competition of State Powers During the Covid-19 Pandemic

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S u m m a r y

This article analyses the problems of (the lack of) parliamentary involvement and control during a special regime implemented to contain the spread of COVID-19, when the decisive powers are shifted in favour of the executive. The need of a quick response to the situation posing a threat to public health was obvious, but regarding the severity of measures undertaken and their impact on the restrictions of human rights, the ex ante mandate for the actions provided by law or ex post approval of the Parliament is the key to ensure the respect for democracy and the principle of the rule of law. Even in times of the pandemic democracy cannot be limited; therefore, in case of a disbalance of legislative and executive powers, the constitutional courts should play the essential role while ensuring the rule of law and the separation of powers. The emerging trends in the jurisprudence of constitutional courts lead to an assumption that, when the powers and the values are competing against each other during the COVID-19 pandemic, favor is granted not to human or public health concerns, despite them being prioritised over all other constitutional values, but rather to the imperatives stemming from the rule of law, meaning that even vital human rights (right to health, right to life) and freedoms shall be taken care of and be protected in compliance with the already mentioned requirements.

Valstybės valdžių įgaliojimų konkurencija COVID-19 pandemijos metu

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S a n t r a u k a

Straipsnyje analizuojama, kokie teisinės valstybės principo nulemti įgaliojimai kyla valstybės valdžios institucijoms reaguojant į pasaulinę COVID-19 pandemiją, kokia yra įstatymų leidžiamosios ir vykdomosios valdžių galių pusiausvyra, nustatant viruso valdymo priemones, ir kokį vaidmenį vaidina konstituciniai teismai spręsdami valstybės institucijų konstitucinius ginčus. Ekstremalioje situacijoje valstybių vyriausybės, kaip vykdomosios institucijos, gali veikti greičiau ir efektyviau nei įstatymų leidžiamoji institucija, siekiant užkirsti kelią virusui plisti ir apsaugoti žmonių ir visuomenės sveikatą. Tačiau, atsižvelgiant į tai, kad Vyriausybės nustatytomis priemonėmis, kurių imtasi pandemijai stabdyti ir valdyti, buvo labai apribotos kitos žmogaus teisės ir laisvės, taip pat į tai, kad pagal Konstituciją žmogaus teisių ir laisvių ribojimai apskritai galimi tik tada, kai jie nustatyti įstatymu, įvertinus iš konstitucinių teisinės valstybės, valdžių padalijimo principų kylančius reikalavimus bei konstitucinius žmogaus teisių ir laisvių apsaugos imperatyvus, pabrėžtina, kad žmogaus teises ir laisves varžantys Vyriausybės sprendimai turi būti parlamentinės kontrolės objektas. Užtikrinant iš teisinės valstybės kylančių imperatyvų įgyvendinimą, parlamento dalyvavimas yra būtinas, todėl konstitucinis parlamento veiklos nepertraukiamumo principas turėtų sudaryti prielaidas sklandžiai veikti parlamentui net ir pandemijos metu. Situacija, kai Vyriausybė yra vienintelis subjektas, galintis savarankiškai nuspręsti įvesti specialius teisinius režimus ir nustatyti priemones, lemiančias, *inter alia,* žmogaus teisių ir laisvių ribojimus, negali būti vertinama kaip atitinkanti teisinės valstybės principo reikalavimus ir užtikrinanti demokratijos principų veikimą.

Konstitucinių teismų vaidmuo sprendžiant dėl įstatymų leidžiamosios ir vykdomosios institucijų galių tarpusavio pasiskirstymo nustatant pandemijos teisinį reguliavimą yra esminis. Spręsdami konstitucinės justicijos bylas, susijusias su galimais žmogaus teisių ir laisvių pažeidimais, patirtais dėl pandemijos metu taikomų ribojančių priemonių, konstituciniai teismai turi patikrinti, ar veikdamos valstybės valdžios institucijos neviršijo joms priskirtos kompetencijos. Išryškėjusios konstitucinių teismų jurisprudencijos tendencijos leidžia teigti, kad net ir esant ekstremaliai situacijai, siekiant rūpintis gyvybiškai svarbiomis žmogaus teisėmis ir laisvėmis (teise į sveikatą, teise į gyvybę) ir jas ginti, reikia laikytis iš teisinės valstybės principo kybančių reikalavimų, *inter alia,* konstitucinės valstybės valdžios institucijų galių sąrangos, užtikrinančios vykdomosios valdžios sprendimų parlamentinę kontrolę.

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