

# Rule of Law in times of crisis

## 1. Introduction

The notorious health pandemic COVID-19 spread in 2019 worldwide and brought substantial changes in all spheres of social life. Inevitably, international and national law was affected as well, because of the States' actions in cases of emergency. In particular, the survival of core principles such as the rule of law and respect for human rights was challenged. The health crisis only highlighted the exceptional need to further solidify the principle of the rule of law. On the one hand, this principle is a milestone in any democratic society, but on the other hand in times of crisis it is exposed to risks of abuse of power by States. For this reason, we should be more self-aware and proactive in identifying ways to straighten the rule of law in times of crisis.

## 2. The problem of the rule of law during the pandemic

The rule of law entails a broad scope of principles such as accountability to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>1</sup> In this connection, this legal principle is important in the field of national as well as international law. Consequently, during the COVID-19 crisis the Secretary General of the Council of Europe, Marija Pejčinović Burić, explicitly said: "The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies,"<sup>2</sup>. Accordingly, she sent to all members of the Council of Europe a toolkit<sup>3</sup> that covered conditions of derogations with regard to human rights, respect of the rule of law, human rights standards and protection of crime. In times of crisis, it is of great significance to support cooperation between States in order to preserve fundamental principles. In fact, the most difficult role of all States in 2020 was to establish fair balance between the public interest and the weight of the individual's right. The authorities must comply with 10 established

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<sup>1</sup> United Nations Security Council. *The rule of law and transitional justice in conflict and post-conflict societies*. (2004), p. 4.

<sup>2</sup> Council of Europe. *Coronavirus: guidance to governments on respecting human rights, democracy and the rule of law*. (2020). Accessed on 1.10.2021 <https://www.coe.int/en/web/human-rights-rule-of-law/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>

<sup>3</sup> Council of Europe. *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis A toolkit for member states*. (2020).

principles in a case of emergency: legality, necessity, proportionality, non-discrimination, time-limits, non-derogable rights, international obligations, parliamentary scrutiny, effective remedy and transparency.<sup>4</sup> Indeed, in emergency situations States may impose restrictions in order to tackle the crisis and protect public health. However, the Governments' actions are subjected to some boundaries even in times of crisis. For instance, the abovementioned principles are guaranteed in national legislation as well as in international treaties. For instance, all members of the Council of Europe have ratified and implemented in their national law the European Convention of Human Rights. During the health crisis many claims of violations occurred under Articles 8, 10, 11 of the ECHR.<sup>5</sup> Despite the fact that the provisions of these Articles, in particular in the second paragraphs, impose situations in which the States may interfere, their actions are not unconditional. It is stated in a Venice report that "Even in a state of public emergency the fundamental principle of the rule of law should prevail. In other words, no-one should be put to trial before a court other than one previously determined by law"<sup>6</sup>. Unfortunately, the COVID-19 virus had a negative impact on society, namely vulnerable groups on the ground of their socioeconomic and health status. Therefore, the pandemic has amplified the divide in societies on the ground of inequality. In reality, however, the preservation of international law standards, including the rule of law, "not only helps justice, but also helps contain the spread of the pandemic itself."<sup>7</sup> Logically, when the fundamental human rights are respected, institutions would further assert their legitimacy and people would be more inclined to follow States' orders and recommendations. However, the countries' measures in combating the Corona virus drastically differ.<sup>8</sup> Governments with an authoritative regime such as China, Singapore and Taiwan had implemented stricter rules in comparison with democracies like Germany, Canada et cetera. In fact, "authoritarianism does not guarantee an effective response, as the experience of Iran, which has endured a high rate of infection and a second wave of COVID 19, demonstrates."<sup>9</sup> Undoubtedly, the pandemic had negatively influenced the whole world, but democracies has shown a better

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<sup>4</sup> Advocates for International Development (A4ID), the Bingham Centre for the Rule of Law, the University of Edinburgh Global Health Academy. *The rule of law in times of health crises*. (2020), p 17-21.

<sup>5</sup> ECtHR. *Factsheet – COVID-19 health crisis*. (2021).

<sup>6</sup> European commission for democracy through law (Venice commission). *Compilation of Venice commission opinions and reports on states of emergency*. (2020), p. 5.

<sup>7</sup> World Justice Project. *Fundamental Rights and the COVID- 19 Pandemic*. (2020), p. 13.

<sup>8</sup> See International Center for Not-for-Profit Law, COVID-19 Civic Freedom Tracker. Accessed on 30.09. 2021.

<https://www.icnl.org/covid19tracker/?location=&issue=2&date=&type=>

<sup>9</sup> Advocates for International Development (A4ID), the Bingham Centre for the Rule of Law, the University of Edinburgh Global Health Academy. *The rule of law...* p. 37.

ability of adaptiveness and collaboration. “Corporations, universities, foundations and nonprofit organizations are cooperating and innovating with local authorities and internationally, whether to deliver medical relief and social support or to secure a vaccine.”<sup>10</sup> The rule of law has a central position in combating the Covid virus, but States must implement mechanisms of its protection.

### 3. Threats to the rule of law

Usually emergency situations do not, initially, violate the rule of law, although they create an environment where the safeguards are more critical and difficult to uphold.<sup>11</sup> Broadly, we may identify two main groups of threats to the rule of law – threats directed at institutions and others in relation to human rights.<sup>12</sup> In the context of the first group, in order to impose COVID-19 restrictions the Governments may unnecessarily concentrate the power in the executive branch. This may lead to abuse of power, which is a serious threat to democracy. For example, around 16 people were killed by security officers in Ethiopia following protests against the arrests of local leaders and activists, allegedly for holding a meeting in contravention of COVID-19 restrictions.<sup>13</sup> In Dominican Republic 85,000 people were detained in a three-month period for allegedly not following the curfew.<sup>14</sup> Furthermore, the Corona virus has impacted the functioning of the Parliament. Some countries such as France in 2020 had reduced the number of its meetings and they were holding them remotely, while Germany continued to sit the meetings in person, but with fewer Members.<sup>15</sup> The crisis may, therefore, lead to postponed legislation and less transparency, which breach core features of the rule of law. Moreover, many elections were postponed due to the Corona virus.<sup>16</sup> Delaying elections in times of crisis is inherently lawful, however States must

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<sup>10</sup> Lon Angeles Times. Op-Ed: *Why democracies do better at surviving pandemics*. (2020). Accessed on 30. 09. 2021. <https://www.latimes.com/opinion/story/2020-05-26/democracies-autocracies-coronavirus-pandemic-response>

<sup>11</sup> Advocates for International Development (A4ID), the Bingham Centre for the Rule of Law, the University of Edinburgh Global Health Academy. Op. cited, p. 22.

<sup>12</sup> Ibidem, p. 23.

<sup>13</sup> Amnesty International. *Governments and police must stop using pandemic as pretext for abuse*. (2020). Accessed on 1.10.2021. <https://www.amnesty.org/en/latest/press-release/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/>

<sup>14</sup> Amnesty International UK. *COVID-19: Authorities commit human rights abuses in 60 countries under pretext of controlling pandemic - new report*. (2020). Accessed on 29.09.2021. <https://www.amnesty.org.uk/press-releases/covid-19-authorities-commit-human-rights-abuses-60-countries-under-pretext>

<sup>15</sup> Inter-Parliamentary Union. *Country compilation of parliamentary responses to the pandemic* <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>. (2020). Accessed on 1.10.2021.

<sup>16</sup> The International Institute for Democracy and Electoral Assistance (International IDEA). *Global overview of Covid-19 impacts on elections*. (2021). Accessed on 29.09.2021. <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

not abuse their interference, for instance, by extending the time period unreasonably. Besides the legislature, the courts are also negatively impacted. For example, family courts have struggled to keep up with cases.<sup>17</sup> Even though some courts have transferred their trial to “hybrid” hearings – remotely and in person, the backlog of cases was still unbearable. As a result, some families had to wait months for courts’ rulings. In particular, an urgent children matter “had a hearing listed for six months later.”<sup>18</sup> Furthermore, the distribution of medical supplies and providing economic support have open new opportunities for corruption. Consequently, the increased levels of fraud may lead to decreased legitimacy of institutions. As a result, this will decrease public trust in institutions, which interferes with the rule of law.

In relation to the second group exposed to risks, the human rights issues, “three rights are at the frontline in the current pandemic”: the right to life and the duty to protect the life, the right to health and access to health care and the freedom of movement<sup>19</sup>. In respect of the right to life all Members of the Council of Europe have the positive obligation to protect the lives of everyone within their jurisdiction. The right to life is an absolute right and it cannot be derogated even in times of crisis. Furthermore, the States’ positive obligations under Article 2 include implementing effective legal framework and to conduct lawful investigations. Furthermore, the right to health access and health care is inherent to the right of life. It imposes the obligation to protect the right of access to health facilities, goods, and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.<sup>20</sup> In the UK the Government faced great difficulties with complying with this obligation. Due to the fact that the “access to primary health care in the UK was severely disrupted”, it resulted in suspension of all elective surgical procedures for at least three months.<sup>21</sup> In addition, the States had to restrict the freedom of free movement with the view to reducing the spread of the virus. However, the interference must be lawful, proportionate and necessary in a democratic society. Unfortunately, some States are alleged to have abused these

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<sup>17</sup>Goodier, M. *Justice, delayed: How Covid-19 exposes our crumbling courts system.* (2021). Accessed on 1.10.2021. <https://www.newstatesman.com/politics/uk-politics/2021/02/justice-delayed-how-covid-19-exposes-our-crumbling-courts-system>

<sup>18</sup> Ibid.

<sup>19</sup> United Nations. *COVID-19 and Human Rights We are all in this together.* (2020), p. 4.

<sup>20</sup> Montel L., Kapilashrami, A., Coleman, M., Allemani, C. The Right to Health in Times of Pandemic: What Can We Learn from the UK’s Response to the COVID-19 Outbreak? (2020). pp 227 – 242. Accessed on 28.09.2021. [https://www.hhrjournal.org/2020/11/the-right-to-health-in-times-of-pandemic-what-can-we-learn-from-the-uks-response-to-the-covid-19-outbreak/#\\_edn21](https://www.hhrjournal.org/2020/11/the-right-to-health-in-times-of-pandemic-what-can-we-learn-from-the-uks-response-to-the-covid-19-outbreak/#_edn21)

<sup>21</sup> Ibid.

principles, which directly violated Article 5 of the United Nations' Declaration<sup>22</sup>. For instance, the president of Philippines publicly stated that lockdown violators could be shot.<sup>23</sup> In Brazil, citizens are bound by their feet for quarantine violation.<sup>24</sup> In countries like India and Pakistan, the police used tactics of public shaming for people who breach lockdown, which include physical beating or being subjected to public humiliation by being forced to crawl.<sup>25</sup>

All of the abovementioned examples in the two broad spheres of threats to the rule of law further manifest the need to effectively ensure guarantees against potential violations and abuses from the State.

#### **4. Suggestions for strengthening the rule of law in times of crisis**

Despite the negative consequences from the Corona virus, that the whole world currently encounters, the 2030 Agenda for Sustainable Development (SDG) 16 still remains. Moreover, one of its main targets promotes the rule of law and ensures equal access to justice. The further establishment of the rule of law will promote great benefits in three major State sectors: economic stability, social sustainability and environmental sustainability.<sup>26</sup> Furthermore, the rule of law is of great significance in addressing and solving the COVID-19 situation. This legal principle entails an important aspect of the regulation of public relations between States and individuals. As we mentioned, the rule of law is the bedrock of democratic societies, which ensures effective and accessible justice, equality and respect for human rights. In this connection, the *Rule of law and Covid-19 policy brief* makes eight suggestions for strengthening the rule of law - citizen participation, emergency restrictions anchored in the rule of law, fair laws for recovery, investments in justice services and legal aid, equitable justice innovation, alternative dispute

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<sup>22</sup> Article 5 of the Declaration by UN states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>23</sup> CNBC. ‘Shoot them dead’ — Philippine leader says won’t tolerate lockdown violators. (2020). Accessed on 01.10.2021. <https://www.cnb.com/2020/04/02/philippines-duterte-threatens-to-shoot-lockdown-violators.html>

<sup>24</sup> Martinez, J. In *Colombia, Citizens are Bound by Their Feet for Quarantine Violation*. (2020). Accessed on 01.10.2021. <https://riotimesonline.com/brazil-news/mercosur/in-colombia-citizens-are-bound-by-their-feet-for-quarantine-violation/>

<sup>25</sup> TRT World. *Why are police in the Indian Subcontinent humiliating quarantine violators?* (2020). Accessed on 1.10.2021. <https://www.trtworld.com/magazine/why-are-police-in-the-indian-subcontinent-humiliating-quarantine-violators-34911>

<sup>26</sup> IDLO. *Rule of law and Covid-19 Policy Brief*. (2020). p. 4.

resolution and informal justice in line with international standard, amplified justice for women and girls, a renewed spirit of multilateralism in alignment with the SDGs.<sup>27</sup>

First, promoting citizen participations in decisions that affect them directly will certainly increase legitimacy in public institutions. Furthermore, when vulnerable groups are part of the decision-making processes, regarding their own health and safety, eventually the response to COVID-19 would have a higher success rate. Moreover, recently in South Africa projects in respect of legal literacy and knowledge have been organized.<sup>28</sup> This further manifests the need of educating basic legal skills in citizens with the view to achieving higher public trust in institutions. Second, in relation to emergency restrictions, they should be precisely defined in national provisions and in accordance with international law. In the presence of a well-defined legal framework less misinterpretations by officials will occur. Third, in the context of promoting fair laws for appropriate recovery, the enforcement of preventive measures in the legislation on the base of the country's economic and political level of development would increase the likelihood of tackling the next crisis. Fourth, States should make more investments in justice services, because when violations occur individuals should receive effective redress. Unfortunately, "throughout the world, funding for legal programs and services, particularly for low-income and vulnerable people is declining and in jeopardy, while income inequality, distribution of wealth and the cost of living all continue to grow."<sup>29</sup> Fifth, In the light of the integration of equitable justice innovation, technological developments would improve the legal services significantly, reduce court's time periods and create better transparency for justice. Sixth, with regard to engaging in alternative dispute resolutions and customary and international standards, this main purpose of this suggestion is to ensure that everyone has access to justice. Seventh, in relation to risks of gender-based violence, woman and girls should have enhanced access to justice. For instance, the legal framework may include appropriate preventative measures in respect of psychological, social or legal services. Finally, the eighth suggestion proposes that in the light of the global challenges we face today, States should cooperate and support each other. The aim of this idea is to expand international communities and further assert their functions.

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<sup>27</sup> Ibid., pp. 24-25.

<sup>28</sup> United Nations Development Programme. *Legal literacy programmes*. <https://www.undp-capacitydevelopment-health.org/en/legal-and-policy/enabling-legal-environments/legal-literacy-programmes/> Accessed on 1.10.2021.

<sup>29</sup> Moore, L., Farrow, T. *Investing in Justice: A Literature Review in Support of the Case for Improved Access*. (2019).

## **5. Conclusion**

In conclusion, the rule of law is one of the milestones in a democratic society. One of its main aspects is the regulation of the relations between States and individuals. In the context of the Corona crisis, the rule of law was under great pressure from States' actions. Indeed, issues of public health and public safety should be highly considered, however the authorities' restrictive measures should not be a "façade" for incorporating strict and authoritarian actions. Moreover, the standards enshrined in the rule of law would benefit the COVID-19 response. Undoubtedly, in times of crisis cooperation is vital for solving crisis – between countries, but as well as between Governments and individuals.

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