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STATE OF EMERGENCY AND EMERGENCY SITUATION IN COVID-19 VIRUS CIRCUMSTANCES

Summary: Conditions which prevent the regular functioning of the state structure require the corresponding legal regulations, which, despite the fact they relatively change the principles it rests upon, fall under the constitutional framework. In a situation with the presence of extraordinary circumstances, a special legal regimen is activated, which implies possible derogations even from the guaranteed human rights. However, those conditions are limited in time, accompanied by the necessary additional restrictions which prevent abuse of power. In the legal system of Serbia, along with the state of emergency defined by the Constitution, the law also regulates the condition of emergency situations. Even though they are not clearly distinguished in terms of content, being rather left to the assessment of competent authorities, their respective legal regimens are different. The COVID-19 epidemic has brought these issues to the fore, and raised certain doubts as to the appropriateness of declaring the state of emergency and its effectiveness.

Key words: state of emergency, emergency situation, COVID-19, human rights

Introduction

The functioning of the state structure rests on the constitutional and legal solutions which should represent a legitimized system, adjusted to the needs and inclinations of the specific society and harmonized with the social reality. Apart from the objective, the power of the state has its normative limitations as well, primarily embodied in the human rights, but also in certain human values, or in different forms of non-state organization, such as civil society and free market economy. In that regard, state power is restricted by law, its organization, extent, aim and implementation are regulated by the Constitution and laws, ruling out every form of autocracy or arbitrariness in the rule of law. Otherwise, in the absence of restrictions, the state system represents the most dangerous form of violence the duration of which, despite the power it may possess, is limited, but the consequences may be too severe.

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However, the role of the state has always included protection from different forms of threats, which exceed regular or predictable challenges and the states resulting from them. Namely, it is the duty of the government to avoid such conditions by its activity, or address them by „regular“ means. On the other hand, the challenges it faces are often neither predictable, nor suitable to be efficiently fought by such regular, standard means. They have accompanied the human society since its beginning, but the means of combating these challenges have undergone a significant evolution. As a result, the state must possess the adequate mechanisms and instruments by means of which, in the case of extraordinary, unpredictable and dangerous circumstances or situations, it will protect its vital interests and the system as such, even when that is not possible to achieve by regular means of the exercise of power.

As the organization of the highest government, the establishment of its borders and the guarantee of the human rights are the most elementary constitutional matter around the world, in the same way the existence of specific mechanisms whereby the state would be able to function in different states of "irregular" nature is one of the issues which are the subject of constitutional regulation. Namely, in most states the highest legal act regulates issues relating to the functioning of the state, or powers, and the interrelationship of the highest state authorities in extraordinary circumstances, departing from the regular state of affairs, while at the same time the Constitution guarantees protection from the government's excessive infringement on the sphere which is outside its scope, primarily the field of human rights and freedoms.

The pandemic causes serious global socio-economical, political, and security disorders, including the largest global recession since the Great Depression. It led to postponing or cancelling sports, religious, political, and cultural events, shortages in supply that was worsened by panic buying, but also to decreased emission of greenhouse gases. Schools, colleges, and universities were closed on a state or local basis in 194 countries, which hit around 98,5% of students in the world. All sporting events were stopped, the Olympic Games were postponed, as well as several continental sports championship tournaments. Nearly all commercial subjects changed the way they work or stopped working. Millions of employees were sent home, many of whom were left without an income. The traffic stopped (Bjelajac, Filipović, 2020). The society was dehumanized and degraded. The degradation of society is a fall of the system of moral norms that are respected, or, should be respected in a society (Bjelajac, Filipović, 2018). Given the proportions of the COVID-19 epidemic, which may be said to create an atmosphere of extraordinary circumstances, and the experiences of fighting it which have involved the declaration of emergency conditions worldwide, and the declaration of the state of emergency and the emergency situation in Serbia as well, this topic is very significant, in particular with regard to the dilemma on the suitability of their declaration.

The concept of emergency circumstances

The effect of natural laws, the complexity of life, and the dynamic nature of society as well, have always exceeded the powers of the law science or legislature to regulate social relations in an impeccable manner. There are always questions not covered by the legal norm, which the legal norm is unable to answer, or which, in conflict with this norm, turn out to be superior, forcing the creator of the law to step back, and act towards adjusting the norm to the social reality. It is therefore impossible, even by constitutional solutions, even though characterized by the highest degree of generality, to include, always and forever, any issue which may pose a problem or challenge to the state power in the future. It is on the legislator, by following it, to develop and add to the constitutional idea, creatively enough to construct, from a limited number of principles or standards, a whole system, and on practitioners to find fair solutions in individual and specific situations, taking into account the system and its principles. This kind of approach becomes most obvious in constitutional solutions relating to emergency circumstances.

The definition of emergency circumstances or irregular conditions (Marković, 2015: 288) may be based on a variety of foundations, but for the purpose of this paper it is sufficient to point out that in the most general sense they represent an objective state which endangers the most important social or state values, or the state system as such, i.e. departs from the regular to the extent which requires the application of specific instruments, not available in regular circumstances. Those instruments imply a particular legal regimen, which is activated with the emergence of such circumstances. In defining extraordinary circumstances more closely, the enumeration method may be applied, taking into account the risk that life may come up with some new, even more dangerous state which, for the sake of a dogmatic approach, would be impossible to resist. Another approach would imply the itemized listing of some of them (war, threatened security, epidemic, an act of God, disaster) which is not exhaustive. A third approach would be based on a general statement of endangerment of the highest social and state values. Although the most flexible, and as such suitable for the fastest reaction, it is at the same time prone to abuse, where most diverse occasions can be used to introduce a new regimen, which as a rule implies greater power of the authorities (primarily executive), as evidenced by numerous historical examples, even those which represent the most serious violations against the human civilization (world wars, atomic weapons, dictatorships, aggressions, political, racial and religious persecution). On the other hand, the generality of defining extraordinary circumstances should necessarily be accompanied by the corresponding regulations, of procedural nature in particular, which would regulate the authority for the determination of this state, the exercise of special powers resulting from it, its control and duration. In a word, emergency circumstances, regardless of their cause, call for activation of a specific, time-defined legal regimen, in which state authorities function by different rules, while some of them (primarily the executive authorities) acquire greater powers, the exclusive aim of which is to eliminate this state of affairs and overcome its consequences.

The Constitution of Serbia distinguishes between the state of emergency and the state of war, as two forms of irregular states which call for the activation of a specific legal regimen. They result in a temporary change of the two key principles underlying the constitutional system: the division of power and the constitutional guarantee of human rights. The constitutional regulation of these issues is of a general nature, but it touches upon different aspects of this regimen, to an extent which may be claimed to represent a corresponding framework, in which the (ever present) risk of overstepping powers by the state (primarily executive) power is reduced to an acceptably small measure. On the other hand, the legal system of Serbia recognizes yet another legal regimen of emergency circumstances, which is established by law, i.e. emergency situation. Based on its character, it should represent an "inter-regimen" between the regular state and the state of emergency, when the degree of threat is not sufficient to activate a special constitutional regimen which allows for a considerable derogation from human rights, but regulates specific responsibilities, of both government authorities and other entities as well, with a view to overcoming the threat in question. The question is to what extent and under what conditions it is legally possible to set up a specific legal system which may alter a constitutionally regulated system of the government's functioning and the realization of social needs, but it also touches upon the subject of limitation of human rights. Modern challenges justify it, but experiences resulting from abuse are constant warnings.

The Constitution of Serbia defines the state of emergency as a specific legal regimen, or a state of limited duration declared by the competent state authorities, when a public threat puts at risk the survival of the state or citizens, in which they obtain special powers, which include the possibility of derogating from the guaranteed human rights with the aim of overcoming the state in question. It quite generally defines the causes for declaring the state of emergency as a "public threat which puts at risk the survival of the state or citizens", which only represents a provision adopted from the European Convention for the Protection of Human Rights.[1] The constitutional solutions from 1990 quoted the threatened interests which represent the conditions for declaration of the state of emergency, but also the material substrate of this regimen, stating that it is declared "when the security of the Republic of Serbia, the freedoms and rights of man and citizen, or the work of the authorities are threatened in part of the Republic of Serbia territory." Even though the values at risk were explicitly enumerated, the interpretation of that risk allowed for equal freedom of assessment to the competent authorities, as in the case of the existing solutions. Bearing in mind that the reasons for the state of war are defined by law, we could draw a conclusion on the "upper extent" of danger, i.e. the causes for declaration of the *state of emergency*, which would be equivalent to those which result in the decla-

[1] The Constitutional Court defined the four constitutive elements of the state of emergency: 1) the constitutional condition – „a public threat which puts at risk the survival of the state or citizens"; 2) the protection object – „the state or citizens"; 3) protection instruments or mechanisms – „the measures which depart from the constitutionally guaranteed human or minority rights"; 4) aim – effectiveness in overcoming the public threat and the urgency of return to the regular constitutional state. *The Constitutional Court's Order which Results in the Rejection of Initiatives for Instituting Proceedings for Assessing the Constitutional and Legal Grounds of the Decision on Declaring the State of Emergency.*

ration of the state of war, while the "lower extent" of this state would be the subject of a somewhat more precise legal definition, and in particular of the *assessment* of the competent government authorities which make the relevant decision, as the legal norms cannot provide an unambiguous reply to the question when the survival of the state or citizens is deemed to be at risk of a public threat,[2] nor would that be required in a democratic society. In that regard, the Law on Defence only stipulates the upper extent, stating that "the state of emergency is a state of public threat in which the survival of the state or citizens is put at risk, as a consequence of military or non-military challenges, risks and threats to security", while the state of war is "a state of danger in which armed action from the outside threatens the sovereignty, independence and territorial integrity of the country, or peace in the region, which requires the mobilization of defence forces and instuments." In other words, external armed threats to the values quoted above, as the highest degree of risk and the reason for activation of the "more difficult" regimen, represent the upper limit, where any other form of threat to the state or citizens may provide a reason for the declaration of the state of emergency.

The question arises whether the occurrence of an epidemic such as COVID-19 may provide a condition for the declaration of the state of emergency, i.e. whether this pandemic is of a sufficient level and magnitude to be deemed threatening to *the survival of the state or citizens* (namely not only posing a threat to the state and citizens, which it undeniably does, being an epidemic, but threatening their survival)? Taking into account the attitudes of the Constitutional Court, according to which the question of risk assessment falls within the capacity of the relevant government authorities, and it is necessary, for the sake of prompt and efficient action, to grant the competent government authority which decides on the state of emergency a certain "margin of free assessment" of the fulfilment of conditions for declaration of the state of emergency, and the fact that in the procedure of assessment of constitutional grounds the Court does not judge the facts, but the violation of law, it is clear that the dilemmas on the legal validity of reasons for declaration of the state of emergency are meaningless.[3]

On the other hand, the level of the threat may be lower in intensity than what is required to activate the delicate legal regimen such as the state of emergency, but sufficiently relevant to call for the activation of certain resources or instruments, or

[2] Schmitt (2001:92) states that besides the objective, the declaration of the state of emergency always implies a subjective element – assessment of the need for its introduction.

[3] "The Constitutional Court points out that, in the procedure of assessing the constitutional and legal grounds, it does not rule on the basis of facts, not judge the facts. However, in view of the aforesaid on the constitutional grounds for the declaration of the state of emergency, the Constitutional Court finds that the infectious disease COVID-19 could be deemed "a public threat which puts at risk the survival of the state or citizens", in terms of article 200. § 1. of the Constitution. As a result, the Constitutional Court points out that we could not infer that the constitutional condition for declaration of the state of emergency was not satisfied. In that regard, the Constitutional Court further points out that when deciding on the declaration of the state of emergency other factors must also be considered, which justify such a decision, in this particular case the condition and capacities of the health care system, the health-related culture of citizens, their mentality, the nation's age structure, etc." *The Order of the Constitutional Court*, p. 7.

for specific engagement or alertness of government authorities or public services on the one, or potentially affecting human rights on the other side. Based on provisions of article 97. § 1. items 4) and 17) of the Republic of Serbia Constitution, which stipulate that the Republic determines the safety of its citizens, and also regulates other relations of interest to the Republic, the Law on Reducing the Risk of Disasters and Managing Emergency Situations was passed, whereby an emergency situation, although not a constitutional category in itself, is defined as a state occurring as a result of declaration by the competent authorities, when the risks and threats, or the resulting consequences for the population, environment and material and cultural assets are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by regular activities of competent authorities and services, due to which their mitigation and elimination necessitate the employment of specific measures, powers and resources with an intensified operational regimen. The system established by this law is defined as part of the national security system. Although the purpose of the law is not exhausted by the management of emergency situations, its very title, and a majority of its provisions cover the treatment of the risks as such, when the threat has not directly occurred, or of prevention, and it is clear that this Law, like the previous Law on Emergency Situations, establishes a different legal regimen, with the constitutionally regulated state of emergency. With regard to the legal standardization of this concept (the previous Law), Avramović and Simović rightly point out the duality of irregular states of similar character, stating that if the legislator's intention was to thoroughly regulate the concept of emergency situations as such, it is essential to define more precisely its relationship with the related legal concept of the state of emergency. It appears that the legislator only provided for a special, milder legal regimen for a, relatively speaking, lower degree of the state of emergency – the emergency situation, irrespective of the Constitution and without a clear differentiation in terms of the legal nature, character and operationalization of the two institutes (Avramović, Simović, 2012: 510).

The emergency situation regimen is also limited in time, but its duration is not predefined, nor could it reasonably be so, as in the case of the state of emergency,[4] necessarily leading to a significantly more limited possibility and extent of potential human rights restrictions, as well as a different constitutional basis. It is defined by article 20 of the Constitution, according to which human and minority rights guaranteed under the Constitution may be restricted by law if the restriction is permitted by the Constitution, for the purposes for which the Constitution permits it (e.g. security, defence, health) to the extent required to satisfy the constitutional purpose of the restriction in a democratic society, without infringing on the essence of the granted right. On the other hand, the existence of such a regimen in itself may not be debatable, or problematic, it has, in the contemporary conditions and experiences result-

[4] The emergency situation is declared immediately on becoming aware of a direct threat of its occurrence. It may also be declared even after its occurrence, if the direct threat of its occurrence could not have been predicted, or if due to other circumstances it could not have been declared immediately after becoming aware of the direct threat of its occurrence. The emergency situation shall be lifted with the cessation of the threat in question, or with the disappearance of the need for implementation of the measures of protection and rescuing from disasters (art. 38 § 2-4 of the Law).

ing from the COVID-19 pandemic, but also in recent instances of acts of God (floods, snows, droughts) in parts of the territory of Serbia, turned out to be more than justified. However, the problem may be related to certain aspects of the system.

The aforesaid Law associates disasters with acts of God or technical-technological tragedies of a certain intensity, the consequences of which threaten the safety, life and health of a large number of people, material and cultural assets or the living environment to a higher extent, and the occurrence or consequences of which may not be prevented or eliminated by the regular activities of competent authorities or services. In the context of the present COVID-19 epidemic, the situation may be classified as a disaster which results from an act of God, which is defined as an occurrence of hydrological, meteorological, geological or biological origin, caused by the effect of natural forces such as earthquakes, floods, torrents, storms, heavy rain, atmospheric discharge, hail, drought, erosion or landslides, snow drifting and avalanches, extreme air temperatures, ice accumulation on waterways, pandemic, epidemic of an infectious disease, epidemics of livestock infectious diseases and the occurrence of pests and other large-scale natural phenomena which may threaten the safety, lives and health of a large number of people, material and cultural assets or the living environment to a larger extent (art. 2, par. 1, items 1-3). Depending on the proportions, spread, and consequences, *and in particular the capacity of the system to combat it efficiently*, this disease may also represent a threat which puts at risk the system itself, i.e. be the reason for declaration of the state of emergency.

Declaration

The declaration of the state of emergency as a regimen which may lead to derogations from the guaranteed human rights, but also to changes in the interrelations between the executive and legislative power, is in its very nature, and in the largest number of comparative legal solutions under the jurisdiction of the parliament, as the authority directly representing citizens as sovereignty carriers. However, given the character of this state, which may have as a consequence the inability to convene the parliament at short notice, and the need for prompt and efficient measures with a view to its overcoming, this decision may also be entrusted to authorities of executive power, while this possibility as a primary rule is rare. In parliamentary systems, this power as a rule belongs to the government, in presidential and firmer semi-presidential systems most often to the head of state[5], and in mixed systems it is based on their joint decision (with other, different combinations being

[5] As an illustration, in emergency circumstances in France the President of the Republic acquires extraordinary powers (art. 16 of the Constitution). This is subject to the fulfilment of two conditions: that the Republic's institutions, the country's independence, the integrity of its territory or the performance of international obligations are threatened in a serious and direct way (1), and that the regular functioning of constitutional public authorities is suspended (2). The formal aspect of assuming extraordinary powers implies previously conducted talks with the first minister, the chairmen of the houses of parliament and the Constitutional Council, and an address to the citizens in order to inform them of the state and measures.

present as well) which, although the reasons may be quoted in the constitution, implies as a rule a certain freedom of assessment. The state of emergency, even though temporary and, owing to the impossibility of the "normal" functioning of government authorities, of different effect compared to the regular state of affairs, is nevertheless regulated by constitutional law, and may thus be subsumed under the "constitutional state" framework (Rajić, 2011: 250). The most important questions regarding the state of emergency (the authority for its declaration, the reasons, duration, effect, the role of parliament in it) are the subject of constitutional regulation (Pajvančić, 2000).

The Decision on Declaration of the State of Emergency in the Republic of Serbia is made by the National Parliament, as the highest representative body, by a majority of votes of all the members of parliament. Even though this majority is in Serbia's constitutional system considered a form of qualified majority, comparative law witnesses examples of demands for a more qualified majority (Hungary, Greece, Croatia), which, bearing in mind the problematic nature of this decision, namely the consequences it might produce, can be fully justified. As opposed to the current Constitution, the Constitution of Serbia from 1990, which contained solutions closer to the semi-presidential system, provided that this decision is made by the President of the Republic, on the proposal of the Government (art. 83, § 1, item 8). Although the Constitution does not specifically regulate the issue of the procedure preceding the declaration of the state of emergency, the Law on Defence (art. 87) provides that the National Parliament makes the decision on the joint proposal of the President of the Republic and the Government, after verifying the fulfilment of conditions. Thus, this case involves two logical operations – the verification of the fulfilment of conditions and decision-making, which could be contained in the same act, while the second has creative power, being of a constitutive nature, as it leads to the establishment of a new legal state. The National Parliament's decision is in this case dependent on the submission of the proposal, as it cannot be made without it. The joint proposal is the result of assessment of the risks and threats to the security of the Republic and its citizens, as protection objects in the state of emergency. The assessment is made by the minister of defence, as the ministries, according to the State Administration Law, monitor and establish the state of areas within their domains, investigate the consequences of the established state and, depending on their capacities, either take the measures themselves, or propose to the Government to pass the regulations and take the measures it is empowered for (art. 13). The assessment which the minister of defence submits simultaneously to the President of the Republic and the Prime Minister, includes an assessment of the threat and the consequences which have resulted, or may result from it. Although the Constitution does not include a solution on the territorial range, the legislator stipulated that the state of emergency may also be introduced in part of the Republic territory (art. 89 of the Law on Defence).

As opposed to the situation when the state of emergency is declared by the National Parliament, which raises no significant doubts, subsidiary authority for its declaration is much more sensitive and complex. In that regard, the following issues arise as particularly relevant: the conditions under which authority substitution takes

place, the decision-maker and the decision proposer; the verification and control of such a decision.

According to the Constitution of Serbia, if the National Parliament is unable to convene, the decision on the declaration of the state of emergency is made jointly by the President of the Republic, the Chairperson of the National Parliament and the Prime Minister, under the same conditions as the National Parliament. Although the role of the Chairperson of the National Parliament is in this case a modification of the solution of the exclusive role of executive authorities in declaring the state of emergency, it must be noted that in this case we are dealing with subsidiary authority, but also with the dilemma relating to the question what is meant by the National Parliament's "inability to convene". Bearing in mind that the Constitution does not regulate this situation, and that even in the case of a more systematic (constitutional, legal, procedural) regulation of this matter, there may be situations of an extraordinary nature which prevent the Parliament from convening, but are not as such included in a single descriptive norm, certain leeway in making the assessment should be granted to the Chairperson of the National Parliament, who represents this body, but at the same time bears responsibility for their work. The National Parliament's Rules of Procedure do not contain substantive-law conditions under which the existence of such a situation could be determined. However, they stipulate that the Chairperson of the National Parliament is to notify the President of the Republic and the Prime Minister that the National Parliament is unable to convene (art. 244, § 1, indent 5), which only leads to the conclusion that this is a matter of assessment and, based on it, notification by the Chairperson of the National Parliament on a factual issue, for which they are empowered by the Rules of Procedure, according to the Constitution[6] (based on which they represent the National Parliament, convene its sessions, chair them and perform other duties stipulated by the Constitution, law and rules of procedure – art. 104, § 2), so that the content-related conformity of the assessment and notification may not be judged. With respect to the proposers of the decision, who are defined by the Law on Defence, given that we are dealing with the concentration of two roles in the same authorities (the President of the Republic and the Prime Minister), and the need for an equal participation of the Chairperson of the National Parliament in the decision-making, we may conclude that the most appropriate decision-making procedure would include: 1) the submission of the proposal by the two presidents – 2) notifying the President of the Republic and the Prime Minister on the National Parliament's inability to convene – 3) the agreement of the three presidents on the declaration of the state of emergency.

The Constitution generally limits the state of emergency in time, emphasizing in particular the temporary nature of the subsidiary decision on its declaration, and providing (relatively flexible) deadlines for the ratification of this decision by the original carrier of this authority. When the decision on the state of emergency was

[6] The Constitution does not state who establishes the National Parliament's inability to convene, but provides the possibility for the duties of its chairperson to be defined by the rules of procedure. In that regard, Pajvančić (Pajvančić, 2009: 261) states: „As they (the three presiding persons) decide on the declaration of the state of emergency, it could be assumed their powers also include decision-making on the issue of the (non-)existence of the National Parliament's ability to convene."

not made by the National Parliament, it ratifies it within 48 hours of its making, but bearing in mind that the reasons for which it was unable to convene to make the said decision may still exist, this deadline is only orientational, non-binding in nature, and it is stipulated that in this case the ratification decision will be made as soon as the National Parliament is able to convene. If the National Parliament does not ratify this decision, the decision ceases to be valid by the conclusion of the first session of the National Parliament held after the declaration of the state of emergency.

In view of the emergence, spread and possible consequences of the infectious disease COVID-19, the President of the Republic, the Chairperson of the National Parliament and the Prime Minister applied the subsidiary model, and made the Decision on the Declaration on the State of Emergency, which was published throughout the Republic of Serbia territory on 15 March 2020, and following the notification of the Chairperson of the National Parliament on the National Parliament's inability to convene, addressed to the President of the Republic and the Prime Minister, on 29 April 2020 the National Parliament made the Decision on the Ratification on the Decision on the Declaration of the State of Emergency, which took effect on the same day, and on 6 May 2020 made the Decision on the Abolition of the State of Emergency. The aforesaid leads to the conclusion on compliance with the constitutional and legal regulations described above, which relate to the state of emergency. However, the public found the most problematic the issue of the National Parliament Chairperson's notification on the Parliament's inability to convene, and its connection with the Order on the Ban on Gathering in the Republic of Serbia in public places in closed areas, passed by the Ministry of Health on 15 March 2020, which was perceived as its precondition. Given the provisions of the National Parliament's Rules of Procedure, and the nature of the act ("a notification"), as one of the actions in the procedure, and not a legal act, which is a matter of assessment of its chairperson, it is clear that the formal validity of the procedure is not called into question, and that there is no legal connection between them, while an order may represent only a kind of landmark relevant for the assessment of the actual state of affairs.[7]

The decision on the abolition of the state of emergency is made by the National Parliament, when the conditions for which it was declared cease to exist, on the joint proposal of the President of the Republic and the Prime Minister. In this case there is also a subjective element which concerns the assessment of the fulfilment of conditions, which all the three aforesaid authorities should agree on.

[7] In that regard, the Constitutional Court concludes: „With respect to the statements of certain initiatives that the Minister of Health's Order on the Ban on Gathering in the Republic of Serbia in Public Places in Closed Areas could not have been the „legal basis" for the National Parliament's inability to convene, the Constitutional Court points out that a distinction should be drawn between the legal basis for decision-making and taking into account certain facts in decision-making. Firstly, the „Decision" for the National Parliament not to convene is not a legal decision, but a notification of the National Parliament's Chairperson to the competent authorities. In this light, it can have no legal basis, and in turn the aforesaid order by the Minister of Health is not that in this case, while, in the opinion of the Constitutional Court, the contents of this act may be one of the actual circumstances or reasons which led the Chairperson of the National Parliament to notify the President of the Republic and the Prime Minister on the National Parliament's inability to convene." *Constitutional Court Order*, p. 10

The emergency situation, as a state which implies a lower-intensity threat, where the protection objects are not the state and citizens whose survival is at risk (as in the case of the state of emergency), but population, material and cultural assets, or the living environment, to the extent which exceeds the regular instruments, but does not requires the measures taken in the state of emergency, is declared by the competent authorities, at the Republic level – the Government, at the autonomous province level – the Province Government, at the level of local self-government units – the presidents of the municipalities (the mayors), on the proposal of emergency situation staff teams, which are formed for each government level, by the relevant executive authorities. Their character of auxiliary (and as a rule predominantly expert) authorities competent for the monitoring of activities aimed at reducing the risk of disasters, and for coordination and management in emergency situations, includes significant operational powers, including management and administration. Bearing in mind that the staff, among other things, orders the employment of forces of the system for reducing disaster risks and the management of emergency situations, of aid assets and other assets used in emergency situations, they constitute an important element of the management system, or segment of the national security system. This kind of system departs from regular chains of management and control of certain forces and assets, reserved for the state authorities (the Government, lower-level executive authorities, administrative authorities, public services). However, in view of the fact that the crisis staff teams are formed by the Government, and managed by the competent minister, the question of responsibility for their work falls under the regular responsibility determination instruments. Bearing in mind that in case of emergence of a higher-intensity hazard (the example of COVID-19), the state of emergency may be declared, all the requirements which led the legislator to regulate the role of this body become even more prominent, as this state makes its role even more manifest. As a result, the role of staff in the state of emergency should be explicitly defined (and potentially expanded), although the existing legal definitions cover all the kinds and forms of threats of such "scope and intensity that their occurrence or consequences may not be prevented or eliminated by the regular activity of competent authorities and services".

It is clear that the decision on declaration of the state of emergency must be the result of agreement of all the political authorities in the first case, and partially in the second as well, which, in view of the problematic nature and possible consequences of this legal regimen, further emphasizes the need to provide a balance in the exercise of power and, as much as possible, avoid its concentration in the hands of executive authorities, or even only the head of state.

Effect

The state of emergency, as a specific legal regimen limited in time, produces significant legal consequences. Generally speaking, they could be divided into two groups: 1) those relating to the functioning of the highest government authorities, and 2) those relating to human rights. Given that the act of declaration of the state of

emergency establishes a particular legal regimen with significant legal consequences, with a potential for change in relations between government authorities, this act may be deemed a general legal act of a constitutive nature.

Attempting to preserve the authority and continuity of operation of the highest government authorities, or prevent a paralysis of the state system and not create the possibility of abuse of the executive power in this kind of situation, the Constitution stipulates that the National Parliament may not be dissolved in the state of emergency, and in the case of its previous dissolution, its full authority is reestablished, and it should last until the termination of the state of war, or emergency (art. 109 and 200), in addition, it convenes after the declaration of the state of emergency without a special notice (art. 106 and 200). This solution is frequently found in comparative law (e.g. in France and Austria). The constitution maker did not explicitly lay down the situation when the term of office of the National Parliament expires during the state of emergency, or when it is declared following the call for regular elections (as was the case in Serbia), but bearing in mind the aim and importance of the constitutional provision on reestablishment of the full authority, this gap must be treated in the same way, i.e. in such a way as to extend the National Parliament's term of office. As opposed to the National Parliament, this is explicitly provided for the President of the Republic. If the President's term of office expires in the course of the state of war or emergency, it is extended in such a way as to last to the expiry of three months as of the day of termination of the state of emergency (art. 116). Any alteration to the Constitution during the state of emergency is also prohibited (art. 204).

The Constitution of Serbia does not stipulate the full concentration of power in case of the state of emergency. Such solutions can be found in comparative law, depending on the form of organization of power, where the head of state (e.g. in France and Austria)[8], or the head of state and the government together (the head of state on the proposal of the government and/or subject to the Prime Minister's co-signature, e.g. Croatia), or the government independently (Italy, Germany), assume certain powers of the parliament (either normative or electoral), with the possibility of derogation from or restriction of human rights. Nevertheless, a certain form of concentration is present, as the measures of derogation from human rights are not within the regular capacity of a single government authority. In declaring the state of emergency, the National Parliament may prescribe measures which derogate from the human and minority rights guaranteed by the Constitution. When the National Parliament is unable to convene, the measures derogating from human and minority rights may be stipulated by the Government, by a bylaw, with the co-signature of the President of the Republic. The measures derogating from human and minority rights stipulated by the National Parliament or the Government may be valid for no longer than 90 days, upon expiry of which they may be renewed under the same conditions. However, along with the abovementioned forms of protection of the basic principles

[8] In emergency situations the head of state usually acquires greater powers. This is not only the case with semi-presidential systems, but also in those which are essentially parliamentary, with certain semi-presidential elements, as is the case with Serbia (Fore more information on the powers of the head of state in semi-presidential systems, see: Rapajić, 2016).

of constitutional order, the Constitution also provides protection mechanisms to be applied in these circumstances, which emphasize their temporary character. When the measures derogating from human and minority rights were not stipulated by the National Parliament, the Government is obligated to submit the bylaw on the measures of derogation from human and minority rights for approval by the National Parliament within 48 hours of its passing, or as soon as the National Parliament is able to convene. Otherwise, the derogation measures cease to be valid 24 hours from the beginning of the first National Parliament session held after the declaration of the state of emergency. The measures derogating from human and minority rights certainly stop being effective with the termination of the state of emergency.

In addition to time limitation, the Constitution also includes other forms of restriction of measures which derogate from human rights, such as the principle of proportionality (only in the scope which is necessary), the ban on discrimination (the derogation measures must not lead to discrimination on the basis of race, gender, language, religion, nationality or social origin), and the prohibition of restriction of the essential rights (dignity, life, integrity, prohibition of slavery and forced labour, rights relating to treating an apprehended person, fair trial, the right to the legal capacity, the right to citizenship, the freedom of thought, conscience, religion, etc.). On the other hand, the Constitution stipulates that forced labour does not include work or service during a state of war or emergency in accordance with the measures stipulated when the state of war or emergency was declared (art. 26), as it may be a precondition of efficiently fighting the reasons which brought about this state of affairs, or eliminating its consequences, but the proportionality principle remains the decisive factor in the assessment of the aforesaid measures.

As opposed to the state of emergency which implies the possibility of restriction of constitutional rights, an emergency situation implies particular legally stipulated duties of state, provincial and local authorities, public services, and other legal entities (e.g. any company and other legal entity is obliged to, within its business activities, take all the measures of risk prevention and reduction, as well as to respond to any request of the competent staff and take part in the implementation of protection and rescue measures, with a refund of the costs from the budget of the corresponding territorial-political unit). Besides the government authorities' duties and powers stipulated by the regulations in the field of health, labour, education, finance, transportation, etc., emergency situations lead to the establishment of a specific system of relations which are activated in the defined circumstances. This results in departures from the regular conditions, and allows for special measures, restrictions, mandatory activities, etc. of a wider circle of entities. Moreover, emergency situations also impose specific duties on the citizens, which are directly linked to this, extraordinary state of affairs.

The Law on Reducing the Risk of Disasters and Managing Emergency Situations highlights specific duties of the Ministry of Internal Affairs (besides the preventive, planning, professional, state monitoring and coordination measures, it also orders partial mobilization of civil protection units at the Republic level, implements measures for the protection and rescuing of endangered persons and property, providing the participation of police and other organizational units in the implementa-

tion of the legally stipulated measures and activities), and the Ministry of Defence (in the conditions when the other forces and assets of the system are not sufficient for the protection and rescuing of people, material and other assets from the consequences of disasters, on the request of the Republic Staff for Emergency Situations, it provides the participation of its organizational units, commands, units and institutes of the Army of Serbia for help in the protection and rescuing, according to the law, except in a state of war or emergency.

The Law lays down specific duties for entities dealing with certain activities of importance to emergency situations, defining them as entities of particular importance, and for legal entities which are the owners and users of electronic communication networks and information systems, scientific institutions and humanitarian organizations. Entities of particular importance to protection and rescuing are business companies and other legal entities dealing with activities in the following fields: telecommunications, mining and energy, transportation, meteorology, hydrology, seizmology, protection from ionizing radiation and nuclear security, protection of the living environment, water management, forestry and agriculture, healthcare, care for persons, veterinary medicine, utility services, civil engineering, catering, and others possessing resources which reduce disaster risks. Entities of particular importance are determined by the Republic Government, the Province Government or a local executive authority. They are engaged by the corresponding staff (of the Republic, province or a local unit), subject to the refund of costs out of the corresponding budget, irrespective of the public procurement rules (art. 31). Higher-education institutions and other institutions dealing with scientific research are engaged in the implementation of the tasks of protection and rescuing, and reducing disaster risks through participation in staff teams, expert-operational teams and operational staff. They inform the Ministry of scientific findings of importance to reducing disaster risks, to protection and rescuing. In addition to the duties referred to above, the Law also stipulates that business companies and other legal entities, owners and users of supplies of water, food, medical devices and drugs, energy resources, clothing, footwear, construction and other products necessary for carrying out protection and rescuing tasks, are obliged to make such resources available for protection and rescuing purposes, on the orders of the competent staff. It also stipulates other restrictions to property rights – owners and users of immovable assets are obliged to enable on their immovable properties the execution of works necessary for protection and rescuing purposes, on the competent staff's orders, subject to the right to a refund paid according to the market prices (art. 32), which falls under the constitutional bases of restrictions (art. 58) "in the public interest", with a corresponding compensation.

The citizens (all the capable citizens, including foreign citizens and stateless persons who are legally entitled to a temporary stay or permanent residence in the Republic of Serbia, of 18 to 60 years of age, exempting the following groups: pregnant women and mothers with children up to the age of ten, and single parents or guardians of children up to 15 years of age, persons with disabilities, as well as persons taking care of disabled persons; persons taking care of, and living in the same households with the elderly who are unable to take care of themselves) are obliged:

1) to receive training for protection and rescuing and to take measures of personal and mutual protection; 2) da accept assignment to civil protection units and respond in case of mobilization of those units; 3) to respond to calls of the competent staff for emergency situations for participation in protection and rescuing actions; 4) to immediately notify the operational centre 112 of the emergence of any hazard; 5) to carry out the stipulated and ordered protection and rescuing measures (art. 36 of the Law). This leads to the restriction of certain constitutional rights (primarily the freedom of movement and settlement under art. 39). On the other hand, the Constitution provides restriction of these rights by law, if necessary for the purpose of conducting criminal proceedings, protection of public order and peace, prevention of the spread of infectious diseases or defence of the Republic of Serbia. However, emergency situations as defined by law go beyond the bases mentioned above. The Law classifies emergency situation management under the national security system, while citizens' duties in them mainly refer to civil protection, which is only in states of war or emergency organized and functions as part of the defence system (art. 77 § 2 of the Law on Defence).[9] These deficiencies should therefore be eliminated, by extending the defence system to certain emergency situations, and not only the state of emergency.

Conclusion

The constitutional provisions on the state of emergency contain an imprecise condition for introducing the state of emergency, which could include most diverse states, risks and hazards which, according to the assessment of competent government authorities, may be eliminated by the application of measures which derogate from guaranteed rights. Bearing in mind the need for the preservation of the essential principles of constitutional order (the division of power, the guarantee of human rights, a restriction of state power), but also the functioning of the state system even in the most difficult circumstances, the Constitution provides the corresponding protection mechanisms, especially with regard to the National Parliament. Similar types of solutions can also be identified in comparative law.

This imprecise basis for declaration has however a limited significance, if the powers of the government authorities in this state have their reasonable limits and the appropriate measure of necessity. The flexibility of the bases for declaration, along with great authority of the executive branch of power, with a concentration of powers in its hands (normative and electoral in particular) could, despite its temporary nature, pave the way for most serious abuses of power and threaten the rule of law principle. The Constitution of Serbia does not stipulate the assumption by the head of state and/or the Prime Minister of the Parliament's broader powers, but exclusively links the power to prescribe the aforesaid measures to the National Parliament's inability to convene, implying the necessary ratification and a general restriction of the duration of the measures.

[9] Cf. Avramović, D., Simović, d. op. cit. p. 512-513.

However, the dilemma arises from the potential assessment of the existence of circumstances which necessitate the declaration of the state of emergency, as it the case of COVID-19 as an infectious disease on which there is insufficient information, with a limited set of instruments for fighting and combating it. Extraordinary circumstances always include a subjective element, as the objectivization of reality can never be ensured to the required extent, and may even impede the institutional mechanisms for combating them. The problem lies in the non-existence of sufficient general trust of the public, and in a tendency for different forms of problematization of the general principles that a state rests upon, as a permanent deficiency of the process of "democratization" of this region, and sometimes even pure manipulation. All this is an indicator of the yet unconsolidated political system, and the consequence of the "transition" process which started in a wrong way in the region of the former state and continued in the same vein, demonstrating its worst aspects.

Even though a certain duality of extraordinary states (besides the state of emergency) is introduced in the legal order, with imprecisely defined interrelations, the introduction of the emergency situation regimen in circumstances of numerous challenges which do not require the activation of the state of emergency with all the consequences that may result therefrom still shows its justification, which has been fully confirmed in the instance of the current infectious disease around the world. This implies a specific regimen which is introduced in qualified situations (disaster risk or elimination of the consequences of disasters, which certainly includes COVID-19), with specific rights and duties of a widest range of entities, from the government authorities to business organizations and citizens, without whom those harmful consequences would be much harder to eliminate, or eliminated inefficiently. This regimen does not infringe on the rights stipulated by the Constitution, in the way possible in the case of the state of emergency, but in line with the constitutional option, the law restricts certain rights in the given situation, when so demanded for reasons of security or public health (for example), as explicitly stated constitutional grounds. However, their interrelations should be more clearly specified in the sense that the declaration of the state of emergency automatically activates the emergency situation, and the system of emergency situations (civil protection) should also be harmonized (its terminology as well) with the defence system.

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ВАНРЕДНО СТАЊЕ И ВАНРЕДНА СИТУАЦИЈА У ОКОЛНОСТИМА ВИРУСА COVID-19

Сажетак: Стања која онемогућавају редовно функционисање државног поретка захтевају одговарајућу правну регулативу, која упркос томе што донекле мења принципе на којима он почива, потпадају под уставни оквир. У ситуацији постојања ванредних прилика активира се посебан правни режим у коме су могућа одступања и од гарантованих људских права. Ипак, та стања су временски ограничена, уз нужна додатна ограничења која онемогућавају злоупотребу власти. У правном систему Србије, уз уставом дефинисано ванредно стање, законом је уређено и стање ванредних ситуација. Иако између њих у садржинском смислу не постоје јасне разлике, него је то препуштено процени надлежних органа, њихов правни режим је различит. Епидемија COVID-19 је актуелизовала ова питања, те отворила извесне дилеме у погледу исправности проглашења ванредног стања и његове делотворности.

Кључне речи: ванредно стање, ванредна ситуација, COVID-19, људска права