

# STATE OF EMERGENCY: A SHORTCUT TO AUTHORITARIANISM\*

## ABSTRACT

From the beginning of 21<sup>st</sup> century, legal ramifications of declaring a state of emergency have attracted a lot of attention due to the fact that many states have resorted to this measure in order to combat, first, terrorism threat, and most recently – a new pandemic – COVID-19. However, a state of emergency is certainly not a new issue, and there is a large body of scholarly work dedicated to it, alongside the issue of derogations from fundamental human rights and liberties both from international human rights law and constitutional law perspective.

This article focuses on constitutional legal aspects of the state of emergency and derogations from human rights obligations and is aiming to address some of the problems that might occur during a state of emergency. It will be argued that a state of emergency represents a convenient shortcut to authoritarianism and that a strict constitutional legal framework is necessary to be put in place in order to prevent the spread of exceptional provisions within the legal system, which could lead to the normalization of a state of exception.

## INTRODUCTION

A large body of scholarly work has been dedicated to the issue of a state of emergency throughout the last two decades. Although significant work has been accomplished in the 20<sup>th</sup> century, the topic was further popularized in the beginning of this millennium as a result of declaration of the “war on terror”,<sup>1</sup> which allowed a number of states, including well-established democracies, to declare a state of emergency or introduce exceptional provisions into their legal systems without formally derogating from respective rights. While such measures predominantly affected the rights of terrorism suspects, the damage also spread into legal systems in general.

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\* Certain parts of this article are based on my LLM thesis submitted to the Central European University’s Department of Legal Studies in 2018 under the supervision of Professor Károly Bárd.

<sup>1</sup> See The Guardian, George Bush’s address to a joint session of Congress and the American people, Fri 21 Sep 2001 16.31 BST, available at: <https://www.theguardian.com/world/2001/sep/21/september11.usa13> [accessed 19 April 2020].

The said emergency measures have altered, *inter alia*, some of the most fundamental principles of criminal justice. Problems arising from introduction of emergency measures are twofold: the first problem is the prolongation of a state of emergency and hence the continued derogation from fundamental rights; the second – introduction of *de facto* emergency provisions into normal legislation. Both of these tactics lead to an important issue with respect to which scholars and experts have continuously expressed their concerns: this issue can be framed as the “normalization” of a state of emergency.

Although this century’s main challenges regarding legal aspects of a state of emergency have been linked to anti-terrorism measures, the spread of COVID-19 has once again demonstrated the need to address pressing issues related to the state of emergency and look into the legal ramifications of introducing an exceptional regime. In addition, while the patterns of the abuse of emergency powers were observed as early as the Roman Republic,<sup>2</sup> studies suggest that there is a strong correlation between the wide-spread and grave violations of human rights and states of emergency.<sup>3</sup> This logically leads to the conclusion that more efficient mechanisms are necessary to be put in place in order to prevent the abuse of powers in times of emergency and establish accountability for the abuse thereof.

This article will present some of the problematic areas of a state of emergency from a constitutional point of view. It will argue that, if relevant constitutional provisions are not properly designed, a state of emergency gives leaders the possibility to take over the legislative power and transform democracies into authoritarian or semi-authoritarian states. This is particularly visible in the absence of strict constitutional regulations regarding declaration and prolongation of a state of emergency, as well as derogation from fundamental human rights and liberties alongside the constitutional oversight of the rule by decrees.

Certainly, one of the most important topics is the definition of the scope of human rights protection in a state of emergency. International and regional judicial and quasi-judicial mechanisms as well as some national courts have set forth standards in the field of human

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<sup>2</sup> See Clinton L. Rossiter, *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton: Princeton University Press, 2008, at 70-71.

<sup>3</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, p. 3, available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [accessed 17 April 2020]; Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: Paris Minimum Standards of Human Rights Norms in a State of Emergency*, (London: Pinter Publishers, 1989) p. 205; Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc.E/CN.4/Sub.2/1982/15, 27 July 1982, available at: [http://hrlibrary.umn.edu/Implications%20for%20human%20rights%20siege%20or%20emergency\\_Questiaux.pdf](http://hrlibrary.umn.edu/Implications%20for%20human%20rights%20siege%20or%20emergency_Questiaux.pdf) [accessed 17 April 2020]; See also Jaime Oraá, *Human Rights in State of Emergency in International Law* (Oxford: Clarendon Press, 1992), 1; Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, Human Rights Quarterly, Vol. 7, No. 1 (Feb., 1985), pp. 89-131, at 91; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (University of Philadelphia Press, 1994); Parvez Sattar, *Human Rights and Three Special Aspects of the Rule Of Law in the Modern Society*, Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, (Ann Arbor: UMI Dissertation Publishing, May 1998), p. 168; See also European Commission for Democracy through Law, *Emergency Powers*, CDL-STD(1995) 012, Strasbourg, 1995, p. 2, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e) [accessed 13 April 2020].

rights law applicable to emergencies, predominantly with respect to the right to a fair trial and due process. However, it is also important to establish standards beyond human rights law – those aiming to ensure that other democratic values in a broader sense, such as principle of separation of powers and the rule of law are preserved.

In most cases, emergencies require rapid reaction, which leaves very little (if any) room for lengthy procedures of legislative deliberation. For this reason, vast powers are being concentrated in the hands of the executive (Prime Ministers or Presidents, depending on the form of the government), which supposedly is the most “efficient” branch of the government.<sup>4</sup> However, precaution needs to be taken in particular when deciding which powers should be given to the executive in times of emergencies *ex ante*, as well as in the course of selecting *ex post* mechanisms for reviewing measures enacted by the executive to combat public emergencies. Otherwise, we will face a growing risk of aiding the establishment of authoritarian or semi-authoritarian regimes. Eventually, the lesser the risk of “normalization” of the exceptional, the longer the road from a state of emergency to authoritarianism.

The first chapter of this article will provide an overview of a state of emergency in general and will illustrate some practical examples. The second chapter will compare emergency measures introduced during the war on terror to certain restrictions enacted during the 2020 pandemic and argue that, although different in nature, these two types of emergencies share some similarities. The third chapter will offer insights into theoretical aspects of a state of emergency based on studies of Dr. Greene and Dr. Dyzenhaus, however it does not pretend to provide the full analysis of the extensive work done by these scholars in the field of emergency powers. At the same time, it will be pointed out that measures enacted during terrorism and COVID-19-related emergencies are particularly worrisome in that they pave the way for authoritarian regimes. The fourth chapter will present examples of some of the most essential constitutional regulations that should be in place in order to avoid normalization of a state of emergency. This paper intends to underline the necessity to create stronger safeguards for preservation not only of individual rights and liberties, but also other democratic values such as supremacy of the constitution and the rule of law.

## I. STATE OF EMERGENCY: NECESSITY AND TEMPTATION

State of emergency is a tempting instrument, allowing states to derogate from fundamental human rights and liberties in order to combat exigencies. Constitutions of most states have an emergency/derogation clause,<sup>5</sup> which prescribes grounds for its declaration as well as the

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<sup>4</sup> See e.g. Jonathan Macey, Executive Branch Usurpation of Power: Corporations and Capital Markets, 115 Yale L.J. 2417 2005-2006, p. 2425, available at:

[https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2348&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2348&context=fss_papers) [accessed 19 April 2020], - stating that “[t]he executive branch clearly has advantages in this arena over the legislature and the judiciary [in terms of] timeliness of the response”.

<sup>5</sup> Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, European Journal of Political Economy, 2017, 1-14, p. 1; See Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, pp. 14-15 and p. 41, available at:

list of non-derogable rights,<sup>6</sup> or the list of rights from which states can derogate.<sup>7</sup> Similarly, international conventions allow states to derogate from their international obligations under exceptional circumstances. However, they “[do] not create a Schmittian state of exception”<sup>8</sup> and the suspension of individual rights is only allowed to the extent prescribed by the derogation provisions.<sup>9</sup>

This does make a lot of sense, - emergencies might prevent states from complying with all their human rights obligations, and national authorities are sometimes required to take exceptional measures in order to combat public emergencies facing the nation. However, it is also true that “emergencies [...] challenge the state’s commitment to govern through law”,<sup>10</sup> and the fact that the state of emergency “put[s] legality to its greatest test”<sup>11</sup> is hardly objectionable. Indeed, as one author puts it, “once law has been established to maintain social order, emergency remains law’s nemesis, the unruly force that would overturn the rules and regimes so carefully constructed by the principles and practices of legality”.<sup>12</sup> A state of emergency *per se* is dangerous for a normal legal order.

Nevertheless, we tend to put more trust into those who govern during emergencies, - a general pattern is that we tend to be more tolerant towards leaders who are in charge of combating an emergency facing the nation. In emergencies, we frequently hear phrases such as “this is not the time to criticize the government”, “the situation cannot be handled otherwise” etc.<sup>13</sup> But sometimes, this narrative leads to overlooking the proper exercise of powers, and it becomes difficult to distinguish which measures are really caused by the necessity to

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558) [accessed 14 April 2020]. However, there are some exceptions, such as the Constitution of the United States of America. The only provision prescribed by the US that is relevant in the context of emergencies is Section 9 (2), which provides that “The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”. For statistical data and a cross-country comparison of the powers allocated within different political actors in emergency situations, see Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558) [accessed 15 April 2020].

<sup>6</sup> See e.g. Constitution of the Republic of Estonia, Article 130.

<sup>7</sup> See e.g. Constitution of the Kingdom of Spain, Section 55.

<sup>8</sup> Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo> [accessed 14 April 2020].

<sup>9</sup> See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 15; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4; Organization of American States (OAS), *American Convention on Human Rights*, “*Pact of San Jose*”, Costa Rica, 22 November 1969, Article 27.

<sup>10</sup> Victor V. Ramraj, *No Doctrine More Pernicious? Emergencies and the Limits of Legality*, in “Emergencies and the Limits of Legality”, ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 4.

<sup>11</sup> Austin Sarat, *Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under the Conditions of Emergency*, in “Sovereignty, Emergency, Legality”, ed. Austin Sarat (New York: Cambridge University Press: 2010), p. 1.

<sup>12</sup> *ibid*, p. 4.

<sup>13</sup> See e.g. The Times of Israel, Stop Criticizing the Government (Shabbos 11), 17 March 2020, 10:03 PM, available at: <https://blogs.timesofisrael.com/stop-criticizing-the-government-shabbos-11/> [accessed 19 April 2020].

combat an emergency, and which measures are the result of an executive feeling too comfortable with his or her exercise of exceptional powers.<sup>14</sup>

As a result, it would be no exaggeration to suggest that emergencies can be used as a shortcut to authoritarianism. From this point of view, the Weimar Constitution has been criticized for the lack of sufficient checks on emergency powers, “which ultimately contributed to the rise of Hitler’s dictatorship through constitutional means”.<sup>15</sup> On one hand, “not every leader is likely to become a Nazi dictator upon declaration of state of emergency”,<sup>16</sup> however, as Elkins, Ginsburg and Melton point out, “sometimes, executives are induced to seek more power because of external shocks that render it prohibitively costly to work within constitutional limits conceived under more stable conditions”,<sup>17</sup> one of such examples being a military crisis, “which often tempts the executive to pursue security and stability at the expense of individual rights”.<sup>18</sup>

Drafters are usually aware of the temptations that those in power might have in states of emergency. For this reason, constitutions include safeguards that prevent certain actions of political actors. Some of the examples are: prohibition of holding elections,<sup>19</sup> introduction of constitutional amendments/undertaking constitutional reforms,<sup>20</sup> or prohibition to dissolve the legislature in a state of emergency.<sup>21</sup>

It is no surprise that a declared state of emergency gives respective branches of the government a relative freedom to gain benefits that would otherwise have faced certain obstacles.

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<sup>14</sup> One of the examples is Donald J. Trump claiming to have “total authority”. See e.g. The New Yorker, We Won’t Know the Exact Moment When Democracy Dies, 16 April 2020, available at: [https://www.newyorker.com/news/our-columnists/we-wont-know-the-exact-moment-when-democracy-dies?utm\\_brand=tny&utm\\_source=facebook&mbid=social\\_facebook&utm\\_medium=social&utm\\_social\\_type=owned&fbclid=IwAR1OrHISgR5E6l-haOeGNi-AhAp\\_GEM9yZIdlmLZqz45FQf1jZlqwMr1Ys](https://www.newyorker.com/news/our-columnists/we-wont-know-the-exact-moment-when-democracy-dies?utm_brand=tny&utm_source=facebook&mbid=social_facebook&utm_medium=social&utm_social_type=owned&fbclid=IwAR1OrHISgR5E6l-haOeGNi-AhAp_GEM9yZIdlmLZqz45FQf1jZlqwMr1Ys) [accessed 24 April 2020].

<sup>15</sup> Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 18-19 [hereinafter, “Elkins et. al”];

<sup>16</sup> Ana Jabauri, Preserving Criminal Justice during a State of Emergency: Derogations from Fair Trial and Due Process Rights under the ICCPR, ECHR and the ACHR, Thesis Submitted to the Department of Legal Studies of the Central European University, 2018, p. 6.

<sup>17</sup> *ibid.*, 73-74; See also David Dyzenhaus, *The Compulsion of Legality*, in “Emergencies and the Limits of Legality”, ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 55, - pointing out that, “even in ordinary times, the executive is prone to try to carve out exceptions for itself, so that it can act largely unconstrained by the rule of law”; See also Bruce Ackerman, *The Emergency Constitution*, Law Faculty Scholarship Series, Paper 121, The Yale Law Journal, Vol. 113, 2004, 1029–1091, p. 1047, - pointing out, in particular, that “European nations have had a long and unhappy historical experience with explicit emergency regimes [whereby] these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue then for lengthy periods”.

<sup>18</sup> Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 18-19, - pointing to the examples such as “Lincoln’s suspension of *habeas corpus* during the civil war, the relaxing of privacy constraints on law enforcement investigations in the post-9/11 environment, or Indira Gandhi’s suspension of elections in India during her period of emergency rule in 1975-1977”.

<sup>19</sup> See e.g. Constitution of Georgia, Article 37 (3) for parliamentary elections; see Article 50 (5) for presidential elections and see Article 71 (5) for general elections.

<sup>20</sup> See e.g. Constitution of the Plurinational State of Bolivia, Article 140; See also Constitution of Georgia, Article 77 (7); Constitution of Moldova, Article 142 (3).

<sup>21</sup> See e.g. Constitution of the French Republic, Article 16.

For example, some countries might proceed with legislating on controversial issues during the restrictions on the freedom of assembly. Poland serves as a good example,<sup>22</sup> - legislative proceedings against the women's right to choose have been accompanied by massive protests in the past years. However, since the possibility to hold protests and demonstrations might be restricted due to the rules of social distancing during the COVID-19 outbreak,<sup>23</sup> the Parliament is trying to use this opportunity to pass legislation banning abortions while finding themselves in the comfort of not being distracted by the mass protests.<sup>24</sup> In response to Poland's intent to proceed with examination of the bills restricting women's reproductive rights, Dunja Mijatović, the Council of Europe Commissioner for Human Rights noted that "[i]n this extraordinary time of the COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights".<sup>25</sup>

She is indeed right in calling it a "temptation", - abstaining from legislating on controversial issues takes at least some commitment to democratic values, and not many politicians have such a commitment in emergencies. What is also true is that passing the said bill in Poland would not be an unprecedented example of the legislative branch ignoring the demands of those, who they should in fact be representing. Such events unfold even during the peacetime, and, in some countries, - quite frequently. For the purposes of this paper though, this example stays relevant - only time will show whether or not the Polish legislature will be able to resist this temptation. Meanwhile, the next section will provide more examples of those who have failed to resist, - it will first address terrorism-related emergencies and compare it to COVID-19-related emergencies, and will further address specific deviations from the rule of law in the context of the latter.

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<sup>22</sup> However, Poland is not alone in this regard, - USA also provides another example of how the current pandemic can be used against women's reproductive rights. See e.g. Quartz, Activists are using Covid-19 to set limits on abortion around the world, 17 April 2020, available at: <https://qz.com/1834915/activists-are-using-covid-19-to-limit-abortion-access/> [accessed 19 April 2020].

<sup>23</sup> However, we have witnessed an interesting attempt to protest while maintaining the rules of social distancing in Israel. See e.g. The Guardian, Israelis hold 'socially distant' protest against Netanyahu, 20 April 2020, available at: <https://www.theguardian.com/world/video/2020/apr/20/israelis-hold-socially-distant-protest-against-netanyahu-video> [accessed 24 April 2020].

<sup>24</sup> Euronews, Coronavirus in Europe: Polish MPs set to debate abortion ban while lockdown prevents protest, 12/04/2020 - 18:22, available at: [https://www.euronews.com/2020/04/12/coronavirus-in-europe-polish-mps-set-to-debate-abortion-ban-while-lockdown-prevents-protes?utm\\_term=Autofeed&utm\\_medium=Social&utm\\_source=Facebook#Echobox=1586708819](https://www.euronews.com/2020/04/12/coronavirus-in-europe-polish-mps-set-to-debate-abortion-ban-while-lockdown-prevents-protes?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook#Echobox=1586708819) [accessed 13 April 2020].

<sup>25</sup> Council at Europe, Commissioner urges Poland's Parliament to reject bills that restrict women's sexual and reproductive health and rights and children's right to sexuality education, 14/04/2020, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament-to-reject-bills-that-restrict-women-s-sexual-and-reproductive-health-and-rights-and-children-s-right-to-sexuali?fbclid=IwAR173ivMkNi-eEXxCTueu9cSacgp39MOn2fG2JSupCLBZxGLTjG-saOpAHQ> [accessed 14 April 2020]. For HRW's reporting on the issue, see Human Rights Watch, Poland: Reject New Curbs on Abortion, Sex Ed: Don't Manipulate Pandemic to Endanger Women, Adolescents, April 14, 2020 12:01 AM EDT, available at: <https://www.hrw.org/news/2020/04/14/poland-reject-new-curbs-abortion-sex-ed?fbclid=IwARINthpGs53ahvIm6ApNIt5Z4O1DNBx89jdeDEJhAnfApIAu3dqlvxG9r4I> [accessed 15 April 2020].

## WAR ON TERROR VS. WAR AGAINST COVID-19

COVID-19 is not the first pandemic that the world is facing, and neither is it the first time that many states simultaneously are declaring a state of emergency. Not to go any further, the beginning of this century was marked by the commencement of the “war on terror”,<sup>26</sup> which served as grounds for either announcing a state of emergency *de jure* and formally derogating from fundamental rights as guaranteed by international conventions, or by applying special *de facto* emergency rules to terrorism cases, especially with respect to fair trial and due process rights.

Terrorism and COVID-19-related emergencies are *prima facie* different. The former represents a threat to national security, while the latter threatens public health. Core rights affected by the emergency powers that states have been resorting to might also differ. However, they do share significant similarities. For instance, both of them are open-ended – terrorism has no “natural resting point”,<sup>27</sup> which means that states might tend to prolong states of emergency in violation of the basic principles enshrined in derogation clauses, – most importantly the requirement that emergency measures be temporary. Similarly, nobody is aware when the novel coronavirus will be eliminated – we can only hope that it does not last for as long as the war on terror.<sup>28</sup> Given the open-ended nature of these threats, the issue of prolongation of a state of emergency and thus “normalization” of the exceptional is even bigger.

Secondly, although emergency measures undertaken throughout these two types of emergencies serve different goals, the manner in which they affect the legal system, as well as the consequences they might have in terms of altering the normal legal order, are quite similar. Below, we will first review some of the measures enacted during terrorism-related and COVID-19-related emergencies separately, and a comparison of risks posed by them will be offered further. It will be argued that the effect of emergency measures related to novel coronavirus might be just as dangerous as those enacted for the purposes of combating terrorism.

We can look for the first interesting similarity in the linguistic aspect of the speeches made during terrorism-related and COVID-19-related emergencies: it is easy to see an identical pattern in the language used by the media and the world leaders in the context of the “war” on terror and the “war” against COVID-19.<sup>29</sup> A rhetoric of anti-terrorism has been very clear

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<sup>26</sup> See *supra* note 1.

<sup>27</sup> David Luban, *The War on Terrorism and the End of Human Rights*, in “The Constitution in Wartime: Beyond Alarmism and Complacency”, ed. Mark Tushnet (Duke University Press, 2005), p. 228.

<sup>28</sup> The war in Afghanistan is a good example of how long can a “war or terror” last. Recently, the US and Taliban concluded an agreement aiming to end the war which was followed after Afghanistan’s refusal to hand over Osama bin Laden. See BBC, *Afghan conflict: US and Taliban sign deal to end 18-year war*, 29 February 2020, available at: <https://www.bbc.com/news/world-asia-51689443> [accessed 19 April 2020]. Nevertheless, it is still unclear whether or not this war will eventually be over as a result of the agreement, as no official cease-fire agreement has been put in place. For more insights in this regard, see Global Conflict Tracker, *War in Afghanistan: Recent Developments*, last updated 17 April 2020, available at: <https://www.cfr.org/interactive/global-conflict-tracker/conflict/war-afghanistan> [accessed 19 April 2020].

<sup>29</sup> See e.g. The Conversation, *Coronavirus: If we are in a war against COVID-19 then we need to know where*

particularly since the US announced the “war on terror”, - terrorism has frequently been referred to as a common enemy; references to heroism of troops and attempts to create a sense of unity against a common enemy have also been recurrent.

If we look into the linguistic aspects of the speeches made in the context of COVID19-related emergencies, we will see the same pattern, - the virus is a common enemy, against which we are at “war”; medical professionals – i.e. the “troops” are at the “front line” while fighting against the common enemy and often speeches include calls for “unification” and “standing together” in times of this emergency.<sup>30</sup> Executive branch is also trying to play the role of the “protecting power”.<sup>31</sup> Interestingly, Donald J. Trump even stated that he is a “wartime President”.<sup>32</sup> All of this points to the fact that certain elements of populist discourse<sup>33</sup> come handy in emergency situations, and that terrorism and COVID-19-related emergencies share a lot of similarities in this regard. Although a detailed linguistic analysis of speeches made in emergency contexts is definitely interesting, it falls beyond the scope of this paper. Thus, we will now proceed with providing practical examples of measures undertaken with the intent to combat the two emergencies under consideration.

During terrorism-related emergencies, many problems have been documented both in *de jure* emergencies where states have formally derogated from their human rights obligations, and in *de facto* emergencies, where emergency provisions were hidden in ordinary antiterrorism legislation. Some of the recurring problems in the jurisprudence of international human rights bodies are: trial of civilians by military tribunals, the use of “faceless judges”, alterna-

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the enemy is, April 1, 2020 3.51pm BST, available at: <https://theconversation.com/coronavirus-if-we-are-in-a-war-against-covid-19-then-we-need-to-know-where-the-enemy-is-135274> [accessed 19 April 2020]. For Noam Chomsky’s brief comment on linguistic aspects of COVID19-related emergencies, see Noam Chomsky: Coronavirus - What is at stake? DiEM25 TV, available at: <https://www.youtube.com/watch?v=t-N3In2rLI4> [accessed 13 April 2020].

<sup>30</sup> See e.g. the tweet of Donald J. Trump, 17 March 2020, stating that “The world is at war with a hidden enemy”, available at: <https://twitter.com/realdonaldtrump/status/1239997820242923521> [accessed 13 April 2020]; See also the tweet of Donald J. Trump, 12 April 2020, referring to COVID19 as the “hidden enemy”, available at: <https://twitter.com/realDonaldTrump/status/1249418405951799309> [accessed 13 April 2020]; See also the tweet of Emmanuel Macron – “Encore et toujours, pour protéger les Français, nos armées s'adaptent et s'engagent en première ligne aux côtés des soignants mobilisés. #FranceUnie”, 4 April 2020, available at: <https://twitter.com/EmmanuelMacron/status/1246510621962776581> [accessed 13 April 2020]. See also: CNBC, Macron warns ‘we are at war’ as France unveils \$50 billion in coronavirus measures, TUE, MAR 17 2020 5:28 AM EDT, available at: <https://www.cnbc.com/2020/03/17/coronavirus-france-president-macron-warns-we-are-at-war.html> [accessed 13 April 2020]. However, such a rhetoric is not typical only for heads of state, - see also World Health Organization Director-General Tedros Adhanom Ghebreyesus stating that “[w]e are at war with a virus that threatens to tear us apart,” – NPR, ‘We Are At War,’ WHO Head Says, Warning Millions Could Die From COVID-19, March 26, 2020 4:46 PM ET, available at: <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822123471/we-are-at-war-who-head-says-warning-millions-could-die-from-covid-19> [accessed 13 April 2020].

<sup>31</sup> See e.g. the tweet of Emmanuel Macron, 1 April 2020, - “J’ai promis de vous protéger face aux pertes de revenus liées au COVID-19”, available at: <https://twitter.com/EmmanuelMacron/status/1245271305882079242> [accessed 13 April 2020].

<sup>32</sup> See e.g. Time, War Has Been the Governing Metaphor for Decades of American Life. This Pandemic Exposes Its Weaknesses, April 15, 2020 6:23 PM EDT, available at: <https://time.com/5821430/history-war-language/> [accessed 6.11.2020].

<sup>33</sup> The author relies on Hawkins’s definition of “populist discourse”. See Kirk A. Hawkins, Is Chávez Populist? Measuring Populist Discourse in Comparative Perspective, *Comparative Political Studies* Volume 42 Number 8, August 2009, pp. 1040-1067.

tion of certain aspects of equality of arms and the presumption of innocence.<sup>34</sup> In this regard, the question we should pose is whether the existing criminal justice guarantees should be altered in the context of counter-terrorism.

Interestingly, some scholars – such as Richard Posner - claim that terrorism suspects “should have no or very few guarantees in criminal proceedings against them”,<sup>35</sup> arguing that, due to the *sui generis* nature of terrorist threat, “it requires a tailored regime, the one that gives terrorist suspects fewer constitutional rights”,<sup>36</sup> and that “national emergencies in general, or the threat of modern terrorism in particular, justify *any* curtailment of the civil liberties that were accepted on the eve of the emergency” (emphasis in original).<sup>37</sup> This argument is based on the assumption that curtailing civil liberties will result in more efficient counterterrorism efforts.<sup>38</sup> However, “while there are often difficult trade-offs to be made between liberty and security, it does not follow that sacrificing liberties will always, or even generally, promote security”.<sup>26</sup>

This paper rejects Judge Posner’s argument and claims that states should not depart from existing human rights standards while countering terrorism.<sup>39</sup> Nevertheless, it should be pointed out that international human rights instruments have afforded states some flexibility with respect to standards regarding fair trial and due process rights in the context of terrorism. For instance, while some international bodies have made it clear that, in general, deviation from the presumption of innocence is *always* prohibited,<sup>40</sup> including the cases of suspected terrorists,<sup>41</sup> the ECHR has had a chance to clarify the scope of the right to remain silent in a terrorism-related case and adopted what I believe to be a rather narrow definition. Namely, in *Murray v. the United Kingdom*,<sup>42</sup> the Court found that the right to remain silent is not absolute and, under certain circumstances, drawing negative inferences from the silence

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<sup>34</sup> General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to A Fair Trial, 23 August 2007, CCPR/C/GC/32, para. 23. Whereas the ECtHR as not dealt with this issue, the UN Human Rights Committee and the Inter-American Court of Human Rights have assessed whether such composition of the court complies with the requirements of Articles 14 and 8 respectively. See e.g. Lori Berenson- Mejía v. Peru, Judgment of November 25, 2004 (Merits, Reparations and Costs), para. 147; Castillo Petruzzi, para. 133; See also César Landa, Executive Power and the Use of the State of Emergency, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 221-222.

<sup>35</sup> Jabauri *supra* note 16, p. 5.

<sup>36</sup> Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006), p. 11.

<sup>37</sup> *ibid.*

<sup>38</sup> David Cole, James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2006), p. 240.

<sup>39</sup> For a proper critique of Judge Posner’s approach, see David Cole, The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11, *Stanford Law Review*, Vol. 59:1735 April 2007, pp. 1735-1751.

<sup>40</sup> General Comment 32, *supra* note 34, para. 6; See UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

<sup>41</sup> Serjio Garcia Ramirez, The Inter-American Court of Human Rights’ Perspective on Terrorism, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 799.

<sup>42</sup> See *Murray v. United Kingdom*, no. 18731/91, 8 February 1996.

of an accused does not amount to infringement upon the presumption of innocence.<sup>43</sup> Moreover, in a more recent case concerning terrorism suspects,<sup>44</sup> the ECHR “quite explicitly disagreed with the UN Human Rights Committee that an emergency, and consequently the derogation measures, can only be ‘temporary’ [and] the Court’s own cases on Northern Ireland confirm[s] that an emergency and a derogation could last for a long while”.<sup>45</sup>

At the domestic level, “some common alterations [to criminal trial procedures], particularly since 9/11, have included extended periods of pre-charge or pre-trial detention; limited access to legal representation; suspension or limitation of habeas corpus; the use of special or military courts; restrictions on disclosure of and access to classified evidence; increased reliance on coerced confessions; the lowering of evidentiary standard; the use of anonymous witnesses; and limitations on appeal rights”.<sup>46</sup> These alterations took place both during *de jure* and *de facto* emergencies.

Similar to the case of terrorism-related emergencies, states have used the COVID-19-related emergency to derogate from their international obligations. As of mid-April 2020, 9 states<sup>47</sup> have notified the Secretary General of the Council of Europe that they were invoking the derogation clause of the European Convention on Human Rights. In contrast to terrorism, as some argue, “[t]he coronavirus pandemic is possibly the closest we have ever seen of a phenomenon that can objectively be categorised as necessitating exceptional measures”.<sup>48</sup> In this regard, the issue of certain countries trying to use emergency powers for unjust restriction of human rights is as pressing as ever.

Many states have resorted to measures that are objectively serving the aim of combating the spread of COVID-19. Some of the most frequent reactions include placing restrictions *inter alia* on “freedom of movement, expression and assembly”.<sup>49</sup> It is true that not all measures used have been disproportionate, however many of them can lead to serious problems in the long run, as evidenced by actions of states that have definitely gone a bit too far in their use of emergency powers.

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<sup>43</sup> I disagree with the Court’s view on the scope of the presumption of innocence. See Partly Dissenting Opinion of Judge Walsh, Joined by Judges Makarczyk and Lohmus, - expressing the position that there was indeed a breach of Article 6 (2) of the Convention.

<sup>44</sup> A. and Others v. United Kingdom, Application no. 3455/05, 19 February 2009.

<sup>45</sup> Marko Milanovic, European Court decides A and others v. United Kingdom, 19 February 2009, available at: <https://www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/> [accessed 20 April 2020].

<sup>46</sup> See Ben Saul, Criminality and Terrorism, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 163.

<sup>47</sup> Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia and Serbia. See European Court of Human Rights, Press Unit, Factsheet – Derogation in time of emergency, p. 2, available at: [https://www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf) [accessed 14 April 2020].

<sup>48</sup> Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo> [accessed 14 April 2020].

<sup>49</sup> Human Rights Watch, COVID-19 Offers Chance to Address Human Rights Concerns, April 14, 2020 12:00AM EDT, available at: <https://www.hrw.org/news/2020/04/14/covid-19-offers-chance-address-human-rights-concerns> [accessed 14 April 2020].

Some measures might on the surface appear necessary and proportionate, while threatening such values as transparency of the judiciary, as it will be further demonstrated. The right to a fair trial has been one of the most susceptible rights during terrorism-related states of emergency. However, COVID-19-related restrictions also have an impact on this right, especially the aspect of a public trial, which can be seen as a collateral damage caused by the restrictions on the gathering of large groups of people. In addition, problems might arise from the absence of a clear legal basis for restriction on specific rights. We can take a look at the Georgian example to see how the right to a fair trial might be affected amidst the novel coronavirus.

On 21<sup>st</sup> of March 2020, the President of Georgia adopted a Decree N1,<sup>50</sup> under which the “court hearings envisioned in the Criminal Procedure Code of Georgia, can be conducted remotely, by electronic means of communication”.<sup>51</sup> Although neither the presidential Decree nor the HCoJ recommendations<sup>52</sup> provide a legal basis for the restriction of the right to a fair trial, “the majority of judges restrict [monitoring organizations’] attendance [on trials] by wrongfully citing the regulations”.<sup>53</sup> Even though the right to a public trial is not an absolute right (in fact, it is the only qualified element of the right to a fair trial), it can only be restricted under exceptional circumstances, and on *ad hoc* basis. Currently, exclusion of the public and the media from court sessions has almost blanket character in practice, which is problematic not only for the protection of the right to a fair trial *strictu sensu*, but from a broader perspective of the transparency of judicial proceedings as well. In addition, the indefinite nature of such a restriction might, in the long run, lead to corruption and wrongful convictions. Thus, insofar as electronic means of communication allow attendance on trials, the right to a public trial should be respected to the fullest extent possible in order to avoid aforesaid drawbacks.

We can find examples of some States that have gone even further. For instance, “[a]uthoritarian countries such as China can impose stricter controls on movement and more intrusive means of surveillance, such as house-to-house fever checks, tracing and enforcement of quarantines, and are less vulnerable to pressure from businesses and popular opinion”.<sup>54</sup> China has banned “all independent civil society and freedom of expression”,<sup>55</sup>

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<sup>50</sup> Legislative Herald of Georgia, Decree N1 “On Measures to be Implemented in connection with the Declaration of a State of Emergency throughout the Whole Territory of Georgia”, 21 March 2020, available at: <https://matsne.gov.ge/en/document/view/4830372?publication=0> [accessed 19 April 2020].

<sup>51</sup> Transparency International, Statement on the Closure of Court Hearings in Common Courts of Georgia and Other Related Problems under a State of Emergency, 13 April, 2020, available at: <https://transparency.ge/en/post/statement-closure-court-hearings-common-courts-georgia-and-other-related-problems-under-state> [accessed 13 April 2020].

<sup>52</sup> High Council of Justice of Georgia, Recommendations, 13 March 2020 (available only in Georgian), available at: <http://hcoj.gov.ge/ge/iustitsiis-umaghlesi-sabchos-rekomendatsiebi/3629> [accessed 13 April 2020].

<sup>53</sup> Transparency International, Statement on the Closure of Court Hearings in Common Courts of Georgia and Other Related Problems under a State of Emergency, 13 April, 2020, available at: <https://transparency.ge/en/post/statement-closure-court-hearings-common-courts-georgia-and-other-related-problems-under-state> [accessed 13 April 2020].

<sup>54</sup> James Paton, When, and How, Does the Coronavirus Pandemic End?, 3 April 2020, 8:16 PM GMT+4, available at: [https://www.bloomberg.com/news/articles/2020-04-03/when-and-how-does-the-coronavirus-pandemic-end-quicktake?utm\\_campaign=socialflow-organic&utm\\_medium=social&cmpid=socialflow-twitter-](https://www.bloomberg.com/news/articles/2020-04-03/when-and-how-does-the-coronavirus-pandemic-end-quicktake?utm_campaign=socialflow-organic&utm_medium=social&cmpid=socialflow-twitter-)

and made attacks against political dissents, as well as “against ‘security threats’ such as film festivals and even women working to end sexual harassment on public transit”.<sup>56</sup>

The Human Rights Watch reported that

In Bangladesh, Cambodia, China, Egypt, Ethiopia, Turkey, and Venezuela, journalists and others have been arrested and detained for reporting on or expressing opinions about COVID-19 on social media. Egypt and China have expelled journalists. In Bolivia, authorities have used COVID-19 as a justification to threaten political opponents with up to 10 years in prison for spreading “misinformation”.<sup>57</sup>

Similar examples can be found in anti-terrorism legislation, which, among others, either gave states far-reaching detention powers,<sup>58</sup> or gave them an opportunity to use counter-terrorism measures for suppression of the dissent.<sup>59</sup> Recep Tayyip Erdogan has used the 2016 emergency following the attempted *coup d'état* in Turkey to silence critics of the government,<sup>60</sup> and is now once again trying to use the existing emergency “to exert direct control over social media platforms like Twitter, YouTube, and Facebook”.<sup>61</sup> In fact, Freedom of expression is only one out of many rights that have potentially been violated during the COVID-19-related emergencies,<sup>62</sup> - “hundreds of citizens have been briefly detained then subjected to criminal investigation and prosecution for social media posts prosecutors deem

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[busi-ness&utm\\_content=business&utm\\_source=twitter&fbclid=IwAR0KJmLhsEN7tqsoMsfXaHLQTRlmCVD2zt7BA3Hi6yFtnrZ\\_abU2wa1G4GQ](#) [accessed 16 April 2020].

<sup>55</sup> The Hill, Authoritarianism is the Greatest Public Health Risk, 02/23/20 12:00 PM EST, available at: <https://thehill.com/opinion/healthcare/484190-authoritarianism-is-a-public-health-risk> [accessed 13 April 2020].

<sup>56</sup> *ibid.* Interestingly, some media platforms have voiced an opinion that authoritarian governments might be more efficient in controlling the pandemic, however, this argument is effectively defeated by facts. See e.g. Radio Free Asia, Estimates Show Wuhan Death Toll Far Higher Than Official Figure, 27 March 2020, available at: <https://www.rfa.org/english/news/china/wuhan-deaths-03272020182846.html> [accessed 19 April 2020].

<sup>57</sup> Human Rights Watch, COVID-19: A Human Rights Checklist, April 14, 2020 12:00 AM EDT, available at: <https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist> [accessed 14 April 2020].

<sup>58</sup> See e.g. Amnesty International, Switzerland: Draconian counter-terrorism laws would target people without charge or trial, 15 January 2020, 11:35 UTC, available at: <https://www.amnesty.org/en/latest/news/2020/01/switzerland-draconian-counter-terrorism-laws-would-target-people-without-charge-or-trial/> [accessed 19 April 2020]; See, in general, Amnesty International, Statement on the Impact of US Counter Terrorism Efforts in Africa on Human Rights Before House Oversight And Reform National Security Subcommittee Dec. 17 2019, available at: <https://www.amnestyusa.org/our-work/government-relations/advocacy/us-counter-terrorism-human-rights-in-africa/> [accessed 19 April 2020].

<sup>59</sup> See e.g. Human Rights Watch, Egypt: Intensifying Crackdown under Counterterrorism Guise: Emergency Courts Used to Prosecute Activists, Journalists, Bloggers, July 15, 2018 12:01 AM EDT, available at: <https://www.hrw.org/news/2018/07/15/egypt-intensifying-crackdown-under-counterterrorism-guise> [accessed 19 April 2020].

<sup>60</sup> See e.g. Human Rights Watch, Turkey: State of emergency provisions violate human rights and should be revoked, October 20, 2016 11:03 AM EDT, available at: <https://www.hrw.org/news/2016/10/20/turkey-state-emergency-provisions-violate-human-rights-and-should-be-revoked> [accessed 19 April 2020].

<sup>61</sup> Human Rights Watch, Turkey Seeks Power to Control Social Media, April 13, 2020 12:00 AM EDT, available at: <https://www.hrw.org/news/2020/04/13/turkey-seeks-power-control-social-media> [accessed 14 April 2020].

<sup>62</sup> See *ibid.*

‘publicly threaten health in order to create fear and panic among the population’. Some get a spell in jail before trial on that charge”.<sup>63</sup>

One of the lucky winners however should definitely be Hungary’s Prime Minister - Mr. Viktor Orbán. On 30 March 2020, Hungarian Parliament equipped the Prime Minister with a so-called Enabling Act,<sup>64</sup> which has been compared to Hitler’s *Ermächtigungsgesetz* of 1933 on several occasions.<sup>65</sup> The Act gave Prime Minister Orbán “dictatorial powers under cover of declaring a state of emergency to fight COVID-19”.<sup>66</sup> It introduces a great deal of restricting measures,<sup>67</sup> however the worst in this story is that “[t]he blanket authorization of uncontrolled executive power will last as long as the ‘state of danger’ persists, which will be determined by the government itself”.<sup>68</sup> Although the parliamentary sessions have not been interrupted, “the act gives the government the power to take extraordinary measures, including suspending or abrogating statutory provisions without parliamentary approval during the crisis”.<sup>69</sup> Ultimately, it is the PM who has the power to decide when the crisis ends.

Although the Enabling Act envisages the possibility of constitutional oversight, in the Hungarian context, it is highly debatable whether or not the Constitutional Court can be deemed as an efficient mechanism of oversight, given the fact that the Court has been packed by the ruling party.<sup>70</sup> Thus, a dangerous amount of power is concentrated in the hands of the executive with virtually no viable oversight mechanisms in place. Given the fact that there is no sunset clause in the Act, an emergency can, in principle, last forever (especially since we do not know when the necessity of combating the virus ceases to exist).

Under such circumstances, an executive might get the impression that he or she is omnipo-

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<sup>63</sup> *Supra* note 61.

<sup>64</sup> See Translation of Draft Law “On Protecting Against the Coronavirus”, available at: [http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/#\\_ftn2](http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/#_ftn2) [accessed 13 April 2020].

<sup>65</sup> Gábor Halmai, How COVID-19 Unveils the True Autocrats: Viktor Orbán’s Ermächtigungsgesetz, Int’l J. Const. L. Blog, Apr. 1, 2020, available at: <http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/> [accessed 13 April 2020]. See also Kriszta Kovács, Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available at: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/> [accessed 16 April 2020]; Renáta Uitz, Hungary’s Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: <http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic> [accessed 16 April 2020]; Tom Flynn, Weimar-on-Danube: on the Hungarian Enabling Act, the European response, and the future of the Union, 6 April 2020, available at: <http://dcubrexitinstitute.eu/2020/04/weimar-on-danube-on-the-hungarian-enabling-act-the-european-response-and-the-future-of-the-union/> [accessed 16 April 2020].

<sup>66</sup> Gábor Halmai, How COVID-19 Unveils the True Autocrats: Viktor Orbán’s Ermächtigungsgesetz, Int’l J. Const. L. Blog, Apr. 1, 2020, available at: <http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/> [accessed 13 April 2020].

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*; See also BBC, Coronavirus: Hungary government gets sweeping powers, 30 March 2020, available at: <https://www.bbc.com/news/world-europe-52095500> [accessed 13 April 2020].

<sup>69</sup> Kriszta Kovács, Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available at: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/> [accessed 16 April 2020].

<sup>70</sup> Renáta Uitz, Hungary’s Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: <http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic> [accessed 16 April 2020];

tent in emergency contexts, and once one gets used to exercising unchecked power, getting back to normalcy might pose a challenge. Accordingly, we might be facing the threat of altering the existing constitutional legal regime. In this regard, it can be argued that Hungary's Enabling Acts amount to the introduction of the "alternate legal regime".<sup>71</sup> Next section of this paper addresses, *inter alia*, the issue of whether or not a new, distinct legal order can be introduced in the course of the exercise of emergency powers. The importance of avoiding gradual "normalization" of emergency measures will also be demonstrated based on a specific example where an exceptional measure eventually transforms to a normal rule.

## II. PROLONGATION OF A STATE OF EMERGENCY OR THE BIGGEST THREAT POSED BY EXCEPTIONAL REGIMES

Long before emergency powers became a topical issue due to terrorism threat, Nazi Germany's supporter and a political theorist Carl Schmitt famously declared that the "[s]overeign is he who decides on the exception", which implies the power to decide on "whether an exception exists or not and what ought to be done in such an exception".<sup>72</sup> He argued that Article 48 of the Weimar Constitution "authorized the President to derogate from the rule-of-law provisions of the constitution if this was necessary to save the constitution itself".<sup>73</sup> This approach has provoked an academic debate among some of the most distinguished scholars working on emergency powers, which is briefly reviewed below.

One important question that arises in this regard is whether special powers can be exercised to the extent of absolute discretion when a state of emergency is declared. Another related question is whether or not the exercise of emergency powers *ipso facto* requires departure from normalcy and act beyond the constitutional legal framework. For instance, let us use syllogistic logic and try to answer the question whether any problems would arise as to the legality of police action in the context of an emergency decree that has empowered the po-

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<sup>71</sup> Renáta Uitz, Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: <http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic> [accessed 16 April 2020];

<sup>72</sup> Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Hart Publishing, 2018, p. 74. See Carl Schmitt, Political Theology, Translated by George Schwab, The University of Chicago Press, Chicago.

<sup>73</sup> See Marc de Wilde, The state of emergency in the Weimar Republic: Legal disputes over Article 48 of the Weimar Constitution, 78 Tijdschrift voor Rechtsgeschiedenis 135, 158 (2010), p. 136 and pp. 144-145. It should be pointed out that, in *Political Theology*, Schmitt "[departs] from its earlier position and a shift[s] to a revolutionary model of emergency regimes. If his earlier position is characterized by his endorsement of commissarial dictatorship, Schmitt's new formula embraces the model of sovereign dictatorship. Schmitt supplants the classical model of limited emergency powers with a model of unlimited dictatorial powers. According to this new model, an exception is characterized by 'principally unlimited authority, which means the suspension of the entire existing order'. [Thus] a sovereign dictator [has the] power to actively change the existing legal order and transform it, in whole or in part, into something else", - cited from Oren Gross, The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy, 21 Cardozo L. Rev. 1825, 1868 (2000), p. 1841.

lice officials to act “in their absolute discretion, search the property of any individual without a warrant”.<sup>74</sup>

This issue is described by Dr. Alan Greene, who points out that, at the first sight, employment of syllogistic logic would lead to the following reasoning:

The order issued by the police to me is validated by the executive order. This executive order is validated by the declaration of a state of emergency, which is itself contained in the constitution. As one ought to obey the constitution, it follows that I ought to obey the directions of the police and consent to my property being searched.<sup>75</sup>

Hence, from this point of view, the employed syllogism would not point to any issues arising with respect to the validity of the action.<sup>76</sup> However, the question that we might pose is whether or not an executive decree can authorize actions that are fundamentally in conflict with the existing constitutional order. Dr. Greene proceeds with the analysis by referring to Dr. David Dyzenhaus, who criticizes Schmitt’s view on the scope of executive powers in emergency contexts. Dr. Dyzenhaus argues that “a genuine constitution should not contain the discretionary power to grant another, radically different constitution”.<sup>77</sup> Indeed, constitutional provisions that enable introduction of a new constitutional legal regime would amount to constitutional suicide.

It can be argued that there are no present-day constitutions that would explicitly allow governments to unilaterally change the existing constitutional legal order. Accordingly, under these circumstances, the real threat comes from the possibility of creating permanent emergencies as a more subtle way of replacing the existing constitution. For this reason, it is important to focus on prolonged/permanent states of emergencies, for which this paper will again rely on the work of Dr. Greene.

He argues that “a permanent state of emergency can amount to an amendment of the constitution by rendering the impinged norms in question invalid by permanently removing their effectiveness”.<sup>78</sup> Indeed, if an emergency is permanent and it removes the effectiveness of constitutional provisions, such an emergency alters the constitution, since validity depends on effectiveness.<sup>79</sup> Accordingly, Constitutions must envisage the possibility of checking the power to declare a state of emergency, as well as measures undertaken throughout its continuation, in order to guarantee that said exceptional measures fulfil their *raison d’être*. While

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<sup>74</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Hart Publishing, 2018, p. 69. Chapter 3 available at: <https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf> [accessed 14 April 2020].

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.* See David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press, 1997) 116.

<sup>77</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Hart Publishing, 2018, p. 70. Chapter 3 available at: <https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf> [accessed 14 April 2020].

<sup>78</sup> *ibid.*, p. 95.

<sup>79</sup> *ibid.* The issue of validity and its relation to effectiveness might be subjected to a debate, however, the scope of this article does not allow delving into it. Rather, the view of Dr. Greene regarding dependence of validity of effectiveness is shared.

some might be in favor of precluding judicial review of the state of emergency, it is argued against this view that:

[such] a legalistic argument [...] removes the requirement that a state of emergency be a temporary departure from the *status quo*. With this temporariness not grounded in law, constitutional emergency powers have the capacity to become permanent, thus rendering other constitutional norms ineffective and depriving them of their validity.<sup>80</sup>

As Dr. Greene and Dr. Dyzenhaus convincingly stress, the Schmittean approach that allows the executive to exercise unchecked powers to the extent that they can alter the existing legal order, should be rejected. In addition, we can see that prolongation of a state of emergency is a serious threat even without looking into its theoretical aspects. One practical example of how emergency regulations can have a permanent effect on the legal order and human rights in particular can be found in the UK.

Namely, while the right to remain silent was regarded as one of foundations of the English criminal justice system, it was abolished precisely because of the adoption of the security measures<sup>81</sup> aiming to “bolster [the United Kingdom’s] powers needed to wage a comprehensive war on terrorism in Northern Ireland”.<sup>82</sup> Before the adoption of such measures, the proponents, including various public officials, were giving assurances that the curtailment would only be applicable in cases of suspected terrorists, within a limited geographical area.<sup>83</sup> However, “the restrictions [on] the right to silence were not limited to those suspected of serious crimes related to terrorism, but were expanded and interpreted as relating to every criminal suspect or defendant in Northern Ireland”.<sup>84</sup>

We can also turn to the example of Turkey to see some of the permanent effects of a 2-year long state of emergency on human rights<sup>85</sup> and democracy<sup>86</sup> in the country. Although a state of emergency declared in July 2016 finally came to an end in July 2018, it “was not accompanied by concrete steps to normalize the human rights situation in the country; [i]nstead, many of the measures introduced during the state of emergency [have remained] in force [...] and continue to have a profound and devastating impact on public life in Turkey”.<sup>87</sup>

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<sup>80</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Hart Publishing, 2018, p. 98.

<sup>81</sup> Jabauri *supra* note 16, p. 19.

<sup>82</sup> Oren Gross, Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), p. 184 and pp. 186-187.

<sup>83</sup> Jabauri *supra* note 16, p. 19.

<sup>84</sup> *ibid.*, pp. 184-185.

<sup>85</sup> See e.g. Human Rights Watch, *Turkey: Normalizing the State of Emergency: Draft Law Permits Purging Judges; Prolonged Detention; Curbing Movement*, Assembly, July 20, 2018 10:12 AM EDT, available at: <https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency> [accessed 19 April 2020].

<sup>86</sup> See European Commission for Democracy through Law, *Opinion No. 888/ 2017 On the Provisions of the Emergency Decree Law N° 674 Of 1 September 2016 Which Concern The Exercise Of Local Democracy In Turkey*, 9 October 2017, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e) [accessed 19 April 2020].

<sup>87</sup> Amnesty International, *Turkey: Amnesty International’s Brief on the Human Rights Situation*, 1 February

Some of the extraordinary measures invoked during the state of emergency have infected the ordinary legislation, - for instance, governors' powers "to restrict movement and ban public assemblies [has been extended] ... [and the police has been allowed] to hold some suspects for up to 12 days without charge".<sup>88</sup> Moreover, "through emergency legislation, the central authorities [were] enabled [...] to appoint unelected mayors, vice-mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the concerned municipalities".<sup>89</sup> Thus, new rules of structural and permanent nature<sup>90</sup> were put in place, and did not cease to apply even after the state of emergency ended.

More generally, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Ms. Ní Aoláin, has also expressed her concerns with respect to the impact of anti-terrorism measures on human rights.<sup>91</sup> In addition to identifying threats posed by emergency measures that are enacted where a state of emergency is formally declared, she addressed the situations of *de facto emergencies*. The Special Rapporteur observed that even in cases when no declaration of a state of emergency and, therefore, no derogation from human rights obligations is made, States are enacting antiterrorism legislation, which by nature is an "emergency regulation".<sup>92</sup>

In the light of the foregoing, it should be concluded that prolonged states of emergencies (1) amount to constitutional amendments and (2) result in weakening of guarantees applicable during normal times, since "temporary" is treated as "permanent" and the "exceptional" is

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2019, p. 1, available at: <https://www.amnesty.org/download/Documents/EUR4497472019ENGLISH.PDF> [accessed 19 April 2020].

<sup>88</sup> *Supra* n 87.

<sup>89</sup> European Commission for Democracy through Law, Opinion No. 888/ 2017 On the Provisions of the Emergency Decree Law N° 674 Of 1 September 2016 Which Concern The Exercise Of Local Democracy In Turkey, 9 October 2017, para. 97, available at:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e) [accessed 19 April 2020].

<sup>90</sup> *ibid*, para. 98.

<sup>91</sup> Un Human Rights Council, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the Human Rights Challenges of States of Emergency in the Context of Countering Terrorism, Advance Unedited Version, 27 February 2018, A/HRC/37/52.

<sup>92</sup> *ibid*, para. 3. It should also be noted that some authors argue against formal derogation from human rights obligations – see e.g. *See* Strasbourg Observers, COVID-19 and the European Convention on Human Rights, 27 March 2020, available at: <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/> [accessed 14 April 2020]. However, Dr. Alan Greene convincingly argues against this position and points to the necessity to derogate under relevant provisions of international human rights conventions. In his view, an "alternative is a situation in which emergency powers are conferred via ordinary legal norms, at the risk of such powers becoming permanent, even after the emergency has ended. In addition, there is the risk that courts may construct the ordinary limitation grounds in an expansive manner in order to accommodate for emergency measures, which may lead to a permanent "downwards recalibration" of human rights protection. The derogation regime mitigates such risks, since it "quarantines" exceptional powers to exceptional situations" – cited from Strasbourg Observers, To derogate or not to derogate? Poll on emergency Covid-19 measures, 2 April 2020, available at <https://strasbourgobservers.com/2020/04/02/to-derogate-or-not-to-derogate-poll-on-emergency-covid-19-measures/> [accessed 17 April 2020]. See Dr. Greene's blog on this issue: Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo> [accessed 14 April 2020].

being treated as “normal”.<sup>93</sup> In addition, “where *de jure* states of emergency have been declared, their ending has not resulted in a return to the *status quo ex ante*; instead, many of the emergency powers are re-enacted as ordinary, permanent laws”.<sup>94</sup> Hence, *de facto* emergency provisions are also dangerous for the existing legal order and human rights guarantees in particular. As pointed out by Dr. Greene in one of his most recent works regarding COVID-19-related emergencies, “if there is one lesson to take from Schmitt, it is the dangers of permanent transformative emergency powers, rather than temporary, defensive ones”.<sup>95</sup>

### III. PREVENTION OF NORMALIZATION OF A STATE OF EMERGENCY

In the light of the dangers and problems demonstrated in the previous section, it would be wise to proceed with some suggestions as to what precautions can the drafters take while designing emergency provisions, in order to avoid alternation of the existing legal order, violation of the principle of separation of powers and unjustified prolongation of a state of emergency. Under certain circumstances, especially in fragile democracies, these measures might not be infallible in the prevention of the worst case scenario, however, they might, in combination, make it more difficult for those in power to transform into omnipotent authoritarian leaders.

First of all, declaration of a state of emergency should be accompanied by at least some sort of legislative control. Even in presidential regimes, where it is most likely for the executives to have the power to initially declare a state of emergency, it should be subjected to *ex post* approval by the legislature.<sup>96</sup> It is true that the safeguards enshrined in constitutions of parliamentary or semi-parliamentary states will differ from those that are present in constitutions of countries with presidential regimes. However, given the threat of the abuse of power in a state of emergency, putting relevant legislative safeguards in place against the executive’s exercise of unchecked power is to be regarded as a general recommendation both

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<sup>93</sup> See also César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 205-206.

<sup>94</sup> Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo> [accessed 14 April 2020].

<sup>95</sup> Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo> [accessed 14 April 2020].

<sup>96</sup> Some presidential regimes do have this model. See e.g. Constitution of the Plurinational State of Bolivia, Article 138: “The validity of the declaration of the state of emergency shall depend on the subsequent approval of the Pluri-National Legislative Assembly [which shall be done within seventy two hours following the declaration at the latest]. The approval of the declaration shall indicate the powers conferred, and it shall maintain strict relation and proportion to the case of necessity addressed by the state of emergency”. In addition, the Constitution prohibits declaration of a state of emergency within the next year, without *prior* legislative authorization.

for presidential and parliamentary regimes.

In an ideal case scenario, prolongation of a state of emergency should not be possible without the supermajority of the legislature.<sup>97</sup> In addition, if the legislature is not in session, it should be assembled upon the declaration of a state of emergency and continue uninterrupted functioning. This will guarantee that the role of the legislature will be preserved during emergencies at least to some extent. Moreover, if we are aiming to create a strong constitutional framework against the abuse of emergency powers, we should also ensure the executive's accountability before other constitutional bodies. For instance, even though Bolivia is a country with a presidential model of government, its Constitution obliges the executive to report to the legislature with respect to "reasons for the declaration of the state of emergency [estado de excepción],<sup>98</sup> as well as the use that has been made of the powers conferred by the Constitution and the law".<sup>99</sup> These mechanisms altogether might create a strong parliamentary oversight, however, as demonstrated by the Hungarian example, relevant mechanisms at the disposal of the legislature might not be very helpful in cases where the executive has the support of the majority of the legislature.

Another mechanism which in combination with legislative safeguards is likely to reduce the risk of the abuse of emergency powers is judicial review. Approach of states in this regard is far from uniform. Constitutions of some states even explicitly prohibit constitutional judicial review of the executive's decrees. For instance, in Turkey, the Constitutional Court is barred from assessing constitutionality of decrees issued during a state of emergency "as to form or substance".<sup>100</sup> These types of provisions are problematic first, because they put the principle of separation of powers at risk, thereby making the protection of human rights dependent merely upon the generosity of the political branches.<sup>101</sup> Secondly, constitutional prohibition of the review of emergency decrees might be seen as a "blank check"<sup>102</sup> by the executive, who might feel too confident with emergency powers knowing that nothing controls him or her. Luckily, however, such provisions are not common.

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<sup>97</sup> In this regard, Bruce Ackerman suggests a very interesting notion of the "supermajoritarian escalator", implying that each time an executive requests to prolong a state of emergency, a growing majority of the legislature should be convinced in its necessity. See Ackerman *supra* n 17.

<sup>98</sup> Such a wording is provided in the translation of the Bolivian Constitution as it appears on Constituteproject.org (text of the Constitution in English available at:

[https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf) [accessed 20 April 2020]). However, it should be pointed out that instead of a "state of emergency", the Constitution uses the words "state of exception" (estado de excepción). Text of the Bolivian Constitution available in Spanish on the website of the Plurinational Constitutional Court of Bolivia – Tribunal Constitucional Plurinacional de Bolivia, Constitución Política del Estado de 2009, available at: <https://tcpbolivia.bo/tcp/sites/default/files/images/pdf/leyes/cpe/cpe.pdf> [accessed 20 April 2020]. Nevertheless, in 2019, Evo Morales used the former wording and informed the public about declaration of a "state of emergency" (estado de emergencia) – see e.g. tweet of Evo Morales from 23 October 2019, available at: <https://twitter.com/i/status/1186999177944948736> [accessed 20 April 2020]; La Vanguardia, La Constitución de Bolivia no incluye el estado de emergencia, 23 Oct. 2019, available at: <https://www.lavanguardia.com/politica/20191023/471158839657/la-constitucion-de-bolivia-no-incluye-el-estado-de-emergencia.html> [accessed 20 April 2020].

<sup>99</sup> Constitution of the Plurinational State of Bolivia, Article 139.

<sup>100</sup> Constitution of Turkey, Article 148.

<sup>101</sup> Jabauri *supra* n 16, p. 9.

<sup>102</sup> *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, at 536; *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S.Ct. 863, at 587.

In some cases, bodies conducting constitutional review have quite broad powers with respect to emergencies. For instance, under the Constitution of Kenya, the Supreme Court can make decisions not only with respect to “any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency”,<sup>103</sup> but also to decide upon declaration of a state of emergency<sup>104</sup> as well as its prolongation.<sup>105</sup> This can be deemed as a good example of strong judicial safeguards. However, we should also take into account that sometimes, political branches will try to strip courts of the jurisdiction on emergency-related issues.

For instance, during the emergency rule in India, Indira Gandhi managed to “[pass] amendments restricting emergency declarations from judicial purview”.<sup>106</sup> In this case, by invoking a very important legal argument, the Supreme Court of India had the opportunity to rule on the constitutionality of the amendments and declare them incompatible with the basic structure of the Constitution.<sup>107</sup> However, not all bodies conducting constitutional judicial review are lucky enough to have a notion similar to the basic structure of the constitution. Hence, if initiated, relevant constitutional amendments can make emergency-related measures non-justiciable, even if the Constitution gives courts such a power in the first place. Accordingly, prohibition of constitutional amendments, can, as a side effect, also ensure that judicial review will be conducted in a state of emergency (although we can think of a number of other reasons why constitutional amendments should not be allowed during the times of exception; and of more reasons why the court’s jurisdiction should not be stripped).

All of this, however, still does not guarantee that the judicial review will be efficient in the context of emergencies, - judges, like other public officials, share the sentiments of the society and “are [similarly] susceptible to the pressures of events”.<sup>108</sup> For this reason, they might be more deferential to political branches than usual.<sup>109</sup> As firstly framed by the federalists, and further reiterated by many, one of the primary tasks of the judiciary branch is to protect fundamental rights and liberties of citizens.<sup>110</sup> However, when it comes to counterter-

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<sup>103</sup> Constitution of Kenya, Article 58 (5) (c).

<sup>104</sup> *ibid*, Article 58 (5) (a).

<sup>105</sup> *ibid*, Article 58 (5) (b).

<sup>106</sup> Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, p. 155.

<sup>107</sup> Jabauri *supra* note 16, p. 9.

<sup>108</sup> Mark Tushnet, “*Emergencies and the Idea of Constitutionalism*” in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet, London: Duke University Press, 2005, 39-55, at 41; See also Bruce Ackerman, *The Emergency Constitution*, *Law Faculty Scholarship Series*, Paper 121, *The Yale Law Journal*, Vol. 113, 2004, 1029–1091, p. 1072.

<sup>109</sup> Some of the most prominent authors in the area of emergency regimes “have evaluated *ex post* judicial control as a rather toothless instrument to constrain government” – See Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, *European Journal of Political Economy*, 2017, 1-14, p. 4 (referring to Bruce Ackerman and David Dyzenhaus); See, in general: Ackerman, Bruce Ackerman, *The Emergency Constitution*, *Law Faculty Scholarship Series*, Paper 121, *The Yale Law Journal*, Vol. 113, 2004, 1029–1091, p. 1072 and David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006. Judicial deference in emergencies is *not* a new tendency. See e. Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Philadelphia Press) 1994, p. 24; See also Clinton L. Rossiter, *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton: Princeton University Press, 2008, pp. 70-71.

<sup>110</sup> Jabauri *supra* note 16, p. 8.

rorism or<sup>111</sup> emergencies such as war, there is a tendency within the judiciary to be more tolerant of intrusive measures.<sup>112</sup> Stemming from a formalistic interpretation of separation of powers<sup>113</sup> and based on the justification that, presumably, the executive has a better understanding of the threat and can competently act in accordance with the interests of national security, some jurisdictions have developed a broad understanding of the “political question doctrine”, whereby the courts leave more space for the political branches in order for them to undertake certain measures limiting human rights.<sup>114</sup> This is equally true in the context of COVID-19-related emergencies, since judges, as ordinary individuals, might fear for their health as well as that of others, and thus might be more lenient towards the government while the latter is enacting certain restrictions.

The former President of the Supreme Court of Israel, Aharon Barak criticizes such an approach, in particular, in the context of the “war on terror” and stresses that the task of the judiciary is to be loyal to their role as a judge, irrespective of whether the country is in the state of emergency.<sup>115</sup> He stresses that “[i]f [judges] fail in [their] role in times of terrorism, [they] will be unable to fulfill our role in times of peace and security.”<sup>116</sup> Similar to the opinion voiced by Lord Atkin in his famous dissent on *Liversidge v. Anderson*,<sup>117</sup> Justice Barak

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<sup>111</sup> See *ibid*, footnote 44: Nowhere in this paper are the terms “war” and “terrorism/counterterrorism” used interchangeably. For the discussion surrounding the application of the laws of armed conflict to terrorism, See Jelena Pejic, *Armed Conflict and Terrorism: There is a (Big) Difference*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, (New York: Oxford University Press, 2012), pp. 171-205; Interesting questions regarding applicability of Geneva Conventions to the detention of a suspected terrorist (Osama Bin Laden’s driver) arose in the US Supreme Court case *Hamdan v. Rumsfeld*. For the discussion, see, among others: C.L. Lim, *Inter Arma Silent Leges? Black Hole Theories of the Laws of War*, in in “Emergencies and the Limits of Legality”, ed. Victor V. Ramraj, (New York: Cambridge University Press, 2008), pp. 387-396; See also Inter-American Commission on Human Rights [the “IACHR”], *Report on Terrorism and Human Rights*, 22 December 2002, OEA/Ser.L/V/II.116, paras. 19 and 73, available at: <http://www.cidh.org/terrorism/eng/toc.htm> [accessed 20 April 2020].

<sup>112</sup> See David Dyzenhaus, *Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security*, Australian Journal of Legal Philosophy, Vol. 28 (2003).

<sup>113</sup> *ibid*.

<sup>114</sup> Jabauri *supra* note 16, p. 10. Cass Sunstein categorizes such tactics as “minimalism”. See Cass R. Sunstein, *Constitutional Personae*, Oxford University Press 2015, p. 74.

<sup>115</sup> Aharon Barak, *Human Rights in Times of Terror: A Judicial Point of View*. Aharon Barak, The Judge in a Democracy, Princeton University Press 2006, p. 285. For more insights regarding Justice Barak’s views on the role of judges in times of terrorism, I suggest reading Chapter 16 of the book, at pp. 283-306.

<sup>116</sup> Aharon Barak, *The Judge in a Democracy*, Princeton University Press 2006, pp. 283-306.

<sup>117</sup> See Dissenting Opinion of Lord Atkin in *Liversidge v. Anderson*, cited in Norman Dorsen, Michael Rosenfeld, Andrés Sajó, Susanne Baer, Susanna Mancini, “Comparative Constitutionalism: Cases and Materials”, 3rd Edition, American Casebook Series, West Academic Publishing, 2016, pp. 1598- 1599:

“In [this country], amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. [...] I protest, even if I do it alone, against a strained construction put upon words, with the effects of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. [...]. I know of only one authority which might justify the suggested method of constructions. ‘When I use a word,’ [said Humpty Dumpty], ‘it means what I choose it to mean, neither more nor less’. [Alice said]: ‘The question is [whether] you can make words mean different things’. ‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’ (Alice though the Looking Glass, cvi)”.

rejects the maxim *silent enim leges inter arma*, stating that laws are most needed in times of war.<sup>118</sup>

Preservation of democratic values is important not only in war, but in all times of emergencies. This is definitely not an easy task, and even the existence of strong constitutional safeguards does not fully guarantee that transformation to authoritarianism will be avoided in a state of emergency. This can only be achieved if all branches do their jobs properly, - legislators should legislate, and the judiciary should protect individuals against the political branches' infringement upon their fundamental rights and liberties. Another and probably the most difficult task is preservation of the existing legal order, - as necessary as it might be to enact exceptional provisions during emergencies and exercise emergency powers, they should not alter the established constitutional reality and should not be prolonged perpetually.

It should also be acknowledged that the very nature of COVID-19-related emergencies might point to the need of adapting *modus operandi* of existing mechanisms of control to the circumstances. For instance, the pandemic might not allow gatherings of large groups of people, thereby making conduction of court hearings in an ordinary manner impossible, or barring the legislature from assembling. In such cases, it should be allowed to do business by online means, such as presenting judicial actions by email. As pointed out in the light of the Georgian example above, court monitors and the public should also be included in hearings to the fullest extent possible under the existing circumstances.

Similarly, the existing pandemic should not serve as a pretext for suspending all legislative proceedings. Some states have been creative in this regard, - for instance, for the first time in its 209-year-long existence, the Congress of Colombia conducted virtual sessions via Zoom, which went much better than many expected.<sup>119</sup> There might be provisions implicitly or explicitly barring legislature from holding virtual sessions, however, they must be adapted to exceptional circumstances such as the COVID-19 pandemic, in order to ensure that the primary legislator in the country does not lose the ability to perform its functions.

In addition to the foregoing, civil societies in every country must continue to pursue their roles as watchdogs in order to create and/or maintain a strong "support network"<sup>120</sup> between courts and human rights activists. On one hand, it is true that not everything functions perfectly in democracies, however "[u]nlike in authoritarian systems, citizens in democracies

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<sup>118</sup> Jabauri *supra* note 16, p. 11. See Aharon Barak, *Human Rights in Times of Terror: A Judicial Point of View*; See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006, p. 4, - challenging Schmittean approach that the rule of law does not apply to emergencies by arguing that "judges have a constitutional duty to uphold the rule of law, even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project".

<sup>119</sup> See Semana, Las sesiones virtuales del Congreso: sí se pudo..., 4/18/2020 5:27:00 AM, available at: <https://www.semana.com/nacion/articulo/coronavirus-en-colombia-el-congreso-inicio-sesiones-virtuales/664279> [accessed 20 April 2020].

<sup>120</sup> For the discussion on importance of synergistic support networks between courts and activists in civil society in general, see Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, Cambridge University Press 2007.

have established channels through which they can reassert their rights and seek accountability for abuse”.<sup>121</sup> The outbreak of COVID-19 and state’s responses have once again demonstrated how fragile democracies can be in a state of emergency. However, it is important to remember that we should remain loyal to democratic values and the rule of law even under exceptional circumstances, - and maybe even more so than during the peacetime.

## CONCLUSION

Many of us have been cheering for the declaration of a state of emergency and imposition of restrictions on fundamental rights in order to prevent the spread of COVID-19. But while we have been focusing on the importance of health, we may have neglected to consider the toll that the pandemic-related emergencies take on democracy. The first two decades of the 21<sup>st</sup> century keep demonstrating how dangerous emergency powers can be not only for existing human rights standards, but to other values such as constitutionalism and the rule of law as well.

This paper intended to demonstrate the necessity to preserve these values in a state of emergency and argued that unchecked executive power might lead to transformation of a state to an authoritarian or semi-authoritarian regime. The paper argued that certain constitutional safeguards should be in place in order to avoid alteration of the existing constitutional legal order. One very important part of it is protection of human rights, however, certain measures should also be prescribed for preserving democratic institutions and the rule of law *sensu lato*.

Preventive measures aiming to avoid normalization of a state of emergency and unjust restriction of fundamental rights, as well as alteration of the existing constitutional legal order are twofold: first, constitutional basis should exist for maintaining checks on the executive power during a state of emergency, such as the parliamentary oversight over declaration and prolongation of a state of emergency, as well as judicial review of emergency powers; secondly, relevant actors – the legislature and the judiciary - should remain loyal to their functions while exercising oversight powers, which, by nature, should be no different from what they do during the peacetime. Only thus can we prevent prolongation of a state of emergency and alteration of the legal regime against the basic principles implicit in genuine constitutions.

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<sup>121</sup> The Atlantic, Democracies Are Better at Fighting Outbreaks, FEBRUARY 24, 2020, available at: <https://www.theatlantic.com/ideas/archive/2020/02/why-democracies-are-better-fighting-outbreaks/606976/> [accessed 14 April 2020].