

# TRAN SPAR ENCY AT STAKE

National Responses in  
Facing Challenges due  
to Covid-19 Pandemic

Edited by Gian Marco Bovenzi  
Conclusions and Policy Recommendations by Emma Galli





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Conclusions and policy recommendations by Emma Galli

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*Emma Galli  
Gian Marco Bovenzi*

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## INTRODUCTION

The health emergency caused by the Covid-19 outbreak required the governments of EU Member States (and worldwide) to adopt several urgent measures to contain and manage the spread of the virus throughout the whole EU territory. Such measures have inexorably posed restrictions on the citizens' basic civil liberties, as well as constraints on economic activities.

This publication provides a comparative study of the different policies adopted by the governments of several Member States (and namely: Italy, Poland, Bulgaria, Slovenia, the Netherlands, and Hungary) and highlights how a crucial and basic requirement for the governmental action should be the safeguard of the fundamental right to transparency and information in public administration, in order to justify the restrictions posed on citizens' civil liberties – even when facing the management of a crisis.

As stressed by the contributions included in this book, although transparency abides to the fundamental principle of democracy, not always the governments of the analysed countries respected such right. In fact, they not even often did.

The pages that follow will try to answer to the following questions: on which statistical and scientific grounds did the governments adopt such measures? Have the governments provided citizens with the access to such information? Which have been citizens' reactions to the implementation of such measures?

This being said, the final goal is to outline if in handling the health emergency the governments have ensured the citizens' right to access government information, or rather if transparency was put "at stake".

*Gian Marco Bovenzi*



# TRAN SPAR ENCY AT STAKE

**SECTION I  
ITALY**

## TRANSPARENCY AND LIBERAL DEMOCRACY

Enzo Palumbo and Andrea Pruiti Ciarello

A liberal democracy is essentially based on three pillars: the separation of powers (legislative, executive, and judiciary); the sovereignty of the people with free elections; and the transparency of the administrative power. These three pillars are interdependent, and each of such powers supports the others' construction and solidity. This entails that whether even one of them lacks or is undermined, same happens for the others, until the ultimate collapse of all the three pillars.

Coming to transparency, let us recall what happened at the end of the last century in reference to the USSR institutional structure, and the reforms Gorbačëv tried to implement since its election as General Secretary of the Communist Party of the Soviet Union in 1985. Particularly, the *glasnost*, Russian word for "openness and transparency", that back then was popularized by Gorbačëv as a political slogan to increase the government transparency. Although not yet at full capacity in the management of the disaster of Chernobyl, such reformation process freed all the repressed energies of the countries of real socialism, bringing to their final collapse six years later. This, despite Gorbačëv's efforts of restructuring and preserving the system through the implementation of the perestroika.

Therefore, if someone asks what are the differences between democratic countries and countries lacking democratic institutions, we could easily say that transparency is one of them. Political transparency, for sure, but also (and probably mostly) the administrative transparency. As soon as the latter brings at everybody's knowledge the means through which the government manages its powers, the citizens' rights and ensured.

At the same time, public institutes for surveillance and control are set up. Thus, the government's executive power is ultimately checked and balanced.

The word "transparency" does not appear in the Italian Constitution. The attempt of former PM Renzi to introduce it in 2016 (including it both in article 97 in reference to the activity of the public administration, and in article 118 in reference to local authorities) was unsuccessful.

Although *transparency* is lexically absent in the Constitution, still it formally and substantially presides all the decision-making processes and the management and control of powers, first through elective assemblies. These control their respective government bodies, and have to be transparent towards the public opinion as well. Otherwise, electoral choices processes would be useless and void, as arguable as the Italian electoral systems in the last 25 years can be.

But several provisions of the Constitution set forth the principle of transparency. Article 97 provides that "Public offices are organized according to the provisions of law, so as to ensure the efficiency and impartiality of administration.", determining "the areas of competence, the duties and the responsibilities of the officials". Seemingly, article 28 provides that "Officials of the State or public agencies shall be directly responsible [...] for acts committed in violation of rights". Moreover, according to article 54 "Those citizens to whom public functions are entrusted have the duty to fulfil such functions with discipline and honour", and article 98 provides that "Civil servants are exclusively at the service of the Nation. If they are Members of Parliament, they may not be promoted in their services, except through seniority. The law may set limitations on the right to become members of political parties in the case of magistrates, career military staff in active service, law enforcement officers, and

*overseas diplomatic and consular representatives”.*

Looking beyond public administration, the principle of transparency is established also under article 21, according to which *“The law may introduce general provisions for the disclosure of financial sources of periodical publications”*. Today, the media and social network should definitely take into account this provision, especially in the increasingly digitalized world in which we will all be more and more surrounded by. This should apply also to the media financial practices, since in some cases not even experts are able to understand the phantom tread linking their transactions.

The ordinary Law n. 241/1990 (article 1) highlighted transparency as a fundamental principle underlying the relationships between the citizens and the public administration, in order to ensure to all the citizens the access to the acts and the records of the public administration. This, in order to hold the activity of public offices and public servants accountable and understandable. In certain cases, also in order to control such activities for whoever holds related interests and for every citizen in general (with legislative decrees numbers 33/2013 and 97/2016).

After all, this is nothing but the principle stated by Luigi Einaudi *“To be informed to deliberate”*.

Article 1 of the legislative decree 33/2013 as modified by the legislative decree 97/2016 states that *“Transparency is seen as full accessibility to the data and documents held by the public administrations, for the purpose of protecting the fundamental rights of citizens, promoting the participation of any interested party in the administrative activities, and fostering widespread forms of control on the pursuance of the institutional functions and the use of public*

*funds. Transparency, [...] contributes to the implementation of the democratic principle and the constitutional principles of equality, impartiality, smooth running, responsibility, effectiveness and efficiency in the utilization of public funds, integrity and loyalty in the service to the country”, thus being considered as “a condition for guaranteeing individual and collective freedoms, as well as civil, political and social rights” and integrating the “right to a good administration and contributes to the realization of an open administration, at the service of citizens”.*

Taking a further look to the general principles of the European Union, the framework sets forth the principles of legislative simplification, subsidiarity, and the right for citizens to access public information. Administrative transparency is thus established.

The goal of legislative simplification has been partially achieved with the introduction of the EU legal framework, replacing or aligning the 28 domestic frameworks. Citizens may now dispose of a clearer and more understandable juridical framework, set out on common goals, and at the same time enabling equal conditions for the enterprises in the European Single Market. The principle of subsidiarity enshrined under article 5 of the Treaty of European Union is safeguarded by the provision that the EU shall act only within the limits of the competences conferred upon it by the Member States, unless the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level: the objective is to make sure that decisions are taken the closest possible to the citizens' needs, verifying that the EU action is “more efficient” than the national ones. This principle ensures the best protection of the public interest, as well as an enhanced “tolerance” of the EU framework by the public opinion.

As for the administrative transparency – concerning the easy and free access of the citizens to public information and to the documents of the institutions grounding the decision-making process – the EU provides that public institutions act in the most transparent possible way. According to article 15, par. 3, of the TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies.

As to better implement the application of the principle of transparency of the European public institution, the Treaty of Amsterdam (1997) provided to “constitutionalize” the principle, which therefore appears today as an accepted general principle of the European Union law<sup>1</sup>.

As previously mentioned, the right of the citizens to access administrative documents was introduced by law n. 241/1990, enforced with regulations n. 352/1992 and n. 184/2006.

Initially the, right to access was set upon condition that a citizen had an actual and current interest in accessing such public documents. As specified by law n. 241/1990, a citizen had to hold a “*juridical situations that have legitimate expectations*”.

Only with the legislative decree n. 33/2013, as modified by the legislative decree n. 97/2016, such right to access the documents of the public institutions is extended to all the citizens. This general right to access makes so that every citizen is entitled to access data and documents additional to the documents that the public administrations are obliged to publish under Law n. 241/1990. Moreover, the right to access applies regardless the fact than a citizen has to hold juridical situations

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<sup>1</sup>R. Luzzatto (2002), Il diritto internazionale generale e le sue fonti, in Istituzioni di diritto internazionale, Giappichelli, Torino, pp. 61-63



with legitimate expectations.

The Covid-19 pandemic has put a strain on the European democratic institutions and, particularly, on the Italian institutions. In order to counter the spread of the virus, the Council of Minister, on January 31<sup>st</sup>, 2020, has declared the State of Emergency until July 31<sup>st</sup>, 2020 (recently extended until the first months of 2021). Consequently (perhaps with slight delay) the government issued the Law Decree n. 6 of February 2020, providing that the President of the Council of Ministers is empowered to use the legal tools of Prime Minister Decrees (PMD, in Italian DPCM) in order to adopt any urgent measure to contain and manage the health emergency.

In our hierarchical system of the sources of the law, the PMD is a secondary source of administrative legal nature. Pursuant Law decree n. 6/2020, the President issues two PMDs: the first on February 23<sup>rd</sup> (effective for the following two weeks), the second only two days later, on February 25<sup>th</sup>, effective until March 1<sup>st</sup>, 2020. Especially through the latter, specific measures restricting personal liberties were established – limited to certain areas of the Italian territory. In the Italian Republican history, such constraints to individual personal liberties were never established by means of an administrative act as the PMD is. Moreover, although the Law Decree n. 6/2020 did actually empower the Prime Minister to do so, several experts and jurists believe that such empowerment has been accorded in violation of the provisions enshrined in article 76 of the Italian Constitution, in matter of the delegation of the legislative power.

On March 9<sup>th</sup>, 2020, the President of the Council of Ministers Giuseppe Conte issued another PMD establishing the lockdown on the entire Italian territory. This solution represents the highest compression on those personal liberties

(movement, association and assembly, profession of religious beliefs, right to work, education, private economic enterprise) that should be guaranteed by a liberal-democratic State. The Italian Constitution further sets forth that personal liberty can be restricted only in such cases and in such manner as provided by the law, and exclusively by reasoned order of the Judiciary.

These administrative acts have been motivated in relation to the *“indications highlighted by the Scientific-Technical Committee under order n. 2 of the Chief of the Department of the Civil Protection on February 3<sup>rd</sup>, 2020, n. 630”*.

Nonetheless, while the PMDs were published on the Italian Official Gazette one after the other, not only the records of the Scientific-Technical Committee (from here on, STC) were not published, but the citizens’ right to access such documents under the abovementioned Legislative Decree n. 33/2013 was forbidden. Given this circumstances, with the public support of the Fondazione Luigi Einaudi, myself and Rocco Todero, attorneys, filed a legal action to the Regional Administrative Tribunal (RAT) of the region of Lazio, with the request of obtaining the disclosure of the reports and documents of the STC that served as a basis for the decisions of the government<sup>2</sup>.

Paradoxically, the pandemic made so that the Italian Republican public institutions finally dealt with the fundamental rights enshrined in the Italian Constitution and in the legal framework of the European Union. In particular, the action of the government undermined the effectiveness of many principles deemed inviolable since then, such as the personal liberty, the right to assembly, the right to freely process religious beliefs, and so on.

In the meantime, on April 2020 the President of the Constitu-

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<sup>2</sup>See “Il Vaccino della Ragione” (2020) for a full description. Published in December 2020, Rubbettino Editore (AA.VV. edited by N. Galati and L. Villa). See also the interview to Enzo Palumbo on Toscana Today, also retrievable on <https://www.toscanatoday.it/covid-e-segreto-di-stato-intervista-allaw-palumbo-di-beatrice-bardelli/>

tional Court of the Italian Republic, Marta Cartabia, delivered a pro-active opinion concerning the relationship between the government and the law-makers, stating that *“the full implementation of the Constitution requires an unanimous engagement with the active and loyal cooperation of all the Institutions, including the Parliament, the Government, the Regions, and the Judiciary. This cooperation is the only way to counter the health emergency. The Constitution does not provide a special law for special times. This, for a conscious choice. On the other hand, the Constitution paves the way to keep on driving also in times of crisis, starting from the loyal cooperation between the institutions – where such cooperation represents the institutional projection of solidarity between the citizens”*<sup>3</sup>.

Some political commentators<sup>4</sup> understood the words of Marta Cartabia as an implicit argument against the issuing abuse of administrative orders in such a sensitive constitutional matter – as surely the rights to personal liberties are.

In August, our lawsuit was successful, and the disclosure of the STC reports was obtained. In September, after the public opinion’s growing demand for an enhanced transparency, a motion aimed at guaranteeing the publication of the records was discussed in the Parliament<sup>5</sup>. Finally, on September 4<sup>th</sup> 2020, the first 100 records of the STC were published on the website of the Italian Civil Protection (those concerning the period between February 7<sup>th</sup> until August 10<sup>th</sup>, 2020), updated with the reports grounding the PMDs adopted back then.

Nonetheless, the reports have not been published in their entirety, but they are full of “omission” and erasures making it impossible to fully control their content – although the Regional Administrative Tribunal provided that such general control was to be guaranteed<sup>6</sup>. Therefore, it is still impossible to understand the scientific grounds on basis of which the government

<sup>3</sup>Constitutional Court of the Italian Republic 2019, relation of April 28 2020 by the President Marta Cartabia, pag.19 ([https://www.cortecostituzionale.it/documenti/relazione\\_cartabia/1\\_relazione.pdf](https://www.cortecostituzionale.it/documenti/relazione_cartabia/1_relazione.pdf))

<sup>4</sup>Claudio Zucchelli on Formiche.net 5/5/2020 (<https://formiche.net/2020/05/sospensione-costituzione-zucchelli/>)

<sup>5</sup>[https://www.camera.it/leg18/1132?shadow\\_primapagina=11161](https://www.camera.it/leg18/1132?shadow_primapagina=11161)

<sup>6</sup>Andrea Pruti Ciarello on Il Riformista, October 7 2020 ([https://www.ilriformista.it/la-finta-trasparenza-del-governo-conte-dati-secretati-e-pieni-di-cancellature-166110/?refresh\\_ce](https://www.ilriformista.it/la-finta-trasparenza-del-governo-conte-dati-secretati-e-pieni-di-cancellature-166110/?refresh_ce))

declared the state of emergency either back then and still today. This would instead be compulsory under the Code of the Civil Protection (Legislative decree n. 1/2018), main legal source used by government to issue the measures countering the spread of the virus.

As can be seen, it's a long way to transparency – and to an accomplished liberal democracy.





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**SECTION II  
POLAND**

## ATTITUDES OF POLISH SOCIETY TOWARDS THE PANDEMIC. AN ATTEMPT AT SYNTHESIS

Dr. Krzysztof Mączka

Dr. Maciej Milewicz

### *Introduction*

The coronavirus epidemic is a significant crisis. Not sudden and violent but creeping. Visible only after time. A bit like a snake that snuck onto the lawn of a lovely single-family home frightened off a bisque labrador and effectively stopped the residents from continuing their daily routine chase. The coronavirus pandemic has turned people lives upside down. It is one of the main reasons why Poles view 2020 as the worst year since the inception of periodic surveys conducted by the Public Opinion Research Center<sup>7</sup> in 1985. The year 2020 is assessed negatively by 59% respondents, beating both the difficult years of the beginning of the systemic transformation (1991 and 1992) and the year 2001, which spread the spectre of terrorism worldwide (about 50%-55%).

The pandemic has forced changes in work, family care, education, and daily habits. It has hit the economy hard, especially those entrepreneurs who could not and still cannot run their businesses in a usual way because of the restrictions associated with the pandemic situation.

For sociologists who deal with the analysis and interpretation of social phenomena daily, the pandemic time provided a reason to conduct many studies on different social life aspects. There is no better moment to observe society than the moment of “change” or confronting people with a harsh and untamed reality. In March 2020, when the government decided to close schools and kindergartens and introduce other restrictions in

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<sup>7</sup>CBOS, “Evaluation of the Year 2020” (Public Opinion Research Center (CBOS), 2021).



various life spheres, such a situation appeared.

The purpose of this article is an attempt to describe how public attitudes towards the pandemic changed. Moreover, it also aims to consider how key individuals' behaviour may have influenced these attitudes in the Polish state. As you will see later in the text, it is reasonable to hypothesize that numerous examples shattered the coherence of the government's narrative of the "necessary stage of responsibility" (i.e., restrictions). We will want to focus on these cases and show what effects they may have had on the public's perception of the pandemic and adherence to the rules for operating in this changing reality.

### *Poles and the Pandemic - a Review of Research Results*

A survey conducted at the threshold of the coronavirus epidemic<sup>8</sup> showed that the vast majority of Poles were quite fearful of the coronavirus from the very beginning (62%). However, it is worth noting that this fear was relatively moderate. Moreover, there was an intense polarization of opinions regarding the uniqueness of COVID-19. Almost half of the respondents (48%) thought it was one of many seasonal epidemics. In comparison, nearly as many (46%) believed that the disease could turn into a pandemic and cause many negative consequences.

Opinions about the dangers of coronavirus varied weakly by education level. Unlike one might expect, people with primary and lower secondary education were somewhat more likely to be convinced of the situation seriousness. In comparison, those with higher education were more likely to be sceptical. The only age group that took a very dim view of the epidemic threat was people aged 24 to 34. More than half of them were significantly more likely to believe that the current epidemic was probably just one of many (58%). Research carried out by

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<sup>8</sup>K. Pankowski (2020), "Poczucie Zagrożenia i Progu Epidemii Koronawirusa", Warsaw

Konsultujemy<sup>9</sup> has shown that young respondents are much more concerned about their relatives getting ill (over 80%), probably because their parents are at higher risk.

In the first phase of the epidemic<sup>10</sup>, people living in small towns (up to 20,000 inhabitants) and rural areas were slightly more likely to be distanced from the coronavirus threat. In contrast, residents of largest cities (more than 500,000 inhabitants) were relatively more likely to be concerned about the threat. However, all results were around 50%.

The beginning of the epidemic was also a great credit to the government actions. Over 80% of respondents accepted the introduced restrictions. However, age, gender, education, and place of residence differentiated this level of acceptance. Older respondents, more often than younger, declared that they followed restrictions. Residents of large cities followed restrictions more often than residents of rural areas. Better educated people more often than those with less education. Better off people than those with major incomes. There is also a significant gender difference. Females more often than males declared that they stick to recommendations.

Surprisingly, there were no apparent differences between the parties in their approval of the government actions. Supporters of all political forces were similarly accepting orders and bans. A similar level of fear also characterized them.

How did this situation change over the months leading up to the end of 2020? Personal fear of contagion remained around 60-70% and was slightly lower in the summer months than in the fall and winter months<sup>11</sup> - Figure 1.

**Figure 1. Are you personally afraid of being infected with co-**

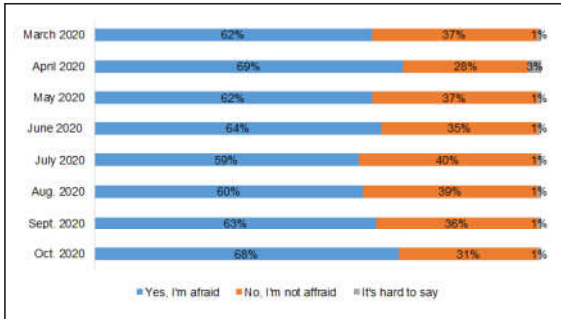
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<sup>9</sup>M. Milewicz (2020), "Opinie i Postawy Polaków Wobec Koronawirusa", Poznan, doi:10.13140/RG.2.2.12595.17448.

<sup>10</sup>See note 8

<sup>11</sup>B. Rogulska (2020), "Obawy Przed Zarażeniem Koronawirusem i Postrzeganie Działań Rządu", Warsaw, <https://www.cbos.pl/PL/publikacje/raporty.php>.

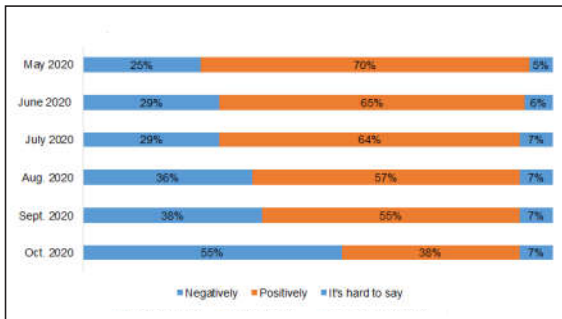
ronavirus?



Source: Rogulska<sup>12</sup>

Between May and October 2020, one can see a very stable trend of decreased government action support from about 70% to 40%, with an increase in negative responses from 25% to 55% - Figure 2.

Figure 2. How, in general, do you see the government's efforts to deal with Poland's coronavirus epidemic?



Source: Rogulska<sup>13</sup>

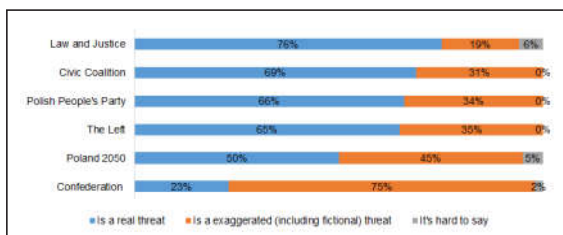
<sup>12</sup>Rogulska.

<sup>13</sup>Rogulska.

The decline in the acceptance of the governmental action may be further compounded by the impression that their effectiveness is low. The threat is getting closer despite the restrictions being put in place. As recently as in August 2020, only one in seventeen respondents had someone in their close circle who had been infected with coronavirus. In November 2020, almost every second<sup>15</sup>.

Moreover, the research showed that the coronavirus epidemic has gone from an issue over and above political divisions to a highly political one. While the epidemic itself is generally still perceived as a real threat by most parties' supporters (including the ruling party and the opposition) - Figure 3. On the other hand, the restrictions and limitations introduced by the government are perceived as adequate to the situation by its supporters, with far more critical opinions from the electors of the other parties – Figure 4<sup>15</sup>.

Figure 3. In your opinion, what is the epidemic of coronavirus for the health of Poles?



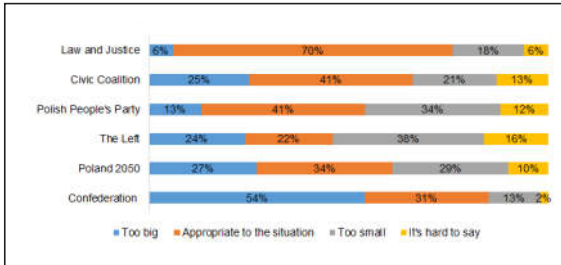
Source: Cybulska and Pankowski<sup>16</sup>

<sup>14</sup>A. Cybulska and K. Pankowski (2020), "Koronasceptycyzm, Czyli Kto Nie Wierzyw Zagrozenie Epidemią", Warsaw, <https://www.cbos.pl/PL/publikacje/raporty.php>.

<sup>15</sup>Cybulska and Pankowski.

<sup>16</sup>Cybulska and Pankowski.

Figure 4. How do you assess current restrictions and limitations?



Source: Cybulska and Pankowski<sup>17</sup>

### Government Attitude versus Public Opinion

In the following analysis, we would like to focus on three groups of phenomena that occurred alongside the noble narrative of the need to follow onerous rules and fight together against a pandemic whose outcome depends on our solidarity and responsibility. In the background, we were confronted with a series of political and moral scandals that undermined the legitimacy of the “common struggle”, showing that those who lead us to it have many offenses on their conscience.

### Who Makes Money from Coronavirus?

In the beginning, were the words. They read: “Polish economy based on small and medium-sized companies which did not have their production parks located in China, paradoxically can benefit from this type of crisis<sup>18</sup>” - said at the end of February 2020, the Minister of Development of the time Jadwiga Emilewicz. She was quick to apologize for her words. Still, her political critics were quick to point out that if coronavirus was

<sup>17</sup>Cybulska and Pankowski.

<sup>18</sup><https://oko.press/emilewicz-nie-jest-wyjatkciem-wladza-lamie-wlasne-zakazy-badania-pokazuja-jakie-to-grozne/>

to be an opportunity for entrepreneurs' development, it would be exclusively for those associated with the ruling party (Law and Justice).

Thus, over several months in 2020, it turned out that:

- The Health Ministry purchased 1,241 ventilators in April from E&K, a company registered in Lublin and owned by a former weapon dealer. The government made a 154 million PLN advance payment immediately after the 200 million PLN deal was struck. The weapon dealer received the money but never fulfilled his obligations. After months of delays, he delivered only 200 respirators - incomplete, without warranty, service, or spare parts<sup>19</sup>.

- They hurriedly bought counterfeit masks. Some of them were transported to Poland in April on the most giant plane in the world Antonov An-225 Mrija. After unloading, it turned out that they did not meet safety standards. The governmental bodies and related companies have not revealed the cost of transport and purchase of useless masks, but it is estimated at 12 million PLN<sup>20</sup>.

- Another part of the masks came to Poland from a ski instructor - a friend of the Minister of Health, Lukasz Szumowski. At the end of March, the Ministry of Health bought over 100 thousand masks for 5 million PLN. As it turned out after tests, they did not meet the standards of protection against viruses. In his statements, the minister claimed that he was cheated like the whole of Europe and explained that the masks that did not have FFP filters, that is, those protecting against viruses, were distributed as surgical ones because they can 'serve very well'. The case went to the prosecutor's office<sup>21</sup>.

- There were irregularities in the purchase of tests for CO-

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<sup>19</sup><https://tvn24.pl/polska/respiratory-od-handlarza-bronia-poslowie-ko-lukasz-szumowski-i-janusz-cieszynski-nie-dopelnili-obowiazkow-4774516>.

<sup>20</sup><https://www.polsatnews.pl/wiadomosc/2020-05-19/wadliwe-maseczki-z-antonowa-obrizona-jakosc-towaru>.

<sup>21</sup><https://www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-policyjne-przeszukania-dot-trefnych-maseczek-od-znajomego-ro,nld,4504582>.

VID-19 detection. The Ministry of Health purchased tests from a Poznań-based trading company Argenta, which imported them from Turkey. They paid an arm and a leg - 128 PLN per item, while tests produced by Polish companies were available on the market two times lower price. In total, 365,000 tests were purchased in this way for almost 47 million PLN<sup>22</sup>.

The image of the Minister of Health, the person who acted as a frontman in the fight against the coronavirus, began to spoil when his problems with the assets declaration, in which a considerable part of the property was written to his wife, were revealed. The person responsible for the fight against the pandemic was also shadowed by his brother's not entirely clear interests. The latter's company received hundreds of millions of PLN in grants from the National Centre for Research and Development, connections that were heavily criticized by the opposition<sup>23</sup>.

The Minister of Health was also accused of hypocrisy. While he was still minister and movement restrictions were being introduced, he loudly praised Poland spending holidays, which would mean not having to leave the Country. "It's safe here," he emphasized every step and cited his holidays spent in the Suwałki region as an example of responsible rest. However, a few days after his resignation, during the pandemic, Łukasz Szumowski went to the Canary Islands<sup>24</sup>...

### *Power Violates its own Prohibitions*

In Poland, we soon had a situation where the government itself began to violate its prohibitions.

The former Minister of Development, Jadwiga Emilewicz, mentioned at the beginning of the article, went skiing in Tarty in

<sup>22</sup>"Problemy Ministra Szumowskiego. Maseczki, Testy i Złe Znajomości - Polityka.Pl," accessed February 2, 2021, <https://www.polityka.pl/tygodnikpolityka/kraj/1957254,1,problemy-ministra-szumowskiego-maseczki-testy-i-zle-znajomosci.read?backTo=https://www.polityka.pl/tygodnikpolityka/kraj/1959028,1,afery-szumowskiego-za-duzo-tego-by-zamiesc-pod-dywan.read>.

<sup>23</sup><https://innpoland.pl/163837,ponad-140-mln-dla-oncoarendi-poslowie-ko-z-kontrola-w-ncbir>.

<sup>24</sup><https://www.se.pl/wiadomosci/polityka/tak-szumowski-namawial-do-wakacji-w-polsce-sam-pojechal-na-canary-aa-EXK9-qxCS-MZQQ.html>.

January 2021 with her sons when Poland's situation is still dire. There are 300-500 deaths per day from COVID-19, and the number of detected daily infections does not fall below 5,000. Most children spent the holidays at home, according to the Minister of Health appeal. Additionally, ski slopes and hotels remained closed.

Since the beginning of the pandemic, many politicians have associated with the ruling camp bending or outright breaking the healthcare system rules.

- On the 10th of April 2020, the chairman of the ruling party Law and Justice Jaroslaw Kaczynski went to a cemetery to lay flowers on his mother's grave and several people who died in the Smolensk disaster. The cemeteries were closed at the time. Besides, one of the most painful restrictions of pandemic times was in force: only five people could attend funerals.

- On the 3rd of October 2020, Przemysław Czarnek, MP, visited his seriously ill grandmother in the Military Clinical Hospital in Lublin, even though since the 12th of March 2020 visiting hospitals was prohibited. Two days later, on Monday, he was to be sworn in as Minister of Education and Science, but it turned out that he had a contracted COVID-19 and the swearing-in was postponed.

- On the 5th of December 2020, the 29th birthday of Radio Maryja was celebrated in a church in Torun. Radio Maryja is a Catholic radio station influential in the right-wing circles, and many politicians of the ruling camp seek its support. According to current regulations, there can be one person per 15 square meters in churches, and the distance of 1.5 meters must be kept. Everyone, except for those officiating the mass, must wear a mask. However, space was not kept, and the Church



most important hierarchs did not wear masks at the ceremony. It did not outrage any of the politicians who came to Torun. The Minister of National Defence, the Minister of Justice, the Minister of Environmental Protection, the Children's Ombudsman, or the President Chancellery representatives took part in the mass. None of the participants received a ticket.

In "Animal Farm", when describing the pathologies of power, George Orwell used an animal metaphor writing: "All animals are equal, but some are more equal than others." Throughout the pandemic, a large part of the Polish society feel a division between equal and more equal. Such behaviour by those in power has obvious, dire consequences. People begin to break Covid rules when they have seen them ignored by those who are privileged.

A study by Daisy Fancourt, professor of psychobiology and epidemiology, quoted in the Polish media, concludes that people stop obeying restrictions not because they have been in place for too long. They begin to flinch when the prohibitions are vague, contradictory, frequently changed. When they see that privileged individuals do not stick to the rules<sup>25</sup>. Meanwhile, these individuals are crucial to maintaining social solidarity and, ultimately, keeping us healthy.

In public perception, the enemy has changed. In the very beginning, it was a virus that had to be defeated. Today the enemy is increasingly onerous restrictions to be circumvented<sup>26</sup>. Restrictions seem less and less necessary, and those who enact them are subject to increasing criticism.

In Poland, on the 23<sup>rd</sup> of January (when this article is being written - editor's note), various social groups are putting more pressure on the government to loosen restrictions. Highlanders are rebelling; restaurants are starting to accept customers

<sup>25</sup><https://oko.press/emilewicz-nie-jest-wyjatkciem-wladza-lamie-wlasne-zakazy-badania-pokazuja-jakie-to-grozne/>

<sup>26</sup>Cybulska and Pankowski, "Koronasceptycyzm, Czyli Kto Nie Wierzy w Zagrożenie Epidemią."

against the ban; retail chains are demanding to open their stores. This demonstrates that any exceptions or modifications to the rules began to affect how others would follow them. Surprisingly, negative cases sometimes influenced positive social attitudes.

### *How to encourage Poles to Get Vaccinated?*

At the end of December, the critical topic dominating public debate in Poland was the issue of vaccination. Contrary to expectations, this issue was approached with reserve rather than enthusiasm. In the 2020 year-end polls, Poles' opinions on vaccination were sharply divided. According to a UCE Research survey from the end of December, 43.4% Poles wanted to be vaccinated against COVID-19, 43.8% were against, while 12.9% had not yet formed an opinion. Similar results were recorded in November 2020<sup>27</sup>. Similar results were obtained by an IBRIS poll commissioned by the "Rzeczpospolita"<sup>28</sup>.

Surprisingly, when asked what could convince people to get vaccinated, the number one answer was a bonus in the form of cash (you could select more than one answer). As many as 45.1 percent respondents indicated such a possibility.

It can be said that at the turn of the year, on an issue that has a fundamental impact on the health and safety of Poles, the government faced quite a challenge: how to encourage people to get vaccinated?

As some commentators point out, "with help" came another scandal whose actors were representatives of artistic and creative circles, traditionally opposed to the right-wing government. It turned out that before the end of the year, in not entirely clear circumstances, they managed to get access to vaccines

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<sup>27</sup>[https://wyborcza.biz/biznes/7,177151,26642642,sondaz-wyborczej-do-szczepien-na-covid-polakow-przekonaty/ko.html?\\_ga=2.33295357.256749482.1611659852-1942603757.1549445445](https://wyborcza.biz/biznes/7,177151,26642642,sondaz-wyborczej-do-szczepien-na-covid-polakow-przekonaty/ko.html?_ga=2.33295357.256749482.1611659852-1942603757.1549445445).

<sup>28</sup><https://www.rp.pl/Covid-19/312279939-Koronawirus-Sondaz-Wielu-Polakow-sceptycznych-wobec-szczepionki-na-COVID.html>.

without a queue, despite the top-down schedule (first the medics, then seniors, etc.). The affair sometimes referred to as the “celebrity scandal,” made widespread headlines and caused the vaccine, a judged unattractive commodity, to quickly become a scarce and desirable commodity.

- Leaving aside the ethical aspect of the story with Krystyna Janda (the heroine of the ‘celebrity’ scandal - ed.), the vaccinated actors’ case is the masterpiece of the world. It created the demand for the vaccine, which suddenly became a desired good in Poland,” said Leszek Sobieski from a regional hospital in Konin (Wielkopolska region).

Jarosław Król, a family doctor, who has an office in a small village Tokary (Wielkopolska), recently received dozens of phone calls about vaccination: - Not only mature people called but also the young ones. They asked when they could get their dose. They all wanted to be vaccinated for COVID-19. The vaccine has become like ham from under the counter in communism time<sup>29</sup>. This has been reflected in subsequent polls. The poll conducted on the 8th and 9th of January 2020 shows that 60.9% respondents want to be vaccinated. As many as 37.2% respondents are definitely willing. Another 23.7% said that they would rather be vaccinated. 16.3% were definitely against, and 11.8% said they would rather not vaccinate. The January poll showed an increase of 14 percentage points in those willing to be vaccinated compared to the second half of December (the previous survey was conducted on the 22nd of December 2020). The most significant drop was noted among those who said they “would rather not get vaccinated” before the holidays, in December 27.1% respondents. Three weeks later, that group had dropped to 11.8%<sup>30</sup>.

<sup>29</sup><https://poznan.wyborcza.pl/poznan/7,36001,26660020,casus-jandy-afery-wykreowala-popyt-na-szczepionke-szpitala.html>.

<sup>30</sup><https://www.rp.pl/Covid-19/301139905-Sondaz-Rosnie-liczba-Polakow-ktorzy-chca-sie-zaszczepic-protiw-COVID-19.html>.

## Summary

The survey results that we quoted in combination with the government representatives failures mainly confirm the hypothesis of inconsistent communication that systematically reduces acceptance for the government actions. Like most politicians in power for a longer period, representatives of the ruling camp suffer from classic symptoms of detachment from reality and political split personality according to the principle ‘quod licet lovi, non licet bovi’. The data clearly show that the credit of trust they have received from the public, however, may one day come to an end.

The prepared description of social attitudes also outlines a picture of several phases that Polish society went through during the last several months of the pandemic.

Phase 1: “Curiosity and Moderate Fear.” (March-May 2020). Staying at home for two weeks was not too demanding, and for many, it might even have seemed attractive. Granted, we couldn’t go to the gym or a restaurant, but we might have been able to read overdue books or finally clean up the household mess. Especially at the beginning of the epidemic, one could see many positives in the restrictions<sup>31</sup> or even a window of opportunity for the introduction of facilities that were previously unavailable for unknown reasons, such as phone medical advice. Besides, the fear of infection, which was present from the beginning, caused the restrictions to be perceived as reasonable and justified even by critics of the government.

Phase 2: “Denial and brief euphoria” (July-September 2020). Higher temperatures and the holiday season made the risk of getting sick seem remote and not so threatening. Everyone wanted a breather after a more extended and more onerous period of austerity than first thought. Politicians further com-

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<sup>31</sup>M. Krajewski et al. (2020), “The Bright Side of the Crisis. The Positive Aspects of the COVID-19 Pandemic According to the Poles,” *European Societies*, 1–14, doi:10.1080/14616696.2020.1836387.

pounded the impression that coronavirus was in retreat, although the statistics did not always support that.

Phase 3: “Rebellion and Frustration.” (October-December 2020). The vacations have passed, the weather has broken, and the coronavirus has returned, however. The restrictions are also back, increasingly burdensome for all citizens for financial reasons. The uncertainty of whether we would have the vaccine, as well as Christmas and New Year’s Eve under the sign of the pandemic, compounded the frustration and desire to revolt.

Phase 4: “Hope and Doubt” (January 2021-...). We have the vaccine. Unfortunately, not enough. Vaccination is moving slowly and amid small scandals. On the one hand, there is hope that the vaccine can help return to normality. On the other, we do not know when it will be our turn, how long the immunity will last, or whether there will be complications. When writing, we are in this phase. We do not know how long it will last and what the next phase will be.

Finally, as well as turning people lives upside down, the pandemic has also changed the face of politics. Commentators<sup>32</sup> point out that it has prioritized issues that until recently no one thought about, such as the National Vaccine Program, the launch of the emergency-stopped economy, the management of education, or digitization still available to many in a minimal way. Thus, the pandemic has changed individual ministry relevance and shown that the rigid sectoral division in government is now untenable. Because to deal with the crisis, an interdisciplinary, cross-cutting approach is necessary. The public mood may change at any time, depending on how burdensome the new order will be for citizens, the extent to which the government will succeed in implementing it, and the opposition in substantive criticism.

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<sup>32</sup><https://www.rp.pl/Rzecz-o-polityce/301199898-Jak-pandemia-zmienia-rzad-i-priorytety.html>.

## FROM DETERIORATING TRANSPARENCY TO “ENTREPRENEURS REVOLT” IN POLAND

*Marek Tatala*

Transparency of public authorities matters for doing business, including risk-taking, innovations and investments. Thanks to that entrepreneurs are able to operate in much more predictable environment and make use of information that are available to the government. Moreover, open policy-making should be based on evidence and not motivated by temporary political temptations. Transparency in decision-making processes is even more important in extremely uncertain times like the current health emergency caused by COVID-19.

This chapter shows how transparency was affected in Poland by responses to the spread of coronavirus. We will first discuss the weakening of transparency in the early stages of the pandemic, including restrictions on access to public information. Then, we will move to the ruling majority's political motivations behind not using pre-existing emergency laws when emergency really occurred. By using extraordinary measures derived from the Constitution of Poland the government reactions to the virus and pandemic-related crisis would have been much more transparent and predictable. We will then assess the preparations of the government and the public sector to the second wave of the pandemic and show that it was worse than the response of its private counterpart. In the final section we will move to the “comprehensive plan” that was presented by the government and was supposed to improve transparency of restrictions affecting businesses and employees, among others. Nevertheless, this plan was abandoned before coming into power and the government returned to much less transparent decision-making. It is one of the reasons why some owners of affected businesses have been revolting against lockdown rules

often imposed in a very arbitrary way and lacking proper legal basis.

This chapter is written from a perspective of entrepreneurs. Nevertheless, the majority of policies and decisions discussed here have been affecting almost all Poland's residents. It seems that COVID-19 will stay with us for long, so it is vital that governments improve transparency of their responses to the pandemic and prepare plans for any future waves of infections and similar challenges. It will make doing business and our everyday life much easier.

### *Coronavirus First Wave and Transparency at Stake*

Emergencies often require quick decision-making. While in early 2020 COVID-19 epidemic in China had been discussed by politicians, experts and media it seems that many governments were shocked when the virus began to spread among Europe at a rapid pace. Some level of chaos and unpredictability was therefore understandable at the beginning of pandemic and it is not surprising that many policies were copied between various EU Member States – from closing borders to different domestic restrictions. Nevertheless, the further we are from the starting point of pandemic, the fewer and fewer reasons there are to avoid transparency and evidence-based policy-making.

The question to what extent the government of Poland was ready for a health emergency caused by an infectious virus is beyond the scope of this chapter. There is for sure need for comparative analysis of readiness of the Member States and the EU for COVID-19 as it is important for potential improvements in this field in the future. However, it is important to highlight difficulties with getting information about pandemic-related topics from the Material Reserves Agency in Poland,

which is responsible for the management of strategic reserves and support to the population in a crisis situations. The agency has been using “national security” and “classified information” as justifications for not providing information to the public about their resources like ventilators<sup>33</sup> or COVID-19 tests<sup>34</sup>. It is necessary to increase transparency of the Material Reserves Agency in order to properly evaluate how well Polish authorities were prepared for the pandemic and what should be improved in terms of the operations of this agency and preparations to similar emergencies.

The propagation of infections among Europe triggered policy responses by the government of Poland. On March 12<sup>th</sup>, 2020 the first restrictions in education were introduced and they were followed by limitations regarding public gatherings, operations of shopping centres, restaurants (take-away only) and closure of, among other things, gyms, museums and many cultural sites. On March 24<sup>th</sup>, a full ban on public gatherings and restrictions on movement was implemented. In the end of March, the list of restricted businesses was extended to include hotels, hairdresser and beauty salons. Parks and beaches were also closed<sup>35</sup>. In late April the process of opening of some parts of the economy was initiated and many restrictions were lifted in May. In the meantime, first measures to at least partially compensate employers and employees for pandemic-related policies, usually named as “shields”, were discussed and implemented by the government.

While urgency was to some extent justified, there has been a growing list of transparency issues since the beginning of the pandemic. Representatives of employers and trade unions have been complaining about insufficient consultation of regulations even where there was time to conduct them. There

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<sup>33</sup>L. Kosztrzewski (2020), 'Material Reserves Agency refuses to say how many ventilators it has, because "it may have a negative impact on public mood"', *Gazeta Wyborcza*, [in Polish], <https://wyborcza.pl/7,155287,26485739,agencja-rezerw-odmawia-podania-ile-ma-respiratorow-bo-moze.html> (accessed 9 February 2021)

<sup>34</sup>K. Żączkiewicz-Zborska, 'It is still unknown how many COVID-19 tests the government has purchased', *Prawo.pl*, 2020 [in Polish], <https://www.prawo.pl/zdrowie/zakup-testow-na-covid-19,505047.html> (accessed 9 February 2021)

<sup>35</sup>A. Łaszek, R. Trzeciakowski (2020), 'Responses to COVID-19 of governments in selected countries', *FOR Analysis* 3/2020, <https://for.org.pl/en/a/7690,for-analysis-3/2020-responses-to-covid-19-of-governments-in-selected-countries> (accessed 11 February 2021).



were meetings organized by the government where legislative proposals with hundreds of amendments were delivered a few hours beforehand<sup>36</sup>. Therefore, the level of knowledge of the government officials and other stakeholders at such gatherings was uneven. Moreover, limited public discussion led to numerous mistakes, loopholes and ambiguity in the pandemic-related legal acts.

There have been many press conferences during which new policies were made known but they were rarely accompanied by disseminating the exact wording of the new proposals. A press conference is important for communication but it is not a source of law. There were cases where regulations were announced just before midnight of a day when they were coming into force. This *modus operandi* of the government, when regulations were not presented during or just after press conferences but just before entering into force a few days later, has increased uncertainty in already very uncertain times.

An even more striking example of deteriorating transparency were changes in access to public information which is a constitutional right<sup>37</sup>. First, a set of amendments in early March temporarily halted administrative proceedings due to COVID-19. Therefore, until mid-May it was almost impossible to obtain public information. The law was changed so that the implementation of general provisions of administrative law was suspended which also included requests for public information. As a result, ministries, public administration and other authorities which decided not to reveal certain information when requested had a legal basis to do so as judicial review was temporary halted. The reason behind this measure was “to freeze the operation of public bodies in dealing with citizens’ matters (...) in order to reduce the number of people in public premises”<sup>38</sup>.

<sup>36</sup>M. Kolińska-Dąbrowska, L. Kostrzewski (2020), 'They are still messing around with the "anti-crisis shield". Employers and trade unions: the Shield is not well prepared', *Gazeta Wyborcza*, [in Polish], <https://wyborcza.pl/7,155287,25813434,pracodawcy-i-pracownicy-zgodnym-chorem-tarza-antykryzysowa.html> (accessed 10 February 2021).

<sup>37</sup>Article 61 (1) of the Polish Constitution: "A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury." Constitution of the Republic of Poland [in English]: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed 11 February 2021).

<sup>38</sup>E. Rutynowska, M. Tatała, P. Wachowicz (2020), 'Rule of law in Poland 2020: The rule of law crisis in the time of the COVID-19 pandemic', *Civil Development Forum*, p. 26, <https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-the-rule-of-law-crisis-in-the-time-of-the-covid-19-pandemic> (accessed 10 February 2021).

Nevertheless, it was misused and this lack of transparency affected entrepreneurs, journalists (willing to ask questions e.g. about restrictions on business activity or plans of the government) and many other individuals.

The Ombudsman and Watchdog Poland foundation argued that these restrictions violated Article 61 of the Constitution of Poland and “deprived citizens of their right to defend their right of access to public information before Courts, a clear violation of Article 233 (3) of the Constitution”<sup>39</sup>. Moreover, after administrative proceeding were resumed, the administrative Courts have been examining cases mostly in closed sessions, without the presence and hearing of the interested parties, which was also regarded as a significant limitation of transparency and right to Court<sup>40</sup>.

While all of these actions had a negative impact on transparency, an even more serious problem was (and still is) a failure to use the tools available in the Constitution of Poland to be triggered in situations like health emergencies. The legal system was prepared to respond, in a predictable and transparent way, to a pandemic within the constitutional framework. But the governing party decided to deal with an extraordinary situation without introducing the emergency laws based on the Constitution. The main reason why the government opted not to use the state of emergency during the first wave of coronavirus were the upcoming presidential elections. Therefore, temporary political interests turned out to be more important than transparent and constitutionally sound policy responses to COVID-19.

### *Elections Instead of Predictable Tools*

Instead of using emergency laws, that give politicians extra

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<sup>39</sup>G. Makowski, M. Waszak (2021), ‘Polish Legislation during the Pandemic vs. Corruption. Anti-crisis Shields: Completing the Law and Justice State Project?’, Stefan Batory Foundation, p.7, [https://www.batory.org.pl/wp-content/uploads/2021/01/Tarce\\_ENG.pdf](https://www.batory.org.pl/wp-content/uploads/2021/01/Tarce_ENG.pdf) (accessed 9 February 2021).

<sup>40</sup>K. Żaczekiewicz-Zborska, K. Kościński (2020), ‘Wholesale examination of cases and violations of rights of participants in the Supreme Administrative Court’, Prawo.pl, [in Polish], <https://www.prawo.pl/prawnicy-sady/posiedzenia-niejawne-w-sadach-administracyjnych,505351.html> (accessed 13 February 2021).

powers to deal with extraordinary situations, the government decided to broaden its powers arbitrarily, through regular laws and executive orders, implemented in a very rapid way. There are three different constitutional measures in Poland that can be used in times of serious crisis: martial law (Article 229 of the Constitution), state of emergency (Article 230) and state of natural disaster (Article 232).

In order to deal with natural disasters (including also epidemics) the government may, for no longer than 30 days, introduce a state of natural disaster. It can be extended with the consent of the lower house of the parliament (Sejm) where the governing Law and Justice party has had majority. Moreover, the legal basis for restrictions of individual rights and liberties must be established by law and extraordinary measures must be proportionate to a threat<sup>41</sup>. *The Law on the State of Natural Disaster* existed in the legal system before COVID-19 and included a long list of tools that could be useful in fighting the pandemic, including restrictions on business activity. Instead of emergency laws, the state of epidemic and – before that – the state of epidemic threat (both implemented on the basis of *the Law on Preventing and Combating Infections and Infectious Diseases in Humans*) were introduced in violation of the constitutional guarantees enjoyed by the citizens.

Furthermore, *the law on Compensation for Losses resulting from the Limitations of Liberties and Human Rights during the State of Emergency* was also part of the legal system when coronavirus was identified in Poland. The introduction of the state of natural disaster therefore triggers the system of compensations for financial losses related to restrictions. Instead of using this mechanism, new tools were developed by the government, often in a rapid way, without proper consultation with the interested parties, including business owners.

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<sup>41</sup>For more details about constitutional states of emergency in Poland Chapter 2 in E. Rutynowska, M. Tatała, P. Wachowicz, supra note 6.

What is important for understanding why this pre-existing tools for fighting an infectious disease were not used by the government is the fact that during the state of natural disaster and 90 days following its termination, it is not permitted to shorten the term of office of the parliament, or to organize elections and referenda. And the presidential elections were scheduled in Poland for May 10<sup>th</sup>, 2020.

The desire of the ruling party to organize elections while popularity of the government and incumbent president Andrzej Duda was still considerable in the early phase of the pandemic was more important than transparency and legal certainty connected with the use of pre-existing emergency measures. The elections in early May finally did not take place after a series of controversial decisions regarding not only the tools used to respond to COVID-19 but also integrity of an electoral process<sup>42</sup>. In the end, the elections – which were the key reason why the constitutional emergency law at the outset of the pandemic was not introduced – took place in late June (first round) and early July (second round). They were won by a candidate of the ruling Law and Justice's party and Andrzej Duda was re-elected<sup>43</sup>.

Since the beginning of coronavirus crisis, many scholars, lawyers and civil society organizations have been emphasizing that the legal basis for government interventions, including restrictions of various business activities were rather poor, and government regulations violated the constitution. Only the state of natural disaster (or other emergency measures from the constitution) allows to close whole branches of the economy and restrict freedoms of movement and assembly<sup>44</sup>. We have been observing a growing number of Court judgements challenging the le-

<sup>42</sup>M. Wilczek (2020), 'Polish government seeks new changes to presidential election rules, allowing in-person voting', Notes from Poland, <https://notesfrompoland.com/2020/05/12/polish-government-seeks-new-changes-to-presidential-election-rules-allowing-in-person-voting/> (accessed 10 February 2021).

<sup>43</sup>M. Tatala (2020), 'Andrzej Duda wins re-election, subjecting the Polish to a second term of illiberality', 1828.org.uk, <https://www.1828.org.uk/2020/07/17/andrzej-duda-wins-re-election-subjecting-the-polish-to-a-second-term-of-illiberality/> (accessed 8 February 2021).

<sup>44</sup>M. Malecki (2020), 'Poland's coronavirus restrictions are unconstitutional, unlawful and risk years of legal chaos', Notes from Poland, <https://notesfrompoland.com/2020/04/18/polands-coronavirus-restrictions-are-unconstitutional-unlawful-and-risk-years-of-legal-chaos/> (accessed 10 February 2021).

gality of restrictions introduced by the government. For example, in October, the administrative Court in Opole quashed a fine imposed by the sanitary authorities on a hairdresser who decided to operate despite the ban. The Court indicated in its judgement that “the Constitution allows restricting freedom of economic activity only in statutes, whereas all such limitations have so far been provided in secondary legislation”<sup>45</sup>.

The politically motivated government’s decision not to declare a state of natural disaster, provided in the constitution, and laws existing in the legal system before appearance of COVID-19 affected transparency of decision-making and lowered certainty in already very uncertain times. Pre-existing measures developed for extraordinary situations like pandemics should be treated like a general plan that is understood by entrepreneurs and all other affected individuals. Of course to build a transparent and trustworthy environment it is also necessary to create more specific plans adjusted to current circumstances and in the following sections we will show what the planning before and at the beginning of the second wave of COVID-19 looked like.

### *Transparent Plans for the Second Wave Needed*

A six-month period between the first infections and the second wave in the autumn has not been properly used by the government. In the times of postponed elections, representatives of the ruling party were downplaying dangers related to coronavirus in order to encourage mass participation, especially among their own supporters.

In early June last year, President Andrzej Duda, when asked “how Poland is preparing for the second wave of coronavirus, which is supposed to come in the autumn,” replied: “No one

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<sup>45</sup>P. Wachowicz (2021), ‘Courts challenge legality of Poland’s lockdown, encouraging businesses to reopen’, Notes from Poland, <https://notesfrompoland.com/2021/02/02/courts-challenge-legality-of-polands-lockdown-encouraging-businesses-to-reopen/> (accessed 12 February 2021).

knows whether the second wave of the coronavirus epidemic will come or not. Of course, there are various speculations, but I stress that these are only speculations”<sup>46</sup>. At the beginning of July, Prime Minister Mateusz Morawiecki was glad that “we are less and less afraid of this virus and this epidemic. This is a good approach because [the epidemic] is in retreat. You don’t have to be afraid of it now”<sup>47</sup>. These statements did not reassure entrepreneurs, and in the July, a survey carried out by one of the associations of business owners “Employers of Poland” (Pracodawcy RP), showed that 90% of entrepreneurs replied that they were concerned about the possibility of the recurrence of the pandemic<sup>48</sup>.

Some degree of chaos had been justified during the first wave of coronavirus, but between May and October, it was important to prepare plans for the next stages of the pandemic and to organize wide-ranging public consultations around these plans, with the participation of entrepreneurs and various experts. Moreover, at that time, it was possible to prepare and consult proposals of further “shields” and other compensation mechanisms for entities potentially affected by lockdowns. This was not done and the government did not use well the time to prepare for the second wave.

This type of transparent planning matters as it enables businesses to predict the level of restrictions using publicly available data. If such plans were prepared in advance, entrepreneurs would have known when and what kind of financial compensation to expect.

Moreover, the Ministry of Health claimed that plans for the second wave of the pandemic were ready. This led to a request for access to these plans by ePaństwo Foundation under the freedom of information law. As the response did not include

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<sup>46</sup>Interview recorded online [in Polish], from 11:43, <https://youtu.be/XpXa8bqVB64?t=703> (accessed 6 February 2021).

<sup>47</sup>A. Kublik (2020), ‘This is how the authorities downplayed the pandemic and boasted: “Nobody can take away our success”’, *Gazeta Wyborcza*, [in Polish], <https://wyborcza.pl/7,75398,26562356,tak-wladza-bagatelizowala-pandemie-i-chwallila-sie-nikt-nam.html> (accessed 10 February 2021).

<sup>48</sup>PolSAT News, ‘Entrepreneurs fear a second wave of the epidemic’, 2020 [in Polish], <https://www.polsatnews.pl/wiadomosc/2020-07-31/przedsiębiorcy-obawiaja-sie-drugiej-fali-epidemii/> (accessed 10 February 2021).

any detailed plans for the future, the ePaństwo Foundation “had caught the Minister of Health making a false statement suggesting that such plans existed”<sup>49</sup>. Again, this shows how non-transparent was the government approach to threats arising from coronavirus.

The general public in Poland noticed these weaknesses in government planning. In an opinion survey made in December 2020 by Kantar, commissioned by the Civil Development Forum, the respondents assessed a degree of readiness of selected institutions for the second wave of the pandemic<sup>50</sup>.

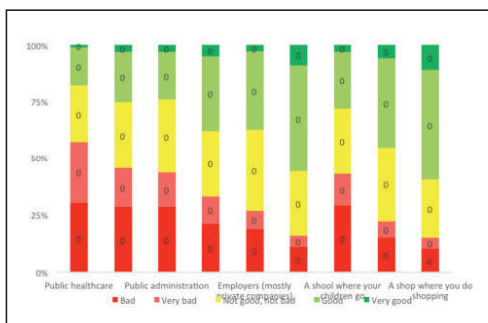
The public sector institutions were judged as much worse prepared than private institutions (Fig. 1). The largest number of negative answers was related to the state-controlled healthcare system (57%), public education (45%) and public administration (33%). The private sector was assessed as much better prepared for the second wave, including a high number of positive opinions on shops (56%) and employers (38% when respondents were asked about all employers and 45% when they were asked about their own employer). Private healthcare received 37% negative opinions compared to 57% negative opinions about the public healthcare.

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<sup>49</sup>G. Makowski, M. Waszak, p.8 supra note 7.

<sup>50</sup>A. Łaszek (2020), ‘Were employers and shops better prepared for the second wave of the pandemic than the public sector?’, Civil Development Forum, [in Polish], <https://for.org.pl/pl/a/8097,komunikat-44/2020-pracodawcy-i-sklepy-lepiej-przygotowaly-sie-do-drugiej-fali-pandemii-niz-sektor-publiczny-badanie-kantar-na-zlecenie-for> (accessed 10 February 2021).

**Fig. 1: Readiness of selected institutions for the second wave of COVID-19 pandemic, source: own calculations based on Kantar<sup>51</sup>**



Summing up, the government first decided not to use the most obvious and transparent mechanisms to respond to health emergency, i.e. the extraordinary laws with derive from the Constitutions. Then, it failed in preparing for the second wave of the pandemic so that transparent plans describing potential restrictions and financial compensations have not been developed. At the same time, more and more Courts have been questioning the legality of restrictions. Therefore, when the second wave started in Poland, the level of uncertainty among entrepreneurs and other people was high and the governmental plans for the future were unknown.

### *From “Comprehensive” to “Irresponsible” Plan*

Due to rapidly growing number of COVID-19 cases, restrictions in Poland were tightened again on October 24<sup>th</sup>, but without any plan for the upcoming weeks and months. Moreover, on the day of the closure of certain branches of economy, no specific

<sup>51</sup>Only people who had an opinion were included. The survey based on direct interviews CAPI was carried out by Kantar on December, 4th-9th using a representative, nationwide sample of 1015 Poles aged 15+.



information was given on how owners would be compensated for the ban and what exemptions from public levies they could count on. It was not until November 21<sup>st</sup>, that the government unveiled “a comprehensive action plan for the coming time”<sup>52</sup>. The next “shield” with compensations for affected employers was launched in mid-January 2021, almost three months after certain entities had to close or restrict (such as take-away only for restaurants and cafes) their operations.

The “comprehensive plan” assumed that after a “responsibility phase”, with numerous strong restrictions, a “stabilization phase” would come where restrictions were to be relaxed and differentiated for regions in red, yellow and green zones<sup>53</sup>. The second stage was to be launched at the earliest on December 28<sup>th</sup> and then postponed to January 18<sup>th</sup>, which was justified by the need to keep people at home during winter school holidays. The entire government plan was based on one indicator only – 7-day moving average of COVID-19 cases. Although the rates of infections for the “stabilization phase”, and yellow and even green zones in parts of Poland were reached after January 18<sup>th</sup>, this phase has not been implemented yet.

Such plans are important from the perspective of entrepreneurs and should be proposed by policy-makers willing to make transparent and predictable decisions. Linking restrictions to selected measurable indicators enables business owners to plan their activities, negotiate contracts with business partners and employees, and better manage their financial resources. Moreover, all plans should be also accompanied by reliable and up-to-date data provided by the government so that everyone interested can analyse current situation and make forecasts.

**We still do not know why the government has not implemented its plan from November. Ruling politicians sometimes say**

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<sup>52</sup>Website of the Republic of Poland [in Polish], <https://www.gov.pl/web/koronawirus/100-dni-solidarnosci-w-walce-z-covid-19> (accessed 10 February 2021).

<sup>53</sup>More details about phases [in English]: Lodz University of Technology, ‘COVID 19 - a new plan of the Polish government’, 2021, <https://cwm.p.lodz.pl/en/news/covid-19-new-plan-polish-government> (accessed 14 February 2021).

that it was due to restrictions in other Countries. But if the government uses this justification, why was the “comprehensive plan” not also dependent on, for example, the number of COVID-19 cases in the Countries neighbouring Poland?

It was a serious mistake of politicians in power to build a plan relying on just one indicator. On February 1<sup>st</sup>, the Minister of Health Adam Niedzielski when asked about the plan from November 2020, replied that “the main determinant is the daily number of infections (...) but in fact it would be completely irresponsible not to take into account other information”.<sup>54</sup> Therefore, even from the point of view of a government official it was “irresponsible” to build a plan using just one indicator. The “comprehensive action plan” was not comprehensive enough.

Since mid-January 2021, more and more struggling entrepreneurs have been reopening their businesses despite restrictions. Some of them were claiming that they are following the plan from November 21<sup>st</sup>, which was abandoned by the government. They were also maintaining that restrictions are “unjustly strict, but are also an illegal encroachment on constitutional freedoms because the government has not introduced the state of emergency that would justify them.”<sup>55</sup> At the beginning of February, a revolt of some entrepreneurs against the lockdown intensified and “around half of Poland gyms have reportedly reopened (...) in defiance of the government’s coronavirus restrictions and thousands of restaurants are expected to follow suit”<sup>56</sup>.

There are many reasons behind this “revolt”, including financial difficulties, but the fact that the government abandoned its previous “comprehensive plan”, which gave a lot of hope for

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<sup>54</sup>Onet.pl (2021), ‘Why are shopping centers open and gyms not? Adam Niedzielski explains’, [in Polish], <https://wiadomosci.onet.pl/kraj/koronawirus-adam-niedzielski-o-otwarciu-centrow-handlowych/8bstdv8> (accessed 10 February 2021).

<sup>55</sup>M. Wilczek (2021), ‘Map shows Polish businesses reopening in defiance of “illegal” lockdown’, Notes from Poland, <https://notesfrompoland.com/2021/01/15/map-shows-polish-businesses-reopening-in-defiance-of-illegal-lockdown/> (accessed 12 February 2021).

<sup>56</sup>M. Wilczek (2021), ‘Half of gyms reopen in Poland amid growing rebellion against lockdown’, Notes from Poland, <https://notesfrompoland.com/2021/02/02/half-of-gyms-reopen-in-poland-amid-growing-rebellion-against-lockdown/> (accessed 12 February 2021).

entrepreneurs, and has not yet presented an alternative plan is one of the cause of growing opposition towards restrictions. Together with questionable legality of current anti-pandemic laws, the non-transparent environment is an additional fuel for “entrepreneurs revolt”. According to a survey of 55 business leaders “entrepreneurs and managers (...) are increasingly frustrated by the lack of prospects and the way the ruling political team uses its powers”<sup>57</sup>. The government cannot make COVID-19 disappear but it can still improve transparency of its responses to the pandemic.

### *Conclusions and Lessons From Poland*

While handling the health emergency required many extraordinary measures, transparency has been put “at stake” by the government of Poland. Entrepreneurs have been one of the groups affected by non-transparent policy-making. The access to public information has been restricted, the pre-existing emergency laws based on the Polish Constitution have not been used, and transparent plans linking policies with selected indicators related to COVID-19 have not been disclosed to entrepreneurs and general public.

It is not surprising that public sector institutions were judged as less prepared to the second wave of the pandemic than their private counterparts. Moreover, problems with transparency can also explain why some owners of affected businesses have been revolting against restrictions often implemented in a very arbitrary way and without a proper legal basis.

Therefore, some recommendations on how to improve transparency in the upcoming months, when COVID-19 will stay with us, and in case of similar emergencies in the future, should be made. First, it is not only important to improve resilience of

economies and healthcare systems but also to develop plans which can be followed in emergencies. These plans should be based on measurable and publicly available indicators and data. Second, instead of arbitrary reactions, governments should follow universal emergency laws and constitutional provisions if they exist in their Country. It will build more predictable environment for business owners and other individuals. Third, there is no reason to restrict access to public information even during pandemics. Transparency matters so that people can evaluate the government responses and exert pressure on policy-makers when needed. Finally, it is important to include entrepreneurs, economists and other key stakeholders in public consultations and discussions on lockdown rules and pandemic-related plans as restrictions, while important for preventing infections, may also be costly for economies and human lives.

These recommendations matter not only for Poland but should be taken into consideration by policy-makers from the rest of EU to build more transparent and predictable guidelines for operating until the end of this pandemic and in health emergencies that may appear in Europe in the future.





# TRAN SPAR ENCY AT STAKE

**SECTION III  
BULGARIA**

## TRANSPARENCY DURING COVID-19

### THE CHALLENGES OF EMERGENCY LEGISLATION AND FINANCIAL ACCOUNTABILITY

*Zinaida Zlatanova*

In the recent decades before the worldwide outbreak of the COVID-19 pandemic, Bulgaria has shown sound macroeconomic policies, stable economic growth and low unemployment<sup>58</sup>. At the same time improving the efficiency of public spending, the quality of public institutions, and the governance framework remained a constant challenge. Weaknesses in health care, education, labour market, the judicial system and the governance, in general, have been in the focus of the attention of the European Commission and the international financial institutions for years. These policy areas are regularly commented and monitored over the recent years by national and international trade and economic chambers, individual investors and governments<sup>59</sup>. In its European Semester Country Reports and Assessments, the European Commission has recommended to the Council and the Council has adopted Country Specification Recommendations on consecutive National Reform Programmes and Convergence Programme of Bulgaria. The Country Specific Recommendations addressed most of the issues mentioned above to improve and assure the resilience of the systems.

In terms of government transparency, accountability and predictability Bulgarian institutions have never been the EU champion. Bulgaria is among the countries where the trust in the EU institutions exceeds that in the national ones<sup>60</sup>.

#### Government expenditure as a percentage of the national GDP

<sup>58</sup>IMF Article 4 Country Reports on Bulgaria, <https://www.imf.org/>

<sup>59</sup><https://www.state.gov/reports/2020-investment-climate-statements/bulgaria/>

<sup>60</sup>Standard Eurobarometer surveys



is low - it is the fourth-lowest - 36,6 % compared to 46,6% EU average in 2019, according to Eurostat data. That would suggest lower interference and regulation by the government if institutions function efficiently, but in this case, it rather contributes to the low quality of some public services. The judiciary and the anti-corruption policy are subject to enhanced monitoring by the European Commission through the *Cooperation and Verification Mechanism for Bulgaria and Romania*<sup>61</sup> (CVM) ever since the country's accession to the EU. Since recently despite the 13 years duration of the CVM, separate monitoring has been introduced for Bulgaria by the European Parliament LIBE Democracy, Rule of Law and Fundamental Rights Group (DRFMG). In the 2020 *Transparency International. Corruption Perceptions Index*, Bulgaria scored 44/100 and was ranked last in the EU and 69th globally - together with Romania and Hungary<sup>62</sup>. Concerning the public opinion in the country - 80% of Bulgarian respondents to the latest Eurobarometer survey on corruption believe that corruption is widespread in their country (EU average: 71%)<sup>63</sup>. while 85% of companies consider corruption to be widespread (EU average 63%). 51% of businesses believe corruption is a problem for the business in the country. 28% of respondents state that they feel personally affected by corruption in their daily lives (EU average 26%) and 63% (EU average 36%) do not think that there are enough successful prosecutions for corruption. Finally, only 13% of companies responded that people and businesses caught for bribing a senior official are appropriately punished (EU average 31%)<sup>64</sup>.

The governance issues mentioned above pre-date the COVID 19 pandemics. However, the pressure on the institutions and their functioning made the scale of the problems visible to the broader public. With infections and death toll rising quickly the public impatience grew to levels rarely seen in the last decade. Demands for tougher scrutiny over government actions are

<sup>61</sup><https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania>

<sup>62</sup>Transparency International (2021), 2020 Corruption Perceptions Index.

<sup>63</sup>Flash Eurobarometer 502 (2020), Corruption.

<sup>64</sup>Flash Eurobarometer 482 (2019), Businesses' attitudes towards corruption in the EU.

widespread, regardless of political preferences and sentiments.

We will look at two issues of great importance to the upholding of democratic governance and the rule of law in an emergency, unprecedented in Bulgaria's recent history – emergency legislation and emergency spending.

### *Act on the Measures and Actions during the State of Emergency*

The first steps after the outbreak of COVID 19 in the EU were undertaken by the Minister of Health according to the provisions of the already existing Health Act. Under said legislation, the Minister of Health has relatively broad powers to introduce partial and general, regional and national epidemic countermeasures. That was the case until the first cases were detected and registered in Bulgaria. The Health Act provisions were considered insufficient by the government. On March 13, 2020, by demand of the government, the Parliament declared a state of emergency for a period of one month, authorising the government to adopt all necessary measures to address the COVID-19 pandemic. This state of emergency has its legal basis in the Constitution. Article 85, p. 12 stipulates that it is an exclusive right of the Parliament to introduce a “state of war or other emergency situation”. The Parliament decision of March 13 also cites Article 57 of the Bulgarian Constitution that stipulates that “during a state of war or other emergency situation certain rights of the citizens might be suspended by a special law”<sup>65</sup>.

On March 13, 2020, Parliament announced a state of emergency for a total duration of one month, which was later extended by another month. In order to comply with the Constitution, the Parliament adopted a specific new law - *Act on the Measures and Actions during the State of Emergency Declared with the Decision of*

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<sup>65</sup>Bulgaria, National Assembly, Decision of declaring the state of emergency (Решение за обявяване на извънредно положение), 13 March 2020

the National Assembly of March 13th, 2020 (“AMADSE” or “the Act”). The Act was adopted by the National Assembly on March 20, promulgated in State Gazette on March 24, but it came into force retroactively from March 13, 2020. The emergency decisions and the newly introduced Act give extensive powers to the government to take measures to deal with the emergency and amends several other laws. At the time of parliamentary debates on the new Act, many issues related to fundamental rights were raised, including the impact of measures on the free movement within the country, the right to privacy, personal life and liberty etc.

On March 22, the President of the Republic, Rumen Radev, imposed a partial veto on *the Act on the Measures and Actions during the State of Emergency* as some parts of the new legislation could undermine freedom of speech as well as business activity<sup>66</sup>.

The Bulgarian Parliament accepted the presidential veto on two parts of the COVID-19 State of Emergency Measures Act related to the freedom of speech and business activity.

On May 12, an amendment to *the Health Act*<sup>67</sup> was adopted which introduced a new emergency regime (“emergency epidemic situation”). The emergency epidemic situation is an emergency regime that can be introduced by the government without consulting the Parliament even though Article 84 stipulates that only the Parliament has the power to introduce an emergency situation. This provoked doubts about the constitutional compliance of the new Act and the legality of the actions of the government based on it<sup>68</sup>. A quick analysis of the epidemic countermeasures introduced with the two parliament decisions under Art. 84 of the Constitution and those introduced by the government alone after the amendments of *the Health*

<sup>66</sup><https://m.president.bg/bg/cat47/1304/ukaz-n-70-za-vrushtane-na-zakona-za-merkite-i-deishiviyata-po-vreme-na-izvunredhoto-polozhenie.htm>

<sup>67</sup>Law to amend and supplement the Health Act.

<sup>68</sup>Art. 63 of the Health Act stipulates that the new regime allows the Council of Ministers to declare an emergency epidemic situation for a certain period at the suggestion from the Minister of Health. This would allow some of the measures taken under the state of emergency to continue to apply and new ones to be introduced, despite the end of the state of emergency.

Act gives arguments for such questions to be raised. Concerns about the transparency of the decision making under the new regime are also due to the lack of detailed provisions as to what epidemic countermeasures are foreseen under which circumstances. On May 14, 2020, the President of the Republic asked the Constitutional Court to examine the compliance of the newly introduced emergency regime with the Bulgarian Constitution

On May 13, the Council of Ministers, on a proposal by the Minister of Health, decided to declare an *emergency epidemic situation* for the duration of one month, which was later renewed several times and is currently declared until September 30.

This new emergency regime was reviewed by the Constitutional Court<sup>69</sup> which decided on July 23 that the regime was compliant with the Constitution with three out of twelve constitutional judges expressing official written reservations for the decision taken<sup>70</sup>.

The process of the adoption of *the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020 (the Act)* followed the trend which had been existing for a long time: that of parliamentarians submitting last-minute legislative proposals. However, in this case, using the fast track was explained with the existing need of taking timely action. The initial proposal for a special law was submitted by members of parliament representing the government coalition on March 16, 2020. It consisted of 7 articles and 14 paragraphs, which amended other acts in force to adjust their provisions to the emergency situation. The final text published in the State Gazette<sup>71</sup> consists of 21 articles and 52 paragraphs. That means that *the Act* fits into the amendment trend that can create significant changes without

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<sup>69</sup>Constitutional Court, Case 7/2020, 14 May 2020.

<sup>70</sup>Constitutional Court Decision 10/2020 of Case 7/2020, 23 July 2020.

<sup>71</sup>Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020, SG28/24.03.2020

the relevant public debate being introduced between the first and the second reading in the National Assembly. The compulsory regulatory impact assessment is one page long and does not quote any public consultation. The document states that no impact on public finances and the state budget is envisioned. This statement alone contradicts the provisions of the draft which provide for significant spending to cope with the consequences for economy.

In the eleven months since its' implementation, *the Act* has been amended thirteen times<sup>72</sup>, most of the amendments introduced through other laws that just happen to be on the table. In fact only three out of the thirteen amendments were not incorporated in randomly chosen draft laws. Some of the noteworthy among the ways the Act was amended and supplemented are the Act on the Trade Registry and the Registry of the Legal Entities with a nonprofit purpose and the Act on the Patents and the Registration of the Useful Models.

The most recent draft amendment of *the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020* submitted for voting by Parliament by the ruling coalition MPs on the 29 January 2021<sup>73</sup> are worth noting and provoked the interest of the press. §4 introduces amendments to the *Gambling Act* that regulate a new game and change other important provisions regulating the gambling business. From the motives accompanying the draft law, it is not clear how the changes to the

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<sup>72</sup>- State Gazette (SG) 34/09.04.2020 Act on the amendment and supplement the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020; SG 38/24.04.2020 Act on the amendment of the Act on the Trade Registry and the Registry of the Legal Entities with a nonprofit purpose; SG 44/13.05.2020 Act on the amendment and supplement of the Health Act; SG 55/19.06.2020 Act on the amendment of the Act on the Value Added Tax; SG 60/07.07.2020 Act on the amendment of the Act on the Bulgarian Red Cross; SG 64/18.07.2020 Act on the Amendment of the Act on the Public Offering of Securities; - SG 71/11.08.2020 Act on the Municipal Taxes; SG 92/27.10. 2020 Act on the Patents and the Registration of the Useful Models; - SG98/17.11.2020 Act on the amendment and supplement the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020; SG 103/04.12.2020 Act on the Budget of the State Social Security; SG 105/11.12.2020 Act on the amendment of the Taxation Procedural Code; SG 107/18.12.2020 Act on the amendment of the Act on the Value Added Tax; SG 109/22.12.2020 Act on the amendment and supplement the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020.

<sup>73</sup>Bulgaria, National Assembly, <https://parliament.bg/bg/bills/1D/163500/>

*Gambling Act* are related to the health emergency situation or why these changes should be made so quickly. It remains to be seen whether the amendments will be adopted.

Another provision of the above-mentioned draft Law, namely §8 was discussed extensively by the Parliament. The draft amendment suggests retroactive changes in the *State Budget Act* for the current year. The parliament opposition<sup>74</sup> challenged the approach as incompatible with the Constitution as it is exclusive government power to submit the *State Budget Act* to the Parliament.

The lack of predictability and stability due to frequent changes in the legislation is not a new phenomenon in recent years. There is a standing practice, noticed by stakeholders. Introducing amendments to a particular law by introducing “additional provisions” in another law, completely not relevant to the first one without a public debate has become a matter of concern for some time now. The importance of the issue has been noted by the European Commission in its Annual 2020 Rule of Law Report. In Chapter IV “Other Institutional Issues related to Checks and Balances” the Report says: “The use of public consultation and impact assessment is limited. Bulgaria’s regulatory process is considered to be lacking predictability and stability due to frequent changes in the legislation. For example, the public procurement law alone was amended eleven times in 2018. 158 Furthermore, the Judicial System Act (JSA), adopted in 2007, has already been subject to 51 amendments. 159 In addition, the ‘legal technique’ observed in the anti-corruption chapter with the amendment of legal acts through other legal acts bypasses the requirements for public consultation and impact assessment. 160 Moreover, there is a trend, noticed by stakeholders, in the procedure for adopting laws in which amendments introduced between the first and second reading

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<sup>74</sup><https://www.dps.bg/aktualno>

in the National Assembly can create significant changes without the relevant public debate.”

Such practice is very abusive in terms of transparency and accountability. Each Bulgarian MP has a right to legislative initiative. However, the long-time Bulgarian legislative tradition is centered around the idea, that the Government is the primary source of legislative initiative. Consequently, the public attention is focused mainly on the government actions and pieces of legislation, that is being submitted by the government. The requirements of the Act on Normative Acts as to how a draft law should be justified, its impact assessed and motivated, provide for a big administrative capacity that is normally attributed to the public administration and the government. In the last 10 years, legislative proposals coming from the MP have become more of a rule than an exclusion. By doing so, however, the MP proposals frequently by-pass the Act on Normative Acts requirements by submitting few sentences to the one-page long text as motivation, which contains almost no information. Laws are being changed by amendments and changes in other laws, which sometimes have no logical relation to each other. Thereby the legislative process becomes extremely difficult to be traced and changes pass unnoticed. So are the actual motives and intentions of the legislator. It might take years to trace and discover the real intentions, gains, and/or advantages and where they might lead us.

In times of crisis, however, this kind of bad legislative practices creates uncertainty among citizens about the necessity and proportionality of the sanitary measures, about the fairness and transparency of the State support to the economic and social systems. It is difficult for the population to evaluate what and why is being done and for that reason to strictly observe the rules.

## *Public funds spending in response to COVID 19*

The Bulgarian government has been implementing economic and social measures since the first days of the outbreak of the disease in the Country. The emergency spending is directed in two main areas - spending on coping with the immediate health crisis and spending to minimize damage to the economy due to the sanitary measures. According to most leading economists in Bulgaria, it is too early to assess the impact of government interventions on the different economic sectors due to the short period of time, insufficient data and the ongoing epidemic situation. However, it is possible to look at the legislative and ad hoc instruments for scrutiny of the spending attributed to the COVID 19 pandemic. Rather specially dedicated programmes, the budget allocations are made on a case by case basis, depending on the needs of the moment - there is no pre-allocated budget attributed to the crisis or a COVID related section of the budget. In general, allocations are relatively easily visible and distributed through different budget sectors - health care, social assistance, unemployment benefits etc. What is less visible to the general public, however, is the share actually spent.

The legality of the spending is assured through the implementation of the ordinary rules existing since before the crisis. The usual tools for financial control are in place to scrutinize government spending. The updates of the budget are being adopted by Parliament. The first update of the 2020 State Budget was adopted soon after the emergency situation was declared by the Parliament on the first days of April 2020<sup>75</sup>. This update provided for significantly higher than envisioned public debt and a budget deficit instead of the envisioned surplus. The overall necessary update of the financial framework was estimated at that time at 4.2 bn.BGN/2.1 bn Euro/. In 2020 the State Budget was updated six times.

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<sup>75</sup>Bulgaria, National Assembly; <https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?rdMat=147392>.



Meanwhile, there were several calls for more transparency of the spending, including from the President of the Republic who insisted on the creation of a separate registry to keep a record of COVID 19 related spending. The opposition in Parliament also expressed concerns. Until now such special registry has not been created. The parliament decided to create a temporary parliamentary committee to oversee the spending related to COVID 19<sup>76</sup> instead. It was established on May 15, 2020. Ten MPs were elected members of the temporary committee, representing on an equal basis the five parliamentary parties. The committee has held seven meetings since May 2020 to date. The agenda includes hearings of the ministers on different aspects of the crisis. A separate hearing was organised on the reallocation and accelerated implementation of the European Structural and Investment Funds under the 2014-2020 programming period<sup>77</sup>. The legality of the spending of the ESIF financed emergency programmes was also challenged by the opposition Socialist party by the means of parliamentary control. The discussion was focused on the exact amount spent<sup>78</sup> and the retroactive changes of the Act on the Measures and Actions during the State of Emergency Declared with the Decision of the National Assembly of March 13th, 2020 concerning the rules and procedures related to the spending of the EU financed operational programmes. The amendment was made through a change in the Patent Act and the draft changes were submitted by MPs, not by the government. According to the opposition, the amendments retroactively introduce new rules for the way financial aid is allocated to the beneficiaries. The issue was not properly clarified during a plenary discussion in Parliament<sup>79</sup>.

The temporary parliamentary committee was the only form of enhanced control over the additional spendings almost until the end of 2020.

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<sup>76</sup>Bulgaria, National Assembly; Temporary Committee for Control of the Public Expenditure for Overcoming the Consequences of the COVID 19 Pandemic

<sup>77</sup>Bulgaria, National Assembly; <https://parliament.bg/bg/parliamentarycommittees/members/2813>The

<sup>78</sup>Bulgaria, National Assembly; [https://parliament.bg/bg/topical\\_nature/34957](https://parliament.bg/bg/topical_nature/34957)

<sup>79</sup>Bulgaria, National Assembly; <https://parliament.bg/bg/plenaryrs/rs/52/ID/10519>

On 28 December 2020, the National Audit Office (NAO) - the independent external financial control agency of Bulgaria, announced that it would perform six audits of the implementation to establish the efficiency and effectiveness of the management of public funds spent on the recovery from the COVID 19 pandemic, including in the health care sector, the measures taken under REACT-EU programme as well as the measures to support tourism. The NOA reports as well that three additional audit reports started in late 2020 are to be published in 2021<sup>80</sup>. The Public Financial Inspection Agency (PFIA) which is the public internal financial control institution under the minister, does not report on financial inspections directly linked to COVID 19 spending - already conducted or foreseen.

The ex-post financial control is an important first step in assessing the legality of the measures and will teach us important lessons for the future.

Financial information in an understandable form is available on the specially created government web portal <https://coronavirus.bg/>. There is a list of programmes introduced or used to tackle the economic and social consequences of the restrictions.

The list includes the programmes paid for by the national budget and the programmes financed by the European Structural and Investment funds. The nationally subsidised measures are reported in a form of maximum available allocation per beneficiary, while the EU funding is presented as a global amount for the respective programme.

Individual support measures and programmes are advertised and explained on the respective websites of the institutions that implement them - such as the National Revenue Agency,

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<sup>80</sup>Bulgaria, National Audit Office; <https://www.bulnao.government.bg/bg/articles/smetnata-palata-shte-izvrshi-342-odl-ta-po-programata-si-za-2021-g-2379>

The Agency for Social Assistance, the Ministry of Economy etc.

On request of the Temporary Parliament Committee, the Minister of Finance also presented a summary of COVID 19 related expenditure for 2020. According to that preliminary assessment - the counter-epidemic and health measures together with the support to the economy and the social sector amounts to 2.9% of 2020 GDP. The finance ministry underlines that it has preliminary data based on the 2020 GDP forecasts.

While the outbreak continues, it is too early to assess the impact of the pandemic or the impact of the measures taken. However, it becomes evident that during a crisis of that scale, the past problems and weaknesses become too big to be ignored, and some of them – dangerous for society. The developments mentioned above in this article are alarming for a very important reason. It becomes clear, that a presence of democratic rules and procedures and their formal implementation cannot guarantee in itself real transparency and accountability. On the contrary. Formal following of procedures may easily turn into a facade behind which untransparent, even undemocratic practices may flourish. The example with the emergency legislation is symptomatic. Parliament is a central institution of liberal democracy. It is perceived, that parliamentary oversight is an important tool for assuring government transparency. Being a source of non-transparent practices itself and preventing the civil society from consultation and participation degrades the parliamentary principle if not the very foundations of democracy. The same is the case with functioning with other institutions e.g. whose exercising control over public spending. Not engaging a broader set of institutions, civil society, and experts in the democratic oversight diminish the trust. Existing formal procedures need to be anchored by convincing and genuine political will for transparency and accountability. The magnitu-

de of the crisis however made it impossible for the problems to be covered anymore. It is also more difficult to marginalize critical voices. Public awareness and scrutiny of government action reached new levels when it turned out lives might be at stake. It is also evident that building more transparent, flexible and agile systems is not a matter of politics, but a matter of urgency.

It is very important for governments to make an honest and transparent analysis of pre-crisis governance's shortcomings and to promote speedy remedies. It is equally important to "keep the receipts" as IMF advises in order to perform an ex-post assessment of health measures and ant-crisis measures and their impact and efficiency. All that needs to be communicated to the citizens in a way convincing enough to be able to face another crisis better prepared.

Certain steps can be recommended already at this stage to overcome weaknesses:

- In the future, emergency situations should not include a number of exceptions to the rules, only. The need of introduction of crisis tailored but enhanced control instruments should be discussed.
- A thorough ex – post analysis is needed in order to draw lessons. The analysis should be two-fold – the actions of the institutions in response to the health crisis and to its economic consequences;
- Assess the accountability of government data and prepare a strategy to improve timing, accuracy and public use of data. It proved to be a live saving tool.

## CHALLENGES IN THE COMMUNICATION STRATEGY AND TRANSPARENCY OF INFORMATION DURING COVID-19

*Teodora Michaylova*

The Coronavirus (COVID-19) outbreak has not only been posing a global challenge for society but has also taught a lesson to leaders around the world. This unprecedented for the modern world crisis is proving that most governments are not prepared to react adequately to the dynamics of the virus and are taking erratic measures to fight it. In fact, the efficacy of the measures set in action depends greatly on the way they are communicated to the public and as a result, disinformation amplifies distrust in institutions. In light of the unforeseen emergency situation, it is crucial to analyse if transparency of information, as a democratic right, is being violated.

During a crisis which involves people's most precious asset, their health, it is not unexpected that there would be a wave of reactions in search of truth. Disinformation and lack of trust in institutions is causing severe damage in the ruling capacities of governments. There is, however, a dual aspect on disinformation. The lack of certainty and hesitance to communicate firmly to the public is leaving space for misinformation to spread around social media and cause chaos and distrust in institutions. On the one hand, governments fail to communicate directly to the public and on the other, some questionable media outlets and social media contribute additionally to the wave of fake news and create unnecessary panic. Lack of transparency concerns not only citizens' health, but it also proves to be a convenient way to use COVID-19 as a pretext for corruption schemes. Information about how governments are using public funds is

not available to the masses which prevents people from holding the government accountable of its expenditures. In this respect, trust in institutions is directly linked to compliance with health directives. In many Countries there have been protests against the measures to stop the spread of the virus, caused precisely by the lack of accurate information and mistrust in the government decisions.

Especially in times of crisis, it is important that everyone in the institution concerned should focus only on their job-related tasks and provide their expertise where needed. A common mistake which has been observed is to send a representative of an institution to an interview or a press conference completely unprepared by a PR specialist. It is the job of the PR experts to serve as a mediator between the government and the public and it is frustrating to see how these people's job has been oftentimes neglected during the COVID-19 crisis, under the pretext that there is urgency in the decision-making process. The Coronavirus situation can serve in fact as the best example for showing how crisis communication works.

Crisis communication is a special branch of public relations that deals with unexpected unfortunate events which pose threats to the company's reputation and can result in loss of public trust. It identifies the threat, its magnitude and composes a plan to minimize the damages and consequently rebuild the image of the company. As Warren Buffet accurately describes it: "it can take 20 years to build a reputation and only 5 minutes to ruin it".

Crisis communication is not new to Public relations experts and it is interesting to see how governments are failing to communicate effectively to citizens. The Coronavirus crisis is essentially not different from any other crisis a company or

organization can get into. There are several fundamental rules of crisis communication which are identical and relate to the COVID-19 crisis.

- Communication Should be Available Immediately across all Departments/Institutions

As soon as news are received externally and decisions are promptly being made, it is crucial to spread current and, most importantly, accurate information as soon as possible to all departments – ministries and other institutions concerned such as hospitals, for example. News spread fast, but bad news spread even faster, which is why the control of information to the media should be strictly monitored. In order to avoid the formation of fake news, controlling the stream of information is of utmost importance. In times of crisis, timing is crucial. Even a slight delay can be fatal if all parties concerned do not work as one and deliver the same message to the public.

- Messages Should be Relevant to the Public

Once any decisions have been made by the organization/government, a communication plan should be drafted where the communication tone and style should be identified so that messages can be relevant and properly understood by the public. Usually, the tone and style should be chosen in accordance with the target audience, in this case, the entire nation. Nevertheless, unlike during elections when the ruling party speaks to its electorate, a national health crisis in a democratic society requires a firm tone of voice, but one that is not threatening. There should be a very delicate balance so that a distinction is made between giving orders as in a totalitarian regime for example and a democracy which calls for diplomacy and compromise, eventually for the well-being of the people.

There are also two main types of groups in which the public can roughly be broken down. There is the public in general and there are the business owners and their employees who suffer greatly from the closure in the hospitality sectors. For those people who are even more affected by the restrictive measures, there should be a special communication plan for them in order to avoid escalations and protests, as much as possible.

- Information Should be Accessible Everywhere

After the information is synthesized and the communication message is drafted, it is time to focus on its dissemination. On the one hand, the organization/government can use its own communication channels like official websites or through its own social media pages. On the other hand, there is the media. Maintaining good communication with the media is crucial in crisis situations. The public relies on journalists to seek out and convey the truth. Consistency in information is giving out a signal that the institutions are to be trusted.

- Confidential Information Preservation

When it comes to crisis, there is always sensitive information involved. This is precisely why there should be a strict control over the access to this confidential information. If it leaks before it is analysed and appropriately presented in a way that it is easier for the public to understand and accept it, there is a risk of losing control over the crisis situation. This can result in immediate distrust in the organization/institutions and their judgment.

- Transparency is Key / Adhering to the Truth

Transparency is a fundamental principle of democracy, but it is



also as relevant to the business world. Good PR practitioners know that transparency is widely appreciated by the public and adhering to the truth in the long term is the best strategy. Admitting a mistake is a human quality and, in this respect, it brings organizations/institutions closer to people. In addition, by admitting fault, there is an opportunity to apologize which is highly valued as well. Being open to the public leaves no reason for them to doubt the capacity and trustworthiness of the company/institutions. An apology is a basic conflict resolution method and studies show that the “victims” not only feel less angry after they receive an apology, but also, they improve their opinion on the offender. Therefore, just like in corporate crisis, governments should not be afraid to admit if certain measures don’t prove to be smart solutions for the problem and don’t present good results.

- Ethics

Finally, there is the most discussed topic in public relations – the ethics in the industry. It is often perceived that public relations specialists are used to cover up companies “mistakes” and shady business. There is a battle in the industry to make it an ethical one and regain trust in communications experts. It is important to highlight the role of PR experts, who shouldn’t be perceived as manipulators, but merely as mediators between the company and the public who find the best way to present sensitive information. Their role is to give information, not to hide it.

A contextualization on how crisis communications work is crucial in order to compare and demonstrate with examples how governments dealt with transparency when communicating to the public during the COVID-19 crisis.

The first coronavirus cases in Bulgaria were detected on the

8th of March 2020: this initiated the state of emergency and led to the first lockdown starting from the 13th of March 2020 until the 14th June 2020. Restrictive measures included: all students attending an online form of education, all restaurants, bars and cafeteria's closing, all stores had to close except for grocery stores and pharmacies which had a special access regime. All group activities and events such as sport events, cultural and entertainment events were cancelled. All employers were asked to switch to home office form of work, some medical examinations, operations and procedures were cancelled as well. Furthermore, if those put in quarantine did not respect it, there was a penalty of 5 years sentence to prison and a fine ranging between 2 500 and 12 500 euro. Restrictions slowly and gradually loosened until the 14th of June, but in this contextual frame, an analysis can be made of the communication strategy which the Bulgarian government undertook.

During the first lockdown, the Bulgarian government decided to take severe restricting measures with the hope those would greatly limit the spread of the virus. A high level of panic was created, the tone of voice the government was using was threatening, firm and rather dramatic. Ironically enough, at that time there were very few coronavirus cases in Bulgaria, and the public noticed that it was inevitable that cases would grow anyway and closing businesses would be more fatal to the economy than imposing a lockdown so early in the pandemic.

Among the controversial measures which caused a wave of reactions was the closure of public parks and gardens for a certain period of time. The government claimed that in outdoor areas people were safe from the virus, but still they closed the parks for walks except for pet owners. The public argued that with 121 people infected during that time (April 2020) such extreme measures were rather unnecessary. The strict

control during this particular time consisted also in the implementation of check points at the entries and exits of all major cities in Bulgaria. Leaving the city was possible only for a business trip with a document from the employer and for personal reasons such as sickness or by residence papers in the respective city. This measure outraged people naturally as it violates their right of free movement and led to traffic jams at the exit points and scandals with police officers as falsifying documents for business trips vastly emerged. Mask wearing, as in many other countries, appeared to be a controversial topic as well. Naturally, wearing masks indoors in public spaces is still among the most effective measures undertaken by all Countries, but when the government issued an order for wearing masks even outdoors, the public reacted by submitting hundreds of complaints at the Supreme Administrative Court, and a couple of days after, the order was suspended. In addition, green corridors for elderly people going to the shops were created to protect them from exposure to contacts with potential virus carriers. The organization of these corridors proved to be a daunting task and failed in its first days. Communication to business (groceries shop owners) and to the elderly as well, who appeared to be just as rebellious as the younger public, appeared to be poor and incoherent.

In terms of leadership, the head of the Military Medical Academy, Major General Ventsislav Mutafchiyski was appointed as Chairman of the National Crisis Management Staff and became the main public figure in the fight against COVID-19. Putting a general in the lead position brings certain associations that the Country is under a military regime and citizen's rightful democratic rights of movement are being violated. The general held press conferences every single day and became for good or bad the most popular figure in the Country. The fact that he is from both a military and a medical background helped him gain trust

from public opinion: with a firm hand, leadership experience and medical understanding of the virus, the crisis could be managed with less casualties just like in a war. And on the contrary, precisely because of this military approach, other people didn't like to be "given commands" by the general. In all press conferences he appeared in his military uniform. This gesture further deepened the sense of being under a military regime where all democratic rights weren't respected. This extreme popularity of the general was noticed by the government authorities who decided to put the general off the screens for a certain period of time and when the public asked where he disappeared, they invited him to participate in press conferences once again, but this time wearing a normal formal suit on and not his military uniform. This move clearly shows how some simple details such as clothing can have a huge impact on communication as well. In addition, many funny memes with the general emerged on social media which reflected well people's thoughts on the general's lead. Created in the spirit of the Bulgarian ethnopsychology, these memes went viral and served as a way to bring some humour in the anyway critical situation.

The strongly restrictive approach of the general was naturally very challenged. However, from a communication point of view, it was both good and bad that live press conferences were held every day for a certain period of time and the new measures iterated until the public understood and accepted the COVID-19 measures. Constant repetition and panic did indeed irritate people on social media, but in fact, the Bulgarian people who usually don't have a mentality of subjecting to rules, needed a strong reminder of what was prohibited, especially given the novelty of such a crisis. Clarification was necessary, but it would be inaccurate to confuse the constant influx of some information with transparency from the government.

Chronologically, what is more specific is that the appearance of Coronavirus in Bulgaria, coincided with major anti-governmental protests which started on the 9th July 2020, under the pretext of corruption practices of the prime minister Boyko Borisov cabinet. Protesters were supported by President Rumen Radev and all this resulted in mass demonstrations gathering thousands of people and in organized blockades of major roads in the capital Sofia and around the Country. It is important to include this particularity in the analysis of how transparent the Bulgarian government is in regards to the Corona crisis. Consequently, under the pretext that the main health measures prohibit mass gatherings, numbers of infected people are rising extremely fast and hospitals are not managing to accommodate and treat patients, protests slowly diminished in favour of the ruling government. Protests didn't only reflect some people's thoughts on the way the government was dealing with the COVID crisis, but rather they focused more on a general disliking of the ruling party – GERB and the prime minister. What deepened the crisis and fused the protests even more was the official support for the president who publicly announced his position in favour of the protesters. Consequently, the Country faced multiple crises – a health one, a political one and an economical one.

On top of everything, critics of the prime minister accused him of falsifying the true number of people infected with COVID-19 in order to get more subsidy from the European Union, as subsidies were given in accordance with the severity of the crisis in each Member Country. Some people from the opposition claimed that corruption schemes emerged even at the very beginning of the crisis in Bulgaria in all relating sectors such as with procurement of supplies of medical materials and protective wear for the hospitals. Currently, in Bulgaria there are almost no monitoring mechanisms to oversee procure-

ment. However, this is also an issue in many other Countries as well, which is why the G20 meeting discussed good practices in combating corruption in response to COVID-19. The continuing emergency measures affect people's rights and freedoms beyond the immediate threat to their health. Based on the signals of independent oversight institutions, the media and civil society, the government should be the centre of democratic accountability for COVID-19 responses. Accountability of data is a topic which affects in many ways the fight against the virus. On the one hand, there is the accuracy of the statistics of infected people and on the other hand, based on those, there is the allocation of emergency funds. The actual statistics of the virus have been a very controversial topic because of the differences and arguments in the scientific circles. Ever since the beginning of the health crisis in Bulgaria, the number of PCR tests is very small compared to other European countries, which according to scholars it is not sufficient to draft accurate conclusions. In addition, for a very long time, antigen testing was not considered credible enough and the results of these tests weren't included in the official statistics, and thus people who tested positive for COVID-19 could officially avoid being quarantined. Consequently, the allocation of emergency funds by the EU, was proportionally connected to the number of people infected in each Country. The only monitoring mechanism for the public spending during COVID set in action in Bulgaria is the establishment of a temporary parliamentary committee charged with the task to oversee all expenditures. The committee comprised ten elected MPs representing the five parties in Parliament. The aforementioned held meetings and hearings of different ministers. At the end of 2020, the National Audit Office, announced that they would be in charge of performing audits of the implementation of funds to assess their efficiency in the health sector as well as those in support of tourism. Those reports have not yet been published. However, it is im-

portant to mention that some official financial information can be found on a government website dedicated specifically to the pandemic - <https://coronavirus.bg/> - where a list of initiatives/programmes can be found in support of the business during the crisis. Some partial information is also being published on the websites of institutions related to the fight against the virus.

However, if this information is to be trusted remains a very debatable topic, especially since trust in the government is decreasing and parliamentary elections in Bulgaria are scheduled for spring 2021. The opposition and some critics of the ruling government claim that it is hiding and falsifying information to serve its own interests. Allegations of forging data to serve governing parties' interests could be seen vastly on social media. In theory and in practice, abusing with the right of transparency in information in a democratic society can be best described as risky and most parties are aware of that.

A good example of how politically harmful the COVID-19 crisis can be, are the presidential elections in the USA in 2020. Many analysts suggest that Donald Trump lost the elections due to poor leadership during the corona crisis in the USA, given the fact that the USA were among the Countries most badly affected by the virus in the world. In times when people primary concern is their health and their business, politicians face an ever more difficult task to win people approval. Even if people are aware that this is a global pandemic and other Countries are struggling to find the best solution to restrict the spread of the virus as well, when they are given a choice, they are more inclined than in normal terms to judge politicians severely on their mistakes. Precisely because of these special circumstances, it will be interesting to see how the vote will turn out in Bulgaria. With the approach of the election day, there are certain shifts in the media landscape which can be observed. In

most news emissions, COVID-19 numbers are being now communicated in a more subtle way, and attention is not being paid to very concerning statistics such as for example the number of people dead per day. The health crisis is not yet stabilized, but news focus on distracting the attention in other directions, especially related to the upcoming elections.

Along with elections, the timing coincides with another very hot topic – the procurement of vaccines. Unfortunately, we can still observe the government making the same mistakes and not learning the main lesson from the lockdowns – information is key. From a communications point of view, just like in business, when a new drug is placed on the market, a marketing campaign is being set in action to make all parties (doctors and patients) aware of the new medication's properties. A strong and transparent information campaign is necessary to convince the public that the proposed vaccine is safe and effective in the fight against the corona virus. Most critics claim that normally for a vaccine to be created and placed on the market it usually takes a much longer time and when one is said to be ready only in one year, the public finds it hard to believe in its safety. Another issue is the appearance of several companies which now produce and offer vaccines, each of them prepared by a different technology. It seems that just like in the open market, these products have different qualities, therefore it is still unknown to consumers which one will be injected into their body, especially because nobody explains in an easy understandable language. This is where communications should have a leading role. The public is still very hesitant on whether vaccines are harmless for them. Every day, there are news of people who lost their lives after being vaccinated in other Countries which is frightening. Just like the Chinese hid a lot of information concerning the virus and how they dealt with it, it is unwise and unethical for governments to hide information to the public.



In addition, some prognosed vaccination schedules have been recently published which caused a wave of reactions on social media. In very short terms, they indicated that in Bulgaria, a sufficient number of people could be successfully vaccinated. This claim, however, finds itself in total contradiction to the so-far evident number of vaccinations which are disturbingly low, and people do wonder if the government is distributing inaccurate prognosis and is thus misleading the public.

In conclusion, history has already showed us numerous times how devastating pandemics can be. It would be unfair to judge leaders severely on their actions, especially since it's impossible to put ourselves in their shoes. The increased responsibility not only on people's welfare but on their lives is a higher stake than ever. Some people compare the pandemic to a biological world war and even the most exquisite general would find it difficult to come up with the most effective strategy to please everyone. However, we must never forget that being an elected leader of a democratic Country brings certain responsibility to people and must protect their legal rights, transparency of information being one of them. It is precisely why we must constantly remind to our leaders that even though the situation is extraordinary and Countries find themselves in states of emergency, those particular leaders have a duty to society.



# TRAN SPAR ENCY AT STAKE

SECTION IV  
SLOVENIA

## THE CASE OF SLOVENIA

Nataša Briški

The first case of coronavirus infection in Slovenia was confirmed on March 4th, 2020. The National Institute of Public Health declared an epidemic a week later<sup>81</sup>. To curb the spread of the novel pathogen various measures were taken<sup>82</sup>. With some exceptions and running on and off since the start of the pandemic, the Slovenian government banned public gatherings indoors and outdoors. Kindergartens, schools and faculties switched to remote learning, work was suspended or reorganised from home. For two months in the Spring public transportation was suspended and air traffic was shut down. Cafés, restaurants and hotels were closed, as were the vast majority of shops and services establishments. Janša's government which started its mandate on March 13th, 2020, also took early action by closing borders, promoting social distancing, wearing masks and instructing the population to stay at home.

Less than a year ago, in May 2020, Slovenia was considered by some<sup>83</sup> to be one of the most successful countries in the fight against the coronavirus epidemic. The government even declared<sup>84</sup> the end of the COVID-19 epidemic effective from May 15th, 2020. Thus Slovenia became the first country in Europe to take this step and proclaim an end to the coronavirus epidemic at home.

The objective of this article is to analyse the response of the Slovenian government to the challenges posed by the Covid-19 pandemic, the transparency of measures taken during the crisis and the reaction to them. To begin, I'll present the measures taken by the Slovenian government to curb the spread of the new corona virus to help the population and companies to

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<sup>81</sup>Slovenia declares coronavirus epidemic, <https://www.gov.si/en/news/2020-03-12-slovenia-declares-coronavirus-epidemic/>.

<sup>82</sup>Major developments concerning coronavirus in Slovenia (chronology), <https://english.sta.si/2847286/major-developments-concerning-coronavirus-in-slovenia?q=coronaviru,measur>. Source: Slovene Press Agency.

<sup>83</sup>Vietnam, Slovenia, and 3 other Countries overlooked coronavirus success stories, <https://www.vox.com/2020/5/5/21247837/coronavirus-vietnam-slovenia-jordan-iceland-greece>.

<sup>84</sup>Odllok o preključitvi epidemije nalezljive bolezni SARS-CoV-2, COVID-19.

overcome this crisis. Given this, I will analyse, if any, on which statistical and scientific grounds the government based such decisions, and how transparent the government has been in taking them. More in detail, the article also offers a review of the reactions of the population to the list of adopted measures and their implementation, the transparency of decision-making and the government's communication efforts.

### Measures taken facing the Spread of Covid-19, Transparency and access to information

If Slovenia did relatively well in the spring, and the summer was relatively calm, things changed tragically in the autumn. COVID-19 infection rates and the number of COVID-19 patients in intensive care started to rise, as did fatalities. Understandably, the government took a tougher approach<sup>85</sup>. Large-scale lockdown in the fight against the COVID-19 pandemic has been added to the already applicable set of measures such as (1) obligatory use of masks with some exceptions, (2) mandatory disinfection in enclosed public spaces and public transport, and (3) ban on gatherings, events, celebrations and weddings, with some exceptions that included limited number of members of the same household.

Everything started in October 2020 when the Slovenian government severely restricted movement of people, both in time and space. Let's first review these measures, which are facing a lot of public scrutiny due to the lack of following principles of open and inclusive policy making<sup>86</sup>, but are met with mixed results.

To contain the spreading of a deadly virus, a ban on crossing the border between the 12 regions was put in place on October 16<sup>th</sup><sup>87</sup> (lifted on February 15th, 2021). Reason given - dete-

<sup>85</sup>Measures and restrictions, <https://COVID-19.sledilnik.org/sl/restrictions>.

<sup>86</sup>OECD principles for open and inclusive decision making <http://www.oecd.org/governance/regulatory-policy/focus-on-citizenspublicengagementforbetterpolicyandservices.htm>

<sup>87</sup>The government restricted movement between regions, <https://www.mladina.si/201961/vlada-omejila-prehajanje-med-regijami-solski-pouk-spet-od-doma/>.

rioration of the epidemiological situation in the Country and restraint of movement should curb the further spread of infections. A couple of days later, on October 20th, a 9pm-6am police curfew went into effect. It was the first curfew<sup>88</sup> to be declared in Slovenia since WWII. According to COVID-19 spokesman Jelko Kacin, the government decided to restrict movement at night - based on European good practices - on the proposal of an advisory group, and above all because many infections, they claimed, still occurred as a result of socializing and various celebrations. And with some exceptions, on October 27th, 2020, a ban on movement between municipalities<sup>89</sup> was imposed (lifted on February 15th, 2021).

With a few days during Christmas and New Year holidays, all the listed measures were continuously in force for three and a half months. The health situation did not change much in the meantime though. From the beginning of November 2020 and all the way to mid-February 2021 Slovenia was continuously placed among the worst countries in the world according to the number of COVID-19 related deaths per million inhabitants. On December 7th, Slovenia reported a record of 66 COVID-19 deaths in a single day. So people began to doubt about the data and reasons behind explanations given by the governmental spokesmen.

At the behest of the Constitutional Court, the government must consult medical professionals and review the reasonableness of movement restrictions in the light of epidemiological conditions. That must be done on a weekly basis since it is a serious encroachment on human rights.

An investigation by the [necenzurirano.si](https://necenzurirano.si)<sup>90</sup> portal showed that the COVID-19 expert group, with which the government was supposed to regularly consult on the measures, never explicitly

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<sup>88</sup>Curfew for the first time since the Italian occupation, <https://www.dnevnik.si/1042941406>.

<sup>89</sup>The new ordinance on the temporary partial restriction of movement and gatherings prohibits movement between municipalities, <https://www.gov.si/novice/2020-10-25-novi-odlok-o-zacasni-delni-omejitvi-gibanja-in-zbiranja-prepoveduje-gibanje-med-obcinami/>.

<sup>90</sup>Zakaj imamo policijsko uro? Hojs dobil idejo v Francoski Gvajani, <https://necenzurirano.si/clanek/preiskovalne-zgodbe/zakaj-imamo-policijsko-uro-hojs-dobil-idejo-v-francoski-gvajani-838947>.

proposed curfews and restrictions on movement in municipalities. According to the portal, the documentation of the Ministry of the Interior obtained by the portal journalists also revealed that the government did not obtain expert assessments regarding the reasonableness of individual measures before each increase in movement restrictions. They should have done this on a weekly basis. According to [necenzurirano.si](http://necenzurirano.si), the usefulness of the curfew was justified only by a study that analyzed its success in French Guiana<sup>91</sup>. As an expert basis for the introduction and extension of curfews and other restrictions on movement, the government only cited general information on the development of the epidemic taken from COVID-19 Tracker Slovenia website and a list of restrictive measures in other EU countries.

According to a study<sup>92</sup> that analyzed mobility and contact tracing during the COVID-19 epidemic, conducted by the Institute for Biostatistics and Medical Informatics of the Ljubljana Faculty of Medicines, “a ban on travel between municipalities has not reduced people’s mobility, which makes its efficacy questionable”.

Slovenian government led by Janez Janša is also working hard to present the COVID-19 crisis not only as medical but as a security issue as well. Measures in this direction also provoked heated public reactions and response from supervisory institutions. As part of the first package of measures to mitigate the effects of the epidemic (PKPI<sup>93</sup>) several controversial provisions (Article 103<sup>94</sup> and Article 104<sup>95</sup>), mainly related to the strengthening of the police state and the invasion of privacy, were taken under the pretext of tackling the epidemic. And Janša’s government has been trying for months to send additional units of Slovenian Armed Forces with police powers on the southern border thus trying to activate Article 37.a<sup>96</sup> of

<sup>91</sup>Evaluating the impact of curfews and other measures on SARS-CoV-2 transmission in French Guiana, <https://www.medrxiv.org/content/10.1101/2020.10.07.20208314v1>

<sup>92</sup>Study questions efficacy of inter-municipal travel ban, <https://english.sta.si/2855054/study-questions-efficacy-of-inter-municipal-travel-ban?q=coronaviru,measur>.

<sup>93</sup>PKP1, <https://www.gov.si/teme/koronavirus-sars-cov-2/odpravljanje-posledic-epidemije/prvi-paket-ukrepov-za-omilitve-posledic-epidemije/>.

<sup>94</sup>Ibid. Article 103 (Police powers), <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO8190>.

<sup>95</sup>Ibid. Article 104, <https://www.ip-rs.si/novice/epidemija-ne-sme-bit-razlog-za-ukinitve-ustavnih-pravic-1178/>.

<sup>96</sup>Ibid. Article 37.a, <https://zakonodaja.com/zakon/zobr/37a-cen-izjemna-pooblastila-vojske>.

the Defence act on the pretext that the virus spread among migrants. Also pointing to growing numbers - as they would claim - of migrants trying to cross the border illegally. The Police statistical report<sup>97</sup> on illegal migration for the period from January 1st to December 31st, 2020, shows the number of illegal border crossings actually decreasing by 10.2 % compared to the previous year.

This government can not exactly boast of the transparency when adopting the packages of measures to mitigate the effects of the epidemic either. The National Assembly passed eight anti-corona stimulus packages (PKP in Slovene) so far. Each time, members of the government tried and in some case succeeded in including changes in legislation that have nothing to do with the fight against the epidemic.

Transparency International Slovenia was critical of public procurement procedures, where less transparent procedures were selected under the pretext of necessity. That weakens competition, they said, adding that without an expert explanation, the first package (PKPI) introduced a significant increase in the limit values in public procurement (Article 90).

As part of the second package (PKP2<sup>98</sup>), the construction legislation was changed. It now limits the possibility of involving non-governmental organizations in the process of obtaining building permits. With the amendment of the Nature Protection Act, the involvement of environmental organizations acting in the public interest in the field of nature conservation is also prevented in other procedures. This was not welcome by the Commission for the prevention of corruption. Among its tasks in the field of strengthening the rule of law as well as the integrity and transparency of the public sector, this one has the task of monitoring the response of state authorities to the CO-

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<sup>97</sup>Illegal border crossings 2020, <https://www.policija.si/o-slovenski-policiji/statistika/mejna-problematika/nedovoljene-migracije-na-obmocju-republike-slovenije>.

<sup>98</sup>PKP2, <https://www.gov.si/teme/koronavirus-sars-cov-2/odpravljanje-posledic-epidemije/drugi-paket-ukrepov-za-omilitve-posledic-epidemije/>.



VID-19 epidemic in light of corruption and integrity breaches<sup>99</sup>: “The adopted government measure effectively prevent NGOs in Slovenia from participating in building permitting procedures for at least the next two years. And the statement by the Minister of the Environment, when adopting amendments to construction legislation that small environmental organizations deliberately prevent construction and economic activity, points to planned changes to the legal framework. This one disproportionately interferes with existing safeguards to protect public interest in the field of environmental protection. Given that procedures for issuing building permits during the epidemic were suspended only for a short time (less than two months), the reasons for loosening the procedures for granting a building permit for the next two years are questionable.”

As part of the sixth package (PKP6<sup>100</sup>), the government extended the deadline for meeting the conditions for accreditation of higher education institutions. Although the epidemic had no impact on accreditation procedures, this measure was part of the intervention law. On the basis of the submitted request for the assessment of its constitutionality, the Constitutional Court suspended the implementation of this provision until further notice. The applicant of a request claims<sup>101</sup> the change was made without justification and for reasons unrelated to mitigating the effects of the epidemic. It is also alleged that it is an inadmissible interference in the ongoing accreditation procedures, as well as that the adoption of a decision on the inadmissibility of calling a legislative referendum on PKP6 prevented voters from requesting a referendum. According to some experts, extended deadline is supposed to play into the hands of a New private University, close to the ruling SDS party. Representatives of New University vehemently reject alleged problems meeting quality criteria, claiming political motives<sup>102</sup> behind the attacks on them.

<sup>99</sup>Commission for the prevention of corruption, <https://www.kpk-rs.si/2020/05/04/rahljanje-postopkov-pridobivanja-gradbenih-dovoljenj-in-zaostritev-pogojev-sodelovanja-nevladnih-organizacij-v-teh-postopkih-povecuje-nastanek-teganj-za-korupcijo-in-krsitve-integritete/>.

<sup>100</sup>PKP6, <https://www.gov.si/teme/koronavirus-sars-cov-2/odpravljanje-posledic-epidemije/sesti-paket-ukrepov-za-omlitev-posledic-epidemije-pkp6/>.

<sup>101</sup>Renewal of accreditations for higher education institutions has been delayed, <https://www.delo.si/novice/slovenija/zadrzno-podaljevanje-akreditacij-visokosolskim-zavodom/>.

<sup>102</sup>Jambreč and Avbelj on the political motives of the former rector of the University of Maribor Rebolj in discrediting the New University, <https://nova24tv.si/slovenija/jambreč-in-avbelj-o-politčnih-motivih-nekdanjega-rectorja-univerze-v-mariboru-rebolja-pri-diskreditacijah-nove-univerze-bil-je-clan-stranke-zares/>

The government also had problems with the transparency of its decision-making in the last adopted eight package (PKP8<sup>103</sup>). They introduced new penalties for residents and legal entities for which there are no rules at all.

The government also passed new rules<sup>104</sup> on law-making to speed up the implementation of laws designed to alleviate the consequences of the epidemic. However, the change remains of general implementation. Transparency International Slovenia<sup>105</sup> drew attention to the risks of making decisions of public importance following a fast-track or urgent procedure. It significantly impairs the possibility of participation of professional and of general public in these legislative procedures. This worsens the quality of decisions and, with unequal access to decision-makers, increases the risk of decisions being handwritten by certain stakeholders.

So in addition to (1) strict restrictions on the movement of people, (2) attempts to use the health crisis to increase police and military powers and (3) the obvious lack of transparency when adopting packages to mitigate the effects of the epidemic, there is also an investigation into purchasing protective equipment.

At the end of April 2020, Ivan Gale, the whistle-blower from the Commodity Reserves Agency, publicly revealed<sup>106</sup> political pressures in the procurement of personal protective equipment. Allegations of government misconduct in the purchasing of protective personal equipment which are adamantly denied by involved ministers and also dismissed by the Prime Minister, have become subject of a parliamentary inquiry<sup>107</sup>. The parliamentary commission of investigation on the purchase of protective equipment and measures to contain COVID-19 should determine the possible political responsibility of public

<sup>103</sup>PKP8, <https://www.gov.si/teme/koronavirus-sars-cov-2/odpravljanje-posledic-epidemije/osmi-paket-ukrepov-zamilitiv-posledic-epidemije-ppk8/>.

<sup>104</sup>Zakon o spremembah in dopolnitvi Zakona o referendumu in o ljudski iniciativi, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2020-01-0785/zakon-o-spremembah-in-dopolnitvi-zakona-o-referendumu-in-o-ljudski-iniciativi-zril-e>.

<sup>105</sup>Political integrity in Slovenia, <http://transparency.si/8-novice/462-politica-integriteta-v-sloveniji-pomanjkjivosti-na-podrocju-zagotavljanja-transparentosti-odlocitev-javnega-pomena>

<sup>106</sup>Background of ordering and purchasing protective equipment, <https://4d.rtvlo.si/arhiv/tarca/174688312>.

<sup>107</sup>[http://www.pisrs.si/Pis.web/pregledPredpisa?id=AKT\\_1177](http://www.pisrs.si/Pis.web/pregledPredpisa?id=AKT_1177).

officials. But, and here's the catch, since the investigation was proposed by the coalition, which overtook the initiative of the opposition by a few hours, the commission<sup>108</sup> will largely focus on the period before the start of Janša's government (March 13th, 2020), i.e. starting from February 1st, 2020. The current government claims their predecessors, led by Marjan Šarec from LMS, left them empty warehouses. The coalition also accuses Šarec's government of taking untimely measures to protect against the epidemic. Parliamentary commission started its works on October 15th, last year. So far, there is no publicly available information on how far they are.

In addition to all of the above, it is also worth mentioning that Slovenia had the longest period of closed schools in the European Union<sup>109</sup>, from October 19th, 2020, to February 9th, 2021. Even though schools were not considered to be one of the outbreaks of COVID-19 infections, they were closed for almost four months. "Schools are opening and closing according to statistics, standard deviations and test errors, with epidemiologists", writes Mladina<sup>110</sup>, "proposing to the government in mid-November that at least pre-school children and first-graders be allowed to go to school as soon as possible."

While desperate parents wondered why other activities could be opened and schools could not, and despite the fact that children and youth are among the most vulnerable groups, Minister of Education Simona Kustec blamed poor epidemiological picture for closed schools. At the same time, she claimed<sup>111</sup> that Slovenian school system is better prepared for distance education than most other countries in Europe. Experts say, not true.

<sup>108</sup><https://www.dz-rs.si/wps/portal/Home/ODrzavnemZboru/KdoJeKdo/DelovnoTelo?dIDT=DT067>.

<sup>109</sup><https://www.24ur.com/novice/slovenija/slovenski-otroci-se-od-doma-solajo-ze-10-teden-tako-dolgo-sole-niso-zaprte-nikjer-v-eu.html>.

<sup>110</sup>Deli in vladaj, <https://www.mladina.si/204927/deli-in-vladaj/>.

<sup>111</sup>When will Slovenian children go back to school <https://www.24ur.com/novice/korona/ministrice-za-solstvo.html>.

## *Citizens' reactions to the implementation of urgent measures*

Since March 2020, Valicon has been monitoring public response to life in an epidemic in Slovenia. The most recent results of the #Newnormal survey (published on February 11th, 2021<sup>112</sup>), measuring people's attitudes towards the new coronavirus, responses to the measures adopted and the level of confidence in the work of the government of the Republic of Slovenia show the percentage of those who perceive the current situation as negative (66 %) has been more or less increasing since the beginning of the epidemic. The months of May and June have been the only exception to that rule.

And while for the last six months, up to mid-January, pessimism has been constantly growing, now 76 % of the respondents think that things are getting better regarding the spread of coronavirus in Slovenia. A record number (63 %) at the same time believe current measures taken by the government to control the spread of the virus are way too strict. It is therefore not surprising that not many people trust the government's work to curb the spread of the virus. Latest numbers shows only 28 % trust the government to do the job.

“People's trust in fellow citizens and public institutions is especially important in times of crisis”, says<sup>113</sup> associate professor Tanja Kamin, chair of marketing communications and public relations at the Faculty of social sciences, University of Ljubljana. As adherence to government action depends on a variety of factors, she believes that an important reason for the lack of public confidence in the government of prime minister Janez Janša is poor communication about measures and the pandemic<sup>114</sup>: “Communicating about the measures taken and the pandemic affects how people experience the crisis. Distrust in Slovenian government is growing because of inadequate and

<sup>112</sup>#Newnormal survey, <https://www.valicon.net/si/2021/02/kjub-vecjemu-optimizmu-glede-sirjenja-virusa-velikavecina-situacija-se-vedno-obcuti-precej-negativno-skoraj-dve-tretjini-vprasanih-ukrepe-ocenjuje-kot-prestroge/>

<sup>113</sup>Vaccination and COVID-19 - Between (dis)trust and solidarity, Pritličje Ljubljana round-table, [https://www.youtube.com/watch?v=OX1rNXsVYWQ&feature=emb\\_title](https://www.youtube.com/watch?v=OX1rNXsVYWQ&feature=emb_title).

<sup>114</sup>60 years of Faculty of social sciences “Covidlada: Družboslovne refleksije epidemije”, <https://www.fdv.uni-lj.si/obvestila-in-informacije/dogodki-in-utrinki/napovednik-dogodkov/60-let-fdv-covidlada-druzboslovne-refleksije-epidemije>, YouTube <https://www.youtube.com/user/UJFDV/live> (in Slovene only).

harmful communication. Due to the use of intimidating rhetoric and the exclusion of experts from public communication, the COVID-19 crisis poses a severe psychological burden for people. They have a feeling that politicians have taken advantage of the pandemic for their own interests. The government made little effort to explain and encourage, but looked for culprits among people. They established power relations and it was the public that was completely subservient.”

Distrust in the government has been mirrored in weak support for tracing application #OstaniZdrav (i.e. #StayHealthy) that government introduced in July and made public in August 2020. After a huge opposition to the idea of its mandatory use, as first envisioned by the government, an app was then released in line with EU recommendations: the use being voluntary. The latest data available<sup>115</sup> (March, 4th, 2021) shows 385 owners of mobile devices in Slovenia downloaded the app #OstaniZdrav so far, about 18 % of population in the Country.

### *Conclusion*

As in the first half of 2020, Slovenia was relatively successful in the fight against the new coronavirus, unfortunately the second half was anything but. There are several reasons for that. Some experts point out the inadequacy of the adopted measures. They claim these ones are not adequately and sufficiently based on data and scientific know-how available at the time. Some blame the government of not being transparent enough in fighting the spread of COVID-19 and point out to lack of transparency in the adoption of packages of measures to mitigate the effects of the epidemic AND in the procurement of protective gear and ventilators during the coronavirus outbreak. Some blame miscommunication of the epidemic for extremely bad health cases in the Country. Instead of explaining and

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<sup>115</sup>Statistics of the application #OstaniZdrav, National institute of public health. Available at: [https://podatki.gov.si/dataset/statisticki-podatki-aplikacije-ostanizdrav?resource\\_id=cf4601a8-edb0-4c3e-8646-a8d9a4094375](https://podatki.gov.si/dataset/statisticki-podatki-aplikacije-ostanizdrav?resource_id=cf4601a8-edb0-4c3e-8646-a8d9a4094375).

comforting, the rhetoric was too often quite the opposite, intimidating. The authorities stirred up fear in their appeals with a patronizing style of communication. Due to all of the above, the level of trust in the government and in its main spokesmen remains low, which consequently affects non-compliance with COVID-19 measures as well.

As of March, 7th, 2021, Slovenia has performed over 940.892 tests, more than 195.086 people have been infected with coronavirus and there have been 3891 deaths recorded due to COVID-19, according to the data posted on COVID-19 Tracker Slovenia. This one is a citizen initiative project which collects, analyses and publishes data on the spread of the SARS-CoV-2 coronavirus and the cause of COVID-19 in Slovenia. Based on the data available at the time of writing this article, infamous statistics of the number of COVID-19-related death per million inhabitants put Slovenia among the Countries in the world that did the worst.

## SLOVENIA: USING THE COVID-19 PANDEMIC FOR EXECUTIVE POWER-GRAB AND DEPARTURE FROM THE SYSTEM OF CHECKS AND BALANCES

*Aljaž Pengov Bitenc*

Slovenian Constitution and its supporting legislation allow a wide range of actors to participate in the legislative process. Parliamentary groups, individual deputies regardless of party affiliation, members of the public and even the Supreme court, can either submit draft legislation or at the very least compel the National Assembly to address an outstanding issue with specific legislation<sup>116</sup>.

In reality, however, the vast majority of draft legislation is put forward by the national government as the top level of the executive branch.

To understand the failures in transparency in the management of COVID-19 and how they were compounded and exacerbated by the environment described in the article by my colleague Nataša Briški, it is necessary for us to get at least a broad understanding of how the process of drafting and approving legislation works. Or, to be precise, how it *should* work.

In this article, we will show that while the decision-making process has largely remained intact, enough loopholes and quirks were created during the pandemic to make it much more opaque, and difficult to navigate for an outside observer.

We will also show that, combined with a rubber-stamp parliamentary majority, these subtle and not-so-subtle changes have the cumulative effect of noticeably eroding the accepted demo-

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<sup>116</sup>Article 88 of the Constitution, <https://www.us-rs.si/media/constitution.pdf>

cratic standard and the system of checks and balances.

### *Decision-making Process in the Government*

On any given day, the Slovenian government might deal with matters ranging from purely operational issues to strategic policy-making which requires processing large amounts of existing legislation, raw data and drafting changes to a wide range of laws. To this end, the decision-making process in the executive branch has been adapted adjusted to better suit the nature of the assignment.

Broadly speaking, there are two levels to the government's decision-making process in the governmental decision-making process:

The *single-step process* is normally used when the top body of the executive branch is dealing with routine and/or operational matters, specific in nature. These matters are handled by various government committees including representatives from ministries (usually a minister or a state secretary, the second-in-command) under whose purview the matter at hand falls.

Unless the matter is contested, the decision adopted by the committee stands as the final decision of the government and is published in the Official Journal, whereby it enters into force.

If the matter at hand is challenged, however, or is complex in nature, it goes through a *two-step process*, where the said committees still address the subject matter and draft a decision, while the actual approval (or rejection) is done by the entire government in a plenary session, where every minister (or the state secretary representing them) has an equal vote and decisions are usually, but not always, adopted by unanimity<sup>117</sup>.

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<sup>117</sup>For the sake of the clarity, we should also add that there are different types of government sessions (notably, plenary and correspondence sessions), but this distinction is less important for the purposes of this text.



## *Low-level Committees Playing High-stake Games*

In a curious twist of fate, the onset of the Covid-19 pandemic in mid-March in Slovenia coincided with the swearing-in of a new government, led by the populist-right SDS party and its leader Janez Janša.

This being Janša's third spell at running the executive branch<sup>118</sup>, and with the first wave of the pandemic making its presence rapidly felt in the country, he and his team hit the ground running.

As with most of the EU, the immediate concern was the apparent lack of PPEs and medical ventilators. While the previous government had already declared the epidemic<sup>119</sup>, thus triggering the special powers clause of the Communicable Diseases Act<sup>120</sup>, the task of procuring said items fell on Janša's government.

And while the special powers already gave the government plenty of wiggle room in terms of departing from the usual public procurement procedures<sup>121</sup> (the government described these as "less transparent public procurement procedures" in an explainer note on its electronic public procurement portal<sup>122</sup>), the entire process was made even more opaque by establishing a parallel, Covid-19-only procurement chain.

To put it in the simplest terms, the government established an interdepartmental committee tasked with collecting and appraising potential bids for PPE and medical ventilators procurement. Those bids that the committee deemed appropriate were then forwarded to the Agency for Commodity Reserves (ZBR) to formalise and execute the purchase.

## The establishment of interdepartmental committees within

<sup>118</sup>Previously, Mr. Janša served as PM in 2004-2008 and in 2012-2013

<sup>119</sup>The Covid-19 epidemic was declared on 12 March 2020 by the government led by Janša's predecessor, Marjan Šarec, <http://www.gov.si/novice/2020-03-12-slovenija-razglasila-epidemijo-novega-koronavirusa/>

<sup>120</sup>Communicable Diseases Act (ZNB), <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO433>

<sup>121</sup>Art 27 and Art 46 of the Public Procurement Act, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7086&d=49683-s=3&d=49683-p=1&d=49683-o=2>

<sup>122</sup>As posted on <https://ejn.gov.si/obvestilo.html>

the government is a standard practice. They are usually tasked with drafting policies and bills, reports, analyses, and recommendations. They are usually staffed with low-level government specialists covering specific areas<sup>123</sup>. In this case, however, the committee on PPE procurement was empowered to make final decisions while having none of the responsibility for actual procurement and quality control.

At the same time, ZBR is one of the smallest government agencies, usually tasked with buying excess product (mostly in the agricultural sector) and keeping an inventory of government-owned commodities, available to be released in case of emergency, to prevent shortages and price hikes. In other words, ZBR is used to dealing with situations of surplus availability and *preventing* commodities market fluctuations, rather than catering to excess demand at mark-up prices.

This break-down of responsibility between a low-level committee with substantial power and little accountability on one side, and a semi-important and under-staffed government agency with no experience in emergency procurement during a global shortage on the other side was the key to what became known as “The Ventilator Affair”.

The scandal where a whistle-blowing employee from ZBR exposed what he alleged were cases of rampant corruption, political favouritism and purchases of sub-par equipment is now investigated by the Court of Audit and a parliamentary investigation committee<sup>124</sup>.

This particular case<sup>125</sup> is still evolving and the upcoming report by the Court of Audit is of a great interest. Especially after the Court president Tomaž Vesel has become a target of a character assassination campaign in late 2020 for reportedly

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<sup>123</sup>See, for example, government document 00104-338/2016/42, dated 7.12.2016, detailing duties of interdepartmental committees.

<sup>124</sup>Often, businesspeople with little or no experience in healthcare but with a vested interest in other dealings with the government would be the favoured providers of equipment, such as Slovenian gambling equipment mogul Joco Pečičnik (<https://www.occrp.org/en/coronavirus/opaque-coronavirus-procurement-deal-hands-millions-to-slovenian-gambling-mogul>).

<sup>125</sup>See Nataša Briški's article for more details on this matter.

preparing a damning report<sup>126</sup>, despite PM Janša had already asked the Court to audit procurement procedures earlier in the year<sup>127</sup>.

### *The Habit of Temporary Changes*

While the procurement practices of the Slovenian government during the Covid-19 pandemic are unbearably opaque and show many signs of plainly corrupt behaviour, the real danger does not lie with the acts themselves.

Much more worrying is the systemic lowering of democratic standards and the trend of opaque stop-gap procedures used during the pandemic becoming the norm going forward.

In January, transparency advocates raised alarm over the proposed changes to the Public Procurement Act the Janša government sent to Parliament for adoption. To wit, among numerous other problematic amendments, the draft law includes changes to Article 46 that would further reduce the already lacking transparency of the procurement procedure, according to Transparency International Slovenia<sup>128</sup>.

Moreover, the government appears to have occasionally used the single-step process (see above) for extending a set of sector-wide lockdown measures<sup>129</sup>, although normally the two-step procedure would be expected when adopting such a complex and wide-reaching decision.

This eschewing of accepted levels of governmental transparency goes hand-in-hand with a situation in early December 2020, when the Constitutional Court found out<sup>130 131</sup> the government had neglected to publish a school lockdown order in the Official Journal, thus failing at the very basic of concepts of

<sup>127</sup><https://www.total-slovenia-news.com/politics/6234-jansa-dismisses-allegations-of-wrongdoing-in-ppe-purchases>

<sup>128</sup>[https://www.transparency.si/images/dokumenti/TL\\_SLO\\_2021\\_zjn-3b.pdf](https://www.transparency.si/images/dokumenti/TL_SLO_2021_zjn-3b.pdf)

<sup>129</sup><https://www.gov.si/novice/2021-01-05-odlocitve-vlade-s-sej-vladnih-odborov/>

<sup>130</sup><http://www.us-rs.si/documents/46/5a/u-i-445-207.pdf>

<sup>131</sup><https://selih.si/en/covid-19-en/the-decision-of-the-constitutional-court-on-invalidity-of-the-governments-measures/>

legal predictability and the rule of law.

And while not specifically contested, this ruling does indicate that the entire series of government orders and decisions adopted during the Autumn “second wave” of the pandemic in Slovenia, were inherently bereft of any legal standing, and yet they were fully enforced without any scrutiny until the highest Court in the Country stepped in; and even this happened only after a group of private citizens challenged a specific lockdown measure.

### *Parliamentary Decision-making Process*

The legislative procedure in the National Assembly, the main parliamentary chamber in Slovenia, is similar to other European parliamentary democracies. That is to say, it consists of three readings: the first reading consists of publishing the draft law in the parliamentary internal information system, the second reading is where the actual work on the bill is done while the third phase consists of a plenary debate on any outstanding amendments and final adoption of the law.

The second reading (the so-called “Committee phase”) is the most important one: specific provisions are debated, amendments are tabled and withdrawn, and the draft wording takes on a basic shape or is subject to an early dismissal, depending on the support it received.

Importantly, this “regular” legislative procedure takes place over a couple of weeks or even months, as the National Assembly holds one session per month and each reading is supposed to take place in a separate session<sup>132</sup>. This is to provide a cooling-off period after each phase and to allow time for proper scrutiny and public debate.

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<sup>132</sup>Under special circumstances, the second and third reading can be joined together, thus shortening the procedure.

## *Omnibus Legislation and Muddying of Legislative Waters.*

In specific circumstances, however, the National Assembly can adopt legislation using a shortened, or an urgent (highly shortened) legislative procedure.

In accordance with Article 143 of the National Assembly Rules of Procedure<sup>133</sup>, urgent procedure was used to pass most of the emergency legislation aimed at soothing the detrimental effects of the pandemic on Slovenian society and economy.

This is not per se problematic. A pandemic is exactly the type of situation that calls for the use of Article 143 of the Rules of Procedure. There was broad political and public support for swift executive and legal action to blunt the blow of the coronavirus onslaught.

However, in what has since been turned into something like a form of art, the government has used this procedure to ram through the parliament a series “anti-corona packages” or PKPs (in Slovenian, *protikoronski paketi*).

These packages were notable for their unorthodox and oft-criticised approach at changing large swaths of legislation by ways of a single piece of omnibus legislation. To give an example at random, the seventh PKP package introduced changes to twenty-nine separate laws, from tax legislation and law on hunting wild animals, to copyright law and previous PKPs, all in one fell swoop.

While the majority of PKP provisions deal with the intended subject matter (that is pandemic relief), often the government would introduce draft articles which have very little to do with the pandemic, but are very much a part of the government’s

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<sup>133</sup><https://mss.dz-rs.si/MIS/ImisAdmin.nsf/MISNetAgent?OpenAgent&2&DZ-MSS-01/ca20e005b7216183df44d3312b92af8bdfb7e69e65bb71944837315a42bb600e>

anti-intellectual and populist ideology, including (but not limited to) hatred of the NGOs, derision of the creative sector and attacking the media.

### *Using Anti-pandemic Legislation to Legislate Non-pandemic Matters*

One such example was found early on, when the pro-government MPs tried to use the legislative package to amend the law on environment, to limit the role of environmental NGOs in spatial planning. The outcry that followed succeeded in modifying the provision and slowing the parliamentary procedure, although the offending passage was not entirely scrapped.

Similar situations were encountered with virtually all PKPs. Eight of them provided regulations for non-pandemic issues: changes to NGO financing, selective accreditation of privately owned universities or forced retirements. Almost every single PKP package included provisions that had little or nothing to do with managing the pandemic.

This sort of omnibus legislation approach was frowned upon by the Country's legal experts<sup>134</sup> In their view, it created confusion as it changed multiple legal variables at once and did not allow enough time for proper legal scrutiny. This increased the possibility of constitutional challenges down the road as well as the possibility of unforeseen and undesired compound legal effects.

### *Neutering Checks and Balances*

Constitutional challenges, however, they have become much more difficult, further limiting the scope of parliamentary and judicial scrutiny, thus derailing the entire system of checks and balances.

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<sup>134</sup>The parliamentary legal service had few good things to say about the omnibus approach. <https://mss.dz-rs.si/IMIS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/0fcf48ac48c904e4a15524b2513f53a76889cf84467dba829139c073f682120a>

The opposition and various other stakeholders were unhappy with the government's opaque omnibus legislative approach and tried to impede it from the get-go. However, after the opposition showed it could effectively run interference and bog the procedure down, the government coalition in the Parliament rammed through a change to the referendum legislation, carving out a loophole which all but prevents challenging "critical" legislation in any meaningful form.

As things stand, Slovenian referendum legislation already prevents specific types of laws from being subject to a referendum. These include laws critical to national security, functioning of the state (internal revenue, budget, etc) or managing natural disasters, among others.

However, even these types of legislation are – as they should be – subject to voters' oversight via a popular referendum, if an appropriate challenge is mounted within a seven-day cooling-off period between adoption and promulgation of the law. If such a challenge is mounted, the parliament must reconvene on this matter within 14 days and pass an act denying the referendum. This, in turn, allows for petitioners to challenge the ban in the Constitutional Court<sup>135</sup>.

Crucially, the disputed law shall not be promulgated until the issue of referendum ban is resolved.

Specifically, this means that either a group of MPs or the National Council (a sort of second chamber of the parliament with limited powers) could mount a constitutional challenge of a "critical" law within a seven-day cooling-off period, between adoption and promulgation of the law. In theory, this constitutional mechanism allows for at least the crudest of checks against executive overreach and abuse of legislative power.

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<sup>136</sup>As defined in Line 1, Paragraph 2 of Article 90 of the Constitution

However, under the guise of the epidemic, the Referendum Act was amended with Article 21a, throwing the usual procedure out the window in cases of critical legislation dealing with natural disasters and national security<sup>136</sup>. In these cases, the National Assembly now has the power to scrap the cooling-off period and have the law come into force immediately upon adoption and publication in the Official Journal.

This has been repeatedly done with PKPs over the course of the pandemic.

Furthermore, while judicial oversight does remain in place over a referendum ban under Article 21a, it can be only triggered *ex post*. Since many of the provisions in the PKPs are time sensitive, it is not inconceivable that by the time any given constitutional challenge would be allowed, the issue itself would have long become moot.

More worryingly, however, is that – despite the new provision was enacted under the guise of the Covid-19 pandemic – it can be used to block a referendum bid against non-Covid-19 legislation as well.

Actually, this already occurred with a law on defence spending, where the government argued that a multi-year spending framework for armed forces was an immediate national security matter and voted to invoke Article 21a of the Referendum Act.

In all fairness, the minimal judicial recourse offered by Article 21a was fully used by the opposition, and the Constitutional Court froze the execution of the law while pending a final decision on whether the referendum would be lawfully denied<sup>137</sup> or not. However, the fact remains the already minimal legislative checks on executive power during a pandemic were waived

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<sup>136</sup>As defined in Line 1, Paragraph 2 of Article 90 of the Constitution

<sup>137</sup>See decision of the Constitutional Court U-I-483/20-10 of 7 January 2021 (<http://www.usrs.si/documents/e2/43/u-i-483-202.pdf>)



in a non-pandemic scenario at the first possible opportunity.

It is therefore necessary to say that, as a result of the pandemic, the system of checks and balances in Slovenia has been noticeably destabilised.

### *Opportunities, too Tempting to Pass*

To recap, while the Covid-19 pandemic wreaked havoc in Slovenian society and economy, both expected to take a long time to recover to pre-pandemic levels, democratic standards and transparency of government can probably be considered as damaged beyond repair. At least in the mid-term.

The loopholes, caveats and precedents created by this government during this pandemic can and will be used in other less relevant circumstances, simply because they will present the path of less friction and will seem political expedients whatever circumstance may arise. If there is any opportunity, it may well prove to be too tempting to pass.

Case in point being the infamous Article 37a of the Defence Act, which was passed in 2016 in the wake of the migration crisis a year earlier, and which (unwisely) provides the armed forces with policing powers over civilians in cases where the police forces would be over-done.

At the time, the liberal government of PM Miro Cerar assured public opinion and skeptics within its own ranks that the provision would only be used in case of another mass migration event and only within limited scope. Needless to say, that in 2020, the right-wing populist government of PM Janez Janša tried (and luckily failed) to invoke this clause multiple times and even tried to generate circumstances (such as intentionally

over-stretching the police) which would provide legal cover for activation of the Army.

*Path forward (if any)*

There is virtually no doubt that the same basic scenario will unfold in a near future. A government, any government, will find itself in a legislative and/or political constraint that will likely have nothing to do with a health crisis, and will look for ways out. It will inevitably find them either in any of the maligned processes described above, ranging from dubious public procurement procedures to perfunctory oversight of executive orders, to playing fast and loose with the legislative procedure and eschewing the system of check and balances.

Stability and democratic standards of any given political system are by definition tested in borderline situations. In Slovenia, the pandemic has brought about many borderline situations, repeatedly. While many attempts to throw the liberal democratic system out of political arena were defeated or at least pushed back temporarily, particularly in the NGO and media sectors, a steady stream of erosion of democratic institutions has continued unabated.

Changing the course of any of this for the better will require much more than just paying the usual lip service to the rule of law and transparency. It will require political vision, ideological determination, and understanding that the need to nurture democratic standards goes beyond the usual election cycle.

To put it bluntly, in order to reinvigorate the democratic standard and transparent governance in Slovenia, a government (any government) must deliberately run the risk of losing power.

Unfortunately, in the current climate this is an almost impossible claim.





# TRAN SPAR ENCY AT STAKE

**SECTION V  
NETHERLANDS**

## THE DUTCH APPROACH: BE A GROWN UP, FACE THE FACTS (BUT PLEASE DO NOT ASK FOR MINUTES OR OPEN DEBATE)

*Carsten Zwaaneveld*

*“I’m not a dictator. And even if I wished to be - and luckily I don’t want to - we just don’t have to security apparatus to do so in the Netherlands. We lack police, we lack army personnel, and – when asked – they would refuse. So, we’ll have to do with Dutchman who behave as grownups and face the facts, as you do in a mature democracy.” – Dutch prime minister Rutte (press conference, 6 August 2020)*

This quote above reveals quite a bit about the Dutch attitude: down-to-earth arranging the necessary steps to control the virus and keeping things practical above all. However, let’s not begin in August, but go back all the way to Sunday, March 15<sup>th</sup> 2020.

Back then, the coronavirus was causing rampage in several parts of the European Union. Some European leaders declared either war or a state of emergency, sometimes accompanied by a full lockdown. It had become clear that a local transmission was taking place in the Netherlands with increasing numbers. If no action were to be taken, the health care system would collapse. So, at about 5h30 pm, the Dutch government held a press conference announcing new, stricter measures. Two ministers (the prime minister was not one of them) told the public that they deemed it necessary for cafes and restaurants to close from 6pm onwards. What they didn’t explicitly reveal to the public was that it would take several more days for 25 regional mayors to create the necessary (temporary) legal base. In fact, the police went into the streets in several places after 6pm to check if they were closing down.

Yet, the Netherlands is a respected democratic society ruled by law and is well known for its functioning bureaucracy. It scored 3rd out of 195 in the GHS Index for pandemic preparedness in 2019.<sup>138</sup> How was it then possible that these serious freedom restricting measures were repeatedly taken with a delayed or flimsy legal base, that they were announced through leaks and press conferences rather than through informing parliament first, and which were often so complex that even enforcing mayors would contradict their own decrees?

This chapter will try to answer some of these questions. It can't be conclusive considering the length of the chapter, however, I will set the stage through *capita selecta*<sup>139</sup>. I will introduce the reader with all the main laws and key players that one needs to know (paragraph 1). From there, I work through the ordinance of regional emergency decrees and its consequences (paragraphs 2 & 3). Next, the reader is taken to the national level through parliamentary debate, a temporary covid law and informal decision making (paragraphs 3 & 4). The closing paragraph (6) will reflect on the approach taken and the lessons that need to be learned.

- Legal Instruments to Tackle a Crisis

Ever heard of Hydra, the many headed mythological creature? Keep it in mind when reading this paragraph. Depending on the type of crises, either a local mayor; a mayor leading a safety region (on its own or through instruction from a national minister) or the national government is competent to respond. They will typically have the necessary executive powers for the duration of a crisis – and are only to be called to their representative body for accountability afterwards. This is done from the perspective taken by the Dutch ‘crises legislation’, which is that most crises are short-lived and regional. Think of a fire in a

<sup>138</sup>See <https://www.ghsindex.org/country/netherlands/>.

<sup>139</sup>It's also good to note that the chapter is limited to the European part of the Netherlands as the 3 special public bodies (Bonaire, Sint Eustatius and Saba) in the Caribbean part of the Netherlands have had specific needs throughout the crisis and distinct legal bases.

chemical plant, a two-day power cut during a cold spell in winter, a localized outbreak of an infectious disease and so on. And when not – which is the case for the more serious emergency legislation - legislation has been written with more traditional threats in mind. War, sabotage, destabilizing (foreign) actors and so on are then taken as reference rather than modern day risks like the effects of climate change and pandemics.

#### *Municipality Law (Gemeentewet)<sup>140</sup>*

The municipality law regulates the day-to-day business of the 352 Dutch municipalities. The powers and responsibilities of the different branches of government are described, as well as many practical procedures. Typically, the municipal executive - consisting of the mayor and the alderpersons- have their own portfolios but they have collegial decision-making. There is one distinct exception to this rule: maintaining public order. The mayor is the sole responsible person for this<sup>141</sup>. He can issue oral and written binding directions, even overriding the law (apart from the Constitution); see articles 172-180. Once the crisis is under control, the Council can hold the mayor accountable. One does not start a group discussion or legal nitpicking when public safety is at acute risk. Act first, justify later seems to be the underlying principle. It's a system designed for short term orders and decrees.

#### *Law on Safety Regions (Wet op de veiligheidsregio)*

Some crises are of more than local significance. If such crises happen, coordination is taken over (from the local mayor) by the chair of the relevant safety region. The 352 municipalities are clustered into 25 safety regions for this purpose. The chair will typically be held by the mayor of the largest city in the area, but this is not always the case. The mayor in charge will consult

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<sup>140</sup>All laws and delegated regulations referred to in this chapter can be found by their Dutch title on [wetten. overheid.nl](http://wetten.overheid.nl).

<sup>141</sup>The mayor is not elected by the population, but appointed by the King after a selection process of the municipal council, he or she can be selected on (crisis management) skills and feels a less direct need to please the populus. This can be either a con or a plus in this context. It might help effectiveness of the incident response, but can create a democratic deficit for the duration of the lack in control by the representative body.



with the other mayors of the region before making a decision. If any mayor disagrees, they can ask for this objection to be put on record. Once the crisis is over, the chairing mayor has to send a written report on the situation and the decisions made to all involved municipality councils for debate.

#### *Law on Public Health (Wet op de publieke gezondheid)*

The Law on public health stipulates the existence of municipal health services (GGD). Among their tasks are infectious disease control and vaccination programmes. They are organized regionally, through cooperating municipalities. In most parts of the Netherlands, the geographic areas between the safety region and the GGD overlap. There is no formal authority for the Minister of Health to direct GGD's.

The law also classifies diseases in different ranges (A, B1, B2, C) with corresponding mandate and obligations to act. For a disease with an A-classification, like COVID-19, the most centralized division of powers within the law applies. In this case, the Law on public health gets linked with the law on the safety regions: through article 6 sub 4, the chair of the safety region takes over control from the local executive and will follow ex article 7 the directions given to them by the Minister of Healthcare. The emergency decrees in the first months (until December) were based on this route.

#### *Emergency legislation (Wet bijzondere bevoegdheden buitengewone omstandigheden & Coördinatiewet uitzonderingstoestanden)*

For emergency situations outside of the scope as stated before, there are some more possible sources for the central government to act. The *Wet bijzondere bevoegdheden buitengewone omstandigheden* (Civil Authorities Special Powers Act)

and the *Coördinatiewet uitzonderingstoestanden* (Exceptional Situations Coordination Act) are the main ones to keep in mind now<sup>142</sup>.

The Coordination Act can be used to either declare a limited or full state of emergency by a royal decree initiated by the prime minister. The combined houses of parliament can decide not to allow (the continuation of) the state of emergency. The declaration of the state of emergency allows the use of a whole toolkit of emergency legislation the Coordination Act refers to. However, most of this legislation has not been kept up to date. It refers to abolished government agencies or secondary legislation that has not been made and the attached list itself is incomplete<sup>143</sup>.

One of the laws referred to is the Civil Authorities Special Powers Act. This law can order compulsory evacuations, body searches, intervention of mail, censorship and much more. A limited number of powers can be called for without a state of emergency, amongst which a curfew. To set a curfew, the prime minister initiates a royal decree (for temporary use) and has to send a bill to parliament for the continuation of the curfew. Once the royal decree is published, the minister of justice and security is competent to set a curfew compliant with the procedures set forth in the delegated legislation (an ‘amvb’ – an executive degree that details one or more article of law to be sent to the Council of State before being proclaimed). If no such regulation is available or fit for the emergency situation at hand, a ministerial regulation is allowed.

### *Constitution (Grondwet)*

One of the most surprising elements of the Dutch constitution is how sober and formal it is. No extensive catalogue of

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<sup>142</sup>The government was asked by parliament to use the *Vorderingswet*, a law that gives the government the power to claim goods, to procure enough face masks for health care personnel. The intention was soon withdrawn when it became clear the result would be contradictory to the goal purposed.

<sup>143</sup>Vink, J, ‘Het Nederlands staatsnoodrecht’, *NJB* 2020/1134.

procedures, and the constitutional rights are mostly safeguarded by formal infringement requirements. Unlike many other countries and treaties, there is no such thing as widespread material restrictions through core rights or tests of necessity, proportionality and subsidiarity. It's fully up to the legislator (parliament and government together) to decide whether any law complies with a constitutional norm. Not even judges are allowed to rule on this. Their competence is limited to lower rules such as ministerial regulations, and local or regional ordinances. This means that the emergency decrees by the safety regions can be tested against the Constitution, but the same can't be done for the temporary COVID-19 law (*Tijdelijke wet maatregelen covid-19*) that succeeded those decrees.

This doesn't mean that there aren't any external safeguards in place. Human rights in international treaties have direct effect in the Dutch legal order through articles 93 and 94 of the Constitution. Hence, a citizen who feels infringement in his or her rights can – and often will – call upon rights in the European Convention of Human Rights.

- The Early Stage: Keeping It Regional and Low Key

COVID-19 has been classified an A-type infectious disease early on in the pandemic. This happened on January 28<sup>th</sup>, 2020 (Regeling 2019-nCov). All A- and B-class diseases are written into the law to prevent executive overreach. The powers related to controlling those diseases are more far-reaching than for other diseases, so different from the C-class diseases, there is parliamentary control over the classification. As new diseases can emerge, it is allowed for the minister of health care to (temporarily) classify such a disease as an A-type after consulting the other members of cabinet. He then needs to send parliament a bill within 8 weeks to reinforce this. If parliament disapproves

of this classification (or when the government withdraws the bill), all measures based upon this classification expire. Strangely, the law says nothing about what happens when no decision is taken on it. And surprisingly, no law engraving COVID-19 into the Law on public health as A-class infectious disease has been approved so far<sup>144</sup>. It was sent, but parliament has been awaiting answers to its written questions for almost a year.

When in February and March 2020 COVID-19 started to spread through the Netherlands, it became apparent that more needed to be done. Until then, the advice was not to shake hands anymore and people were requested to stay home when either ill or when they had had contact with someone who had been in a high-risk area like China or later Italy. The aforementioned press conference of March 15<sup>th</sup> was one of those steps to do more. The Netherlands went into an ‘intelligent lockdown’. People were still allowed to go outside whenever they wished – but cafes and restaurants were closed, as well as gyms, physiotherapists and massage salons. Some shops decided to close on their own decision to protect staff. A legal base for enforcing a safe distance (1.5m) between people and a prohibition on gatherings and hang around in groups were introduced in emergency decrees as well. The next paragraph will go extensively into these last two rules.

### *Enforcing in Advance of a Legal Base*

At the aforementioned press conference, imperative language was used. It was thus not surprising that, combined with civic spirit, many restaurants started closing. They finished cooking the last ordered dishes, sent them to their customers and kindly asked them to eat quickly and be out before 6pm. In some municipalities, police made rounds looking for signs that places were indeed closing. No fines were written, no hard

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<sup>144</sup>At the time of concluding the text for this chapter, February 15th 2021.

requests were made to close down (to my knowledge at least) – but even soft requests, their mere presence indicated a legal obligation. Which was untrue. The first emergency decrees by safety regions, including the ban to service the public other than for take-away, would only be published 3 to 5 days later.

This delay was caused by the layered process that had to happen afterwards. The relevant ministers, for healthcare and for justice and safety, had to write a binding direction to the 25 safety regions. Together with those regions, they would discuss a model emergency decree in which – after reaching a compromise - the directions would be translated into legal norms. When those were agreed upon, the 25 safety regions had to transplant this model decree to their own. This is both a formal and a material process. Formal, because they have to involve the other mayors for their views (and possible objections) as well as making regional adjustments<sup>145</sup>. Material, due to the decisions made on who exactly does the enforcement, and to mitigate the regionally different impacts of COVID-19. Think of the exceptions made for weekly markets, when they served an essential function to parts of the population.

Due to the urgent nature of publishing the decrees, they were to be set in force immediately after they were signed. Hence, it wasn't that people could only be fined after it was published in one of the official government journals – but immediately after it was placed on the websites of the safety region in question. Websites that no normal citizen would probably know the existence of, or would even know to look at for the emergency decree, as the safety regions website typically are used for information on wholly different matters, such as the operations of the fire brigade. One could argue this isn't problematic: the core elements are expressed in the press conference after all. But if it takes days to translate this PR-talk to legal norms,

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<sup>145</sup>An initial analysis of the differences can be found here: <https://coronapapers.nl/nieuws-1/nieuws/mate-van-juridische-differentiatie-door-veiligheidsregio-s>.

one can't expect everybody to instinctively make the same assumptions. This is especially relevant since a covid fine for violation of group size or keeping the safe distance could go on your criminal record.

- What Exactly Did We Regulate?

As hinted on in the previous paragraph, the emergency decrees came with some problems of their own. While during the first weeks of crisis, most legal scholars, publicists and judges gave the government some leniency, from spring onwards the public debate on the legality of the decrees intensified. After all, having executive decrees severely limiting civil rights for months on end is not something to take upon lightly. It is beyond the scope of this chapter to talk through all of this entire matter, but three telling examples of the transparency versus efficiency-problem will be elaborated on.

*What Did We Write down again? Same Model, Different Opinions by Regional Mayors*

Having a decentralized approach to the actual legal base for COVID-19 measures and enforcement priorities does not only bring positive customization, it also causes confusion. Amongst citizens, but surprisingly also amongst the regional mayors who chair the safety region. From here, we will go back to the safe distance rule and the rules on group sizes and gatherings.

The model emergency decree of the safety region contained two key articles in on before-mentioned behavioural obligations. Article 2.2 prohibited being in public space with 3 or more persons without keeping a safe distance (1.5m) between each other and others. There are exceptions, for example for family members and children. The limit stands regardless

of whether the group meets coincidentally. Article 2.1 stated that all gatherings were prohibited, while not exactly defining what a gathering is. It basically comes down to ‘a gathering is a gathering’.

And here comes the interpretation game. The regional mayor Bruls, who chairs the meeting of mayors chairing the safety regions (yes, they have a meeting structure as well – *het Veiligheidsberaad*) says meeting with more than 3 persons is allowed as long as they all keep their distances to other group members. The mayor of The Hague Remkes, who chairs the safety region for The Hague and surroundings, said around the same time that such a situation is not allowed. And even when it would technically be allowed, people were encouraged to stick to the spirit of the law, not to the letter. Or as he said it: it isn’t a game to outsmart the government, but serious pandemic business<sup>146</sup>.

So, who’s right? In some ways Remkes was right. What he clearly said was the message the the Dutch government and police tried to get across: do not meet. Legally, Bruls was right.

One could argue that any meeting of more than 2 people is a gathering and this was prohibited under article 2.2 of the emergency decree – but seen from a perspective of both logic and legislative technique, that would make no sense. After all, article 2.2 explicitly does not limit group size as long as everyone within the group stays 1.5m apart from each other. It also says in the explanatory note to the emergency decree that it applies for getting together both on purpose and coincidentally. This article would lose purpose if the previous article (2.1) is to be interpreted as saying that all planned get-togethers over 2 persons are not allowed. Simply stated, that broad interpretation would mean there aren’t any circumstances left to forbid

<sup>146</sup>See for example: “Ook met 1,5 meter ertussen is (bewust) samenkomen verboden: zo werkt de noodverordening”, Omroep West, <https://www.omroepwest.nl/nieuws/4018343/Ook-met-1-5-meter-ertussen-is-bewust-samenkomen-verboden-zo-werkt-de-noodverordening>

under article 2.2.

An interesting side note: many fines given for violating the 1.5m safe distance-rule or group size rule were cancelled by either the public prosecutor or were returned to the officers or enforcer to provide more motivation. This because the reports lacked a description on how it was determined that the observed distance was smaller than 1.5 meters.

### *Practical or Necessary Limitation? A Case about Student Households*

An important exception to group size and safe distance-observing were household members. Whereas the idea behind this exception is totally clear, as it makes no sense to suddenly keep your distance or split into sub groups while you share toilets, sinks and living space – in bureaucratic reality it gets muddy. Why? Because student housings and other communal living forms exist. For example, students might very well live together in maybe 5 or 20 persons per house, while administratively having separate addresses. Having small rooms, they basically live together as a family in the shared areas.

Several municipalities chose to fine them when being outside in parks in groups. Sometimes even when sitting in front of their own building. Arguments heard when protesting could either be categorized as ‘we can’t check if you live together’ or ‘if people see groups of young people together, this is bad for public moral if they themselves can’t be in groups’. All possibly valid arguments from a practical point of view – but how so from a legal perspective? How and when was it decided that public health and safety required students living in student houses to split up before going outside? The answer is still not out there...



## *Who Sets the Best Lobby*

Once the infection rate started to lower and the number of infections decreased, both politicians and the public started to look forward. How to open and restart the economy and public life safely and responsibly? The Dutch government answered with a roadmap, setting the stages for expanding the types of allowed business and activities, the size of groups and so on. In the first step, hairdressers, masseurs, swimming pool and others were allowed to re-open again when the youth went back to primary school and everybody below the age of 18 could start practising outdoor sports in groups again. In the second phase, cafes were allowed to partly open, locations like museums and cinemas could receive visitors again and high schools reopened. In the third phase, around July, group size and capacities would be increased. And then finally, in September, the reopening of business for gyms, casinos, saunas, coffeeshops (the Dutch kind, without coffee) and sex workers would come.

This last category seems a bit arbitrary. Obviously they are different than a category that is not yet named: festivals and night clubs. They were so far off the road, no date was set for their reopening. But many people couldn't see why a cafe was allowed to reopen while a coffeeshop had to stay closed. Why was it more dangerous for casinos to allow business than for 100-person conferences? As for gyms: not only does one want to incentivize people to stay healthy during a pandemic, typically it's easier to register visitors there and have safety measures (distance, air circulation, continuous disinfection, health check) in place than in a cafe operating with a large terrace and 30 (or later 100) indoor guests.

Having a national government with two Christian parties in it, some thought most of this had to do with morals and prejudices. In reality, it looked more like a lobby race. Early on, physiotherapist successfully managed to have themselves reclassified from a (forbidden) contact profession to an allowed paramedical profession. Many other sectors started making plans for reopening: creating sectoral guidelines on how to keep themselves and their guests safe once back in business. Thus creating a link with the ministry of economic affairs and climate policy as well as with the pandemic response teams. When successful, this could help in a shift of the expected burden of proof. No longer would it be the sector having to show they took responsibility, but it would be the government that had to explain why despite all the good intentions and plans, it still wasn't responsible to have people go for a drink or museum visit. For gyms, this worked exceptionally well: while they were originally planned to reopen as last after the first wave, in the end they were relatively late to have to close during the second wave. The data had not changed, but the perspective had: from a possible source of infection to a physically and mentally needed outlet.

### *How to Rate this?*

The examples above show an executive that is both responsive and nontransparent. Responsive in the sense it answers to questions arising from policy and enforcement, but nontransparent in the sense that arguments often seem ad hoc and based on perspective or ease rather than strictly on necessity, proportionality and subsidiarity. Could they have done better? Probably yes. Could they have done much worse? Absolutely.

- Democratic Legitimacy Awaits

Emergency decrees are for use in emergency situations only. To

do otherwise would set bad precedent for both internal and international politics. But more importantly: they set aside the representative power in favour of the executive. The longer the crisis evolves, the more the government response hurts citizens' other interests, the more choices need to be made and the harder the call for increased democratic legitimacy needs to be heard. And it was heard. At first, many local councils decided to give their mayor and aldermen a few weeks to handle the acute phase of the crises, so not to add burden to the civil servants with questions or debates when all their energies needed to be focused on helping people in need. They soon got back to the steering wheel, asking for additional local economic relief for business, on how the city could help prevent children dropping out from schools (or leasing them laptops for digital education) and many more issues. At the same time, public and academic pressure increased to do something about the – in the eyes of the public opinion – arbitrary fines and the flimsy legal base of the emergency decrees. They predicted that judges could dismiss fines at any moment and that public support (much needed for the highly sought after voluntary compliance of the covid measures) could erode if such a situation were to involve.

Nationally, parliament had nearly weekly debates with the government and was briefed by the National Institute for Public Health and the Environment (RIM) and representatives from the health care sector before such debates. The briefing and debate could take up a whole day in parliament, as the House of Representatives could go into all policy details they thought fit to be discussed. Through resolutions, they would vote to adjust and finetune policy. This absolutely contributed to transparency, though it did not make up for a lack of formal parliamentary involvement.

This last point was to be repaired with the before-mentioned temporary COVID-19 law (*Tijdelijke wet maatregelen covid-19*). Announced in spring, it went into force on December 1st. In those six months, a lot happened. After the first drafts were prepared, it was placed in consultation with relevant authorities and stakeholders. Much can be said about the process, but from a transparency point of view one point stands out: the way parliament handled the processing of the law. Rather than having an open debate in the plenary session, much happened behind informal, thus closed, doors. The parliamentary delegations of the four parties supporting the current government and three opposition parties had negotiations with the government. They discussed what powers could be introduced, how to get more parliamentary involvement in the proposed regulations, for how long the law would apply and more. This was following a summer of public and academic debate on the version sent to parliament. So when on October 7<sup>th</sup>, it was announced that the seven parties would have a deal with cabinet, it wasn't so much of an open debate a week later in parliament itself. On the one hand, it is a net positive that parliament showed its teeth and got so involved – but to do so, they had to use backdoor leveraging rather than the public exchange of arguments one would wish for in an ideal situation.

### *No Notification to the Council of Europe*

Even though many rights had been limited and no extensive justification took place, the Council of Europe had not received any notification that the State was derogating certain obligations under the ECHR due to the emergency situation<sup>147</sup>. This feels wrong. Either one notifies the Council's secretariat or one motivates infringement on convention rights to the same standards as one normally would (which did not happen in the motivation to the emergency decrees).

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<sup>147</sup>See the CoE-secretariats website for a list of the declarations made by member state: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>.

Some guess that the issue of notification hasn't come up due to a translation issue. Whereas the English version of the convention speaks in article 15 of the time of war or other public emergency as ground for taking measures derogating the obligations under the convention and having to notify the Secretary-General, the Dutch version speaks of 'enige andere algemene noodtoestand', which would be the declaration of a full state of emergency under the Exceptional Situations Coordination Act. I can see how this has played a part in the process, but I think the core reason was another: the decision to use as much regular instruments and be as casual as possible, rather than opening the Pandora's box.

- Consistent Policy Leaking

It was not only in dealing with the translation of norms from minister to safety regions or the handling of the temporary COVID-19 law by parliament, that closed-door meetings occurred. In many ways, for the last year, true power laid at the Sunday meetings at the Catshuis – the formal residence of the Dutch prime minister.

At this location, a core cabinet team consisting of a handful ministers (typically the prime minister, the health minister and ministers with socio-economic portfolios) would discuss policy based on previously received advice from the expert of the Outbreak Management Team (OMT). A representative from the OMT, from the health care sector, the safety regions, socio-economic partners or other relevant parties could also be invited to these closed-door meetings.

No formal notes of these meetings are taken, but parts of the discussions still went public. The invited guests could give some

sort of clue of the agenda at hand – but this mostly happened through purposeful leaking. Let's set a typical scene... Sometime on late Sunday, one or more media outlets would report on the stricter or more lenient measure to be announced two days later at the regular Tuesday 7pm press conference or on the issues advice was requested on from the OMT. This happened so regularly, it is hard to conclude anything other than it being consciously leaked between the moment of informal and formal decision making. It raises the question of why this was the case. Cynically, one could say it's a free form of polling. See how the public responds, and adjust accordingly. Positively, it allows everyone a chance to mentally prepare themselves for what is about to be announced. And more importantly, in this view, society gets a chance to put pressure for much needed exceptions and finetuning. After all, the COVID-19 decision-making is done under extreme time pressure. Measures are often generic and have not gone through the usual process of involvement of about every other societal (f)actor one can think of. By means of leaks, the most urgent interests can be taken into account in advance. This all contributes to creating a support base and building legitimacy.

- Concluding

The rule of law and democratic processes do not primarily exist for times of abundance and prosperity. Under those circumstances, different needs, societal contradictions and human nature are relatively easily navigated into a compromise benefiting all. However, it's when scarcity and lose-lose-situations appear that we need fundamental rights and their impartial well-thought processes most. They are our tools for weathering the storm. Never has their safeguarding function been as acute as it is in a crisis, especially one as unforeseen as the current pandemic. By having a tradition of cooperation through

a crisis, the system held.

Looking forward however, lessons need to be learned. Not only do we need to incorporate the possibility of a long-impacting pandemic into our rules and regulations for crisis situations, but we need to fundamentally consider the balance that should be sought in such situations. We never know which crisis comes next, but we do know that the questions that arise after a year of pandemic control efforts will have to be answered again in the future.

When the balance between the needs and rights is established in advance and coupled with a transparent and inclusive public debate, there is more justification for the government to take crisis measures without consultations. After all, it's no easy feat to consider the clashing fundamental rights when all capacity goes to a crisis-in-action.

Such a framework would also help to more adequately motivate the chosen measures. The emergency decrees had rather short motivations of necessity, proportionality and subsidiarity. This was mostly compensated in the temporary law but remains unconvincing to parts of the population.

When all is normal again, it would thus be wise to ask ourselves – as society and decision makers together – questions like: What is a just policy goal and necessary in/for a democratic society? Are all measures proportional to this goal? Which is the fundamental core of civil rights that we do not infringe upon? And does our constitution reflect those priorities correctly? Currently, the freedom of religion means that Sunday mass can't be forbidden or regulated, demonstrations can be regulated but not pre-emptively forbidden, and students living together in a student house couldn't not sit together in a park

without being fined due to group forming in spring. Or take another example: a curfew was deemed as necessary and was enacted, but the right of privacy was thought to prevent the executive to set binding rules for the number of people one is allowed to have over, and enforce on it. The question on why it is more infringing to have someone enforce 'behind the front door' than to be locked in your house for 1/3<sup>rd</sup> of a day has not been answered so far.

And lastly, subsidiarity. Whenever a new policy was announced or new COVID-19 measures were (re)introduced, this was set against the development of the number of cases and the number of patients in hospital (requiring ICU-care). It was rarely explained why (less infringing) alternative measures or different enforcement priorities could not do the job. For the curfew regulation, for example, it isn't explained how the extra enforcement would make for a difference in dropping the R-rate compared to a situation in which the same extra capacity was organized for enforcing the 'no parties'-rule in the evening without a curfew. When it came to re-opening sectors, something similar happened: no logical and coherent explanation was given on which sector opened, when and what the expected impact was. The roadmap seemed more like a political compromise than sticking to strict subsidiarity.

Not having such motivations in the published regulations makes the justification of the infringements of the COVID-19 measures on fundamental rights imperfect, at best. Near-weekly parliamentary debates and the ritual leaking of planned measures to test the waters and mentally prepare citizens does not fully compensate for it.







# TRAN SPAR ENCY AT STAKE

SECTION VI  
HUNGARY

## WAR ON COVID-19 IN HUNGARY - THE MILITARIZED AND OVERPOLITICIZED FIGHT AGAINST THE PANDEMIC

*István Szent-Iványi*

### *The War Game on COVID-19*

The pioneer of unorthodox political measures and solutions, Hungary, is experimenting with another unprecedented response to the epidemic threat. In Hungary, COVID-19 is not a prima facie health care or an epidemiological issue. First and above all, it is a war waging by the government against it and it is mainly performed in a form of military operation. It is not an exaggerated metaphor here but the hard reality of the daily life hit by the pandemic.

The war needs an army and a chief commander and we do have him: the hyperactive Hungarian prime minister, Viktor Orbán. The whole operation is commanded by the Operative Staff (not joking, really that is its name), formally led by the Minister of the Interiors, but in reality led by the PM. The Operative Staff works as the Headquarters of the Chief Commander and since last March this OS does have a session on every workday, sometimes even at weekends in the early morning, at 6 am. They must demonstrate to the wider audience that the fate of the Country is in the good hands of the vigilant great leader who dedicated his efforts and abilities day and night for the epic fight against the pandemic. The composition of the Operative Staff is also very instructive: most of them are men in uniform, high ranked officers of the police, the border guard, fire department, disaster relief service, military service and so on. To be frank, sometimes, a few virologists, epidemiologist and the chief medical officer appear at the sessions, but they are mere mutes. There is no doubt on that, that the final say in all measures to

be taken belongs to the Supreme Leader of the country, PM Orbán.

The Operative Staff does have an interesting and surprising history. It has been originally set up relative early, already at the end of January 2020. At that time, five out of nine members of the Staff were high ranked generals and only four represent the health care or science, but all are puppets. At the beginning the co-chair of the Staff was the Miklós Kásler, the Minister for Human Resources (who is responsible for health care and epidemiology), but later on he has been totally marginalized and disappeared from the scene.

No surprise, that the vocabulary and the language of the Hungarian COVID-19 policy is overwhelmingly militarized. It reflects the intimate affection of the PM to the military. Of course, we are “waging a war on COVID-19”, the PM does have a “war plan”, we have won “the battle of the first wave” “but the war is not won yet”, we have a well-designed “operation”, we are “fighting”, “combatting”, “we shall come over” at the end, “the coronavirus is an invisible enemy”, “we do not surrender” to the enemy, we are “going to defeat” the virus, we “command the units” and so on – all these are quotes from the PM or from leading members of the staff.

It is not only about the words but the deeds, too. Armoured vehicles and tanks appeared in Budapest and in the main cities, and military patrols are on the streets. No acceptable reason has been given for that, but it is clear that the virus was not deterred by the massive military presence in the streets of the main cities. To put an insult to injury, the 140 so-called strategic companies and firms have been put under control by the Ministry of Defence. Military commanders with their staff have been appointed at the helm of all hospitals and they have full

right to check and control the medical institutions. The Terror Combatting Centre is also on alert and standby. It gives the impression that protection against the epidemic is mainly the task and duty of the law enforcement and military organizations. The landscape of the Country is strongly resembling to the aftermath of a military coup.

### *The State of Emergency Looked like a Coup*

The language and the military operations are not the sole resemblance to a fictitious military coup: the Parliament (more precisely the ruling party representatives in the Parliament) in the framework of the extraordinary legal order declared a state of emergency already in March which could give an almost dictatorial power to the government which means in Hungary: to the PM. On top of that, the state of emergency has been declared for an indefinite period of time. The Parliament has been completely side-lined and the government ruled by decrees without the constraint of existing law, any Hungarian law could be overturned at PM Orbán's will. According to the original plan, the Hungarian Parliament was not supposed to meet during the state of emergency. However, this was changed due to the fierce domestic and international protest and outrage. However the Parliament finally did have session during the state of emergency, its role was marginal and inessential. All major issues are governed by decrees, more than 100 decrees have been issued in that period.

Kim Lane Scheppele, the Princeton law professor and a legal expert on Hungarian constitution rightly pointed out: „*The constitution specifies that the emergency must end when the crisis ends, but the determination of that moment is left to the prime minister. In short, Orbán's emergency gives him everything he ever dreamed of: The absolute freedom to do what he wants.*”<sup>148</sup> And she is right to

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<sup>148</sup>Kim Lane Scheppele, Orbán's Emergency, in: Hungarian Spectrum, March 21, 2020

claim that PM Orbán never lets a crisis go to waste<sup>149</sup>.

Indeed, the state of emergency law significantly curtailed the citizen's freedom creating two new severely punished "crimes". One of them called "fake news" or "scaremongering" crime which means anyone who distributes false, fake news or even truth agitating the public (whatever it means), can be punished by up to five years in prison. It provides a large room for discretion and arbitrariness of the authorities against the citizens. The Hungarian Police opened more than 100 cases of suspected scaremongering and fake news and temporarily detained several people<sup>150</sup>. Among them there were some outrageous procedure against citizens who posted a true news or an opinion in the social media and the police arrested, harassed, home search ordered with them in early morning. Thanks to the broad and loud public protest, the "perpetrators" have been released without punishment, and finally no cases were brought to the court.

Another "crime" according to this law is the violation of curfew or break of mandatory isolation or any other restrictions. This law curtailed the fundamental citizen's right of free movement and freedom of assembly. The public demonstrations and rallies have been forbidden and strictly penalized. During the time of state of emergency, a few demonstrations have taken place only, but the participants on the selective basis have been severely fined and penalized.

The peculiar Hungarian law on state of emergency triggered a fierce international criticism, the European Parliament adopted a statement claiming that this law and the government measures were "incompatible with European values". "The indefinite period" of state of emergency caused very harsh anxiety and concerns and it was also problematic that the Parliament gives the right to revoke the state of emergency to the government

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<sup>149</sup>Ibidem

<sup>150</sup>Hungary set to end disputed emergency virus power, in: EJRACTIV.com, 16.06. 2020

decision. The government does have the sole right to determine the end of emergency situation and to ask the Parliament to revoke it.

After almost three months of emergency, it has been revoked by Mid-June. Just a day after, PM Orbán was demanded by his critics “to apologize to Hungary for unfounded accusations about the law.” However, the international critics did not highlight all shadows and abuses of the law which happened during the time of emergency in Hungary.

While many celebrated the end of unlawful emergency in Hungary, they did not remark that it was only an “optical trick”, a tactical game on behalf of the government. On the very same day, when the Parliament voted to end the state of emergency, they voted in favor of a new law on the so-called “state of medical emergency”, and according to this law the government can rule further by decrees with even less control than before.

Let me quote a precise description of the scope of the “medical state of emergency” law. According to this, the law “provides that the Government may declare a “medical emergency” on the recommendation of the Chief Medical Officer and following a ministerial proposal. The beginning and the end of the medical emergency, which is not laid down in the Constitution, depends on the government decision. According to the law, during the medical emergency, the government may, by decree, restrict the exercise of fundamental rights such as freedom of movement or assembly. The restrictions can initially last for six months, but can then be extended practically indefinitely. Parliamentary approval is no longer required.”<sup>151</sup>

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<sup>151</sup>T. Skoric (2020), Is the State of Emergency in Hungary Really Over? In: FNFEurope, , fnf-europe.org, 29/06/2020



*Under the umbrella of emergency strange things have happened*

As I described, the first wave of the emergency and lockdown between 11 of March and 16 of June has been performed like a military operation. It was the circus for the public and behind the scenes and besides the military parade and mismanagement of the pandemic lot of other worrying things happened which have nothing to do with COVID-19 and the fight against it at all. Under the protection umbrella of emergency, the government issued more than 100 decrees, imposed sectoral taxes and took away significant financial resources from local communities as a punishment of the previous year's local election when many of them fell in the hands of the opposition<sup>152</sup>. A new additional injury is that the local governments belonging to the ruling party have got compensation for the lost tax revenues, the oppositional ones did not.

Most of the over 100 decrees issued in these three months did not affect the health care situation. One enlightening example for that is the case of a private firm called Kartonpack which had a long standing dispute with government-close business circle has been put under government control, its executive and the supervisory board members along with the CEO have been quickly removed and replaced by cronies of the business rivals. Meanwhile, during the first wave the business circles close to the Prime Minister have received more public money than ever before. These companies of the government-close oligarchs have won 74 public procurement tenders between January and April 2020. According to the analysis of the Corruption Research Center of Budapest, in 2020 the risk of corruption in Hungarian public procurement reached its highest level since 2005<sup>153</sup>.

The tax revenues of the local governments have been reduced or simply taken away. The competences of the local go-

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<sup>152</sup>Gabor Tanacs, Natalie Huet, Hungary ends emergency powers, but new law opens up potential to re-apply them. In. Euronews, 16/06/2020

<sup>153</sup>Ibidem

vernments have been curtailed and some privileged enterprises have been put under the competence of the County councils because all of them are controlled by the ruling party. A harsh conflict was looming between the capital city (ruled by the oppositional coalition) and the government, and the government obstructed and attacked the city council on all possible occasions. They brutally reduced the local business tax and other revenues and took away the funds reserved for the reconstruction and development of the city. It is not overstated to say that the government waged a cold war against the capital.

### *Intensified Attack Targeted the LMBTQ Community*

While the pandemic was going on, PM Orbán found time, energy and effort to attack and charge a way vulnerable community, the Hungarian LMBTQ people. During the first wave, maybe at the peak of it in May, the Parliament adopted a new law that “banned legal gender recognition meaning transgender and intersex people in Hungary cannot legally change their gender or sex (both called “nem” in Hungarian) assigned at birth”<sup>154</sup>. This means that the original name in the Birth register can not be changed anymore, denying the right of the transgender people for a new identity. The government banned a 20 and more years of exercised practice and step back in an earlier period. It was not the only single attack on that community.

In autumn, a children-book “Meseország mindenkié” (Wonderland is for Everyone) has been published. This children-book slightly changed the very famous fairy-tales: the main characters were featured by the representatives of different marginalized and vulnerable groups (Roma people, LMBT people, disabled persons or homeless persons and so on). This publication triggered a fierce homophobic attack led by a far right political party Mi Hazánk (Our Homeland) again but high level

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<sup>154</sup>Hungary: Intensified Attack on LGBT people, Human Rights Watch, hrw.org, 18/12/2020

representatives of the government and the ruling party joined the dubious choir. Including PM Orbán who literally said in one of his regular Friday Radio shows, commenting this book, that “the LGBT people should leave our children alone.”

This incited hatred served as a useful prologue for the next attack which took place in December. The Parliament amended the Adoption Law and this Amendment restricted child adoption to the married couples, and the single can not adopt anymore, only in an extraordinary case, with special permit of the Minister for Family Policy (!). Practically this motion banned the until then accepted practice that same-sex couples, unwed different-sex couples, single persons could adopt children<sup>155</sup>. This homophobic operation has been confirmed by the 9<sup>th</sup> Amendment of the Basic Law (the new Constitution) which reaffirmed the conservative notion of the marriage and literally saying: “The father is a man and the mother is a woman”. It constitutionally excludes the possibility for a next government to adopt a law on the same-sex marriage.

By the way, as a part of the protection against pandemic, the government drastically changed the electoral law, too. This electoral law has been adopted by Fidesz government in 2011 and it has strongly favoured the Fidesz electoral interests, but it was not enough. The new law would effectively force the oppositional parties to create a joint party list and run joint candidates. They have only any chance to win if they unite, but the Hungarian opposition is diverse and fragmented, composed from leftist parties through ecologist and liberals to explicitly rightist parties. According to the previous electoral law, they could set up minimum 3 different party lists which could make possible joining parties on the same list with similar political platform. Then now the ruling party can attack and criticize the joint party list as a strange and unnatural coalition and on the dif-

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<sup>155</sup>ibidem.

ferent and contradictory positions of the respective parties of the joint list. It is very unfair to make an essential modification of the electoral law just one and half year before the election and on top of that, it has been adopted only by the ruling party votes in the Parliament.

### *Information Lockdown*

From the beginning, the Orbán regime pursued a restrictive information policy based on secrecy. In the last ten years, it has been a constant blame of the opposition and the civil society that the access for essential information was restricted or denied, and several times the information of many important public issues (investments like Paks 2 nuclear plant) remained classified for many years. The function and operation of the government have been always untransparent, opaque and blurred. During the state of emergency, this information policy has been enhanced and more restricted. For instance, until then, the authorities had to have respond to information request in 15 days, but during the emergency the time frame to respond has been prolonged to 45 days. Delicate and peculiar issues have been classified for decades: for instance the contract and all other important reconstruction details of the Budapest-Belgrade high speed railway which is part of the Chinese Belt and Road Initiative and its use and profitability are seriously questionable have been classified for 30 years. Many assume that this very secretive information policy is the hotbed of corruption.

Transparency has never been a virtue of the Orbán government. The opacity of the governance against the public scrutiny and accountability plays an important role in the regime ruling method. Opacity makes difficult to exercise a substantiated critics on the government activities due to the lack of reliable and precise information. It is an utmost difficult job for investigati-

ve journalism to dig out information and explore the dubious cases. But opacity is covering not only the clear corruption cases but almost everything. The government feels safe itself if the critics are not well informed and uncertain in their assumptions. This is an overall characteristics of the governance style of the regime, but in the wake of the pandemic it has been further enhanced. Let me give you some enlightening examples:

The same practice of closed or restricted information is exercised when it comes to the basic data of pandemic. However the government collects all kind of information on the COVID-19 broken down into the local area, age groups, hospitals, professions and so on, the public opinion does not have access to these data. Only the basic figures are published which are communicated to WHO and from those statistics anyone could get an open access anyway. It has a clear consequence that the society is not informed or even misinformed about the real situation in Hungary. This information policy serves the interest of the aggressive government campaign on the pandemic. Those who do not follow the independent or international media on the pandemic news can believe that Hungary is a real success story and one of the best performing Countries in the World when it comes to protection against COVID-19. According to the governmental propaganda, the government does its best and was very effective and successful. Of course, the brutal facts obviously contradict this success narrative.

As of today, in Hungary, the number of the known infected cases is more than 433,000, that means the total cases/1 Million are around 45,000. This means that Hungary is somewhere among the middle field of the COVID-19 pandemic. But when it comes to the death rate, 1,561/1 Million, is extremely high and Hungary is in the “top league” of the most severely hit Countries. The death rate is more or less same as in the USA

or Spain, a bit less than in Italy but significantly higher than in Sweden where there was no lockdown and only a few restrictions in comparison to Hungary.

The poor performance of Hungary confronting with COVID 19, is not surprising after taking into account the critical shortfalls of the Hungarian health care and epidemiology system. Now it brutally backfires that in recent times the health care system has been neglected and side-lined, financial resources have been withdrawn, the necessary reforms postponed and medical and nursing staff have left the country en masse<sup>156</sup>.

Those who are informed by the government-close media are not aware of these very facts, they believe that Hungary is among the best performing Countries and we owe to thanks this to our excellent government and particularly to the PM.

### *Brussels-bashing*

Since 2011, the Hungarian government and PM Orbán do have a favourite passion of bashing Brussels. Brussels is guilty and responsible for every shortfall and problem, we are freedom fighters and waging an independence war against the Brussels Empire, the colonial power. Brussels is the new Moscow, the European Union is the new Soviet Union. The Soviets ruled by tanks, Brussels rules by banks and so on. This passion did get a new upswing with the pandemic.

The Brussels-bashing is a very tricky exercise. While the EU is extremely popular in Hungary, its approval rate is over 70%, the direct EU-criticism would fire back to the government. Therefore they invented the Brussels narrative, where Brussels is the symbol of the ruthless rule of the unelected eurocrats, and the greedy elite, Brussels is the center of an empire and the good

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<sup>156</sup>l. Szent-Iványi (202), Hungary's weaponising of the coronavirus crisis, In: *encompass-europe.com*, March, 2020.

Hungarians, the freedom fighters, are on the right and fair side of History against the evil's empire.

During the first wave, the government blamed Brussels that did not help, did not provide financial aid and/or any kind of assistance in the epic fight against pandemic, even worse, that Brussels harshly criticized the Hungarian government's state of emergency instead of providing masks, ventilators and other medical equipment. This harsh Brussels-bashing was calmed down in Summer, after the announcement of the unprecedented and ever largest EU recovery fund of the "Next Generation EU". This bashing was suddenly refurbished when it turned out that the "Next Generation EU (and the new MFF) is conditionally tied up to the rule of law mechanism. The Hungarian government scaled up the criticism and blamed Brussels with pressuring and blackmailing Hungary (and Poland), and threatened veto against the two essential financial instruments. After the compromise on the implementation of the rule of law mechanism, this type of criticism has been stopped but immediately after it has been replaced the new issue of the vaccine supply.

Already last summer, the European heads of governments agreed on the common purchase of the COVID vaccines to exclude a vaccine war or conflicts stemming from the competition among the Member states. The European Council has instructed the Commission to start negotiations with the main vaccin developing pharmaceutical enterprises on the joint procurement of the COVID vaccines. The Commission has concluded its talks and signed a contract with eight pharma firms, it seemed to be that all governments were pleased and satisfied with them. The Hungarian Government started to blame Brussels last December, citing the UK and Israel examples and claiming that Brussels signed a bad contract and outside

the EU, Countries are ahead of us in vaccination and we are lagging behind them and that is again a Brussels' fault. This criticism has been magnified after the announcement that the main vaccine provider, Pfizer/Biontech and AstraZeneca are not able to deliver the contracted amount of vaccines in the first quarter of the year. Of course, it was an epic failure and responsibility of the Brussels eurocrats/bureaucrats and then the Hungarian government is forced to purchase the vaccines on the free market. They started to negotiate on procurement of the Russian Sputnik V vaccine and the Chinese Sinopharm vaccines. However, the Hungarian public opinion is very critical and suspicious on these vaccines and only a few percentage is ready to accept a vaccination with them, they continue to negotiate and with both vaccines producers and they signed a letter of intent to buy a million dose of them. The OGYÉI (Hungarian Medicines Agency) upon a strong government pressure has already approved the Sputnik V vaccine without thorough tests and examination and the Chinese vaccine is already under the doubtful examination of this Agency. Meanwhile, in the government-close media there is a constant and dominant narrative that Brussels has failed in vaccination, does not help us, but our government will resolve this issue. Despite of that, so far they were not able to change the widespread estrangement and resentment against the Eastern vaccines.

### *Short summary*

The Hungarian Prime Minister loves playing war games. This is not new nor surprising. His usual vocabulary is full with military expression. He likes being surrounded by men in uniform. His son was been sent to Sandhurst Royal Military Academy (after a failed soccer player career – soccer is the other PM favourite passion). The governmental COVID-19 strategy is rather resembling to a military operation than to a health care



and epidemiological issue. The government declared a war on COVID-19, they have a “war plan”, they perform a military operation and the military patrols on the streets could be an iconic image of the “fight” against the pandemic in Hungary. Outsiders may have an impression that this is the Country aftermath of the military coup. The state of emergency, lockdown, curfew, curtailed freedoms and so on – everything is on place that characterize a coup.

By the way of state of emergency – it is again a sort of Hungaricum (special Hungarian product) for an indefinite period of time. The Parliament has been completely side-lined and the government ruled by decrees without constraint of existing law, any Hungarian law could be overturned at PM Orbán’s will. It caused and triggered a harsh protest and then has been revoked after three months, but immediately replaced by the “medical state of emergency”. It is again a smart Hungarian trick: according to this law the government can rule further by decrees with even less control than before under the “normal” state of emergency.

Under the protection umbrella of emergency, the government issued more than 100 decrees, imposed sectoral taxes and took away significant financial resources from local communities as a punishment of the previous year local election when many of them fell in the hands of the opposition. Most of the more than 100 decrees issued in these three months did not affect the health care situation.

While the pandemic is going on, PM Orbán found time, energy and effort to attack and charge a vulnerable community, the Hungarian LMBTQ people. First the Parliament adopted a law which bans the change of the original name in the birth register, denying the right of the transgender people for a new identity.

Then a new law on adoption excludes the same-sex couple from the adoption.

PM Orbán does have a favourite passion of bashing Brussels and his passion did get a new upswing by the pandemic. During the first wave, the government blamed Brussels which did not help, did not provide financial aid and/or any kind of assistance, even worse, criticized the Hungarian government state of emergency instead of providing masks, ventilators and other medical equipment. During the second wave, the Government started to blame Brussels, citing the UK and Israel examples and claiming that Brussels signed a bad contract on the procurement of vaccines and outside the EU Countries are ahead of us in vaccination and we are lagging behind them and that is again a Brussels' fault.

Hopefully, this strange war against COVID-19 shall be won, but there is another parallel war on freedom and citizen's rights. And we are strongly afraid that our freedom and rights will be severely damaged and sacrificed in that perilous war.

## PUBLIC PERCEPTION OF HUMAN RIGHTS DURING THE COVID-19 PANDEMIC-RELATED LOCKDOWN IN HUNGARY

*Dániel Mikecz, PhD*

The COVID-19 pandemic already resulted in crucial economic and political changes globally. In an emergency situation, extraordinary measures by governments could be necessary, nevertheless, democratic institutions and minority rights should be respected. In Hungary, the parliamentary supermajority of the Fidesz party supported prime minister Viktor Orbán to govern with decrees without a temporal limit. Since the 30th of March, 2020, not even the Fidesz MPs can control the government, which was crucial for Orbán in the tight-fisted management of the economic crisis followed by the pandemic. Beyond the national level in the European Union the coronavirus could backslide integration as borders are closed, the movement of persons is restricted and distrust in international organizations might grow. Nevertheless, citizens in populist regimes are witnessing how the constricted public sphere and crooked governance lead to policy failures. Also, the need for international cooperation in challenging global risks might give a new momentum for European integration.

While the pandemic accelerated illiberal tendencies in Hungary, civil society activism also gained new impetus not just autocratic aspirations. Civil organizations and local groups started to aid elderly people in shopping and provided them company in order to satisfy their social needs and combat isolation. Companies and individuals donated computers, laptops, tablets, web cameras for students, teachers, and schools for the successful transition to online education. Theaters and also political par-

ties started to sew protective textile masks. Nevertheless, the virus also caused panic and fear on the global level, which was in many cases the basis of policymaking and not rational, cool-headed planning<sup>157</sup>.

This paper wishes to investigate the public opinion on lockdown measures. By analyzing this issue, the paper answers the question if human rights have been deteriorated according to the respondents and if they think that the Hungarian government misused the emergency situation for gaining more political power.

### *Lockdown Measures in Hungary*

The first coronavirus cases were confirmed on the 4<sup>th</sup> of March. The infected people were two Iranian students. On the 7<sup>th</sup> of March, the government announced to cancel the celebrations on the 15<sup>th</sup> March national holiday, and the government declared a national emergency. The follow-up lockdown measures included remote education in universities and the restriction of the entry of foreigners into the Country<sup>158</sup>. As further measures, indoor events above 100 and outdoor events above 500 participants were banned. The Orbán government did not want to discontinue face-to-face education for the first time presumably due to economic reasons. However, due to public pressure, all schools were closed on the 16<sup>th</sup> of March. The movement of citizens was also restricted, as they could leave their homes only with a justified reason, like shopping for essential goods, and between 9 am and 12 pm only citizens above 65 were allowed on shops. At the same time, the opening hours of restaurants and bars were also limited, while cinemas and theatres were closed<sup>159</sup>. On the 27<sup>th</sup> of April, the mayor of Budapest made it mandatory to wear masks on public transport and in supermarkets, shopping malls. The Hungarian parliament issued

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<sup>157</sup>O. Łabendowicz and B. Lenkowski (2020), The Status of Human Rights During the COVID-19 Pandemic and Lockdown. In: Dániel Mikecz (ed.): The state of human rights during the COVID-19 pandemic in East-Central Europe. Budapest: Republikon Institute

<sup>158</sup>P. Gelencsér, J. Székely (2020), COVID-19 related lockdown, human rights and public opinion in Hungary. In: Dániel Mikecz (ed.): The state of human rights during the COVID-19 pandemic in East-Central Europe. Budapest: Republikon Institute

<sup>159</sup>P. Gelencsér, J. Székely (2020), *ibid.*

the so-called authorization law on the 30<sup>th</sup> of March, which entitled the government to rule with decrees without a time limit. The opposition proposed to have a 90 days time limit, but the right-wing majority of the national assembly rejected it<sup>160</sup>. The debate over the time limit also meant the end of political consensus between the government and the opposition on the pandemic-related measures. While in other member states of the EU, like in Germany, where radical right-wing groups and in Italy, where restaurant owners protested against the lockdown measures, or in the Czech Republic and Slovenia, where restrictions amplified the anti-government protest movements and dissatisfaction with the ruling parties<sup>161</sup>, the vast majority Hungarian society approved the lockdown measures. During 2020, only one notable demonstration was held by pandemic-sceptics in Budapest, which was attended by around 1,000 participants<sup>162</sup>. As a matter of fact, the positive health effects of social distancing have been affirmed by researchers<sup>163</sup>. Nevertheless, while air-traffic lockdown measures slowed down the growth rate of the virus, it also increased the doubling time of infection<sup>164</sup>. Moreover, a positive and mostly unexpected effect of the lockdown was the improving of air quality in major cities<sup>165</sup>.

### *Data and Results*

In order to assess the public perception of the COVID-19 pandemic-related lockdown measures, the paper analyzes the opinion survey data of the Republikon Institute. The data collection was conducted by interviewing 1,000 people by telephone between the 19<sup>th</sup> and 25<sup>th</sup> of September, 2020. The sample is representative of the adult population of the country by age, gender, education, and type of settlement.

<sup>160</sup>P. Gelencsér, J. Székely (2020), *ibid.*

<sup>161</sup>Briski, Natasa. (2020). The coronavirus related lockdown measures, human rights violations and the EU's perceived role in Slovenia. In: Dániel Mikecz (ed.): The state of human rights during the COVID-19 pandemic in East-Central Europe. Budapest: Republikon Institute

<sup>162</sup>P. Gelencsér, J. Székely (2020), *ibid.*

<sup>163</sup>L. Di Domenico, G. Pullano, C. Sabbatini, P. Boëlle, V. Colizza (2020). Impact of lockdown on COVID-19 epidemic in Île-de-France and possible exit strategies. *BMC medicine*, 18(1), 1-13.

<sup>164</sup>H. Lau, V. Khosrawipour, P. Kocbach, A. Mikolajczyk, J. Schubert, J. Bania, T. Khosrawipour (2020). The positive impact of lockdown in Wuhan on containing the COVID-19 outbreak in China. *Journal of travel medicine*, 27(3), taaa037.

<sup>165</sup>M. C. Collivignarelli, A. Abba, G. Bertanza, R. Pedrazzani, P. Ricciardi, M. C. Milno, Marco Carnevale, (2020). Lockdown for CoVID-2019 in Milan: What are the effects on air quality?. *Science of the total environment*, 732, 139280.

2020. The sample is representative of the adult population of the country by age, gender, education, and type of settlement.

How important are the following measures?	Mean	N	Std. Deviation
wearing facemasks	1.6907	993	1.16687
limiting the number of participants at events	2.0997	975	1.3083
travel restrictions	2.8042	980	1.46429
closing restaurants, cafes	2.9313	958	1.36743
shutting down institutes of education	3.1528	960	1.31743
curfew	3.5063	980	1.41187
introducing the shopping time limit for senior citizens	3.5951	981	1.47064
closing shops	4.197	986	1.02098

Table 1 Mean value of the approval of lockdown measures on a five point scale (1=very important, 5=not important at all)

According to the dataset, the wearing of facemasks was highly approved by Hungarians at the end of September 2020 (table 1). High approval rate of facemask wearing is very likely interrelated with the freedom of movement. While wearing a facemask can be inconvenient in many situations, that functions as a ‘VIP-pass’ as it gives access to indoor places and grants free movement outdoors. Other measures, which directly restrict the freedom of movement, were less approved by the respondents. The Hungarian society rather disapproved the shutdown of educational institutes, which can put a serious burden on the daily routine of families. Interestingly the shopping time limit for citizens over 65 and the temporary closing of shops were more unpopular than curfew measures.

How did the following matters changed during the pandemic in Hungary?	Mean	N	Std. Deviation
freedom of assembly	2.3996	876	0.96017
access to education	2.4314	930	1.11052
freedom of press	2.5357	906	1.00685
state of freedom of speech	2.5605	935	0.94921
free access to information	2.6291	931	1.00018
freedom of religion	2.8359	853	0.72389

Table 2 Mean value of subjective assessment of change of freedoms during the COVID-19 pandemic (1=it became much worse, 5=it became much better)

We also asked the respondents about their opinion on changes of various freedoms. In neither case did they report development, which can be understood during a lockdown (table 2). According to the data the freedom of assembly and the free access to education were deemed as most deteriorated during the pandemic. It can be assumed, that under 'freedom of assembly' most respondents meant social gathering and not the right to demonstrations. The reason of the impairing access to education was most probably the quick switch to online education after the shutdown of schools.

Are you satisfied with the Hungarian government's strategy against the coronavirus?	Mean	N	Std. Deviation
Fidesz voters	1.9374	424	0.88616
voters of the united opposition	3.6933	299	1.00173
undecided voters	3.1137	88	1.16746
no answer	2.8335	71	1.18606
Total	2.7218	882	1.26317

Table 3 Mean value of satisfaction with the Hungarian government strategy against coronavirus (1=very satisfied, 5=very unsatisfied)

The opinion survey demonstrated that the Hungarian society was rather satisfied with the government strategy against coronavirus (table 3). There is an obvious difference between the voters of Viktor Orbán's ruling Fidesz party and the voters of the united opposition. Undecided voters on the other hand tend to be more unsatisfied with the output of the government.

Do you think that the Hungarian government misuses its power?	Mean	N	Std. Deviation
Fidesz voters	4.2778	412	1.01374
voters of the united opposition	2.4358	292	1.14863
undecided voters	3.3094	73	1.19943
no answer	3.6286	62	1.158
<b>Total</b>	<b>3.5037</b>	<b>838</b>	<b>1.37132</b>

Table 4 Mean value of opinions if the Hungarian government misuses its power during the pandemic (1=totally, 5=absolutely not)

The Orbán government was heavily criticized after the authorization to rule with decrees without a time limit. However, the respondents did not think that the government misused power during the pandemic (table 4). Nevertheless an obvious difference can be noted here between the opinion of the voters of the government and the opposition.

### Conclusions

The lockdown measures substantially changed the daily routine in Hungary as well. Schools were shut down, restaurants and cafes were closed, white collar workers went to home office. While traveling abroad became habitual for many segments of the Hungarian society especially during summertime, in 2020 those who went abroad had to spend two weeks in quarantine.



At the same time, the Orbán government was authorized to rule with decrees in the emergency situation. The opposition proposed to have a 90 days' time-limit, which was rejected by the governing majority. As the results demonstrate the Hungarian society was politically divided in these questions. The voters of the ruling Fidesz party approved the government's strategy in handling the pandemic, while opposition voters were not satisfied with that. The political divide can be observed in relation with power misuse by the government at the same period. Most Hungarians reported about the deterioration of those freedoms, which are directly linked to their daily routine. The results suggest that Hungarians interpreted the lockdown measures from the aspect of their personal freedom and not from more abstract concepts of human rights.

## CONCLUDING REMARKS AND POLICY RECOMMENDATIONS

*“We should not let the virus destroy our core values and free societies”*  
Council of Europe, 7 April 2020

Transparency is an old issue raised in the political sphere. Already in 1908 Filippo Turati, an influential Italian political leader, suggested the importance to make the public activity transparent, coining the metaphor of the “glass house”.

Transparency and integrity issues in government are at the forefront of the political and economic debate in Europe. Public administrations are requested to engage in a more active disclosure of information, while in the past they were passively providing it upon request and discretionally. In Italy and in Portugal, for example, regulations on transparency have been introduced to guarantee to the stakeholders the right to access the public administrations’ documents, also as a way to limit inefficiency and corruption in the public sector.

In the political economy framework, transparency represents a useful tool to address the problems of information asymmetry characterizing the relationship between the principal, i.e., the stakeholders, and the agent, i.e., policy makers, whose interests may be conflicting. Therefore promoting transparency about the government activity is one of the policies undertaken in contemporary democracies to monitor the integrity and performance of public officials, improve policy effectiveness, and enhance government accountability (OECD 2017).

The need of transparency has increasingly grown during the Covid-19 pandemic. Several EU and OECD countries have

adopted new laws and/or triggered the existing emergency legislation that attributes to the government temporary powers to introduce significant limitations of fundamental freedoms, economic activities, and public life (e.g. Belgium, France, Germany, Hungary, Italy, Slovenia); others like Denmark, have speeded up the legislative processes for measures that address the pandemic (Sigma 2020).

However, even in a time of crisis when the standards of democracy, human rights, and the rule of law fall short, governments must not have their hands completely free, rather they have to guarantee the proportionality and predictability of their actions (IDEA 2020). In this respect, the comparative perspective on the reactions of different European countries (in this volume represented by Bulgaria, Hungary, Italy, the Netherlands, Poland, and Slovenia) during the pandemic, may prove useful to evaluate the governments' management of the emergency. In Italy, for example, the government kept secret the Scientific-Technical Reports used to legitimize the Prime Minister Decrees establishing restrictions. An abuse of the emergency legislation occurred in Poland, Hungary, and Bulgaria. In some cases lack of transparency and corruption in the procurement of emergency medical equipment have been detected<sup>1</sup>. Overall, governments set forth several restrictions often with opacity, and in some cases the constitutionality itself of the government decrees has been questioned.

In twenty-five years of transparency research<sup>2</sup> scholars have addressed several issues, i.e. they have identified different forms of transparency (political, administrative, fiscal); developed both “top down” and “bottom up” methods to measure the degree of transparency of the governments; analysed the socio-economic and political factors that affect the demand of transparency, such as age, gender, digitalization, education, income,

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<sup>1</sup>It is worth noting that the 2020 Corruption Perception Index (CPI) published by Transparency International show that Bulgaria (44), Hungary (44), Italy (53) and Poland (56) and Slovenia (60) are perceived as quite corrupt countries; the Netherlands instead appears transparent (82). I recall that the scores of the CPI range from 0 (high corruption) to 100 (low corruption).

<sup>2</sup>For an extensive review see Cucciniello et al. (2016).

education, party competition, voter turnout; and verified the positive impact of transparency on the policy outcomes, i.e. stakeholders' participation to decision making processes, trust in government, political accountability, integrity of public officials.

International and non-governmental organizations as well, have paid increasing attention to transparency in politics and in public administration. As recently warned by Transparency International, in times of crisis transparency and accountability matter even more to reduce the risk that the crisis itself is used as an excuse to bypass the rules, leaving more room for corrupt practices.

Therefore, it is important to involve business and civil society organisations and other key stakeholders to support draft legislation and policy restrictions during long-term crises to guarantee an open and inclusive decision-making process, to prevent policy mistakes, and to favour citizens' trust in the institutions and respect of the rules.

The road to transparency has been firmly undertaken in the European countries but, as the recent events have shown, it is still a long way.

*Emma Galli*



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*The health emergency caused by the Covid-19 outbreak required the governments of EU Member States (and worldwide) to adopt several urgent measures to contain and manage the spread of the virus throughout the whole EU territory. Such measures have inexorably posed restrictions on the citizens' basic civil liberties, as well as constraints on economic activities.*

*Through a comparative analysis of the different policies adopted by the governments of Italy, Poland, Bulgaria, Slovenia, the Netherlands, and Hungary, this volume highlights how crucial it is for the governments to respect the fundamental right to transparency and information in public administration, in order to justify the restrictions posed on citizens' civil liberties – even when facing the management of a crisis.*

*The aim of the book is to outline if in handling the health emergency the governments have ensured the citizens' right to access government information, or rather if transparency was put “at stake”.*

