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WORKING PAPER

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**Endogenous Sources of
Pandemic Governance:
Executive Power and
Lockdown Measures
in Turkey, the United
Kingdom and Germany**

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

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Working Papers, Forum Transregionale Studien 20/2023

DOI: <https://doi.org/10.25360/01-2023-00030>

Design: Plural | Severin Wucher

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The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health, Long-term Care and Gender Equality.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

The COVID-19 pandemic has prompted governments across the world to take unprecedented responses in an attempt to contain the spread of the new coronavirus – colloquially known as lockdowns. Adopting a contextually situated approach on the lockdown measures and powers in a cross-country analysis of Turkey, the United Kingdom and Germany, this paper pursues two arguments: First, it finds that the expansion of executive power during the COVID-19 pandemic is a common problem across different regime types and constitutional settlements. Based on this finding, the paper then contends that the expansion of executive power is informed and shaped by endogenous dynamics. Even when the executive branch does not appear motivated to pursue the augmentation of executive power in the beginning, a number of mutually reinforcing processes and dynamics may lead to rule them assertively, to assume more prerogative powers and to further undermine the accountability mechanisms. Such processes and dynamics include: (1) the nature of the threat and the technocratic manifestations of the COVID-19 emergency which both required unprecedented responses and affected different branches of government differently; (2) the 'rally-around-the-flag' high public support towards governments and political leaders which provided incentives to take even far-reaching pandemic measures, and (3) the failing authority of the World Health Organization in managing and coordinating the global risks posed by the COVID-19 pandemic which stoked nationalist pandemic responses. The findings of the paper suggest that the conventional (constitutional) theory in health emergencies underwent a reinvention to the detriment of institutional checks and balances, parliamentary supervision and judicial independence during the COVID-19 pandemic. Considering the endogeneity of the crisis, and the fact that an era of emergencies is set to bear down on us, there is alarming signals that executive over-reach will become more prevalent in future health emergencies.

Keywords: COVID-19, pandemic, executive power, Turkey, Germany, UK, emergency

Suggested Citation:

Emre Turkut, "Endogenous Sources of Pandemic Governance: Executive Power and Lockdown Measures in Turkey, the United Kingdom and Germany", re:constitution Working Paper, Forum Transregionale Studien 20/2023, available at <https://reconstitution.eu/working-papers.html>

Endogenous Sources of Pandemic Governance: Executive Power and Lockdown Measures in Turkey, the United Kingdom and Germany

Emre Turkut¹

Introduction

The COVID-19 pandemic that was first emerged in China in December 2019, has led to diverse state responses ranging from as elimination, suppression, mitigation, and inaction.² The World Health Organization (WHO) declared the spread of the new coronavirus as a public health emergency of international concern in January 2020 and then as a pandemic in March 2020. Due to the lack of know-how and established points of reference in terms of both the epidemiological and legal tools to fight this particular emergency, states across the world have taken unprecedented responses behind a “veil of ignorance”³ in an attempt to contain the spread of the virus – commonly known as lockdowns. While lockdown does not have any specific legal definition, the term generally refers to compulsory, non-pharmaceutical interventions taken by states that restrict internal movement, close schools and businesses, and ban international travel.⁴ Such policies, guided by epidemiological models, revolved around the idea of ‘social distancing’ with the aim of reducing social interactions between people in order to delay and moderate the spread of an evolving pandemic in a population.⁵ These confinement measures often take the form of a ‘stay-at-home’ requirement with certain exceptions such as leaving home for essential reasons including for essential work and limited daily exercise.

As lockdown measures were seen as the only option available to slow down the pandemic before the discovery and the roll out of vaccines (especially during the first wave from January 2020 to July 2020), states adopted bundles of highly restrictive, intrusive and sweeping confinements. Such decisions have been taken under rapidly changing

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² For a recent paper on these different strategies and their policy implications, see: Magnus Lundgren, Mark Klamberg, Karin Sundström, and Julia Dahlqvist, ‘Emergency powers in response to COVID-19: Policy Diffusion, democracy, and preparedness’ (2020) 38.4 *Nordic Journal of Human Rights*, 305-318.

³ Angelo Golia, Laura Hering, Carolyn Moser, and Tom Sparks, ‘Constitutions and Contagion—European Constitutional Systems and the COVID-19 Pandemic’ (2021) 81.1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, 147, 152.

⁴ Abel Brodeur, *et. al.*, ‘COVID-19, lockdowns and well-being: Evidence from Google Trends’ (2021) 193 *Journal of Public Economics*, 1-8.

⁵ Jose Lourenco, *et. al.*, ‘Fundamental principles of epidemic spread highlight the immediate need for large-scale serological surveys to assess the stage of the SARS-CoV-2 epidemic’ (2020) *MedRxiv*, 1-7, available at: <https://www.medrxiv.org/content/10.1101/2020.03.24.20042291v2>.

epidemiological situations, in most of the cases, in the absence of scientific evidence on the combined effectiveness of these measures, their societal and economic impact on, and degree of complication of, the population.⁶ As such, they caused substantial economic and social costs while also damaging trust in governmental conduct, and population wellbeing.⁷ Over time, however, States moved to take a more nuanced approach (during the second/third waves starting in late 2020 and throughout 2021) tailoring the severity of a lockdown by age groups and activities, known as targeted lockdowns. Such fine-tuning confinements have been found to offer more flexibility and transparency when making difficult trade-offs between economic activities and social security.⁸

The responses to the COVID-19 pandemic prompted an emerging body of scholarly work entailing national reports, case analysis and various summaries of the measures, mostly focusing on their legality and compliance with the rule of law and human rights.⁹ Yet, only few contributions have conducted a comparative cross-country analysis on COVID-19 emergency measures.¹⁰ The existing research thus fails to reach patterns across different regime types, constitutional settlements and institutional contexts (from democratic to hybrid/authoritarian), which bear remarkable similarities that cumulatively result in constitutional deformation/degeneration, undermining accountability mechanisms and entrenching the powers of incumbents. To fill this gap, this paper provides a cross-country analysis of three case studies namely Turkey, the United Kingdom and Germany.

Adopting a contextually situated approach (combining perspectives from *doctrinal* and *law in action* approaches, see *infra* Section on methodology) on the lockdown measures and powers in these three case studies,¹¹ this paper pursues two arguments: First, it finds that the expansion of executive powers during emergencies albeit varying degrees, is a common problem across different regime types and constitutional settlements. Based on this finding, the paper then contends that the expansion of executive power is informed and shaped by endogenous dynamics. Even when the executive branch does not appear motivated to pursue the augmentation of executive power in the beginning, a number of mutually

⁶ Nina Haug, *et. al.*, 'Ranking the effectiveness of worldwide COVID-19 government interventions' (2020) 4.12 *Nature Human Behaviour*, 1303-1312.

⁷ Richard Layard, *et. al.*, 'When to release the lockdown? A wellbeing framework for analysing costs and benefits' (2020) IZA Discussion Paper No. 13186, 1-19, available at: <https://www.iza.org/publications/dp/13186/when-to-release-the-lockdown-a-wellbeing-framework-for-analysing-costs-and-benefits> and Betty Pfefferbaum and Carol North, 'Mental health and the Covid-19 pandemic' (2020) 383.6 *New England Journal of Medicine*, 510-512.

⁸ Sergio Camelo, *et. al.*, 'Quantifying the benefits of targeting for pandemic response' (2021) *MedRxiv*, available at: <https://www.medrxiv.org/content/10.1101/2021.03.23.21254155v3>.

⁹ As a salient example, see the symposiums on 'COVID-19 and States of Emergency (2020)' 'Power and the COVID=19 Pandemic (2021)' hosted by *Verfassungsblog*. The symposiums bring together country reports from different contexts. See: 'COVID 19 and States of Emergency' March-April 2020, available at: <https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/>, and 'Power and the COVID=19 Pandemic (2021)' February-May 2021, available at: <https://verfassungsblog.de/category/debates/power-and-the-covid-19-pandemic-debates/>.

¹⁰ For a notable exception, see: Golia *et. al.*, *supra* footnote (n 3).

¹¹ In terms of temporal focus, the analysis in this paper mostly concentrates on two constitutionally salient COVID-19 waves – the first (from January 2020 to July 2020) and the second (from November 2021 to February 2021).

reinforcing processes and dynamics may lead to rule them assertively, to assume more prerogative powers and to further undermine the accountability mechanisms. The paper identifies three such processes and dynamics: (1) the nature of the threat and the technocratic manifestations of the COVID-19 emergency which both required unprecedented responses and affected different branches of government differently; (2) the ‘rally-around-the-flag’ high public support towards governments and political leaders which provided incentives to take even far-reaching pandemic measures, and (3) the failing authority of the WHO in managing and coordinating the global risks posed by the COVID-19 pandemic which stoked nationalist pandemic responses.

The remainder of the paper unfolds in four parts. After elaborating on methodology, the case selection (Section 1) and the concept of endogenous executive power (Section 2), it will zoom in on some fundamentals of pandemic governance and lockdown measures in selected countries adopting a contextually situated approach that will allow us looking at the significance of specific institutional designs, constitutional settlements, regime types as well as their historical, political and social contexts (Section 3). Then, the study focuses on endogenous sources of executive power during the COVID-19 pandemic (Section 4). The concluding Section briefly addresses the implications of this paper’s findings on theories of emergency governance and sets out the conclusion.

1. Methodology and case selection

This paper zooms in on three case studies – namely Turkey, the United Kingdom and Germany.¹² While these countries share many pertinent factors, they also display enormous institutional and constitutional differences. At the most fundamental level, all three countries signify and symbolize different level/stages in the European political/legal spectrum. The UK and Germany both categorically belong to the core family of Western liberal democracies – those fundamentally committed to the principles of the rule of law and separation of powers. Still, a startling backsliding against the backdrop of a breakdown in rule of law and human rights and disempowerment of the legislature is widely reported in the former in recent years.¹³ Turkey, on the other hand, despite once being regarded a bright spot of liberal democratic transformation, in more recent years has moved away from democratic ideals and toward an authoritarian rule. The three case studies may thus serve as illustrative examples of the COVID-19 measures taken in mature liberal democratic countries (Germany), democracies in danger of backsliding (UK) and hybrid – semi-authoritarian, competitive – regimes (Turkey). Yet, at the same time, they hold membership to the core mechanism in their region, namely the Council of Europe (CoE). Moreover, they range from relatively strong forms of parliamentarism (Germany) to parliamentary sovereignty (Britain)

¹² These case studies analytically fall into category of ‘most different inference oriented’ qualitative small-N studies. See: Ran Hirschl, ‘The question of case selection in comparative constitutional law’ (2005) 53.1 The American Journal of Comparative Law, 125-156.

¹³ See, Meg Russell, Alan Renwick and Lisa James, ‘What is democratic backsliding and is the UK at risk?’ The Constitution Unit, 5 July 2022, available at: <https://constitution-unit.com/2022/07/05/what-is-democratic-backsliding-and-is-the-uk-at-risk/>.

up to an executive presidentialism (Turkey). In state form, they range from devolution (UK) to federalism (Germany) to a centralized unitary state (Turkey). In terms of judicial powers and organizations, they range from 'weak-form' judicial review (UK) to a more deferential one (Turkey) and to a strong centralized judicial review (Germany).

While all three jurisdictions carefully regulate (and circumscribe) emergency powers, they also differ in one significant factor: the sources of such codification and design. The German constitution, for example, contains detailed prescriptions on how the federal authority may respond to an emergency providing substantive and procedural constraints.¹⁴ Similarly, the Turkish constitution has specific frameworks regulating different forms and types of emergencies.¹⁵ In the UK, despite the fact that it does not have a codified constitution in one document, the regime regulating emergency powers is entrenched in a combination of constitutional conventions and principles governing the exercise of the government, the prerogative powers of the monarch and ordinary legislation.¹⁶ However, whatever flexible modes the constitutional regulation of emergencies offers to restore normality, emergency powers essentially enable the government to limit, suspend and/or derogate from, certain constitutional rights setting aside ordinary institutional checks and balances – all of which typically works to concentrate power in the executive. More fundamentally, these countries seemed to have followed different models of emergency governance in the COVID-19 pandemic ranging from, what can be loosely categorized a legislative model (Germany) to an executive model (UK) up to an extra-legal model (Turkey). Commonly, the executive branches emerged as the main political and institutional actors in all three countries studied in this paper throughout the COVID-19 pandemic. Yet, one key factor that mattered significantly was the readiness of the specific system to absorb a sudden expansion of executive powers.

Previous theoretical and empirical research on crisis and emergencies established that emergency governance is traditionally regarded as executive governance for various reasons notably prompt-decision making, expertise, and implementation capacities. One common tautological tendency, however, has been to define, explain and analyse crisis and emergencies by their *outcomes* that result (i.e. emergencies' causal effects on institutions), rather than *processes* that yield them. If a public emergency concentrates both policy and law-making powers on executive branch, they also provide incentives for political actors to define, create and (mis)use them. Yet, there is a dearth of focus on institutional settings, constitutional structures, and political contexts around the actual operation of executive powers during emergencies. This is the gap this paper aims to fill.

Methodologically, this study employs a mixed approach combining both doctrinal and law in action (or law in context) approaches to make sense of this complexity influencing pandemic

¹⁴ Rainer Grote, 'Regulating the State of Emergency – The German Example' (2003) 33 Israel Yearbook on Human Rights, 153-177.

¹⁵ See, Article 119 of the Turkish Constitution, as amended on 16 April 2017, Act No. 6771, <https://global.tbmm.gov.tr/docs/constitution_en.pdf>.

¹⁶ Pedro Villarreal, 'Public Health Emergencies and Constitutionalism Before COVID-19: Between the International and the National' in R. Albert and Y. Roznai (eds.), *Constitutionalism Under Extreme Conditions* (Springer 2020) 220.

responses with particular focus being directed at lockdowns in all three selected cases, with an eye to producing analytically general insights. Broadly speaking, doctrinal research seeks to examine how “legal concepts are defined and fit together and the extent to which any general principles can be extracted by legal reasoning that can guide future decisions.”¹⁷ The law in action approach, on the other hand, examines the ways in which legal norms and practices are conditioned by, and centered on, namely the cultural, social, political and institutional contexts of law.¹⁸ In this vein, this method takes into account of the case-specific local contexts, which gives legal institutions, norms and practices their true meaning.¹⁹

From this perspective, a mixed approach, based on a combination of doctrinal and law in action methods, stands out as the most appropriate and useful method for the purposes of this paper mainly because it aims to unravel endogenous processes and dynamics which may possibly explain the augmentation of executive power during the COVID-19 pandemic. By doing so, it aims to encapsulate both *constitutive* (i.e. what constitutes the process of executive power enhancement/aggrandizement during emergencies) as well as *casual* analyses (i.e. how/why do the constitutive components of such process occur). As explained below, the paper treats the (expansion) of executive power in different specific contexts as the phenomenon to be explained. Several factors concatenated with the COVID-19 emergency can help explain this variation.

2. Endogenous Executive Power

This paper contends that endogeneity occurs when “outcome variables exert feedback effects on their causes.”²⁰ The established research from social sciences literature for instance usually regards endogeneity as a threat to causal claims: if the outcome variables do not affect each explanatory factor at the same time, causality does not create endogeneity.²¹ However, the insights from comparative politics and analytical sociology are most useful here as they provide a more accurate description of causal complexity. More specifically, scholars from comparative politics have provided convincing accounts of cause-

¹⁷ John Bell, ‘Legal Research and the Distinctiveness of Comparative Law’ in Van Hoecke (ed.), *Methodologies of Legal Research* (Hart Publishing, 2011) 155.

¹⁸ Philip Selznick, ‘“Law in Context” Revisited’ (2003) 30.2 *Journal of Law and Society*, 177-186.

¹⁹ The ‘practice tracing’ method developed by Vincent Pouliot (as a variation of the ‘process tracing’) perfectly aligns with, and complements, the ‘law in action’ approach in that both focus on contexts, which gives social practices/phenomena (in the former) and legal norms/practices (in the latter) their true meaning. See: Vincent Pouliot, ‘Practice Tracing’ in A. Bennett and J. Checkel (eds.) *Process tracing: From metaphor to analytic tool* (Cambridge, 2015) 237-259 and Emanuel Adler, and Vincent Pouliot, ‘International practices’ (2011) 3.1 *International Theory*, 1-36.

²⁰ David Waldner, ‘Process Tracing and Causal Mechanisms’ in H. Kincaid (ed.) *Oxford Handbook of Philosophy of Social Science* (Oxford University Press, 2012) 79.

²¹ Aaron D Hill, et. al., ‘Endogeneity: A Review and Agenda for the Methodology-Practice Divide Affecting Micro and Macro Research’ (2021) 47.1 *Journal of Management*, 105-143 and John Antonakis, et. al., ‘Causality and Endogeneity: Problems and Solutions’ in D. Day (ed.) *The Oxford Handbook of Leadership and Organizations* (Oxford University Press, 2014) 93.

and-effect relationships using different methods of causal inference.²² An important strand of this literature for example particularly looks at origins of constitutions as well as the political and social phenomena underlying them. It establishes that constitutions and the constitutional design produce numerous consequences for significant real world outcomes, ranging from political conflicts to government spending.²³ There may be other unintended consequences when a constitution interacts with a country's sociocultural, historical and institutional settings.²⁴ Other studies from analytical sociology, in a way, complement this theoretical framework. For example, they contend that an outcome is not simply a consequence of various actors involved acting within certain frameworks as well as their actions performed within such limitations. In particular, insights from conflict of sociology establish that a conflict may acquire "a life of its own", and then cause "action and the formation of collective identities, much as collective identities give rise to conflict and action."²⁵

Emergency may certainly become a living mechanism too. Combining both perspectives, the paper argues that each emergency takes an unexpected and arguably unprecedented form, unleashing its own endogenous dynamics. At the most fundamental level, the rather specific circumstances of a particular emergency, and the ensuing endogenous dynamics may coercively dominate the way in which the constitutional system reacts to the shift to executive governance. Such endogenous dynamic may include the nature of emergency and its resulting conditions, lacking clear international guidance and high public support for emergency measures. In other words, the executive power may augment as a result of these more informal dynamics and processes, independent from the formal design and regulation of emergencies under constitutions or ordinary legal frameworks, but concatenated with a particular emergency and its related variables.

3. Pandemic Governance and Lockdown Powers in Turkey, the UK and Germany

3.1 (Different) Modes of Legality

When faced with the spread of the pandemic, governments across the world were confronted with one common question: how to provide a legal basis for their pandemic responses. One common response was to declare a state of emergency. The COVID-19 Civic Freedom Tracker maintained by the International Center for Not-for-profit Law (ICNL) identified the record number of 112 emergency declarations – at the time of writing – including both formal ones and its variations such as state of crisis and state of disaster over the past two years.²⁶ That new record number puts the COVID-19 related state of emergency

²² For a general overview of such studies, see Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53.1 *American Journal of Comparative Law* 125.

²³ Robert Cooter, *The Strategic Constitution* (Princeton University Press, 2020) 360.

²⁴ See generally, Michel Rosenfeld and András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2014) 1396 pp.

²⁵ Jens Rydgren, 'The Power of the Past: A Contribution to a Cognitive Sociology of Ethnic Conflict' (2007) 25.3 *Sociological Theory*, 225-244.

²⁶ The COVID-19 Civic Freedom Tracker is available at: www.icnl.org/covid19tracker/.

declarations substantially above those declared globally since the 1980s.²⁷ Yet, while more than half of the countries declared a state of emergency during the COVID-pandemic, some countries did not follow this general worldwide trend. It is indeed an established practice that states do not necessarily need to trigger emergency frameworks when confronted with extraordinary situations posing fundamental threats to their territory and their people. They often prefer to cope with emergencies by using available means under ordinary legislation, which was a common thread between Berlin, London and Ankara.

None of the three countries studied in this paper has declared a formal state of emergency, but rather, their responses mounted within the regular constitutional-legal framework. In Germany, the Infection Protection Act (IPA) was briefly used in the first two months of the pandemic – which mainly provided a legal basis for the lockdown measures taken by the Federal as well as the *Länder* in the form of executive decrees.²⁸ As the IPA's purpose is to "prevent communicable diseases in humans, detect infections at an early stage, and prevent their further spread"²⁹, the legal basis for far-reaching lockdown measures, applied without any exemptions, appeared rather weak to justify targeting the population at large.³⁰ In the coming months, the German legislature adopted four different acts "on the Protection of the Population in the Event of an Epidemic Situation of National Significance"³¹ substantially revising the IPA which cumulatively provided a proper basis for the Bundestag to declare epidemic situation of national significance by introducing an extensive catalogue of Germany's lockdown measures. With the adoption of this catalogue of measures, German federal state authorities have moved to take a more nuanced approach tailoring the severity of a lockdown by age group and sectorial activities.

²⁷ Christian Bjørnskov and Stefan Voigt, 'This Time is Different? On the Use of Emergency Measures During the Corona Pandemic' (2020) 36 ILE Working Paper Series, available at: <https://www.econbiz.de/Record/this-time-is-different-on-the-use-of-emergency-measures-during-the-corona-pandemic-bjornskov-christian/10012290065>.

²⁸ Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG), 20 July 2000, available at: <https://www.gesetze-im-internet.de/ifsg/index.html#BJNR104510000BJNE003203116>.

²⁹ Ibid, Infektionsschutzgesetz-IfSG, para. 1

³⁰ Anna Katharina Mangold, 'Germany and COVID-19: A Most Eventful Year', *Verfassungsblog*, 7 April 2021, available at: <https://verfassungsblog.de/germany-and-covid-19-a-most-eventful-year/>.

³¹ These four acts were adopted on 27 March 2020 (the First Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance, available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl120s0587.pdf), on 19 May 2020 (the Second Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance, available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl120s1018.pdf), on 19 November 2020 (the Third Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance, available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl120s2397.pdf) and on 22 April 2021 (the Fourth Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance, available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s0802.pdf).

A similar path was also taken in the UK. Despite having “garnered a considerable prowess”³² in handling emergencies including disasters and public health risks as illustrated by a number of extensive legislations such as the Civil Contingencies Act 2004 (CCA) and the Public Health Act 1984 (PHA), the UK Parliament adopted the Coronavirus Act (CVA), passed within a week and having been subjected to almost no substantial debate.³³ Replete with broad delegated powers,³⁴ the CVA was argued to provide an example of “excessive executive dominance.”³⁵ Though the CVA grants the Government a wide range of powers to handle the pandemic, the lockdown measures were introduced largely through the Section 45R of the PHA.³⁶

Unlike the UK and Germany, Turkey did not feel the need to complete or clarify its existing legal framework to fully justify its pandemic measures. Against the backdrop of Turkey’s new presidential system that was introduced in 2018 after the approval of the 2017 constitutional amendments in a referendum,³⁷ the Turkish state response to the pandemic was heavily based on executive administrative discretion and largely implemented by executive decisions and circulars (both presidential and ministerial). To provide legal justification for these measures, the Turkish executive (the President and his administration) relied on two pre-existing old piece of legislations, namely the Law on Public Health (LPH)³⁸ and the Law on Provincial Administration (LPA).³⁹ These two legislations cover a wide number of public health related issues such as diseases; epidemics or emergency contingency plans and grant broad ranging powers to Turkish state and local authorities. However, they do not provide a clear basis for several of the wide-ranging measures that Turkey resorted to combat the pandemic, *inter alia*, lockdowns and curfews. As a result, the legal basis of Turkey’s responses appeared to be rather controversial, but the Turkish hyper executive saw no need to put more teeth on this deficient framework.

³² For a detailed analysis, see: Clive Walker (ed.), *Contingencies, Resilience and Legal Constitutionalism* (Routledge, 2015), 152 pp.

³³ The Coronavirus Act 2020 received Royal Assent on 25 March 2020), available at: <https://bills.parliament.uk/bills/2731>.

³⁴ The Delegated Powers and Regulatory Reform Committee in its report to the House of Lords stated (at para. 28) that “had the country not been in the midst of a developing national emergency, there are powers in this Bill, including far-reaching Henry VIII powers, about which our commentary would have been far more trenchant and our recommendations far more robust.” See: Ninth Report, 9th Report of Session 2019-21 - published 23 March 2020 - HL Paper 42, available at: <https://publications.parliament.uk/pa/ld5801/ldselect/lddelreg/42/4202.htm>.

³⁵ Jake Hinks, ‘The Coronavirus Act 2020: An Example of ‘Excessive Executive Dominance’, *U.K. Constitutional Law Blog*, 9 June 2020, available at: <https://ukconstitutionallaw.org/2020/06/09/jake-hinks-the-coronavirus-act-2020-an-example-of-excessive-executive-dominance/>.

³⁶ Additionally, the CVA 2020 enables police and immigration officers to detain a person for a limited period that is or may be considered infectious and to take them to a suitable place to enable screening and assessment. See: Schedule 21 of the CVA. See also: Rebecca Moosavian, Clive Walker and Andrew Blick, ‘Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism’ (2021) 72.1 Northern Ireland Legal Quarterly, 1-36.

³⁷ For a detailed analysis on the proposed amendments, see: Venice Commission, Opinion No 875/2017 on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13 March 2017.

³⁸ Turkey, Law on Public Health (*Umumi Hifzissihha Kanunu*) No. 1593, 24 April 1930.

³⁹ Turkey, Law on Provincial Administrations (*İl İdaresi Kanunu*) No. 5442, 10 June 1949.

3.2 Parliamentary Involvement in Lockdown Policies

The COVID-19 pandemic has dramatically transformed or exacerbated the power relations between the executive and the legislature to the detriment of the latter. One common thread that emerged from three case studies is that parliaments were marginalized and sidelined to some extent with regard to both their law making and oversight functions.⁴⁰ However, the level of deviation from constitutional standards varied significantly.

The German legal response to the pandemic held up as model with relatively minimal departure from the constitutional fundamentals. Over the past two years, the well established rationalized forms of German parliamentarism kept the executive within the limits of its confined powers. This does not mean that there were no concerns. Regular critical voices had been raised towards the degree of involvement of the *Bundestag* in pandemic policies.⁴¹ For instance, it was argued that the *Bundestag* had merely followed and rubber-stamped what the *Länder* representatives have decided behind closed doors.⁴² However, during the pandemic, we saw in many cases that the German parliament regained its relevance as a functioning oversight body. In particular, the First Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance of 27 March 2020 amending the Section 5 of the IPA produced the effect of transferring unprecedented and far-reaching powers to the Federal Health Ministry including the powers to introduce Corona measures by a decree (statutory order).⁴³ This led several commentators to argue that there had been a shift of parliamentary powers towards the executive, eroding parliamentarism in contravention of the Basic Law.⁴⁴ In part, as a result of these criticisms, the German parliament substantially amended the IPA by the Second Act in November 2020.⁴⁵ Another step in the right direction was Section 28a of the IPA in which the Parliament legislated a catalogue of pandemic measures.

A more significant and worrisome trend of transfer of powers to the executive and the sidelining of the Parliament was visible in the UK. Scholars commonly argued that the Westminster Parliament suffered a big loss in competences as well as its constitutional position as reflected in poor quality of legislation, lack of consultation and debate, and a mere appearance of scrutiny.⁴⁶ Importantly, a recent research finds that the two additional new modes of review (two monthly reports and six monthly votes on renewal) brought by the CVA and their implementation during the pandemic merely provided an appearance of

⁴⁰ For a more comprehensive discussion on the worldwide thread on curbed oversight functions of parliaments during the COVID-19 emergency see: Elena Griglio, 'Parliamentary oversight under the COVID-19 emergency: striving against executive dominance' (2020) 8.1-2 *The Theory and Practice of Legislation*, 49-70.

⁴¹ Jörg M. Dostal, 'Governing Under Pressure: German Policy Making during the Coronavirus Crisis' (2020) 91.2 *The Political Quarterly*, 542-552.

⁴² Mangold, *supra* footnote (n. 30).

⁴³ See in particular, Section 5, para. 2, sentence 2 nos. 3 and 4 of the *Infektionsschutzgesetz-IfSG*, *supra* footnote (n. 28).

⁴⁴ Pierre Thielbörger and Benedikt Behlert, 'COVID-19 and the Basic Law: On the (Un)suitability of the German Constitutional "Immune System," *Int'l J. Const. L. Blog*, 20 March 2020, available at: <http://www.iconnectblog.com/covid-19-and-the-basic-law-on-the-unsuitability-of-the-german-constitutional-immune-system/>.

⁴⁵ Golia *et. al.*, *supra* footnote (n. 3).

⁴⁶ Moosavian, Walker and Blick, *supra* footnote (n. 36).

scrutiny and was part of a broader pattern of marginalizing the UK Parliament in more recent years.⁴⁷ Despite the fact that the House of Lords established a COVID-19 Committee to consider the long-term implications of the pandemic as early as May 2020,⁴⁸ another research highlighted that Parliament was not “seen to fit to insist upon” its regular oversight mechanism.⁴⁹ Parliamentary committees have initiated several COVID-19 inquiries,⁵⁰ however these were found to be “negligible.”⁵¹ Importantly, the performance of the Parliament in scrutinizing over the Government’s use of secondary legislation (in particular statutory instruments, mostly under negative procedure and using the urgent procedure under the PHA) received regular criticisms too.⁵² Overall, in the UK, the pandemic saw very little parliamentary oversight or intervention, which was argued to be tantamount to “government by decree.”⁵³ Such trend towards executive dominance indeed reflected, and reinforced, a pre-existing long-standing trend in the UK, a vivid constitutional debate about the limits of the powers of government and the ultimate authority of Parliament that largely marked the Brexit process.⁵⁴

The trend towards a more powerful executive at the expense of the legislature was even more pronounced in Turkey. As noted above, the Turkish response to the pandemic was shaped and driven by its new presidential system organized around the almost unlimited and unchecked executive power.⁵⁵ Under this new system, presidential decrees have been the main mechanism of rulemaking and the Parliament, controlled by President Erdogan’s Justice and Development Party (AKP) and its small coalition partner, the Nationalist Movement Party (MHP), is largely unable to exercise an effective oversight role. Whilst the Turkish Parliament has remained fully functional over the past two years, it played almost no oversight role over the drastic measures taken by the Turkish executive. It is noteworthy that Turkey’s new presidential system severely curbed the Parliament’s legislative and oversight functions. While the opposition parties have tried to initiate all existing three

⁴⁷ Daniella Lock, Pablo Grez Hidalgo and Fiona De Londras, ‘Parliament’s One-Year Review of the Coronavirus Act 2020: Another Example of Parliament’s Marginalisation in the Covid-19 Pandemic’ (2021) 92.4 *The Political Quarterly*, 699-706 (identifying four obstacles to an effective scrutiny: “inadequate parliamentary time scheduled for the review; the ‘all-or-nothing’ framing of the review; late and inaccurate government reporting prior to the OYR; and the failure to address key issues regarding the operation of the CVA, including major human rights concerns).

⁴⁸ The UK COVID-19 Committee’s reports are available at: <https://committees.parliament.uk/committee/460/covid19-committee>.

⁴⁹ Nina Malik, ‘Leaving Lockdown: The Impact of COVID-19 on Civil Liberties and National Security in the UK and US’ (May 2020) Henry Jackson Society Report, available at: <https://henryjacksonsociety.org/publications/leaving-lockdown-the-impact-of-covid-19-on-civil-liberties-and-national-security-in-the-uk-us/>.

⁵⁰ The COVID-19 Review Observatory compiles these inquiries on its website, available at: <https://blog.bham.ac.uk/cvro/covid-19-reviews/committee-inquiries-westminster/>.

⁵¹ Joelle Grogan, ‘A Government (Un)Governed?: Examining the UK’s Legal Responses to the COVID-19 Pandemic’, *Verfassungsblog*, 7 May 2020, available at: <https://verfassungsblog.de/a-government-ungoverned/>.

⁵² Moosavian, Walker and Blick, *supra* footnote (n. 36) 21.

⁵³ Keith D. Ewing, ‘COVID-19: Government by Decree’ (2020) 31.1 *King’s Law Journal*, 1-24.

⁵⁴ Joelle Grogan, ‘COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis’ (2022) *Hague Journal on the Rule of Law*, 1-21.

⁵⁵ Sinem Adar and Günter Seufert, ‘Turkey’s presidential system after two and a half years: an overview of institutions and politics’ (2021) SWP Research Paper 2/2021, 1-39, available at: <https://www.swp-berlin.org/en/publication/turkeys-presidential-system-after-two-and-a-half-years>.

parliamentary oversight mechanisms, namely, the right to put written questions, parliamentary inquiry, parliamentary investigations,⁵⁶ President Erdogan's AKP together with its small coalition partner, the MHP, which holds the parliamentary majority, was able to effectively block them.⁵⁷ One notable exception to this parliamentary non-involvement was the adoption of an early release legislation in April 2020 which released up to 90,000 prisoners, around one-third of Turkey's prison population in a bid to reduce the risk of COVID-19 outbreaks in prisons.⁵⁸ Overall, in Turkey, the COVID-19 pandemic was argued to have "accentuated the long-standing process of executive aggrandisement."⁵⁹

3.3 Judicial Oversight of Lockdown Measures

Courts in Germany have also engaged in balancing health aims against rights restrictions, and demanded modifications to be performed to the pandemic measures in order to better protect fundamental rights. The strict measures that COVID-19 triggered in Germany led to a flurry of judicial cases and challenges before both state courts and the Federal Constitutional Court (FCC).⁶⁰ While most challenges were rejected, in 3 important decisions taken in the course of April 2020, the FCC found the general ban on religious gathering and public protests violating the proportionality requirement (that the rights limitations are proportional to the health objectives they serve), arguing that less rights restrictive ways were available (i.e. social distancing measures and hygiene concepts).⁶¹ Importantly, the FCC acknowledged that state authorities had certain discretion under the statutory instruments on whether and how to allow certain gatherings. Yet, in the course of exercising that discretion, they were required to recognize the freedom of assembly as a significant feature

⁵⁶ See Article 98 of the Turkish Constitution.

⁵⁷ The official statistics, for example, clearly show that the Turkish Government glossed over the overwhelming majority of the opposition lawmakers' nearly 600 pandemic-related written questions since 2020. Moreover, over 80 motions for parliamentary inquiry requests have not been addressed at all in the past two years. The final mechanism alive, parliamentary investigation is rather impossible to be triggered due to the required three-fifth majority. See the Turkish Grand National Assembly website, under 'Denetim' (Parliamentary Scrutiny, available at: https://www.tbmm.gov.tr/develop/owa/tbmm_internet.anasayfa.

⁵⁸ Turkey, Law No. 7242 on the Execution of Penalty and other Security measures amending certain legislations, 15 May 2020, available at: <https://www.resmigazete.gov.tr/eskiler/2020/04/20200415-16.htm>. For a discussion on the Turkish Constitutional Court's decision regarding the constitutionality of the Law No.7242, see: Emre Turkut, 'Emergency Powers, Constitutional (Self-)Restraint and Judicial Politics: the Turkish Constitutional Court During the COVID-19 Pandemic' (2022) *Jus Cogens* (Online first articles), 1-22.

⁵⁹ Başak Çalı and Emre Turkut, 'Turkey: Pandemic Governance and Executive Aggrandisement' in J. Grogan and A. Donald (eds.) *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge, 2022) 248-258.

⁶⁰ Holger Hestermeyer, 'Coronavirus Lockdown-Measures before the German Constitutional Court', *IConnect Blog*, 30 April 2020, available at: <http://constitutionnet.org/news/coronavirus-lockdown-measures-german-constitutional-court>.

⁶¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 15 April 2020, No. 1 BvQ 828/20 available at: https://www.bverfg.de/e/rk20200415_1bvr082820.html and 17 April, 2020, No. 1 BvQ 37/20, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200417_1bvq003720.html and 29 April, No. 1 BvQ 44/20 available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html.

in any well-functioning democracy even in times of a pandemic.⁶² Many administrative courts soon followed these decisions, permitting such assemblies. These decisions also forced changes to the pandemic responses as exemplified by the gradual relaxation of measures from April 2020 onwards. Yet, over time, the FCC proved more deferential and displayed restraints and refrained from “questioning the health-related necessities of the pandemic response.”⁶³

In two highly symbolic cases that were decided in November 2021, the FCC granted a wide latitude (arguably wider than in cases mentioned above) to the executive in order to prevent the spread of the pandemic and largely supported the extensive curfew restrictions and school closures under the Fourth Act Protect the Population During an Epidemic Situation of National Significance (“federal pandemic emergency brake”).⁶⁴ Importantly, the FCC noted that such measures were both lawful and constitutional in light of both their effectiveness and the pandemic threat level. While there are signs of judicial restraint, German courts displayed an effective judicial oversight on the executive pandemic policies. Nonetheless, the fact that many courts at both national and federal level have involved themselves in the pandemic policy response in Germany is an indication that executive power was not entirely unbound, and that judicial oversight remained in place.

As for the judicial involvement in pandemic response in the UK, most challenges failed, similar to Germany. Yet, even when an objection was sustained and a challenge proceeded to the merits stage, UK courts adopted a business as usual approach to the principle of legality even in a time of emergency. One illustrative case is *R. (on the application of Dolan) v. Secretary of State for Health*.⁶⁵ As briefly noted above, the Minister of Health exercised his authority under Section 45 PHA to impose a full lockdown in England by means of Health Protection Regulations of March 2020.⁶⁶ This was so because the CVA 2020 did not confer new powers on UK (as well as Welsh) ministers to impose a lockdown on the people of England (and Wales).⁶⁷ Such orders under the PHA, however, raised considerable legality and human rights concerns.⁶⁸

⁶² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 15 April 2020, No. 1 BvQ 828/20 available at: https://www.bverfg.de/e/rk20200415_1bvr082820.html.

⁶³ Hestermeyer, *supra* footnote (n. 60).

⁶⁴ FCC, 19 November 2020 1 BvR 781/21, available at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/11/rs20211119_1bvr07812.1.html and 1 BvR 971/21, available at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/11/rs20211119_1bvr09712.1en.html.

⁶⁵ Royal Courts of Justice (UK) *R. (on the Application of Dolan) v. Secretary of State for Health*, No. C1/2020/1117, 1 December 2020, available at: <https://www.judiciary.uk/wp-content/uploads/2020/12/Dolan-v-SSHSC-judgment-011220-.pdf>.

⁶⁶ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020 No. 350.: “During the emergency period, no person may leave the place where they are living without reasonable excuse.”

⁶⁷ It did, however, confer such on Northern Ireland and Scottish ministers, see: Schedule 18 and 19 of the CVA.

⁶⁸ Jeff King, ‘The Lockdown is Lawful: Part I’ and ‘The Lockdown is Lawful: Part II’, *UK Constitutional Law Association Blog*, 1-2 April 2020, available at: <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/> and <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/>. See also, Kanstantsin Dzehtsiarou, ‘Article 15 Derogations: Are They Really Necessary During the COVID-19 Pandemic?’ (2020) 4 European Human Rights Law Review, 359-371 and Alan Greene, ‘Derogating from the

These concerns were at the heart of *Dolan*. The case was filed in May 2020, and the lockdown measures were not in effect at the time of the decision (in June 2020). Nevertheless, the Court of Appeal, upholding the earlier decision at first instance,⁶⁹ held that the Minister was granted with broad powers by sections 45C(1-4) and found that the 26 March Health Regulations fell within the scope of such powers.⁷⁰ It then rejected the applicants' arguments challenging the *vires* of the Regulations. As one observer noted, "the Court's strained and obfuscatory reasoning was analytically unsound and demonstrated undue deference to the executive."⁷¹ Such demonstrations of executive-minded judicial outcomes followed soon.

An important case in which the claimant raised similar legality concerns regarding the Health Protection Regulations on the requirement of self-isolation for those with a positive COVID-19 test and their close contacts, was similarly dismissed by the High Court of Justice.⁷² The Court in essence rejected the central argument of the claimant by underlining that isolation did not amount to quarantine. On the one hand, it found the Minister could impose a self-isolation in line with Section 45G PHA and on the other, such imposition of confinement did not amount to a deprivation of liberty (following an order from a peace justice) but rather a restriction of freedom of movement.⁷³ A narrow interpretative approach seemingly avoided to establish a breach of the right to liberty and security under Article 5 ECHR.⁷⁴ As one commentator strikingly highlighted, "an Englishman's home is not necessarily his prison hospital, but only because the court [*or any other international court for that matter, including the ECtHR*] defined the boundaries of detention as not including a home curfew if unaccompanied by other restraints."⁷⁵ These cases demonstrate the restraint on the part of UK courts in trying to balance fundamental rights with health related measures.

A more worrisome case in terms of judicial oversight of pandemic responses emerged from Turkey. Turkish courts simply refused to function as a forum of legal accountability for both pandemic policies implemented by Turkey's strong executive and their vast human rights

European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?' (2020) 3 European Human Rights Law Review, 262-276.

⁶⁹ *Dolan v. Secretary of State*, supra footnote (n. 65).

⁷⁰ Court of Appeal (UK), *R. (on the Application of Dolan) v. Secretary of State for Health*, EWCA Civ 1605, 9 December 2020.

⁷¹ John Yap and Nicholas U. Jin, 'R (Dolan) v Secretary of State for Health and Social Care: Legality in the Time of Coronavirus' (2021) Oxford U. Undergraduate Law Journal, 171.

⁷² Royal Court of Justice (UK), *R (Francis) v Secretary of State for Health & Social Care*, No: CO/3476/2020, December 2020, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3287.html>.

⁷³ For a short case analysis on *Francis*, see Tim Baldwin, 'Social Welfare Update: Legality of Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 upheld; meaning of self-isolation' *Garden Court Chambers Blog*, 23 December 2020, available at: <https://www.gardencourtchambers.co.uk/news/social-welfare-updates/social-welfare-update-legality-of-health-protection-coronavirus-restrictions-self-isolation-england-regulations-2020-upheld-meaning-of-self-isolation>.

⁷⁴ A similar narrow approach under Article 5 ECHR was adopted in the *Terhes v. Romania* judgement (App No. 49933/20, 12 April 2021, Admissibility) by the ECtHR. The case concerns the lockdown which was ordered by the Romanian government from 24 March to 14 May 2020 to tackle the COVID-19 pandemic and which entailed restrictions on leaving one's home. The ECtHR held that the measure complained of could not be equated with house arrest, thus constituted no deprivation of liberty under Article 5 ECHR. Accordingly, the ECtHR unanimously declared the application inadmissible.

⁷⁵ Moosavian, Walker and Blick, supra footnote (n. 36) 30, (emphasis added).

implications by displaying notable signs of judicial restraint and enhanced deference.⁷⁶ At the time of writing, Turkey's pandemic measures have not seen a slew of judicial challenges. In an illustrative decision in the case of *Senih Ozay* in which the applicant challenged the legal basis of Turkey's pandemic-related curfews imposed on citizens over 65 – a measure adopted via a circular by the Turkish Interior Ministry,⁷⁷ the Turkish Constitutional Court (TCC) reached a rather uncritical and formalistic outcome by dismissing the case on non-exhaustion of available remedies. In particular, the TCC noted in its decision that lockdown (or curfew) in its nature was an administrative measure and that the applicant should first take this case before an administrative court.⁷⁸ As regards whether the remedy before administrative courts was both available and effective, the TCC simply noted that the applicant could request an order of stay of execution before administrative courts due to irreparable harm or damage caused by the administrative action, and/or its complete lack of legal basis within a reasonable time. This in itself was enough to conclude that a remedy before administrative courts should be considered both available and effective.

This decision revealed numerous challenges. Particularly, the TCC refrained from issuing its authoritative views on who might be the competent body to declare lockdown, subject to what procedural-substantive constraints. More importantly, this executive minded decision allowed the Turkish government to go uninterrupted with the drastic COVID-19 measures. This undue deference to the executive was particularly unfortunate, as over the past two years, clear evidence of pretextual and vindictive use of the pandemic to achieve other controversial ends emerged from Turkey. The under-reporting of pandemic cases and deaths by the Turkish Government as well as its selective application of pandemic rules, despite legal restrictions, raised regular concerns about whether the Turkish government was taking the pandemic seriously. More strikingly, Turkish authorities launched yet another crackdown targeting thousands of individuals who challenged the government's official line on the pandemic.⁷⁹

4. Endogenous Sources of Executive Power

4.1 Technocratic forms and manifestations of the COVID-19 emergency

As it has been shown in the preceding analysis, one quick reaction across all three case studies was the concentration of decision-making power at the top of political hierarchy. In the followings, I will explain the dynamic and/or logic underpinning of this state of affairs,

⁷⁶ For a comprehensive analysis on how Turkish courts, in particular the Turkish Constitutional Court, treated legal challenges brought against Turkey's legal responses to the COVID-19 pandemic, see: Turkut, *supra* footnote (n. 58).

⁷⁷ TCC, *Senih Ozay*, App No 2020/13969, Dec. 9 June 2020, available at: <https://www.anayasa.gov.tr/media/6791/2020-13969.pdf>.

⁷⁸ *Ibid*, *Senih Ozay*, para. 30.

⁷⁹ 'OSCE Media Freedom Representative about detention of several journalists following their reports on coronavirus crisis in Turkey', 23 March 2020, available at: <https://reliefweb.int/report/turkey/osce-media-freedom-representative-concerned-about-detention-several-journalists> and Owen Dyer, 'Covid-19: Turkey cracks down on doctors who doubt official figures' (2020) 370 *British Medical Journal Online* (News), available at: <https://www.bmj.com/content/370/bmj.m3787>.

namely the nature of the threat and the technocratic manifestations of the COVID-19 pandemic.

The intuitive claim here is that the COVID-19 pandemic generated arguably the most complex global health crisis in history given its devastating and multidimensional effects on the global scale. Indeed what started as a public health emergency soon intensified and expanded with huge impacts on public health and unprecedented shocks to economies and labour markets, labelled as “the COVID-19 recession.”⁸⁰ It also produced a social crisis, which definitely illustrated worldwide inequalities, and injustices. As in the words of UN Secretary-General António Guterres, it has fast become a full-fledged human rights crisis, not just due to the impact of COVID-19 itself, but because of the COVID-19 state measures worldwide.⁸¹ Particularly worrying is that the COVID-19 pandemic hit hard at a precarious time of the rule of law backsliding; the populism surge; growing illiberalism, authoritarianism and rising ethno-nationalism.⁸²

Given the magnitude of the threat, another intuitive claim can be that responding to the COVID-19 requires fast, decisive action unified by strong leadership. The novel challenge posed by the new coronavirus for legislatures is self-evident. Parliaments, by their nature, are large bodies and their operation requires bringing a wide group of people together to deliberate and vote. While several measures were taken for the full functioning of the Parliaments, the pandemic severely disrupted the way in which Parliaments could conduct their business. More fundamentally, the pandemic represents a crisis situation that requires extensive government action, where the role of parliament is less clear. As illustrated by the pandemic responses in Turkey, the UK and Germany, the COVID-19 pandemic created a real sense of emergency that empowered the executive branch and emboldened it to assert and use greater authority to address the immediate public health threats. One key manifestation of such greater authority was manifested in the rise of technocratic mode of governance.⁸³ The COVID-19 pandemic has indeed become synonymous with technocracies – i.e. agencies, commissions, and other non-departmental bodies typically established by and within the executive branch, taking on functionally equivalent roles in risk and emergency management, including the role as tactical command centre in the hot phase of crisis management.⁸⁴ These bodies, namely, the Robert Koch Institute in Germany, the National

⁸⁰ John Bluedorn, *et. al.*, ‘Gender and Employment in the COVID-19 Recession: Evidence on “She-cession”’ (2021) IMF Working Papers No. 95, 31 March 2021, available at: <https://www.imf.org/en/Publications/WP/Issues/2021/03/31/Gender-and-Employment-in-the-COVID-19-Recession-Evidence-on-She-cessions-50316>.

⁸¹ ‘Coronavirus pandemic is becoming a human rights crisis, UN warns’ (*The Guardian*, 23 April 2020), available at: <https://www.theguardian.com/world/2020/apr/23/coronavirus-pandemic-is-becoming-a-human-rights-crisis-un-warns>.

⁸² Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018), 320 pp.

⁸³ Sebastián Lavezzolo, Luis Ramiro, and P. Vazques, ‘Technocratic Attitudes in COVID-19 times: Change and Preference over Types of Experts’ (2021) *European Journal of Political Research* 1-20 and Eric L. Windholz, ‘Governing in a Pandemic: from Parliamentary Sovereignty to Autocratic technocracy’ (2020) 8.1-2 *The Theory and Practice of Legislation*, 93-113.

⁸⁴ For a case study on the use of technocratic bodies in Taiwan, see: Tsung-Ling Lee, ‘The rise of Technocracy and the Covid-19 Pandemic in Taiwan: Courts, Human rights, and the Protection of Vulnerable Populations’ (2021) 22.6 *German Law Journal*, 1115-1132.

Institute for Health Protection in the UK and the Coronavirus Scientific Advisory Board in Turkey performed important functions in the COVID-19 responses including, *inter alia*, proposing prevention, mitigation and containment measures and thus tying the strategic and operational levels of emergency management together.

A technocratic approach is in essence evidence-based and scientific. The growth of delegated agencies as well as the prevalence of technocratic discourse – as we have seen – during the COVID-19 pandemic, may promote a depoliticized decision-making. However, two findings from established research on technocracy-politics nexus are important here. First, the empirical research found that technocracy as a depoliticized decision-making institutional model might reverse the role in politics, providing incentives for technocrats to usurp the real power and thus, challenging representative democracy and democratic legitimacy.⁸⁵ Second, except for a brief period of de-politicization in a technocracy-as-regime is likely to be followed by an effective political polarization for cases that may harbour large potential in that regard.⁸⁶ The COVID-19 pandemic has proved to have such potential. The pandemic soon experienced a high degree of political politicization on government-opposition about how to handle the crisis best within a country.⁸⁷

Such political polarization was clearly exemplified by the reactions and sentiments of parliamentary opposition parties in Germany and in the UK. A research based on data compiled by the Johns Hopkins University's COVID-19 Data Repository, the Oxford Government Response Tracker and the Stringency Index on government-parliamentary opposition relations during the COVID-19 pandemic found that German opposition parties adopted a more cooperative behaviour during the first six months of the pandemic whereas the opposition parties in the UK were more confrontational.⁸⁸ This finding indeed reinforces existing scholarship, which clearly establishes that increased polarization and politicization leads to more political stalemates and policy gridlock, leading to a decline in legislative activity.⁸⁹ If a legislature does and cannot play its essential role of law-policy making, this would shift the balance of power between the executive and legislative branches of government in favor of the former. This may explain the decreased role of the UK Parliament during the COVID-19 pandemic. As the UK Parliament lost both of its law and policymaking influence over the pandemic, the executive did not hesitate to fill this vacuum by introducing more stringent pandemic measures.

⁸⁵ Pier Domenico Tortola, *The Technocratic Challenge to Democracy* (Routledge, 2020), 61-74.

⁸⁶ Jonas Anshelm and Simon Haikola, 'Depoliticization, Repoliticization, and Environmental Concerns: Swedish Mining Politics as an Instance of Environmental Politicization' (2018) 17.2 ACME: An International E-Journal for Critical Geographies, 561-596.

⁸⁷ Sebastian Jungkunz, 'Political Polarization during the COVID-19 Pandemic' (2021) 3 Frontiers in Political Science, 2021, Article 622512, 1-8 and Sol Hart, Sedona Chinn and Stuart Soroka, 'Politicization and Polarization in COVID-19 News Coverage' (2020) 42.5 Science Communication, 679-697.

⁸⁸ Tom Louwerse, *et. al.*, 'Opposition in Times of Crisis: COVID-19 in Parliamentary Debates' (2021) 44.5-6 West European Politics, 1025-1051.

⁸⁹ For an analysis in the US context which argues that the politicization and polarization led to an increase of presidential power, see: Edward G. Carmines and Matthew Fowler, 'The Temptation of Executive Authority' (2017) 24.2 Indiana Journal of Global Legal Studies, 369-398.

4.2 The ‘Rally-around-the-flag’ phenomenon and high public support for pandemic measures

The COVID-19 pandemic may well be argued to represent a different type of event than those usually studied in the health emergencies literature. It is clear that it shares certain characteristics with national security and military emergencies as it hits quite suddenly, with a large effect on everyone’s daily life evoking comparisons and analogies to wartime or terrorism incidents. It is well established that in such emergencies citizens tend to become more favourable towards political leaders and institutions leading citizens to rally around them as a “lifebuoy.”⁹⁰ The existing scholarship on public opinion during emergencies finds that citizens may be willing to set aside their beliefs in democratic processes and place their broad trust in political leaders and governments consistent with the well-established ‘rally-around-the-flag’ effect of such events.⁹¹

The implications of the COVID-19 pandemic are largely in line with such findings. Indeed one common feature of the pandemic has been a widespread and high support for the lockdown measures among the general public, across the political spectrum.⁹² The initial empirical research on the pandemic for example found that the perception of the personal threat mattered less and citizens judged the threat of the pandemic by the magnitude of the policy response.⁹³ In all three countries, top political leaders experienced high approval ratings throughout the pandemic. In the UK, in the early months, Prime Minister Boris Johnson enjoyed his largest support (reaching close to thirty points higher than their approval before the countries shut down in April 2020).⁹⁴ Public support for President Erdogan also rocketed to around %60 in April 2020 – compared with %42 in February 2020.⁹⁵ A similar high degree of political support was clearly observed in Germany.⁹⁶

More importantly, the data compiled by the Oxford COVID-19 Stringency Index sufficiently documents the correlation between high levels of public approval and the stringency of measures.⁹⁷ A cursory analysis on this data indicates that the technocratic framing of the

⁹⁰ Dominik Schraff, ‘Political Trust during the Covid-19 Pandemic: Rally around the Flag or lockdown effects?’ (2021) 60.4 European Journal of Political Research, 1007-1017.

⁹¹ Darren W. Davis and D. B. Silver, ‘Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America’ (2004) 48.1 American Journal of Political Science, 28-46 and Joshua Woods, ‘The 9/11 Effect: Toward a Social Science of the Terrorist Threat’ (2011) 48.1 The Social Science Journal, 213-233.

⁹² Stephen Reicher and John Drury, ‘Pandemic Fatigue? How Adherence to Covid-19 Regulations has been Misrepresented and Why it Matters’ (2021) 372 The British Medical Association, 1-3 and Colin Foad, *et. al.*, ‘The Limitations of Polling Data in Understanding Public Support for COVID-19 Lockdown Policies’ (2021) 8.7 Royal Society Open Science. 1-11.

⁹³ Bengt Johansson, David Nicolas Hopmann and Adam Shehata, ‘When the Rally-around-the-Flag Effect Disappears, or: when the COVID-19 Pandemic becomes “Normalized”’ (2021) 31.1 Journal of Elections, Public Opinion and Parties 321-334 and Schraff *supra* footnote (n. 90).

⁹⁴ IPSOS, ‘Political Trust during the Covid-19 Pandemic’, Report, August 2020 available at: <https://www.ipsos.com/sites/default/files/ct/news/documents/2020-08/political-trust-and-the-covid-19-crisis.pdf>.

⁹⁵ ‘Pandemic Boosts Support for Europe’s Autocrats’ (*Balkan Insight*, 6 May 2020) available at: <https://balkaninsight.com/2020/05/06/pandemic-boosts-support-for-europes-autocrats/>.

⁹⁶ Frederik Jørgensen, *et. al.*, ‘Public Support for Government Responses against COVID-19: Assessing Levels and Predictors in Eight Western Democracies during 2020’ (2021) 44.5-6 West European Politics, 1129-1158.

⁹⁷ The Oxford Government Response Tracker’s Covid-19 Stringency Index is available at: <https://ourworldindata.org/covid-stringency-index>.

pandemic responses coupled by official narratives of containment were successful in convincing different walks of life of the public, including those critical of the government. By way of illustration, in the UK public support for the third national lockdown remained high in mid-2021, a period marked by harshest restrictions in all countries, with the public supporting even stricter measures than those implemented by the UK Government.⁹⁸ One could thus find clear evidence that executives can generate widespread public support even for highly far-reaching and invasive policies that would likely violate a wide spectrum of human rights and constitutional liberties.

4.3 The WHO's failing international authority

The WHO was established in the aftermath of the Second World War as specialized agency of the United Nations to eradicate and prevent the spread of infectious diseases. The global health regulations, in particular, the International Health Regulations 2005 (IHR) provide a comprehensive and overarching legal framework placing numerous obligations on Member States on handling public health events and emergencies that have the potential to cross borders.⁹⁹ The IHR seeks to “prevent, protect against, control and provide a public health response to the international spread of disease” while avoiding and minimizing interference with “international traffic and trade” and maintaining “full respect for the dignity, human rights and fundamental freedoms of persons.”¹⁰⁰ The regulations allow the WHO to coordinate global efforts to catch and combat outbreaks that risk turning into health emergencies by collecting and disseminating information (monitoring systems with each Member State).¹⁰¹ As demonstrated by the SARS and Ebola pandemics, the WHO has become increasingly involved in containing global health in recent decades.

During the COVID-19 pandemic, however, unprecedented national-domestic responses have abounded that made the international health authority epitomized in the WHO largely irrelevant.¹⁰² The IHR was adopted in 2005 to fill the gap of an international agreement, specifically designed to prevent epidemics in the wake of China's failure to report the 2002 SARS outbreak to the WHO.¹⁰³ Yet, ironically, it was the Chinese government's failure again

⁹⁸ In a poll carried out by Opinium in January 2021, most participants believed that the Government should close coffee shops, cafes and children's nurseries in a further tightening of the national lockdown see: 'Close coffee shops and nurseries during lockdown, voters say in new poll' (*The Guardian*, 16 January 2021) available at: <https://www.theguardian.com/politics/2021/jan/16/close-coffee-shops-and-nurseries-during-lockdown-voters-say-in-new-poll>.

⁹⁹ The IHR are an instrument of international law entered into force on 15 June 2007 and legally-binding on 196 countries, including the 194 WHO Member States; See WHO, International Health Regulations, available at: <https://www.who.int/publications/i/item/9789241580496>.

¹⁰⁰ See Articles 2 and 3 of the IHR.

¹⁰¹ See in particular, Article 2 of the WHO Constitution.

¹⁰² For a critique of the WHO's response to the pandemic, see: Armin von Bogdandy and Pedro Villarreal, 'Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order' (2020) MPIL Research Paper No. 2020-18, 1-33, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600058.

¹⁰³ Lawrence O. Gostin and Rebecca Katz, 'The International Health Regulations: The Governing Framework for Global Health Security' (2016) 94.2 *Milbank Quarterly*, 264-313.

in the wake of the COVID-19 pandemic undermining the effectiveness of the IHR and the legal authority of the WHO.

The IHR imposes various core obligations on its Member States. First, States have a timely-notification and information-sharing requirement “within 24 hours of assessment of public health information, of all events, which may constitute a public health emergency of international concern.”¹⁰⁴ Following such notification, they have to send the WHO “timely, accurate and sufficiently detailed public health information” – such information should include “case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed.”¹⁰⁵ Second, Member States must “develop, strengthen and maintain” their own domestic capacities in order to better “prevent, detect, and respond” to the spread of such diseases.¹⁰⁶ In doing so, while States preserve their “sovereign right to legislate and implement legislation in pursuance of their health policies”, their domestic efforts must “uphold the purpose” of the IHR.¹⁰⁷ Third, States can respond to outbreaks with only those measures that are in line with “scientific principles” and “any available specific guidance or advice from the WHO.”¹⁰⁸ Such latter advice and guidance by the WHO should include “the detection and assessment of, and response to, events”, “the mobilization of financial resources”, “the provision or facilitation of technical cooperation and logistical support”, “the formulation of proposed laws and other legal and administrative provisions”, and “the evaluation and assessment of their public health capacities.”¹⁰⁹

In the wake of the COVID-19 pandemic, the potential liability of governments in relation to negligence and omission with respect to the IHR and international law in general has been a fiercely discussed topic. Already in December 2019, China, the origin country of the pandemic, has been accused of attempting to cover up the spread of the coronavirus in the early days and weeks.¹¹⁰ Reportedly, the Chinese authorities waited until 31 December 2019 before reporting “a pneumonia of unknown cause” to the WHO’s country office.¹¹¹ A doctor named Li Wenliang, who tried to raise alarm about the outbreak by posting videos on social media, was targeted by the Chinese authorities for “spreading false information” and later died due to the coronavirus infection.¹¹² On 15 January 2020, China reported that it had found no evidence of human-to-human transmission of the virus and was reluctant to allow

¹⁰⁴ Article 6(1) IHR.

¹⁰⁵ Article 6(2) IHR.

¹⁰⁶ Article 5 IHR.

¹⁰⁷ Article 3 IHR.

¹⁰⁸ Article 42 IHR.

¹⁰⁹ Article 43 IHR.

¹¹⁰ Shadi Hamid, ‘China Is Avoiding Blame by Trolling the World’ (*The Atlantic*, 19 March 2020), available at: <https://www.theatlantic.com/ideas/archive/2020/03/china-trolling-world-and-avoiding-blame/608332/> and James Kynge, Sun Yu and Tom Hancock, ‘Coronavirus: the cost of China’s public health cover-up’ (*Financial Times*, 6 February 2020), available at: <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441>.

¹¹¹ The WHO, ‘Coronavirus’, available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

¹¹² Emma Graham-Harrison, Tom Phillips and Justin McCurry, ‘Doctor who blew the whistle over coronavirus has died, hospital says’ (*The Guardian*, 6 February 2020), available at: <https://www.theguardian.com/world/2020/feb/06/whistleblower-chinese-doctor-dies-from-coronavirus>.

the WHO investigators into its territory to assess the severity of the situation and collect vital information.¹¹³ In addition, it was reported that China waited seven weeks to impose lockdowns despite the fast spread of the virus. While China banned the trade and consumption of wild animal already in February 2020, its years-long failure to regulate wildlife markets may have exposed it to international state responsibility.¹¹⁴ Numerous scholars have claimed that China has run afoul of the IHR's core requirements (in particular the obligations of timely notification and information-sharing in Articles 6 and 7 of the IHR)¹¹⁵ and should also be held liable under international law on a wrongful act (an obligation to make full reparation for the harm done through, among other things).¹¹⁶

The IHR has also proven ineffective in shaping the WHO's response to the pandemic. In the early stages, the WHO's authority was seriously affected by its ambivalent and permissive attitude towards China. China's failure to report to the spread of the disease, its downplaying of the danger of human-to-human transmission, and the (in)accuracy of its communications as from January 2020 did not prompt strong response from the WHO, weakening its credibility. In the intervening weeks, despite the fast spread of the virus, the WHO has been unable to push China towards stronger cooperation. In late January 2020, the WHO Director-General Tedros Adhanom convened several emergency meetings to decide whether an emergency declaration was warranted.¹¹⁷ These efforts however did not lead to such declaration as it was "too early" and there was only "a limited number of cases abroad" despite the fast spread of the disease in China as exemplified in government-imposed lockdowns in Wuhan.¹¹⁸ The WHO finally declared the COVID-19 a public health emergency of international concern on 30 January 2020. This decision met with strong criticism from a

¹¹³ WHO, Report of the WHO–China Joint Mission on Coronavirus Disease 2019 (COVID-19), available at: <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>. See also: Nick Givas, 'WHO Haunted by Old Tweet Saying China Found No Human Transmission of Coronavirus' (*New York Post*, 20 March 2020), available at: <<https://nypost.com/2020/03/20/who-haunted-by-old-tweet-saying-china-found-no-human-transmission-of-coronavirus>> and Donald G. McNeil Jr. and Zolan Kanno-Youngs, 'C.D.C. and W.H.O. Offers to Help China Have Been Ignored for Weeks' (*New York Times*, 7 February 2020), available at: <https://www.nytimes.com/2020/02/07/health/cdcoronavirus-china.html>.

¹¹⁴ Lian Pin Koh, Yuhua Li, and Janice Ser Huay Lee, 'The Value of China's Ban on Wildlife Trade and Consumption' (2021) 4.1 Nature Sustainability, 1-14.

¹¹⁵ James Kraska, 'China is legally responsible for COVID-19 damage and claims could be in the trillions', *War on the Rocks*, 23 March 2020, available at: <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>; David Fidler, 'COVID-19 and International Law: Must China Compensate Countries for the Damage?' *Just Security*, 27 March 2020, available at: <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/> and Peter Tzeng, 'Taking China to the international court of justice over COVID-19' *EJIL: Talk!* 2 April 2020, available at: <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>.

¹¹⁶ International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001), Article 31. For an analysis on this claim, see: Lucas Bergkamp, 'State Liability for Failure to Control the COVID-19 Epidemic: International and Dutch Law' (2020) 11.2 European Journal of Risk Regulation, 343-349.

¹¹⁷ WHO, Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), 23 January 2020, available at: [https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

¹¹⁸ Maria Cheng, 'UN agency: China virus 'too early' for emergency declaration' (*Associated Press*, 23 January 2020), available at: <https://apnews.com/article/travel-united-nations-public-health-health-ap-top-news-0f266d872a7571bfa8807d2fa3daff9f>.

wide swath of international community that maintained that the WHO should have acted sooner. An extensive report of May 2021 compiled by the Independent Panel for Pandemic Preparedness and Response (IPPPR) – an independent panel of 13 experts, set up by the WHO on the request of the Member States¹¹⁹ indeed confirmed that the WHO was too cautious in communicating the severe health risks of the coronavirus noting that it should have declared a global emergency earlier than it did.¹²⁰

After the WHO finally declared an international health emergency, it called on governments across the world to take “urgent and aggressive action” but recommended against “any travel or trade restriction.”¹²¹ This was for good reason: the IHR was indeed established to prevent border closures which would result in a clear ban on international travel and which could then discourage government from communicating outbreak-related information.¹²² Nonetheless, States did not pay any heed to the WHO recommendation. Soon afterwards, governments worldwide responded to the pandemic with sweeping and wholly unprecedented measures that have drastically limited individual freedoms and fed into more domestic/nationalist responses.

Several scholars argued that the widespread use and implementation of lockdowns (in Turkey, the UK, and Germany and beyond) may have given rise to a breach of the IHR.¹²³ One study for example found that since the WHO had provided alternatives, including “risk communication, surveillance, patient management, and screening at ports of entry and exit” countries breached the IHR by imposing lockdowns i.e. closing their borders and adopting travel restrictions contrary to the WHO advice.¹²⁴ Another research similarly found that forced travel restrictions undercut “the global solidarity that WHO seeks in responding to this threat.”¹²⁵ To be clear, the WHO did not recommend lockdowns (in the form of mass stay-at-home order and international travel restrictions) in the early stages of the pandemic and proposed systematic social distancing interventions (such as prohibiting large-scale

¹¹⁹ The panel was established in response to the World Health Assembly Resolution on ‘Covid-19 Response’, WHA 73.1, 73rd Assembly, 19 May 2020 available at: https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf.

¹²⁰ IPPPR, ‘COVID-19: Make it the Last Pandemic’, Report, 12 May 2021, available at: https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf.

¹²¹ WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), 30 January 2020, available at: [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

¹²² See also: Armin von Bogdandy and Pedro Villarreal, ‘International Law on Pandemic Response: a First Stocktaking in light of the Coronavirus Crisis’ (2020) MPIL Research Paper No. 2020-07, 1-29, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650.

¹²³ Under Article 43(1) of the IHR, any additional health measures implemented by countries “shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives”.

¹²⁴ Roojin Habibi, *et. al.*, ‘Do not Violate the International Health Regulations during the COVID-19 Outbreak’ (2020) 395 *The Lancet*, 664-666.

¹²⁵ Benjamin Mason Meier, Roojin Habibi, and Y. Tony Yang, ‘Travel Restrictions Violate International Law’ (2020) 367.6485 *Science*, 1436-1436. The IHR also require States to “collaborate...to the extent possible” by coordinating medical, logistical, financial, and legal responses to public health emergencies.

gatherings and school/workplace closures).¹²⁶ Once more and more countries started imposing lockdowns in later stages, it somewhat reluctantly accepted that they were to be considered “as a last resort option” while noting that they should not be the “primary means”¹²⁷ of the pandemic response, nor can they be “a long-term solution.”¹²⁸

Any firm conclusion on whether lockdowns breached the IHR or whether States may have been justified in imposing such restrictions essentially depends on the effectiveness of these measures. However, there seems to be no consensus among the scientific community. While some experts and researchers found that lockdowns have been beneficial in stopping international transmission,¹²⁹ other studies found the evidence inconclusive.¹³⁰ Importantly, a recent research finds that multiple lockdown measures imposed simultaneously – as it has been the case with the COVID-19 responses – make it challenging to isolate the effect of a single measure.¹³¹

Yet, what the WHO discovered in the immediate aftermath of the COVID-19 pandemic was that “it had little power to convince States to follow the IHR’s provisions.”¹³² This stemmed from both its structural weaknesses as well as its controversial practices in a swiftly worsening pandemic which fits into a larger pattern of the failing authority of the WHO in managing and coordinating global risks. As the COVID-19 pandemic highlighted, such global risk perception indeed served to strengthen the discretionary power of national executives as they claimed to reduce their citizens’ exposure to coronavirus risk based on unprecedented measures by gaining more power that would not otherwise be available to them.

Conclusion

This paper attempted to unravel some of the endogenous dynamics that played a part in the augmentation and enhancement of executive power during the COVID-19 pandemic. The very corner stone of the argument is rested on the fact that each emergency takes an

¹²⁶ See WHO, Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), available at: [https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)).

¹²⁷ Helen Pidd, ‘National lockdowns should be backup plan on Covid, says WHO envoy’ (*The Guardian*, 29 October 2020), available at: <https://www.theguardian.com/politics/2020/oct/29/national-lockdowns-should-be-backup-plan-on-covid-says-who-envoy>.

¹²⁸ WHO, WHO Director-General’s opening remarks at the media briefing on COVID-19, 21 August 2020, available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---21-august-2020>.

¹²⁹ Alessio Andronico, *et. al.*, ‘Evaluating the Impact of Curfews and other Measures on SARS-CoV-2 Transmission in French Guiana’ (2021) 12.1 *Nature Communications*, 1-8; Seth Flaxman, *et. al.*, ‘Estimating the Effects of Non-Pharmaceutical Interventions on COVID-19 in Europe’ (2020) 584.7820 *Nature*, 257-261 and Nina Haug, *et. al.*, ‘Ranking the Effectiveness of Worldwide COVID-19 Government Interventions’ (2020) 4.12 *Nature Human Behaviour*, 1303-1312.

¹³⁰ Chloe Dimeglio, *et. al.*, ‘Side Effect of a 6 pm Curfew for Preventing the Spread of SARS-CoV-2: A Modeling study from Toulouse, France’ (2021) 82.5 *Journal of Infection*, 186-230.

¹³¹ Kristian Soltesz, *et. al.*, ‘The Effect of Interventions on COVID-19’ (2020) 588.7839, *Nature*, E26-E28.

¹³² Oona A. Hathaway, Preston J. Lim, Alasdair Phillips-Robins and Mark Stevens, ‘The COVID-19 Pandemic and International Law’ (2021) 54 *Cornell International Law Journal*, 149, 221.

unexpected and arguably unprecedented form and creates its own endogenous universe. As illustrated by the pandemic responses in Turkey, the UK and Germany, the COVID-19 created a real sense of emergency that empowered the executive branch and emboldened it to assert and use greater authority. Such greater authority was clearly manifested, *inter alia*, by the rise of technocratic mode of governance, sidelining of the Parliament and undue judicial deference.

These findings carry potential implications for theories of emergency governance in health crisis. While it might still hold true that the executive branch could become more unbound in national security emergencies, which are categorically more prone to abuse and misuse,¹³³ the potential effects of the expansion of executive power in a health crisis cannot be underestimated. As noted above, the COVID-19 pandemic represents a unique crisis situation (arguably the most complex global health crisis in history) that requires extensive government action, where the role of parliaments and courts are less clear. While the COVID-19 measures and restrictions required significant changes in daily life, public support for these measures remained high even when the executives resorted to stricter and harsher measures. The WHO's controversial practices (as in the case of lockdowns) in a worsening pandemic became unfortunate markers of its structural weakness and its failing authority of the WHO in managing and coordinating global risks. Lack of international guidance and the irrelevance of the WHO in pandemic responses might also possibly explain why pandemic measures were the products of domestic forms of health governance and why the national government and executives addressed the coronavirus as if they were addressing a domestic national security threat.

As it has been shown above, these factors have indeed served to strengthen the discretionary power of national executives as they claimed to reduce their citizens' exposure to the coronavirus risk based on unprecedented measures by gaining more power that would not otherwise be available to them. Several international organizations and scholars have indeed confirmed that the COVID-19 pandemic reaffirmed and accelerated the current global threat of democratic decline, the wave of populism and illiberalism while favouring authoritarian forms of emergency governance.¹³⁴ In one sense, the findings of the paper suggests there is evidence that the conventional (constitutional) theory in health emergencies underwent a reinvention to the detriment of institutional checks and balances, parliamentary supervision and judicial independence during the COVID-19 pandemic. As we have seen above, the expansion of executive power during health emergencies is a common problem across different regime types and constitutional settlements. And when considering the endogeneity of crises and the fact that an era of emergencies is set to bear down on us, there is alarming signals that executive over-reach will become more prevalent in future health emergencies.

¹³³ Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19.5 International Journal of Constitutional Law, 1498-1535.

¹³⁴ V-Dem Institute, 'Autocratization Turns Viral, Democracy Report 2021', Report, available at https://www.v-dem.net/static/website/files/dr/dr_2021.pdf and Jan Petrov 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What role for Legislative and Judicial checks?' (2020) 8(1-2) The Theory and Practice of Legislation, 71-92.

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