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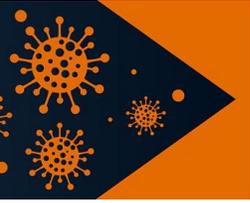
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## THE RULE OF LAW CRISIS AND SELF-INCURRED IMMATURITY

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**Abstract:** *The COVID-19 pandemic challenged countries around the world to preserve public health which entailed limitations of human rights. We have seen around the world that these limitations were adopted in way that was not in accordance with the proportionality principle, which led to misuse of the state of emergency in general and the interventionism of unseen proportions. The goal of this paper is to present how Bosnia and Herzegovina, as a country in transition, faced the COVID-19 pandemic and give an overview of the events that represent human rights and freedoms violations and abuses associated with the state of emergency.*

**Keywords:** *COVID-19; Human Rights and Freedoms; Rule of Law; Political Elite; Populism; Interventionism*

## INTRODUCTION

Since the appearance of COVID-19 which caused global pandemic, this disease in scientific, political and media discourse was named with equipollent term as the 'unknown deadly enemy'. Many countries around the world were tasked to protect human lives against the virus known to pose a threat against all, whereas other information was subject to speculation. Countries have used different strategies against this unknown enemy, but what is common to for each is that they all, more or less, used a lockdown as a restrictive measure in order to reduce social contacts and prevent the spread of coronavirus pandemic. Lockdown involves the limitations of numerous human rights, and since human rights are interdependent and related the limitations on the right to freedom of movement entails the limitation on other rights: the right to freedom of movement, right of assembly, right to work, right to education, and right to freedom of religion.

Although COVID-19 poses a threat to human rights and governments in such extraordinary circumstances may legitimately limit and derogate from particular rights or freedoms, such limitations and derogations should be implemented in accordance with the principles of the International Covenant on Civil and Political Rights and European Court of Human Rights implying they must have legitimate purpose, be temporary in nature, balance between collective and individual interest, and follow the principle of non-discrimination (Sadiković 2003). However, we have seen that in many countries these limitations and derogations were not adopted in accordance with these instructions. In the war against the 'unknown deadly enemy' many countries experimented and entered this situation unprepared, and on the other hand this war was used for personal gain by political elite and groups which adversely affected the rights, spiritual integrity and dignity of citizens. For almost three decades Bosnia and Herzegovina has fought with all the challenges of transition: unemployment, corruption and nepotism, shortage of entrepreneurship, organized crime and rule of law deficiencies. All of these provided fertile ground to political elite which used COVID-19 as a perfect tool and excuse to once more play the card of nationalism, populism and profiteering and so inflict the final stroke to disenfranchised and resigned people.

### WHAT WAS THE SITUATION LIKE IN BOSNIA AND HERZEGOVINA BEFORE COVID-19 PANDEMIC?

Bosnia and Herzegovina (hereinafter referred to as: BiH) is formally established under the rule of law and other democratic principles as it is laid down in the BiH Constitution Article 1(2) (Constitution of BiH 1995). Formally, the rule of law is also an indispensable principle in governing parties' programs as well government's programs

such as the Reform Agenda for Bosnia and Herzegovina 2015 - 2018 which mostly proclaims the reinforcement of this principle and among other states:

There is a need to ensure the irreversible entrenchment of the rule of law which must be built on a foundation of concrete progress in the fight against organized crime, terrorism and corruption. All necessary institutional and operational developments will aim to provide citizens throughout BiH with a safer and corrupt-free environment. At the same time, governments at all levels in BiH will enhance their commitment to restore overall citizens' trust in rule of law institutions by developing capacities, accountability, professionalism and integrity (Reform agenda 2015).

However, since gaining its independence, BiH could not implement the rule of law principle in state management which can be seen every year in the Rule of Law Index report. The Rule of Law Index report 2020 shows that BiH is in the 64<sup>th</sup> place out of 128 countries where the rule of law was measured, and the lowest score was in the following categories: Constraints on Government Powers, Absence of Corruption, Open Government and Fundamental Rights (Bock et al. 2020). For BiH the rule of law is unreachable ideal which is only used formally by ruling political elite to appease international officials, manipulate the public and decorate their political speeches and secure votes. The rule of law is a principle which in democratic countries should be the highest principle which protects citizens from the arbitrary actions of the state, maintaining the citizens' rights and freedoms. However, in BiH instead of the rule of law there is the rule of political parties with their distorted outlook on nationalism and collectivism, as well as political practice in which parties delegate its members in state institutions, all of which results in the rule of law and legal state absence and creates the environment where such deviations become a norm. The first case of coronavirus infection in BiH was confirmed on 5 February, but political elite in BiH ignored warnings and indications of pandemic by being more focused, at that time, on their ethnic and nationalistic conflict.

Democratic system is sustainable and strong as its institutions (Asemoglu and Robinson 2014), and to make those institutions strong it is necessary to fulfill, among other, the principle of tripartite system which exists on the separation of powers model, the executive branch, the legislative branch, and the judicial branch, each with separate, independent powers and responsibilities, and at the same time respects rights and freedoms of its citizens. The independence of judicial branch from executive and legislative branches is a foundation for its effective, responsible conduct and respect of democratic standards, and that was the reason for establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in 2004 (hereinafter: the Council).

The law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina defines the election of its members from the following institutions: the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Supreme Courts of each entity, the Prosecutor's Offices of each entity, the Brcko District of Bosnia and Herzegovina Judicial Commission, the Bar Associations of each entity, the Parliamentary Assembly of Bosnia and Herzegovina and the Council of Ministers of Bosnia and Herzegovina. The last two mandate one representative each, but they do not have voting rights in disciplinary actions, dismissals and elections of judges and prosecutors. In short, the Council elects judges and prosecutors of all BiH courts except the Constitutional Court of BiH and the Constitutional Courts of each entity, monitors work of elected judges and prosecutors, starts disciplinary procedures, etc. (Trnka 2006). We can see that the election process of the Council members and their statutory responsibilities are made so that executive and legislative branches do not have influence on election of judges and prosecutors. Although the Council was created to ensure the independence of judicial power, in reality it turned out differently.

While countries across Europe prepared for the indicated scenarios and COVID-19 pandemic by developing strategies, forming disease control centers and informing their citizens, BiH was in the middle of political crisis with blocked institutions. The Constitutional Court of Bosnia and Herzegovina made a decision on appeal from seven delegates from the Republic of Srpska Council of People from 6 February 2020 which states that Article 53 of the Law on Agricultural Land of the Republic of Srpska is unconstitutional (Constitutional Court U-8/19). This decision of the Constitutional Court of BiH caused political crisis in BiH because political elite from the Republic of Srpska (hereinafter: RS) decided to block state institutions in BiH. Specifically, RS political elite decided to withdraw from BiH governmental institutions and thus block their functioning stating that they will remain blocked until the foreign judges from the Constitutional Court are removed. In this regard, on 17 February the RS Council of People adopted the information on 'anti-Dayton activities of the Constitutional Court of BiH' and conclusions on work discontinuance of RS representatives in BiH institutions until the adoption of the law on the mandate termination of foreign judges in the Constitutional Court of BiH. After that, Milorad Dodik, the Serb member of the Presidency of BiH, organized a meeting with politicians and state officials from RS who work in BiH institutions Milan Tegeltija, the president of the High Judicial and Prosecutorial Council, also attended the meeting. This type of non-institutional gathering would not raise a flag had it not been for the attendance of the Council's President, whose sole purpose is to ensure the independence of judicial power in BiH. Even more scandalous is the statement from the Council's President for the Radio Free Europe: "I did say that according to the Law on the High Judicial and Prosecutorial Council, I am RS representative. We have obligations towards RS because of the Law on

the High Judicial and Prosecutorial Council that was created by the Agreement on the transfer of certain competencies" (Radio Free Europe 2020).

It is interesting that entity representatives are not mentioned anywhere in the Law on the High Judicial and Prosecutorial Council, and nowhere does it state that the Council members are responsible for the protection of the entity. This is how BiH prepared for the pandemic, with blocked institutions and where the president of the institution responsible for the independent work of judicial power explicitly showed that his work is influenced by the executive and legislative branches in RS. The political elite, which was occupied with ethnic issues, nationalism and power struggle, ignored their duty to promptly inform their constituents and develop the most efficient strategy against pandemic.

## THE RULE OF LAW DURING COVID-19 PANDEMIC

When COVID-19 pandemic reached Bosnia and Herzegovina, the Federation of BiH declared a state of emergency on March 16, which for consequence had the enforcement of restrictive measures thus quickly making BiH a country with the most restrictive measures implemented. The RS Government made the same decision a bit later on 28 March. The wave that was brought by pandemic will surface the crisis in BiH state by the enforcement of measures which were made haphazardly and were not planned, which were against legal and constitutional principles, were not in accordance with non-discrimination principle and did not consider economic consequences. Also, many consequent events will once again show that the rule of law in BiH does not exist and that BiH as a country is not in the service of its citizens - which is the purpose of a country, but rather its purpose is in gaining and maintaining power by the political elite. In this section of the paper we will analyze the most prominent events which followed, and actions and statements of political elite and other public officials in BiH, compare them with the rule of law definitions made by political and legal philosophers, which defined the rule of law in several different ways but essentially all were in agreement that the rule of law represents the supremacy of law over the state.

### *The Unconstitutionality of the Measures*

One of the main elements of the rule of law is governing the country in accordance with law and not with arbitrary decisions or executive orders. John Locke in his definition of the rule of law stated: "whatever form the Commonwealth is under, the Ruling Power ought to govern by declared and received laws and not by extemporary dictates and undetermined resolutions" (Locke 1993). In that regard, the BiH Government, specifically the Federation of BiH Government made decisions that were later on declared unconstitutional by the Constitutional Court of BiH.

The Federal Department of Civil Protection on 20 March 2020 issued an Order No: 2.40-6-148-34/20 and on 27 March 2020 an Order No: 2.40-6-148-34-1/20 (Federation of BiH 2020). The first Order prohibits the movement to the persons younger than 18 and older than 65 on the Federation of BiH territory. The second Order extends the first order until further notice because the first Order was in power until 31 March 2020. The Constitutional Court of BiH, made a decision on the appeal of several individuals that the Orders are unconstitutional and concluded that this Order violates the plaintiff appellants' right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of the Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms because there is no proportionality or fair balance between the measures ordered by the impugned Order and public interest in the protection of public health, since the impossibility of imposing more lenient measures has not been previously discussed and reasoned, and because the measures imposed are not strictly time-limited, nor is there an obligation of the Federal Department of Civil Protection to review and extend these measures on a regular basis only if it is "necessary in a democratic society" (Constitutional Court of BiH 2020).

Also, the Constitutional Court of BiH dismissed the appeals in the part wherein appellants request the repeal of the Order since it could jeopardize public health. Instead, the Constitutional Court decided to give the Federal Department of Civil Protection deadlines for reviewing the ordered measures in accordance with the Court's Decision. The new Order, issued on 24 April 2020 No: 12-40-6-148-143/20, prohibits movement to persons younger than 18 and older than 65, except on Mondays, Wednesdays and Fridays for persons older than 65, between the hours 09:00 and 13:00, and on Tuesdays, Thursdays and Saturdays for persons younger than 18, between the hours of 14:00 and 20:00 (The Federation of BiH 2020). Also, the validity of the new Order was until 30 April 2020.

To this day, no person from the Federal Department of Civil Protection was held accountable for the issuance of these orders which violated human rights, principle of non-discrimination and jeopardized physical and spiritual integrity of the persons covered by this Order.

### *Ventilators Scandal and the Rule of Law*

The first test of the rule of law followed immediately after the Ventilator Scandal in which the members of governing political elite, specifically the Prime Minister of the Federation of BiH Fadil Novalić played the central role. The Ventilator Scandal (hereinafter: The Scandal) happened in the midst of pandemic when countries around the world gave the priority to the protection of public health by purchasing ventilators and other necessary medical equipment. In such chaos around the world, the Federation

of BiH through company Srebrena Malina purchased ventilators worth 10.5 million BAM from the People's Republic of China. What made the public suspicious was the fact that the purchase of ventilators was conducted through the company whose principal activity is fruit and vegetable processing and preservation. People held responsible were Fikret Hodžić, the owner of the Srebrena Malina Company, Fahrudin Solak, Director of the Federal Department of Civil Protection and Fadil Novalić, Prime Minister of the Federation of BiH. The Prosecutor's Office of Bosnia and Herzegovina decided to conduct an investigation after the publication of several newspaper articles and reports. After being questioned in the State Investigation and Protection Agency, the Prosecutor's Office of BiH imposed a custodial measure which was denied by the Court of BiH and Fadil Novalić, Fahrudin Solak and Fikret Hodžić were released, pending trial. The Prosecutor's Office of BiH charged them for the following crimes: association for the purpose of committing criminal acts, money laundering, falsification of official records, abuse of position and acceptance of gifts and other benefits. Investigative procedures by the Prosecutor's Office in democratic countries established on the rule of law is a regular procedure if there is a suspicion of a criminal act, whether the suspects are ordinary citizens or highly positioned state officials in public institutions. But in this case, it was obvious that the rule of law does not exist in BiH and that its authorities do not want to be subject to legal norms. There were many reactions following the arrest of Fadil Novalić. Among first was a statement made by the Party of Democratic Action president (hereinafter: SDA), Bakir Izetbegović in which he claims the action was an attack on the Bosniaks and openly accuses the Prosecutor's Office of BiH stating: "I am certain that there is no evidence and that there will not be any, and this is the continuation of the attack on the Bosniak leaders which started with the appointment of Gordana Tadić as the Chief Prosecutor in the Prosecutor's Office of BiH and charging several BiH Army generals" (Radio Free Europe 2020). SDA also made a statement in which among other they claim: "The Prosecutor's Office of BiH cannot have jurisdiction only in the parts of the country where Bosniaks predominantly live, especially it cannot be an instrument of the Croatian Democratic Union in a political conflict and used for the violent change of constitutional order in this country with unforeseeable consequences" (SDA 2020).

Albert Dicey in his work *'Introduction to the Study of the Law of the Constitution'*, where he first used term the 'rule of law', gave three main concepts of the rule of law and those are: no man could be lawfully interfered or punished by the authorities except for breaches of law established in the ordinary manner before the courts of land; no man is above the law and everyone, whatever his condition or rank is, is subject to the ordinary laws of the land; the result of the ordinary law of the land is constitution (Dicey 1982). The true test of the rule of law is when laws and constitution must be applied to the public administrative authority and in that regard BiH did not pass this test.

Deng Xiaoping, who led the People's Republic of China through a series of reforms and development of institutions, defined democracy as: "Democracy is institutionalized and written in law, so that institutions and laws do not change when the leaders change or when the leaders' outlooks change" (Yongnian 1999).

That means that authority should not be dependent on one individual or a group because then we would talk about the rule of people and not the rule of law. The rule of law entails that political elite has a duty to work within the rule of constitutional law, and each action outside of this framework should be sanctioned by appropriate measures which was not the case in BiH due to the pressure of political elite on judicial system. Also, it is disputable to identify one person with institutions, since the rule of law implies institutional rule and not the rule of people.

### *Ignoring the Key Principles of Tripartite Branches of Government*

The High Judicial and Prosecutorial Council of Bosnia and Herzegovina is also responsible for the political elite actions, since the Council jeopardized its own integrity prior to the pandemic. The integrity of the Council was mostly jeopardized, as we mentioned before, by the attendance of the President of the Council at a non-institutional meeting organized by the Serb member of the BiH Presidency Milorad Dodik, where the Council president attended as a representative of the Entity, although the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina does not say that members of the Council can represent entities. The Council was formed in order to ensure the independence of judicial branch and with it empower the rule of law in BiH, but as we can see in the Rule of Law Index 2020 report, the Council does not fulfill that function. The problem is that leaders in the Council, such as the president, consider the rule of law only as a phrase and not as a true guiding principle that should be woven into each decision made by the Council. Hopefully the rule of law will be strengthened soon through the Temporary Investigative Committee of the House of Representatives of the Parliamentary Assembly of BiH tasked with the evaluation of work in BiH judicial institutions. It will investigate the conditions in BiH judicial institutions with a special emphasis on the Council's capability to participate in processes necessary for the acceptance of BiH as an EU member state. In accordance with the conclusion of the House, the Temporary Investigative Committee is tasked to conduct all necessary actions to fulfill its goals and in accordance with the Law on Parliamentary Oversight and the Rules of Procedure of the House of Representatives (Parlament.ba 2020). In this regard, the Temporary Investigative Committee was formed to evaluate the work of the Council. Milan Tegeltija's reaction to the work of the Temporary Investigative Committee depicts the non-existence of awareness and knowledge what the rule of law represents. In his statement, after the establishment of the Temporary Investigative Committee, he says:

Conclusion of the House of Representatives of the Parliamentary Assembly of BiH to form the House's investigative committee in order to investigate the situation in judicial branch, especially in the Council, represents in essence a parliamentary supervision over the judicial branch which, as such, is not planned nor allowed by positive obligations in BiH. In this way the House of Representatives of the Parliamentary Assembly of BiH acts out of scope of BiH Parliamentary Assembly's authority and it is interference and pressure from the legislative branch on the judiciary, and as such undermines democratic constitutional system of tripartite separation of powers (Radio Free Europe 2020).

Also, Milan Tegeltija in his statement said: "Members of the Council, judges and prosecutors in BiH will not in any way participate in the work of this Investigative Committee of the House of Representatives of the Parliamentary Assembly of BiH" (Radio Free Europe 2020). Based on this statement, a person at the head of the key institution in judicial branch at the state level, we can see that the rule of law is misinterpreted by the Council's president. Tripartite separation of powers does not merely mark the independence of one branch from the other, but it also means that one branch can control the other so that no branch can abuse its power and such system is called a system of checks and balances. Judicial branch should be independent from legislative and executive branch as Montesquieu states:

When the legislative and the executive powers are united in the same person (...) there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner (...) Again there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor (Gosalbo 2010).

The European Commission for Democracy through Law lists a system of checks and balances as an instrumental part of the rule of law stating that it should be well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law (Council of Europe 2016). The system of checks and balances entails that each branch exercises certain powers that can be checked by the powers given to the other two branches and each branch is not allowed to exercise the

powers of the other branches (Vergotini 2015). Temporary Investigative Committee was established to investigate the situation in BiH judicial institutions but that does not mean that legislative branch interferes with the work of judicial branch. On the contrary, the competence of the Committee does not jeopardize the work of the Council nor any other judicial authority. The Committee's authority is in accordance with the democratic principles where legislative branch does not overpower or interfere with the work of judicial branch, as can be seen from the list of competences in the rules of procedure that the Committee: a) conducts public hearings, b) summons and interviews witnesses from any BiH institution, c) demands from witnesses to answer all the questions and state all the facts and information, as well as those considered confidential, d) initiates liability procedure for witness who refuse to appear before the Committee and give false testimony under oath, e) requests reports from any elected and appointed official, officer or institution, f) demands auditor's help, g) asks help from the independent experts outside of BiH institutions, and uses other competences specified in the Law on Parliamentary Oversight and the Rules of Procedure of the House of Representatives (parlament.ba 2020).

Listed competences do not in any aspect interfere with the work in judicial branch, so the establishment of the Temporary Investigative Committees is in accordance with democratic standards which permit one branch to check other two without interfering into each other's authority. In comparative law we can see the supervision of judicial branch by the legislative branch in the United States of America (hereinafter: US), the cradle of the rule of law as we know it today. Early in 1966, Senator Joseph C. Tydings, Chairman of the Subcommittee on Improvements in Judicial Machinery, commenced an investigation of "the availability of and need for procedures to govern removal, retirement, and disciplining of unfit Federal judges."<sup>3</sup> In his opening statement, Senator Tydings said: "The purpose of these hearings is to determine whether the Federal judiciary has the necessary statutory tools to police its own house fairly, efficiently, and if not, to explore the possibility of drafting and introducing remedial legislation" (Shiple 1970).

In that context, we can see that the Council's president Milan Tegeltija, as a person responsible for the functioning of judicial branch in BiH, abuses the tripartite system in order to avoid the questioning in front of the Temporary Investigative Committee, and at the same time weakens the independence of judicial branch by subjecting himself to the decisions of legislative and executive branches in RS. We see that the Council's president does not essentially understand the tripartite system and abuses it in the worst manner, damaging the whole judicial branch in BiH.

### ***State Interventionism and a Police State in the Name of People***

It is evident that political and health institutions, key institutions in fighting infectious disease, are unprepared to fight pandemic and could collapse at any moment. One of the reasons is the fact that instead of competent and responsible individuals, ruling parties appointed their members into these institutions. Being aware of their incompetence and lack of expertise, they started implementing restrictive and repressive measures. After they forcefully locked down people, they used the conditions of this 'mini dictatorship' for cheap demagoguery and populism, which on the one hand was founded on the "ideals of intervention state that saves us all, taking our own personal responsibilities on itself" (Čavalić 2020) and on the other hand, the ideals of police state which punishes freedom and rewards vassalage.

The people lockdown also meant putting the economy on a stand-by, which brought long-term negative consequences that were not taken into consideration by the decision makers. Ignoring the experts' advice, Governments in BiH did not timely react and bring measures that would prevent economic disaster. Upon the FBiH Government's proposition, the Law on Mitigation of Negative Economic Consequences was adopted but a month too late because by then, tens of thousands of workers had already lost their jobs and business entities were severely affected. Negative economic consequences which will affect BiH citizens for a long time showed us the danger of state interventionism and that "economic intervention, even the piecemeal methods advocated here, will tend to increase the power of the state" (Popper 2003).

The introduction of repressive measures for the BiH citizens meant replacing the already cracked democratic state with the police state. Non-functionality of democratic institutions, state interventionism and the usage of repressive measures led to acquisition and abuse of power by the government on the one hand and the deprivation of rights and liberty to citizens on the other. In that regard we can see the truth in Karl Popper's words who said that the state as a necessary evil whose authority should not be multiplied more than it is necessary.

## **CONCLUSION**

The COVID-19 pandemic poses a threat for public health and human lives which prompted many countries around the world to declare the state of emergency. Governments around the world implemented measures which meant limitations of human rights and freedoms. However, that often also meant the abuse of the state of emergency, misuse of powers, and proclamation of ideologies which are in conflict with democratic principles and represent a threat to human rights and freedoms. BiH as a country in transition, established on the politics of ethnocentrism, provides a fertile ground for political leaders to misuse their authority in the pandemic.

Their actions showed once more that there is no rule of law in BiH, democratic institutions are not functional, state interventionism is destructive for the economy, and it also showed hidden autocratic tendencies of country's political leaders to establish a police state. In general, BiH is a country whose political leaders use it to gain power and maintain status quo on the expense of human rights and freedoms. Overall, the continuance of the rule of law crisis, abuse of human rights and freedoms, and negative economic consequences during pandemic in BiH are just another proof that the state is a necessary evil and that state interventionism is always destructive for the economy. Reflecting on these events it is impossible not to conclude that Bosnian society is in a state of "self-incurred immaturity" (Kalanj 2005) and it is necessary to reevaluate existing values and develop real democratic country and society built on liberal values of the rule of law, minimal state, and citizen and economic freedoms and individualism. Events presented in this paper should in the words of Karl Popper be "warning that if we relax our watchfulness, and if we do not strengthen our democratic institutions while giving more power to the state by interventionist 'planning', then we may lose our freedom. And if freedom is lost, everything is lost" (Popper 2003). 

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