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FOUR-MONTHLY REVIEW

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Editorial

Editors-in-Chief and Managing Editors***

1. Introduction

We are pleased to present the second volume of *Legal Policy & Pandemics. The Journal of the Global Pandemic Network (LPPJ)*, which continues to host and stimulate the international scholarly debate on the Covid-19 crisis, with articles on international pandemic legislation, judicial trends, and the digital transition.

All of these issues are critical to understanding how the COVID-19 pandemic is reshaping public policy towards a more resilient society and what role human rights and environmental protection will play in this paradigm shift[1].

This is a major challenge today and the outcome is by no means certain. Indeed, while resilience has become a buzzword, what constitutes a resilient society in the context of interconnected economic, health and ecological crises is a complex question.

Commonly described as the adaptive capacity of a system to cope with change and continue to develop and renewing equilibrium in the face of crises, in such a way as to maintain essentially the same function, structure, identity and feedbacks[2], resilience is giving rise to a variety of approaches.

Indeed, in the pandemic and post-pandemic context, different public and private resilience strategies coexist, based on different values and goals [3]. As reports on recovery stimulus packages reveal[4], while there are many examples of green initiatives, particularly in the area of renewable energy, many governments have prioritized economic recovery, even at the cost of returning to old carbon-intensive habits[5].

In this complex scenario, the aim of the GPN is to contribute to the construction of resilience models based on the recognition of the mutual interdependence of social and ecological systems, in accordance with the latest achievements of environmental law studies[6], the One Health strategy[7], and the multiple values expressed by sustainable development policies: environmental protection and respect for human rights, with the corollaries of inclusion, the fight against inequalities, open and democratic governance, innovation, and the strengthening of the rule of law and institutional and judicial systems.

This framework should hopefully guide the post-pandemic recovery to better rebuild and correct the unsustainable trends of the pre-pandemic decades[8], that led to deep financial,

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* Antonio Herman Benjamin, Paola Iamiceli, Emmanuel Kasimbazi, Jolene Lin, Nicholas Robinson, and Elisa Scotti.

** Cristiana Lauri and Maria Antonia Tigre.

[1] Maria Antonia Tigre and others, 'Environmental Protection and Human Rights in the Pandemic' (2021) 1(1) LPPJ 317 < https://www.aracneeditrice.eu/free-download/979125994435123.pdf> accessed 15 December 2022.

[2] Brian Walker and others, 'Resilience, adaptability and transformability in social-ecological systems', Ecology and Society (2004) 9(2).

[3] C S Holling, 'Engineering resilience versus ecological resilience' in PC Schulze (ed), *Engineering within ecological constraints* (National Academy Press, Washington, D.C., USA, 1996).

[4] *Vivideconomics Greenness of Stimulus Index – Final Report* (2021) <https://www.vivideconomics.com/wp-content/uploads/2021/07/Green-Stimulus-Index-6th-Edition_final-report.pdf> accessed 15 December 2022.

The Green Future Index (MIT Technology Review, 2022) <https://mittrinsights.s3.amazonaws.com/GFI22report.pdf> accessed 15 December 2022.

[5] *The Green Future Index* (MIT Technology Review 2022) cit.

[6] Nicolas A. Robinson, 'Juridical Principles to Sustain Planetary Health' (Pathway to the 2022 Declaration Blog 5 May 2021) <https://www.pathway2022declaration.org/article/juridical- principles-to-sustain-planetary-health/> accessed 15 December 2022; Nicolas A. Robinson 'The Resilience Principle' (2014) 5 IUCN Acad. Envtl. L. eJournal, 19, <http://digitalcommons.pace.edu/lawfaculty/953/>; Michel Prieur and Gaëll Mainguy, 'Non-regression in environmental law' (2012) 5(2) S.A.P.I.EN.S [Online] <http://journals.openedition.org/sapiens/1405> accessed 15 December 2022.

[7] N.A. Robinson, 'Integrating the SDGs through One Health?' in N Kakar, V Popovski, and NA Robinson (eds), *Fulfilling the Sustainable Development Goals: On a Quest for a Sustainable World* (Routledge 2021).

[8] OECD, *Building Back Better: A Sustainable, Resilient Recovery after COVID-19* (2021) cit.; The European Economic and Social Committee (EESC), (2021), 'Shifting priorities towards post-COVID sustainable reconstruction and recovery' <https://www.eesc.europa.eu/sites/default/files/files/qe-02-21-886-en-n.pdf>; COVID-19: UN Regional Commissions ECA ECLAC ESCAP ESCWA UNECE *Towards an inclusive, resilient and green recovery - building back better through regional cooperation* (2020) <https://www.cepal.org/en/publications/45551-covid-19-towards-inclusive-resilient-and-green-recovery-building-back-better> accessed 15 December 2022.

economic and environmental crises, increased inequality[9], and threats to peace and security[10].

The challenge is not easy. As will be highlighted in §2 and §3, both the Articles on international health law and those on justice and digitization demonstrate the importance of a holistic approach that integrates environmental protection and human rights into any policy. In this perspective, the final §4 will highlight the importance of intersecting the digital and environmental transitions and building the technological future on the basis of human and nature-centered design.

2. Building a Resilient Framework. The Urgency of an International Convention on Pandemics and the Global Challenges for the Judiciary

In this context, the opening essay of the current issue is a contribution by Michel Prieur and Ali Mekouar (*Towards a Global Convention on Pandemics*) outlining a proposal for an international convention drafted by the International Center for Comparative Environmental Law (CIDCE), in collaboration with the Normandy Chair for Peace and the Global Pandemic Network. The significant proposal was submitted as part of ongoing negotiations at the World Health Organization to develop an international convention, agreement or other instrument on pandemic prevention, preparedness and response[11]. The cutting edge vision underpinning the draft convention is to advance global health law in harmony with nature, in accordance with the paradigms of the One Health strategy, and with respect for human rights.

In the "Litigation" section Giancarlo Montedoro and Elena Emiliani (*Pandemic and the Justice System: the End of Global Expansion?*) examine the role of the judiciary during the pandemic as a guarantor of the rule of law and human rights versus public authority. The authors observe obstacles such as financial constraints, ineffective procedures and the failure to provide swift justice, and argue that after years of expanding judicial power and extending jurisdictional models to policy makers (e.g., independent authorities), the trend will reverse in favor of governments in the future.

The contribution provides a critical reading of the role of the judiciary in its often conflicting but essential relationship with governments and parliaments, especially in a context of growing populism. Interwoven with the critical analysis are descriptions of the judicial dynamics triggered in the pandemic era and the processes of digitization of judiciary experienced in the pandemic and destined to be consolidated.

3. Resilience and Digitalization. The Pandemic Experience

The "Essays" section is dedicated to a key pillar of resilience: digitization. The various contributions, inspired by the Third Global Webinar *COVID-19 and Digital Society. Building Resilience on Innovation* held on November 9, 2021 with the support of Un-Habitat and the International Institute of Administrative Sciences (IIAS-IISA), explore the role of digitization during the COVID-19 pandemic.

The issue is crucial[12]. In the wake of the pandemic outbreak and the adoption of social distancing and lock-down measures as much as possible, life has suddenly moved online and digital technology has proven to be the backbone of resilience in a (health) crisis event: much of the world went *digital*[13].

The availability of digital devices and connectivity ensured the continuity of many economic activities and allowed people to continue to work, attend school, communicate, shop and meet online. Digital tools and solutions helped manage the spread of the coronavirus: researchers used big data and artificial intelligence to identify epidemiological patterns and accelerate research for vaccine development. Smart mobile applications were developed to track and trace the coronavirus transmission.

Digitization thus played a significant (but uneven) role in mitigating the negative socio-economic impact of the pandemic.

This shift has made the "online-onlife" equation immediately concrete with regard to work,

[9] OECD, *Building Back Better: A Sustainable, Resilient Recovery after COVID-19* (2020) <https://read.oecd-ilibrary.org/view/?ref=133_133639-s08q2ridhf&title=Building-back-better-_A-sustainable-resilient-recovery-after-Covid-19> accessed 15 December 2022.

[10] Noah Bell and others, 'Environment of Peace: Security in a New Era of Risk' (2022) < https://doi.org/10.55163/LCLS7037>

[11] The full text of the Proposal is available at <https://cidce.org/en/pandemics-and-environment-2/> and in this Issue.

[12] OECD, *Digital Transformation in the Age of COVID-19: Building Resilience and Bridging Divides* (Digital Economy Outlook 2020 Supplement, OECD, Paris, 2020) <www.oecd.org/digital/digital-economy-outlook-covid.pdf> accessed 15 December 2022

[13] UNCTAD, *Impact of the Covid-19 Pandemic on Trade and Development: Lessons Learned* (UNCTAD/OSG/2022/1) <https://unctad.org/system/files/officialdocument/osg2022d1_en.pdf > accessed 15 December 2022.

commerce, culture, educational services, and health itself[14].

The pandemic, suddenly jolting us into the digital future in response to the emergency, has revealed the enormous potential of digital innovation for sustainable and inclusive growth and for enabling better functioning institutional systems with empowering and democratizing characteristics[15].

However, the acceleration induced by the pandemic has also highlighted the critical aspects of digitization.

First of all, the lack of universal access to the Internet, the need for reliable technologies, and a cultural gap emerged, revealing major inequalities both within and between countries, different areas (urban, rural, mountainous, remote and less populated areas, and islands), different parts of society, groups and minorities. In this scenario, it has been observed, many have been left behind and *"the vulnerable became even more vulnerable"*[16] . Indeed, the digital divide, in the pandemic, hindered the enjoyment of basic social human rights such as education, employment and health itself. The economic fallout of digital inequality is also considerable, exacerbating the weakness of businesses unable to innovate or compete with global digital companies, based mainly in the United States of America and China[17].

The pandemic has therefore taught that bridging the digital divide as well as strengthening digital governance is crucial for a just, resilient and sustainable digital transition[18].

In terms of sustainability, although the general indicators of the SDGs would seem to show synergies, research on the detailed indicators shows trade-offs that require further investigation[19].

From a legal perspective, a growing debate highlights the most critical issues related to privacy and other fundamental rights[20], misinformation, over information (the so-called "infodemic" - WHO)[21], cybersecurity and reliability of connectivity[22], as well as the rule of law and the proper functioning of democratic systems. Indeed, the pandemic has highlighted the risk of the *surveillance society*[23] and *surveillance capitalism*[24] based on the use and misuse of data (by both the private sector and governments) through artificial intelligence (AI)[25]. Against this backdrop, contact-tracing applications have raised major concerns about privacy, data protection and other human rights, leading to limited use in Europe and the United States - while more widespread use has occurred in Asia [26]. The spread of AI for automated decision making has revealed the lack of transparency of algorithms, the potential for

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[14] Luciano Floridi, 'Introduction' in L Floridi (ed), *The Onlife Manifesto. Being Human in a Hyperconnected Era* (Springer, Cham, 2015) <https://doi.org/10.1007/978-3-319-04093-6_1>.

[15] OECD, *Keeping the Internet Up and Running in Times of Crisis* (OECD, Paris, 2020), <www.oecd.org/coronavirus/policy-responses/ keeping-the-internet-up-and-running-in-times-of-crisis-4017c4c9/> accessed 15 December 2022. United Nations Group on the Information Society, *UNGIS Dialogue on the Role of Digitalization in the Decade of Action* (2020) <https://unctad.org/system/files/official-document/ dtlstictinf2020d3_en.pdf> accessed 15 December 2022.

[16] UNCTAD, *Impact of the Covid-19 Pandemic on Trade and Development: Lessons Learned,* cit.

[17] UNCTAD secretariat, *Recovering from COVID-19 in an increasingly digital economy: Implications for sustainable development,* cit.

[18] UN-Habitat, *Assessing the Digital Divide* (2020). <https://unhabitat.org/programme/legacy/people-centered-smart-cities/assessing-th e-digital-divide> accessed 15 December 2022.

[19] UNCTAD secretariat, *Recovering from COVID-19 in an increasingly digital economy: Implications for sustainable development* (2022) <https://unctad.org/system /files/official-document/tdb_ede5d2_en.pdf>; B Brenner and B Hartl, 'The perceived relationship between digitalization and ecological, economic, and social sustainability' (2021) Journal of Cleaner Production 315 <https://doi.org/10.1016/ j.jclepro.2021.128128>. For environmental impacts see § 4.

[20] United Nations, *The right to privacy in the digital age* A/RES/73/179, (2018) <https://digitallibrary. un.org/record/1661346> accessed 15 December 2022; UN-Habitat, *Mainstreaming Human Rights in the Digital Transformation of Cities* (2022)<https://unhabitat.org/ sites/default/files/2022/11/digital_rights_guide_web_v ersion_14112022.pdf> accessed 15 December 2022

[21] Defined by the WHO as *"an over-abundance of information – some accurate and some not – that makes it hard for people to find trustworthy sources and reliable guidance when they need it".* WHO, *Novel Coronavirus (2019-nCoV) Situation Report* (13/2020) <https://www .who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf> accessed 8 December 2022.

[22] UNCTAD, *Impact of the Covid-19 Pandemic on Trade and Development: Lessons Learned* (UNCTAD/OSG/2022/1). <https://unctad.org/system/f iles/official-document/osg2022d1_en.pdf> accessed 8 December 2022.

[23] For the first reference to computer-based 'surveillance society' in social science see GT Marx 'The surveillance society: the threat of 1984-style techniques' (1985) The Futurist, June: 21-26; O Gandy, 'The surveillance society: information technology and bureaucratic social control' (1989) Journal of Communication, 39:3.

[24] S Zuboff, 'Big other: Surveillance capitalism and the prospects of an information civilization' (2015) Journal of Information Technology, 30, 75–89.

[25] United Nations Global Pulse, *COVID-19 data protection and privacy resources* (2021), <https://www .unglobalpulse.org/policy/covid-19-data-protection-and-privacy-resources/> accessed 8 December 2022

[26] UNCTAD secretariat, *Recovering from COVID-19 in an increasingly digital economy: Implications for sustainable development* (2022) cit.

discriminatory or unlawful outcomes, and, more generally, challenges for the rule of law and for judicial review[27].

Challenges related to constitutional guarantees are addressed in this issue of LPPJ.

Analyzing the Greek experience, Vassili Christou's article (*Remote togetherness. The digitization of human activities in the pandemic and related challenges to data privacy, equality and democracy in Greece*), touches on a number of concerns related to potential erosions of democracy and rights caused by government responses to the pandemic and the exercise of broad executive powers.

Several measures have been taken to ensure the continued functioning of the state and public services through the application of innovation and digitization solutions. The article by Márton Sulyok and Dávid Márki (*Hungarian COVID-19 Response and Its Legal Background - Some Practical Aspects of Digitalization*) analyzes this development in light of the constitutional and legal context of the so-called "special legal order" (SLO) in Hungary.

The measures and regulations developed against the COVID-19 pandemic may also affect the realization of fundamental rights. Emmanuel Kasimbazi (*The Human Rights Challenges of Covid-19 Digital Documentation in Uganda*) shows how private data collection and surveillance in Uganda appears to have lacked sufficient oversight, safeguards or transparency.

Through a pragmatic focus on three relevant issues in the fields of public administration, health, and education, Fulvio Costantino's article (*Covid-19 and digitization: the Italian experience*) describes the critical nature of pandemic digitization through the example of the controversial digital surveillance tool; and examines the lessons and opportunities offered by pandemic digitization to stimulate innovation and the difficulties in profiting from this stimulus.

Technology has ensured the continuity of the activities of judicial systems and prevented their suspension. Uday Shankar and Sourya Bandyopadhyay (*Building Resilience on Innovation? Indian Judiciary, Digitization and the Covid-19 Pandemic*) describe how the Indian judiciary, which had been working towards ICT transformation, used the challenge of the pandemic to strengthen decisively its institutional capacity with the help of technology, providing momentum towards the goal of virtual judicial processes.

4. Further Pathways for the Digital and Ecological Transition

When analyzing the digital transition, accelerated by the pandemic and supported by post-pandemic plans, particular attention must be paid to its environmental impacts.

Indeed, the debate on the relationship between digitization and the ecosystem has gained momentum in recent years, and to date many studies have been carried out, although the issue still needs to be explored in-depth.

On the one hand, digitization appears to be a positive tool that supports environmental sustainability. Ehrlich and Holdren's[28] well known theorem tells us that in order to reduce the environmental impact of a growing population, the efficient use of natural resources enabled by innovation is crucial.

Even before the pandemic, it was recognized that digitalization would play a key role in ensuring the environmental sustainability of development.[29]. The responsible use of digital technologies, such as artificial intelligence, remote sensing, big data analytics and robotics, improves knowledge of species and their habitats, helps monitor, conserve, restore and sustainably use biodiversity[30]. Digital technologies improve the circular economy optimizing products' design and the use of resources, including secondary raw materials[31].

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[27] See, e.g., the legislative initiative of the EU Commission, including both a proposal for a regulatory framework on AI and a revised coordinated plan on AI, to promote the development of AI and address the potential high risks it poses to safety and fundamental rights equally. EU Commission, *Fostering a European approach to Artificial Intelligence*' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regionsm COM/2021/205(final) <https://eur-lex.europa.eu/legal content/en/TXT/?uri=COM%3A2021%3A205%3AFIN> accessed 8 December 2022; UNESCO, *Draft text of the Recommendation on the Ethics of Artificial Intelligence,* <https://unesdoc.unesco.org/ark:/48223/pf0000377897> accessed 8 December 2022; UNCTAD, *Impact of the Covid-19 Pandemic on Trade and Development: Lessons Learned* (2022) cit.

[28] Paul R Ehrlich and John P Holdren 'Impact of population growth' (1971) Science, New Series, Vol. 171, No. 3977. (Mar. 26, 1971), pp. 1212-1217.

[29] UNEP, *How artificial intelligence is helping tackle environmental challenges* (2022) <https://www.unep.org/news-and-stories/story/how-artificial-intelligence-helping-tackle-environmental-challenges> accessed 8 December 2022

[30] The United Nations Environment Programme (UNEP) *Digital Transformation: Becoming an Innovative, Agile and Collaborative Organization, Fit for Purpose in the Digital Age* (2022) <https://www.unep.org/resources/policy-and-strategy/digital-transformation-becoming-innovative-agile-and-collaborative> .

[31] E Barteková and P Börkey, 'Digitalisation for the transition to a resource efficient and circular economy', OECD

Mitigation and adaptation strategies to climate and environmental crisis benefit from technology in terms of data prediction and monitoring and system responsiveness.

More generally, the collection, monitoring, and exchange of environmental data and the availability of data from other relevant sectors support effective, science-based environmental policy-making. Technology enhances the quality of regulation: it broadens the knowledge base for decision-making processes enabling better choices e.g. in planning, siting, and environmental impact assessment; it facilitates transparency, data dissemination and participation, strengthening environmental democracy; it makes implementation more effective, by embedding regulation in the algorithmic rule and enabling efficient monitoring[32].

In this way, digitization can make decision-making more impartial, more effective and more respectful of planetary boundaries.

Information technology could thus be a key pillar of the One Health strategy for pandemic prevention and response, based on environmental protection, monitoring, data sharing, and early warning systems.

However, this great potential must be seen in the context of a transition that also has significant environmental externalities.

Concerns have been raised about the effective ability of digital technologies to contribute to decoupling growth from resource use and its environmental impacts[33]. Research and reports show a trade-off between digitization and the environment[34]. In particular, climate change and waste generation indices describe a growing and significant ecological footprint of a digitized society. According to the International Telecommunication Union (ITU) e-waste is one of the world's largest and most complex waste streams. The Global E-waste Monitor 2020[35] reports an increasing amount of e-waste being generated globally (53.6 million tonnes in 2019), of which only a tiny fraction is properly collected and recycled (only 17 percent). The rest is undocumented, and much of it is dumped in landfills or traded illegally, posing risks not only to the environment but also to human health as e-waste is non-biodegradable and rich in hazardous toxins[36]. The problem worsens as the devices become more numerous, smaller and more complex. Failure to recycle is also a detriment to the circular economy and democracy: e-waste contains scarce and valuable raw materials (including metals such as neodymium, indium, and cobalt), whereas the extraction of these minerals can be associated with violence, conflict, human rights abuses and severe environmental damage[37].

Energy (and emissions) is the other major environmental challenge of digitization[38]. Although digital technologies can improve energy efficiency and reduce emissions, energy consumption in the deployment and development of digital technologies is increasing rapidly. Information and communication technology (ICT)-related operations are expected to account for up to 20 percent of global electricity demand, with one-third coming from data centers alone[39]. Electronic devices themselves have a growing carbon footprint. This occurs not only in the process of production (which should be corrected through circularity inputs) but also during use: from

Environment Working Papers, No. 192, OECD Publishing, Paris, (2022) <https://doi.org/10.1787/6f6d18e7-en>

[32] The United Nations Environment Programme (UNEP) *Digital Transformation: Becoming an Innovative, Agile and Collaborative Organization, Fit for Purpose in the Digital Age*, cit.

[33] B Brennera and B Hartl, 'The perceived relationship between digitalization and ecological, economic, and social sustainability' (2021) Journal of Cleaner Production, 315

[34] UNEP, *The growing footprint of digitalization,* <https://wedocs.unep.org/bitstream/handle/20.500.11822/37439/FB027.pdf>; Statista, *Data centers worldwide by country 2021* (2021) <https://www.statista. com/statistics/1228433/data-centers-worldwide-by-country/ > accessed 8 December 2022.

[35] Launched in July 2020 by the Global E-waste Statistics Partnership, between the International Telecommunication Union (ITU), the Sustainable Cycles (SCYCLE) Programme currently co-hosted by the United Nations University (UNU) and the United Nations Institute for Training and Research (UNITAR), and the International Solid Waste Association (ISWA), <https://www.itu.int/en/ITU-D/Environment/Pages/Spotlight/Global-Ewaste-Monitor-2020.aspx >.

[36] The United Nations Environment Programme (UNEP) estimated in a 2015 report "Waste Crimes, Waste Risks: Gaps and Challenges in the Waste Sector" that 60-90 per cent of the world's electronic waste, worth nearly USD 19 billion, is illegally traded or dumped each year, <https://www.unep.org/resources/report/waste-crime-waste-risks-gaps-meeting-global-waste-challenge-rapid-response > accessed 8 December 2022

[37] UNEP , *The growing footprint of digitalization,* cit.

WEF *A New Circular Vision for Electronics – Time for a Global Reboot* (2019). The report supports the work of the E-waste Coalition, which includes the ILO, ITU, UNEP, UNIDO, UNITAR, UNU and Secretariats of the Basel and Stockholm Conventions.

[38] International Energy Agency, *Data Centres and Data Transmission Networks – Analysis, IEA* (2020) <https://www.iea.org/reports/data-centres-and-data-transmission-networks > accessed 8 December 2022

[39] N Jones, 'How to stop data centres from gobbling up the world's electricity' (2018) Nature 561, 163-166. < https://doi.org/10.1038/d41586-018-06610-y >.

streaming video and online gaming, to cryptocurrency trading and digital banking, to simply sending emails, every digital action contributes to an increasing influx of data that feeds into the data processing cycle and the resulting production of emissions[40].

In this context, it is unclear whether, under scenarios of continued innovation, the increased use of electricity and rare materials will be compensated by efficiency gains and sustainable behaviors promoted by digital innovations. In addition, there are the so-called rebound effects of digital technologies which have the side-effect of supporting more efficient but overall unsustainable patterns of production, consumption and social organization. The perceived sustainable benefits of digital technologies may be limited or turn out to be unfounded and digitization may therefore stand at odds with a just transition to sustainability.

These risks highlight the importance of regulating the environmental impacts of the digital transition by orienting both digital technologies and consumption towards ecologically sustainable paradigms, inclusive practices and democratic governance[41].

5. Managing the Digital Transition. A Call for Research

Digital technologies had already been evolving rapidly before the pandemic and are now accelerating at a rate that is unlikely to be reversed. In the coming decades, digital technologies will make the world more connected, smarter, more efficient, and hopefully more resilient and sustainable[42].

However, as experience of the pandemic has shown, technology is not neutral nor does it have an autonomous physiognomy or trajectory, and, if not properly regulated, there are risks of failing to capture the value it could have. Quite the opposite, technology could create more scope for significant damage to the rule of law and the proper functioning of democratic systems, markets and competition, civil, political, and social human rights (including privacy, freedom of expression, and information), and the environment, as well as exacerbating inequalities between and within countries and creating new cybersecurity risks. Thus, digitization could hinder a just transition to sustainability unless the digital regime is built on inclusive practices, democratic governance, and environmental regulation [43].

Apart from a neo-Luddite approach of radical rejection of the risks and potential of technology, the prevailing view is that human agency is central to the pathways of technologies and that building the digital regime on inclusive practices, democratic governance, human rights and environmental protection is crucial[44]. At the same time, it is suggested that a revision of the Sustainable Development Goals is proposed to adapt them to the changing technological context[45].

Thus emerges the urgent need for a holistic global policy, possibly supported by a global institution, that reflects the multiple and interrelated dimensions of data – sometimes of general interest and ground for the development of digital public goods, such as in the case of health and the environment – and that balances different interests and needs in a way that supports inclusive and sustainable development, with the full involvement of countries that are lagging behind in digital preparedness[46].

The pandemic related acceleration of the digital transition, including through the resources of recovery plans, is therefore a significant opportunity, in which we must not be *'sleepwalkers',* led by creative chaos[47], prisoners of our servant, according to the well-known Hegelian's *Master-Slave Dialectic*[48].

To this end, debate and scientific research need to increase; at present inadequate space is given to the sustainability aspects of the digital transition[49].

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[40] UNEP, *The growing footprint of digitalization*, cit.

[41] *Ibidem.*

[42] UNEP, Digital Transformations Subprogram, *Digital Transformation: Becoming an Innovative, Agile and Collaborative Organization, Fit for Purpose in the Digital Age* (2022) <https://www.unep.org/resources/policy-and-strategy/digital-transformation-becoming-innovative-agile-and-collaborative> accessed 8 December 2022

[43] Allan Dahl Andersen and others, 'On digitalization and sustainability transitions' (2021) *Environmental Innovation and Societal Transitions,* Vol 41 96–98.

[44] Simon Nicholson and Jesse L. Reynolds 'Taking Technology Seriously: Introduction to the Special Issue on New Technologies and Global Environmental Politics' (2020) *Global Environmental Politics* 20(3) 1–8 <https://doi.org/10.1162/glep_e_00576 >.

[45] Allan Dahl Andersen and others, 'On digitalization and sustainability transitions', cit.

[46] UN, *Our Common Agenda* (Report of the Secretary-General, 2021), <https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf> accessed 8 December 2022.

[47] Simon Nicholson and Jesse L. Reynolds 'Taking Technology Seriously: Introduction to the Special Issue on New Technologies and Global Environmental Politics', cit.

[48] Georg WG Hegel, 'Phenomenology of the Spirit', Trans. A. V. Miller (Oxford: Clarendon Press, 1977) [1807].

[49] Allan Dahl Andersen and others, 'On digitalization and sustainability transitions' (2021) cit.

Mentioning first the UN initiative for a Global Digital Compass[50], there is a growing call from institutions, relevant stakeholders, academia, and research centers to develop consistent and transparent studies on the relationship between digitization, resilience, and environmental, economic, and social sustainability [51]. The Global Pandemic Network intends to contribute to this effort, primarily through the contributions in this issue. They are intended as a starting point for reflecting on the role of digitization for resilience models based on human rights and environmental protection, as well as on the One Health approach.

We are therefore grateful to all the Authors, GPN members, and our readers for the contribution they have made and will continue to make.

[50] UN, *Our Common Agenda* (Report of the Secretary-General 2021), <https://www.un.org/en/content/common-agendareport/assets/pdf/Common_Agenda_Report_English.pdf> accessed 8 December 2022.

[51] B Brenner and B Hartl, 'The perceived relationship between digitalization and ecological, economic, and social sustainability' (2021) cit.; Allan Dahl Andersen and others, 'On digitalization and sustainability transitions' (2021) cit.

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SECTION I – ESSAYS

Towards a Global Convention on Pandemics

Michel Prieur, Mohamed Ali Mekouar***

Abstract. Under the auspices of the World Health Organization, an intergovernmental negotiating body has recently been established to craft a convention, agreement or other international instrument on pandemic prevention, preparedness and response. In an effort to support this initiative, the International Centre for Comparative Environmental Law (CIDCE), in partnership with the Normandy Chair for Peace and the Global Pandemic Network, has drawn up a draft convention on pandemics, which is primarily aimed to serve as a source of reference and inspiration for State and non-State actors that will engage in the upcoming negotiations of the future instrument. This note argues that an international convention tackling pandemics is urgently needed; outlines the CIDCE-proposed convention; and advocates the rapid adoption of a pandemic treaty in order to advance health law and environmental law globally, in harmony with nature.

Keywords: *Pandemic, COVID-19, "One Health", Convention, Treaty, Environmental Law, Health Law*.

1. Why is a Pandemic Treaty Needed?

The coronavirus disease (COVID-19) pandemic has inflicted enormous bruises on humanity and the planet. By mid-February 2022, the insidious virus had claimed the lives of nearly six million people around the globe.[1] This disastrous toll is all the more challenging as the pandemic-induced shocks continue to unfold worldwide. While economic recovery is marking time[2] and the labour market is being damaged,[3] extreme poverty is rising,[4] essential health services have been interrupted,[5] access to energy, water and sanitation is hampered,[6] the natural world is deteriorating,[7] water and land resources are being depleted[8], plastic pollution is

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[1] WHO reported 5,878,328 deaths caused by COVID-19 as of 21 February 2022: *WHO Coronavirus (COVID-19) Dashboard*, <https://covid19.who.int/>, accessed 12 February 2022.

[2] Global growth is expected to decelerate markedly to 4.1% in 2022: World Bank, *Global Economic Prospects*, Washington, DC, 2022, <https://openknowledge.worldbank.org/bitstream/handle/10986/36519/9781464817601.pdf>, accessed 12 February 2022.

[3] Lockdowns and travel restrictions have disrupted supply chains, thus heavily impacting employment: ILO, *World Employment and Social Outlook - Trends 2022,* Geneva, 2022, <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_834081.pdf>, accessed 12 February 2022.

[4] C. Sánchez-Páramo *et al*., "COVID-19 leaves a legacy of rising poverty and widening inequality", *World Bank Blogs*, 7 October 2021, <https://blogs.worldbank.org/developmenttalk/covid-19-leaves-legacy-rising-poverty-and-widening-inequality>, accessed 12 February 2022.

[5] Ongoing disruptions have been reported in over 90% of countries surveyed on continuity of essential health services during the COVID-19 pandemic: WHO, "Essential health services face continued disruption during COVID-19 pandemic", 7 February 2022, <www.who.int/news/item/07-02-2022-essential-health-services-face-continued-disruption-during-covid-19-pandemic>, accessed 12 February 2022.

[6] Whereas hand hygiene is essential to prevent the spread of COVID-19, globally over three billion people and two out of five health care facilities were lacking adequate access to hand hygiene means in 2021: United Nations, *UN World Water Development Report 2021: Valuing Water*, UNESCO, Paris, 2021, <https://unesdoc.unesco.org/ark:/48223/pf0000375724>, accessed 12 February 2022.

[7] See: OECD, *The long-term environmental implications of COVID-19*, Paris, 2021, <https://read.oecd-ilibrary.org/view/?ref=1095_1095163-jpelnkdei2&title=The-long-ermenvironmentalimplications-of-COVID-19>; Geneva Environment Network, COVID-19 and the Environment, 1 February 2022, <https://www.genevaenvironmentnetwork.org/resources/updates/updates-on-covid-19-and-theenvironment/>, accessed 12 February 2022.

[8] Pressures on land and water resources have built to the point where productivity of agricultural systems is compromised and livelihoods are threatened: FAO, *The State of the World's Land and Water Resources for Food and Agriculture - Systems at breaking point. Synthe-*

proliferating,[9] and biological diversity is declining.[10] With the combined effects of heightened climate change,[11] agri-food systems are further disrupted, exacerbating hunger and malnutrition globally.[12] Thus, the UN-established 2030 horizon for the achievement of the Sustainable Development Goals (SDGs) risks slipping away inexorably,[13] like an elusive mirage.

However critical they may be, the public health measures – such as confinements, travel restrictions, border closures – widely deployed to stem the pandemic, have inevitably disrupted, slowed down or paralyzed activities, exchanges and interrelations, in the social, economic, cultural and environmental fields, both within countries and among nations. These abrupt repercussions of the pandemic outbreak have crudely laid bare the fragility of societies and ecosystems alike. As António Guterres put it, the coronavirus disease pandemic "has been a challenge like no other since the Second World War, revealing our shared vulnerability and interconnectedness".[14]

As stated by the United Nations, "[t]he COVID-19 pandemic serves as a mirror for the world".[15] The scourge of the coronavirus has suddenly uncovered the common vulnerability of nations in the face of a global pandemic, the devastating fallout of which has spared no single country. All States have been deeply affected, and no individual State has been able to overcome, without pitfalls, the multifaceted crisis that has been unleashed. The community of nations was clearly not adequately equipped to manage the emergency quickly and effectively, both individually or collectively.[16]

One of the factors limiting the capacity for joint international response to acute epidemic outbreaks is the lack of a global convention dealing specifically with pandemics.[17] Admittedly, the 2005 International Health Regulations[18] represent a major tool for epidemic control. However, they do not fully meet the specific requisites of the urgent and coordinated response that a widespread, lightning-fast pandemic entails. Hence the need for the international community to adopt a pandemic treaty which enables it to mobilize, with all the speed and efficiency needed, in the event of a risk of global spread of serious infectious diseases.[19]

sis report 2021, Rome, 2021, <www.fao.org/3/cb7654en/cb7654en.pdf>, accessed 12 February 2022.

[9] With plastics becoming a severe threat to natural ecosystems and human health, a twofold increase in the number of plastic debris is predicted by 2030: A. L. Patrício Silva *et al.*, "Increased plastic pollution due to COVID-19 pandemic: Challenges and recommendations", *Chemical Engineering Journal*, Vol. 405, 2021, <www.sciencedirect.com/science/article/abs/pii/S1385894720328023>; N. U. Bensona, D. E. Basseyb and T. Palanisamic, "COVID pollution: impact of COVID-19 pandemic on global plastic waste footprint", *Heliyon*, Vol. 7, Issue 2, February 2021, <www.cell.com/heliyon/fulltext/S2405-8440(21)00448-5?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS2405844021004485%3Fshowall%3Dtrue>, accessed 12 February 2022.

[10] The world has fallen short on its targets to halt biodiversity loss, with 28% of listed species being threatened with extinction: United Nations, *The Sustainable Development Goals Report 2021*, New York, 2021, <https://unstats.un.org/sdgs/report/2021/The-Sustainable-Development-Goals-Report-2021.pdf>, accessed 12 February 2022.

[11] Atmospheric concentrations of the major greenhouse gases increased in 2020-2021, above the average for the last decade, despite a 5.6% drop in fossil fuel CO_2 emissions in 2020 due to restrictions related to COVID-19: World Meteorological Organization, *State of the Global Climate 2021: WMO Provisional Report*, Geneva, 2021, <https://reliefweb.int/sites/reliefweb.int/files/resources/WMO%20Provisional%20Report%20on%20the%20State%20of%20the%20Global%20Climate%202021.pdf>, accessed 12 February 2022.

[12] In just one year, 161 million more people faced hunger in the world, making the UN commitment to eradicate hunger by 2030 even more doubtful: FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2021*, Rome, 2021, <https://www.fao.org/3/cb4474en/cb4474en.pdf>, accessed 12 February 2022.

[13] With less than a decade to go, the SDGs "have been thrown even further off track": United Nations, *Our Common Agenda - Report of the Secretary-General*, New York, 2021, <www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf>, accessed 12 February 2022.

[14] *Ibid*.

[15] United Nations, The Sustainable Development Goals Report 2021, *op. cit.*

[16] Global Health Centre, *Envisioning an international normative framework for pandemic preparedness and response: issues, instruments and options*, Geneva, 2021, <https://repository.graduateinstitute.ch/record/299175?_ga=2.112502148.1668580522.1644908637-1431847029.1644908637>, accessed 12 February 2022. See also: L. Sermet, « Le règlement sanitaire international à l'épreuve de la COVID-19: remarques sur l'opérationnalité de l'OMS », *Revue de droit sanitaire et social*, n° 5, 2020.

[17] H. Nikogosian, *A guide to a pandemic treaty*, Geneva, Graduate Institute of International and Development Studies, 2021, <www.graduateinstitute.ch/sites/internet/files/2021-09/guide-pandemic-treaty.pdf>; S. J. Hoffman *et al.*, "Assessing Proposals for New Global Health Treaties: An Analytic Framework", *Government, Law, and Public Health Practice*, Vol. 105, No. 8, 2015, <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2015.302726>, accessed 12 February 2022.

[18] <www.who.int/publications/i/item/9789241580410>, accessed 12 February 2022.

[19] J. H. Duff *et al.*, "A global public health convention for the 21st century", *Health Policy*, Vol. 6, Issue 6, 1 June 2021, <www.thelancet.com/action/showPdf?pii=S2468-2667%2821%2900070-0>, accessed 12 February 2022.

Being a global threat, a pandemic calls for global solidarity and a global solution, through a global convention. The well-being of humankind and the viability of the planet are at stake.

Actually, the catastrophic fallouts from the COVID-19 pandemic have led to a "surge of collective action".[20] The international community did not fail to react resolutely to face a truly global threat. Logically, the initial focus was on its health and socioeconomic impacts. But it did not take long for the legal dimension to emerge. In May 2021, the World Health Assembly (WHA) decided to hold, within six months, a special session to assess the "benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and response".[21]

The International Centre for Comparative Environmental Law (CIDCE[22]), as an international NGO specializing in environmental law and endowed with special consultative status with the United Nations, has a natural vocation to protect human and animal health in times of pandemic. Therefore, to support the WHA initiative, CIDCE established a group of legal experts in environmental law, health law and human rights law[23] to develop a convention on pandemics, in collaboration with the Normandy Chair for Peace[24] and the Global Pandemic Network.[25] After three months of voluntary work by the group of lawyers from September to November 2021, a draft convention on pandemics was published by CIDCE in three language versions – English, French and Spanish –[26] with a rationale in favour of its adoption.[27]

2. The CIDCE-proposed Convention at a Glance

Scientifically, it is widely recognized that the resurgence of pandemics is caused by anthropogenic interference in natural ecosystems. The complex interconnection that exists between living species is often the root cause of zoonoses, the occurrence of which is linked to the close interdependence between human health, animal health and environmental quality.[28] Consequently, the "One Health" approach is at the heart of the draft convention.[29] Being at the crossroads of all disciplines relating to the human-animal-environment interface, it makes it possible to anticipate, prevent, detect and control diseases that are transmitted from animals to humans.[30] Stemming from a "planetary health"[31] vision, it intimately integrates the well-being of humanity and the preservation of other forms of life. Hence, it is likely to better prevent pandemics while upholding nature, since it also involves the fight against biodiversity loss and climate change, thereby promoting a sustainable development pathway that is mindful of planetary boundaries, as called for by the 2021 Geneva Charter for Well-being.[32]

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[20] United Nations, *Our Common Agenda - Report of the Secretary-General*, *op. cit*.

[21] Decision WHA74(16), "Special session of the World Health Assembly to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response", 31 May 2021, para. 1, <https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74(16)-en.pdf>, accessed 12 February 2022.

[22] <https://cidce.org/en/>.

[23] The members of that group are listed in: <https://drive.google.com/file/d/1LLH3aq-8Che91knJbsHr-2HcKOK9Rz59/view>, accessed 12 February 2022.

[24] The Normandy Chair for Peace arranged the meetings of the group of lawyers through its digital platform.

[25] The Global Pandemic Network spearheaded the formulation of the rationale for the draft convention.

[26] The draft convention was completed in French on 30 November 2021, then translated into English and Spanish. The three versions were uploaded simultaneously on the CIDCE website on 9 December 2021. They are available at: <https://cidce.org/en/pandemics-and-environment-2/>, accessed 12 February 2022.

[27] The rationale was articulated in two forms – an executive summary and an explanatory version – which are available at: <https://drive.google.com/file/d/1QCALmGPihnT4t8J0pNwGkmDAQoKD4w9B/view> and <https://drive.google.com/file/d/1U88cRiTkGgfnaIKHns8yRbKs0Nobve-A/view>, accessed 12 February 2022.

[28] IPBES, *Workshop Report on Biodiversity and Pandemics of the Intergovernmental Platform on Biodiversity and Ecosystem Services*, Bonn, 2020, <https://ipbes.net/sites/default/files/2020-12/IPBES%20Workshop%20on%20Biodiversity%20and%20Pandemics%20Report_0.pdf>, accessed 12 February 2022.

[29] See in particular paras. 16 and 17 of the Preamble, and Articles 2-l, 3-2-a and 5-a of the CIDCE draft convention.

[30] The One Health High Level Expert Panel (OHHLEP) has recently developed a comprehensive definition of "One Health". Jointly endorsed by FAO, OIE, WHO and UNEP on 1 December 2021, this updated definition reads: "One Health is an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals and ecosystems. It recognizes the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent […]". It is available at: <www.fao.org/3/cb7869en/cb7869en.pdf>. On the "One Health" concept, see also: J. Zinsstag *et al*., *One Health. Theory and Practice of Integrated Approaches to Health*, Wallingford, CAB International, 2015, <https://web.ssu.ac.ir/Dorsapax/userfiles/Sub183/One_Health_The_Theory_and_Practice_of_Integrated_.pdf>, accessed 12 February 2022.

[31] As epitomized by the 2021 São Paulo Declaration on Planetary Health, available at: <https://drive.google.com/file/d/1jyC7uXyt8o8PqoEJG44GMBjaTSjuqvUs/view>, accessed 12 February 2022.

[32] Adopted at the 10th Global Conference on Health Promotion, the Charter advocates coordinated action to "value, respect and nurture planet Earth and its ecosystems", through "strong links to 'One Health' and planetary

In this perspective, the draft convention is underpinned by the human right to a healthy life in harmony with nature, in an environment conducive to the achievement of the highest possible level of health and well-being, for the benefit of present and future generations.[33] On this basis, the convention's text aims very broadly to prevent, anticipate, contain, manage and eradicate pandemics in a rapid, efficient, equitable, united and inclusive manner, while respecting the rights of humanity and the viability of the planet.[34] It therefore embraces both preparedness and response to pandemics, their anticipation being key to prevent their occurrence, restrain their spread and control their effects.

With regard to pandemic preparedness, the draft convention urges States to put in place coordinated national strategies involving health, veterinary and environmental authorities; to develop scientific research on the prevention of the risk of zoonotic emergencies; to have the necessary specialized medical and health personnel and the health and hospital infrastructure needed to deal with the risks of a pandemic; to promote the culture, resilience and capacities of society for pandemic risk management; to strengthen epidemiological surveillance through early detection and warning systems, and monitoring of the evolution of pandemic outbreaks.[35]

In terms of pandemic response, States are required to instantly alert the population when a pandemic outbreak is detected and to protect them in the most effective way possible, by triggering an emergency plan for pandemic control. It is also incumbent upon them to be truly transparent by notifying potentially affected States within 24 hours. On the health front, the draft convention enshrines vaccine equity, recognizing that large-scale vaccination is a global public good. Universal access to vaccines must therefore be guaranteed to protect the entire population of the world against a pandemic.[36] The same goes for medicines, means of screening and medical equipment, the availability of which must be universal. In this spirit, States Parties are expected to help each other in providing and receiving all necessary assistance, especially emergency relief, bearing in mind the special needs of developing countries.[37]

Strengthening of scientific and technical cooperation on pandemics, including epidemiological, pharmaceutical and environmental research, in connection with human and animal health, is an essential part of the draft convention, which aims in particular to promote the transfer of technologies, knowledge, skills and abilities.[38] In view of this, an Intergovernmental Panel of Experts on Pandemics (IPEP) is to be set up to collect and assess the most advanced data on the origins, prevention and management of pandemics and to provide, in an impartial, neutral and objective manner, scientific, technical, socio-economic and legal advice, as well as to set forth strategies for pandemic preparedness and response.[39]

In order to facilitate effective implementation of the convention, increased coordination of actions carried out by the international agencies concerned with pandemics is crucial, especially between the World Health Organization, the Food and Agriculture Organization of the United Nations, the United Nations Environment Programme, the World Organization for Animal Health, the World Intellectual Property Organization, the World Trade Organization and the World Bank.[40]

Concurrently, the proposed convention commits States to raising and allocating adequate, predictable and sustainable financial resources to ensure the execution of specific programmes for pandemic preparedness and response. It also foresees the possibility of establishing a voluntary global fund to mobilize additional financial resources aimed to assist developing countries in complying with the convention.[41]

Lastly, institutional and procedural arrangements are provided for the effective implementation of the convention, including the holding of regular sessions by the Conference of the Parties,[42] the submission of periodic reports by the Parties,[43] the establishment of an Implementation and Compliance Committee[44] and the designation of a dedicated Secretariat for support services.[45]

health to enhance pandemic preparedness and improve health and equity for the future". It is available at: <https://cdn.who.int/media/docs/default-source/health-promotion/geneva-charter---unedited---15.12.2021.pdf?sfvrsn=f55dec7_5&download=true<, accessed 12 February 2022.

[33] CIDCE draft convention, Articles 2-k and 3-1.

[34] *Ibid.*, Article 1.

[35] *Ibid.*, Articles 4 to 12.

[36] Recently, the UN General Assembly called again for ensuring equitable, rapid and universal access to vaccines to fight the COVID-19 pandemic in Resolution 76/175, "Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic", 16 December 2021, A/RES/76/175, <https://undocs.org/en/A/RES/76/175>, accessed 12 February 2022.

[37] CIDCE draft convention, Articles 4 and 13 to 17.

[38] *Ibid.*, Articles 18 to 22.

[39] *Ibid.*, Article 27.

[40] *Ibid.*, Article 23.

[41] *Ibid.*, Article 24.

[42] *Ibid.*, Article 25.

[43] *Ibid.*, Article 29.

[44] *Ibid.*, Article 28.

[45] *Ibid.*, Article 26.

Representing a global political commitment to tackle pandemics, the proposed convention would help to enhance engagement of stakeholders and consolidate multisectoral partnerships, offering a dialogue and convergence framework for the coherence of approaches, the coordination of actions and the synergy of interventions. Anchored on "One Health", it would reduce the risks of emerging diseases of zoonotic origin, the most probable sources of looming pandemics, while strengthening health systems so that they are more resilient and better equipped to deal effectively with future pandemics.

3. "The Fierce Urgency of now"

On 1 December 2021, by its decision SSA2(5) taken at the end of the aforementioned special session, the WHA established an intergovernmental negotiating body (INB) mandated to "draft and negotiate a convention, agreement or other international instrument on pandemic prevention, preparedness and response".[46] While this important decision is most welcome, the INB work schedule, spread over three years, is far too long. Indeed, it is planned that: (i) the INB will hold its first meeting by 1 March 2022 to elect its officers and outline its programme;[47] (ii) its second meeting will take place in August 2022 to identify the provision of the WHO Constitution under which the instrument should be adopted;[48] (iii) the INB will then submit a progress report to WHA76 in May 2023;[49] and (iv) finally, the INB will present its outcome to WHA77[50] – that is: not before May 2024.

In the age of pandemics that we are currently experiencing, the question is not whether, but when other pandemics will occur[51]. With interconnectedness of societies and interdependence of economies being ever more intensified by globalization, the risks of the spread of pathogens are likely to increase exponentially.[52]

In view of such looming threats and the devastating effects of the current pandemic, a more diligent stance is critical. A tighter timeline for the ING remains conceivable should WHO Member States agree to it. To this end, a new WHA special session could be convened in late 2022, with the sole purpose of considering and adopting the convention on pandemics, which would have been previously developed and negotiated by the INB. Hence, when meeting in May 2022, WHA75 could reschedule the INB meetings and decide to convene a WHA special session in December 2022. Such a shortened timetable would be coupled with an intensification of the INB meetings, which would make it possible to conclude the convention before the end of 2022.[53]

This is not utopian. In a comparable context of a serious disaster with transboundary effects, an exemplary precedent of an accelerated negotiation process can be recalled. After the explosion of a reactor at the Chernobyl nuclear power plant on 26 April 1986, two conventions were negotiated and adopted, in just five months, through the International Atomic Energy Agency: (i) the Convention on Early Notification of a Nuclear Accident; and (ii) the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.[54] Today, in the face of an infinitely more deadly global pandemic, why should such a feat not be replicable within WHO?

In a pandemic emergency, there is also a legal emergency. As Nicholas A. Robinson warned, the next pandemic is here,[55] and prospects of predictable outbreaks suggest that it could come soon and be deadlier.[56] Hence the need to act quickly and speed up the negotiation process of the pandemic treaty.

"We are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now". This prophetic phrase, although shaped by Martin Luther King, Jr. in a different context[57],

[46] "The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response", para. 1, <https://apps.who.int/gb/ebwha/pdf_files/WHASSA2/SSA2(5)-en.pdf>, accessed 12 February 2022.

[47] *Ibid.*, para. 2.

[48] *Ibid.*, para. 3.

[49] *Ibid.*, para. 5.

[50] *Ibid*.

[51] M.-M. Robin, La fabrique des pandémies - Préserver la biodiversité, un impératif pour la santé planétaire, Paris, La Découverte, 2021.

[52] H. De Pooter, Le droit international face aux pandémies: vers un système de sécurité sanitaire collective?, Paris, Pedone, 2015.

[53] This scenario was envisioned at the time of writing in February 2022. However, since then, the INB work schedule was confirmed as initially planned in decision SSA2(5).

[54] Both adopted on 26 September 1986: the first entered into force on 27 October 1986, the second on 26 September 1987: IAEA, "Nuclear safety conventions", <www.iaea.org/topics/nuclear-safety-conventions>, accessed 12 February 2022.

[55] N. A. Robinson, "The Next Pandemic Is Here", *The Environmental Forum*, November/December 2020, pp. 30-35,<https://law.pace.edu/sites/default/files/ZoonosisEssayEnvtForumEliNov2020.pdf>, accessed 12 February 2022.

[56] E. Smitham and A. Glassman, "The Next Pandemic Could Come Soon and Be Deadlier", *Center for Global Development*, 25 August 2021, <www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier>, accessed 12 February 2022.

[57] He asserted "the fierce urgency of now" in two memorable speeches: "I Have a Dream" (1963) available at: <www.americanrhetoric.com/speeches/mlkihaveadream.htm>;

could be paraphrased today as the world is at serious risk of severe future pandemics.

As the international community is about to celebrate the 50th anniversary of the 1972 Stockholm Declaration, it should urge prompt conclusion of a world convention to tackle pandemics, one which would advance health law and environmental law globally, in harmony with nature.

and "Beyond Vietnam - A Time to Break Silence" (1967), available at: <www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm>, accessed 12 February 2022.

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SECTION I – ESSAYS

Remote Togetherness. Digital Human Activities in the Pandemic and Related Challenges to Data Privacy, Equality, and Democracy in Greece

Vassiliki Christou

Abstract. The transition to a digital form of life was the way the modern world reacted to the new situation necessitated by the pandemic. Very shortly after the first shock, the world started to go remote, to operate from a distance, and a digital, non-physical way of life emerged. For a large portion of the global community, togetherness was on back but in a different, remote way. Although it is still early to grasp the broader impact and implications of this new remote togetherness, it is important to focus on aspects of the constitutional principles affected by this new, digital and remote way of life, which has already started integrating itself as a new normality. This paper addresses the constitutional implications of the remote function in the field of education, employment, as well as in the public sector, the Parliament and the Courts, and points to the issues of rights, equality and democracy raised in the remote mode of operation. For instance, data privacy has been restricted, because human activities, remaining unrecorded when taking place in the physical space, went or could go on record, when taking place in the digital world. This fact by itself entails a loss of freedom, namely the freedom to remain unattended and unrecorded during a good part of the day, which can be summarized as "behavioral privacy". Additionally, by going on record, personal information can be further processed, even for purposes not directly related to the initial activity, i.e. for analysis and marketing. Moreover, the right to education experienced a significant backslide, because it is impossible to achieve same educational goals by distance learning. Equality and equal opportunity have to some extent been jeopardized due to the digital divide, namely the disparate impact of the pandemic on those who had the means and the skills to work remotely and those who did not. Further, remoteness posed new challenges to the right of access to a Court, as well as to democracy, as face to face confrontation has always been considered an integral to lively debate and sincere dialogue. In that respect, the very understanding of democracy has been profoundly challenged by the remote mode.

Keywords: *COVID-19, digitalization, Greece, remoteness, democracy*

1. Introduction

The transition to a digital form of life was the way the modern world reacted to the new situation necessitated by the pandemic. At the beginning, social distancing was strictly implemented, and it meant almost absolute isolation in the privacy of our homes. The outbreak of the pandemic brought about an abrupt slowing down of an intense pace of life. Yet seemingly within a few days, one could say time froze, and this proved potentially fruitful to those who took the opportunity to reflect on their choices, priorities and life plans. However, very shortly after the first shock, the world started to go remote, to operate from a distance, and a digital, non-physical way of life emerged. For a large portion of the global community, togetherness was on back but in a different, remote way.[1]

As I shall present, schools, even those at the elementary education level, organized distance teaching and online instruction (III). Where possible, depending on the sector, employees worked remotely from home, using email correspondence and videoconferencing tools and all business data were removed to the "clouds", so that they could be accessed from everywhere (IV). Collective bodies, in both the private and public sector, convened remotely through various digital platforms (V). In that respect, shifting to videoconferencing was

[1] On how the way of life in the pandemic challenges the way we think about basic liberties, see Vassiliki Christou. "Οι ατομικές ελευθερίες και η μεταβολή της ανθρώπινης συνθήκης [Basic Liberties and the Change of Human Condition]" (2020) 85 ΔτΑ, p. 615.

viewed as a way to *"maintain a semblance of normalcy in school, work, and social life"*.[2] Even the Greek Parliament started to utilize new technologies, albeit only to support "real" sessions, which remained the center of parliamentary activities (VI). The Courts did not embrace distance hearings, but various forms of electronic and digital communication came into use to support internal communication within a Court, and even, in some cases, as I shall explain below, the internal sessions of the judges to issue a judicial opinion (VII).

In other words, after the bewilderment of the first days, things started to accelerate again. The pandemic accelerated digitalization, which was already under way, as well as the transition to a new model of life, and to a new digital economy, based on remote experience and interaction. Although remote experience is not synonymous with virtual experience, it still cannot be equated to in-person exchange. It is too early to soundly assess how the digital revolution is going to affect human history. For instance, the industrial revolution precipitated broad social changes and paved the way to democracy and universal suffrage.[3] The long-term outcomes of the digital revolution are yet unknown. The international community is witness to these changes, which will possibly lead to a new era in human history (or perhaps we have entered this new era), and the long-term impact thereof exceeds the abilities of human knowledge. The social distancing imposed by COVID-19 has been characterized as *"a natural experiment on a massive scale"*[4] and it is perhaps early to estimate long term effects or even social transformation taking place at the time.

Although it is still early to grasp the broader impact and implications of this new remote togetherness, it is important to focus on aspects of the constitutional principles affected by this new, digital and remote way of life, which has already started integrating itself as a new normality. This paper addresses the main issues of rights, equality and democracy affected by digitalization during the Covid-19 pandemic in Greece. In fact, a number of concerns have been expressed over potential erosions in democracy and rights caused by government responses to the pandemic and by the exercise of broad executive powers.[5] It must also be emphasized that Covid-19 might be used as a pretext to adopt repressive measures for reasons unrelated to the pandemic.[6] However, the effect of digitalization itself on democracy and rights (other than privacy)[7] has not yet been assessed to a significant degree, and this is what the present paper aims to contribute to.

Data privacy has been restricted, because human activities, remaining unrecorded when taking place in the physical space, went or could go on record, when taking place in the digital world. This fact by itself entails a loss of freedom, namely the freedom to remain unattended and unrecorded during a good part of the day, which could be summarized as "behavioral privacy".[8] Additionally, by going on record, personal information can be further processed, even for purposes not directly related to the initial activity, i.e. for analysis and

[2] Michael Goodyear. "The Dark Side of Videoconferencing: The Privacy Tribulations of Zoom and the Fragmented State of U.S. Data Privacy Law" (2019-2020) 10 HLRe: Off Rec 76, p. 77.

[3] On the history of the universalization of the suffrage in Britain as a phenomenon parallel to the industrial revolution and the rise of the working class, see Vassiliki Christou. "Brexit, Representative Democracy and Constitutional Reform since 1997" (2018) 3 EPRL/REDP, pp. 834-886 [839-848].

[4] Orrell, Brent; Leger, Matthew. "Trade-Offs of Remote Work: Building a More Resilient Workplace for the Post-COVID-19 World" Washington D.C., American Enterprise Institute, November 2020, p. 4.

[5] See for example European Commission for Democracy Through Law, (Venice Commission), Respect for Democracy, Human Rights and the Rule of Law during states of emergency - Reflections, Strasbourg, 26 May 2020, CDL-PI(2020)005rev, by Nicos Alivizatos (Member, Greece) Veronika Bílková (Member, Czech Republic) Iain Cameron (Member, Sweden) Oliver Kask (Member, Estonia) Kaarlo Tuori (Member, Finland), (https://www.constitutionalism.gr/wp-content/uploads/2020/05/2020-005rev-CDL-PI_states-of-emergency-democracy.pdf).

[6] Weber, Michael A. et al., "Global Democracy and Human Rights Impacts of COVID-19: In Brief. Congressional Research Service Report", June 26, 2020 See also "Protecting Democracy During Covid-19 in Europe and Eurasia and the Democratic Awakening in Belarus: Hearing Before the Subcommittee on Europe, Eurasia, Energy, and the Environment of the Committee on Foreign Affairs", House of Representatives, One Hundred Sixteenth Congress, Second Session, 2020.

[7] See Spyros Tassis. "Πανδημία και Ιδιωτικότητα" (The pandemic and privacy), https://www.constitutionalism.gr/2020-06-tassis-pandimia-idiotikotita/; Lilian Mitrou. "Τα προσωπικά δεδομένα την εποχή του Κορωνοϊού" (Personal Data in the Time of Corona), Syntagma Watch, 16.3.2020, available at: https://www.syntagmawatch.gr/trending-issues/ta-prosopika-dedomena-stin-epoxi-tou-koronoiou/; Fereniki Panagopoulou-Koutnatzi. "Η προστασία προσωπικών δεδομένων σε περίοδο πανδημίας" (Data Protection in the Pandemic), available at: https://www.constitutionalism.gr/wp-content/uploads/2020/03/2020.03.28_Panagopoulou_privacycoronavirus.pdf

[8] On this aspect of privacy as freedom, freedom to behave spontaneously and without (self) censorship, see: Vassiliki Christou. "Το δικαίωμα στην προστασία από την επεξεργασία δεδομένων. Θεμελίωση – Ερμηνεία – Προοπτικές" (The Right to Protection from Data Processing. Foundations – Interpretation – Prospects) Introduction by Nikos K. Alivizatos, Athens/Thessaloniki, Sakkoulas Publications, 2017, p. 10.

marketing. Moreover, the right to education experienced a significant backslide, because it is impossible to achieve same educational goals by distance learning, as I shall explain below. Equality and equal opportunity have to some extent been jeopardized due to the digital divide, namely the disparate impact of the pandemic on those who had the means and the skills to work remotely and those who did not. Further, remoteness posed new challenges to democracy, as face to face confrontation has always been considered an integral to lively debate and true dialogue. In that respect, the very understanding of democracy has been profoundly challenged by the remote mode.

2. Legal Responses to the Pandemic in Greece: An Overview

Before going in detail into the aspects of remoteness or digital togetherness that are of importance to rights and democracy's perception, this section first provides an overview of the Greek Government's response to the pandemic to the present moment to provide the broader framework, in which digitalization of human activities has accelerated.

Broad powers have been assumed by the Greek Government, and the role of the public sector in protecting life and safety vis-a-vis private sector efficiency has been fully verified.[9] These measures adopted by the Greek Government can been divided into three bundles, each corresponding to one of the three consecutive phases of the pandemic. It is arguable that international society is living through the third phase as this paper is being written in December 2021.

The first phase spans the period from March to June 2020. It encompasses curtailment of most activities, which operated remotely to the extent possible, with the exception of food and drug stores. Moreover, strict curfew rules, stay-at-home orders and travel limitations were explicitly foreseen in ample legislation invoked at the time, [10] the lack of scientific knowledge about the new virus is characteristic of the first phase of the pandemic.[11] Due to the unpredictably rapid expansion rates of the deadly epidemic, the Government's response to the pandemic was packed into emergency legislation initiated already in late February, and going on in March, April, and May 2020.[12]

In the second phase, lasting approximately between September 2020 to May 2021, measures adopted were of the same kind, namely those including curtailment of activities and restriction of movement and travel. However, they were more selective and targeted activities that were more dangerous for the spread of the virus, such as regulating activities of massive attendance, including universities, or activities involving intimate interaction, including dance clubs or restaurants, the latter operating solely as take-aways. What was new in that phase was the face-mask-orders. Additionally, by the end of the second phase, COVID vaccinations had been made available for the elderly and vulnerable groups, as well as for some younger groups, in all cases at a voluntary level. Moreover, the restrictive measures were adopted by the means of ordinary legislation, that is by a number of short-term and periodically renewed joint ministerial decisions, after assessment of the epidemiological data, the transmission rate of the virus, and the resilience of the public health care system.[13]

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[9] Francis Fukuyama. "The Pandemic and Political Order" (2020) 99 Foreign Aff p. 26, 30: "In April, Jack Dorsey, the CEO of Twitter, announced that he would contribute $1 billion to COVID-19 relief, an extraordinary act of charity. The same month, the U.S. Congress appropriated $2.3 trillion to sustain businesses and individuals hurt by the pandemic. Antistatism may linger among the lockdown protesters, but polls suggest that a large majority of Americans trust the advice of government medical experts in dealing with the crisis. This could increase support for government interventions to address other major social problems." See also I. Skandalis. "Labour Law Measures Adopted in Response to COVID-19 in Greece. In E. Hondius, M. Santos Silva, A. Nicolussi, P. Salvator Coderch, C. Wendehorst, & F. Zoll (eds.), Coronavirus and the Law in Europe, Intersentia, 2021, pp. 989-1008; S. Devetzi/A. Stergiou, Social security in times of corona, Athens-Thessaloniki, Sakkoulas Publications, 2021.

[10] Yiannis Drossos. "COVID-19 as a Global Institutional Event and Its Institutional Treatment in Greece, Legal Policy & Pandemics", (2021) The Journal of the Global Pandemic Network, p. 115; George Karavokyris. "Constitutionalism and COVID-19 in Greece: The Normality of Emergency", VerfBlog, 2021/2/25, <https://verfassungsblog.de/constitutionalism-and-covid-19-in-greece-the-normality-of-emergency/>, DOI: 10.17176/20210225-153933-0.

[11] Jürgen Habermas. Le Monde, 10.4.2020, Interview by Nicolas Truong: «Dans cette crise, il nous faut agir dans le savoir explicite de notre non-savoir».

[12] Governmental Act of Legislation published in Gov. Gaz. A΄ 42/25.2.2020; Governmental Act of Legislation published in Gov. Gaz. A 55/11.3.2020; Governmental Act of Legislation published in Gov. Gaz. A΄ 64/14.3.2020. All three Acts were ratified by Law 4682/2020 published in Gov. Gaz. A 76/3.4.2020. See also Governmental Act of Legislation published in Gov. Gaz. A΄ 68/20.3.2020 and ratified by Law 4863/2020. Last, Governmental Act of Legislation published in Gov. Gaz. A΄ 90/1.5.2020 authorized the withdrawal of the various restrictive measures, imposed during the first phase of the pandemic. The latter was ratified by Law 4690/2020 published in Gov. Gaz. A' 104/30.5.2020.

[13] See indicatively Joint Ministerial Decision Δ1α/ΓΠ.οικ.53080 published in Gov. Gaz. B΄ 3611/29.8.2020, about the social distancing rules and other health protection rules in private enterprises, in the public

The current phase, the third phase was initiated this past fall of the year 2021 and is still in progress. This phase is essentially different from the other two, as activities are again taking place in person. The vaccination distribution has been extended to cover all members of the population, including children, on a voluntary basis and the restrictive measures now target the unvaccinated, in order both to protect public health, as well as to increase vaccination coverage, and possibly – somewhere at the end of the tunnel – achieve herd immunity. Access rules have also been added to social distancing rules.[14] This third phase is of limited relevance to this paper, as most activities are open again and may operate in person. However, it is interesting to note cases in which remoteness has been established as a "new normality", mainly in the field of employment.

3. Education

A. Remote Schooling During the Pandemic

During the first phase of the pandemic, all schools were closed, and pupils of all ages had to adjust to distance instruction. Synchronous distance courses were only optional for teachers.[15] In other words, synchronous instruction could depend on teacher preferences and availability for live sessions. During the second phase of the pandemic, all schools joined the mode of synchronous learning, which became compulsory by law. [16] As of the first phase of the pandemic, the Ministry of Education employed a private videoconferencing tool for this purpose. However, for elementary education, classes were scheduled only in the afternoon (from 14:10 am to 17:20), whereas high school classes were scheduled in the morning. It should be noted that during the second phase of the pandemic, schools were not shut down for the whole school year, but rather during a good part of it. As a result, pupils had to adjust to shifting between alternative modes of instruction, online on the one hand, and in-person teaching at school on the other hand.

B. The Right to Education and Equal Access

Did any of the above exceptional educational measures violate the constitutionally protected right to education? A social right to education is guaranteed under Article 16 para 4 of the Greek Constitution, which provides as follows: *"All Greeks are entitled to free education on all levels at State educational institutions. The State shall provide financial assistance to those who distinguish themselves, as well as to students in need of assistance or special protection, in accordance with their abilities.."* [17] The fact that education is guaranteed as a social right entails that the Government enjoys a margin of appreciation as to how it may organize public schools, which educational method to endorse, and, of course, over the content of the education to be provided. However, the Government must respect some constitutional limitations. First, education has to abide by the liberal, democratic principles embodied in the Constitution, e.g. the non-discrimination principle or freedom of religion.[18] Second, as regards the quality of the education provided, the Government may not fail to guarantee a minimum level of educational services

sector and other places of assembly; Joint Ministerial Decision Δ1α/Γ.Π.οικ. 56418 published in Gov. Gaz. B' 3927/14.09.2020, about the temporary suspension of the operation of private enterprises, and of other places of assembly, and compulsory face mask use to reduce the spread of the virus; Joint Ministerial Decision Δ1α/Γ.Π.οικ. 56415 published in Gov. Gaz. B' 3951/15.9.2020, regarding curtailment of road, air and sea transportation; Joint Ministerial Decision Δ1α/Γ.Π.οικ. 59624 published in Gov. Gaz. B' 138/26.09.2020, about quarantine and isolation measures; Joint Ministerial Decision Δ1α/Γ.Π.οικ. 61940 published in Gov. Gaz. B' 4326/02.10.2020, regulating maximum number of persons in public and social events special rules for cafes, bistrots and restaurants.

[14] Joint Ministerial Decision Δ1α/ΓΠ.οικ. 55400 published in Gov. Gaz. B' 4206/12.09.2021, concerning emergency health protection measures regarding access to closed spaces in all Greek territory. See also a comment on the constitutionality of these measures by Vassiliki Christou. "Είναι συνταγματικά τα νέα μέτρα για την πρόσβαση στους κλειστούς χώρους;" (Are the new measures on accessing closed spaces constitutional?), Syntagma Watch, 24.09.2021, https://www.syntagmawatch.gr/trending-issues/einai-syntagmatika-ta-nea-metra-gia-thn-prosvash-stous-kleistous-xwrous/.

[15] Ministerial Decision 57233/Υ1 published in Gov. Gaz. B' 1859/15.05.2020, on synchronous remote teaching being optional.

[16] By Ministerial Decision 120126/ΓΔ4 published in B' 3882/12.09.2020, synchronous remote teaching became compulsory for the period of suspension of in-person school activities during school year 2020-2021. By Article 4 of the said Decision the schedule of elementary school classes was set at 14:10 until 17:20. Also, information and announcements about the operation of schools during the second phase of the pandemic is available at <Παιδεία | CoVid19.gov.gr - Part 2>

[17] A translation of the Greek Constitution in English published by the Greek Parliament is available at https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf

[18] See Giorgios Sotirelis. "Θρησκεία και Εκπαίδευση κατά το Σύνταγμα και την Ευρωπαϊκή Σύμβαση. Από τον κατηχητισμό στην πολυφωνία" (Religion and Education according to the Constitution and the ECHR. From indoctrination to pluralism), Athens, Ant. N. Sakkoulas, 1998.

for all, which corresponds to the inflexible and intangible core of the respective right.[19]

Article 16 para 4 of the Greek Constitution not only guarantees a social right to education, but also, in combination with the equality clause, laid down in Article 4 para 1 of the Greek Constitution, an individual right, a justiciable claim to have access to public education available by the Government on equal terms for all.[20] In a nutshell, the Government may enjoy some leniency in organizing the school system, but this school system has to be accessible to all on equal terms, for instance pupils with disabilities have to be reasonably accommodated to public schools. Additionally, the Government is bound by Article 21 para 1 of the Greek Constitution to protect childhood.[21] In other words, special care is due to children, also when organizing a public school system.

During the first phase of the pandemic (from March to May 2020), protection of the right of access to a school may be considered, strictly speaking, to have fallen under the minimum level required by the Constitution, due to the fact that live interaction between pupils and teachers was not guaranteed as a legal obligation. However, given the exceptional situation of the first phase, i.e. the manifestly shocking experiences made in Italy, the lack of scientific knowledge as to how to protect society from the disease, and the short duration of the restrictive measures expanding over two months of a school year that had run normally from September until March, it could be concluded that there was no violation of the social right to education during the first phase of the pandemic, provided that there was a pressing social need to protect public health and that the emergency situation was unpredictable.

The evaluation of the restrictive measures imposed on school activity during the second phase of the pandemic from a constitutional point of view calls for more elaborate argumentation. First, measures during the second phase pose different dilemmas. Whereas during the first phase the main problem was the lack of synchronous instruction and of communication between pupils and their teachers, and among pupils themselves, in the second phase the question was whether synchronous online instruction had been prolonged for longer period than was strictly necessary. Given the substantial negative effects of online education on children, elaborated below, and the fact that the emergency situation was no longer unforeseeable, the measures imposed on educational activities should be tested by a more thorough proportionality review than a mere rational basis test.

One can hardly overstate the great disadvantages of remote teaching in comparison to in-person teaching in class. Research conducted for the Congress in the USA, where schools also shut down for a long period of time during the pandemic, illustrates the problems attached to remote, synchronous online teaching.[22] First, according to this research, there are problems inherent to the lack of necessary technology, such as access to broadband, devices, necessary connectivity or data limits, which disproportionately affect poorer pupils. For instance, data limits or limited number of devices in a household may not have been enough to meet the needs of pupils learning at home. In other words, quick transitioning to an online learning environment maximizes the digital divide, meaning the gap between families who have access to the resources to fully engage in an online environment and are acquainted to the use of new technologies and those who do not.[23] In fact, in Greece some hardware devices were offered to pupils under a social benefit program called "Digi-

[19] In German literature the inflexible and intangible core of human rights is called "Wesensgehalt". See Pieroth/Schlink. „Grundrecht Staatsrecht II", 18., neu berabeitete Auflage, Heidelberg, C.F. Müller, 2002, pp. 69-71; Arthur Kaufmann. "Über den „Wesensgehalt" der Grund- und Menschenrechte". (1984) 70 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, p. 384; Peter Häberle. "Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz: zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt", Heidelberg, Müller, 1962.

[20] P.D. Dagtoglou. "Ατομικά Δικαιώματα" (Basic Liberties), Volume A, 2nd enhanced edition, Athens-Komotini, Ant. N. Sakkoulas Publications, 2005, pp. 807-808; Dimitris Sarafianos. "Article 16", in: Spyropoulos/Kontiades/Anthopoulos/Gerapetritis (eds). "The Greek Constitution. A Commentary", Athens/Thessaloniki, Sakkoulas Publications, 2017, pp. 389-390.

[21] Article 21 par. 1 of the Greek Constitutions states: ¨1. The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State […].¨ A translation of the Greek Constitution in English published by the Greek Parliament is available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf>

[22] "Distance Learning: Challenges Providing Services to K-12 English Learners and Students with Disabilities during COVID-19. Highlights of GAO-21-43, A report to congressional committees" November 2020 (Content downloaded from HeinOnline). The Government Accountability Office (GAO) exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government.

[23] Zota, Rita R.; Granovskiy, Boris. "Remote Learning for K-12 Schools during the COVID-19 Pandemic." Congressional Research Service Report prepared for members and committees of Congress, August 20, 2021 (Content downloaded from Hein Online).

tal Care", but this help was too little too late for such a massive shift to online instruction.[24]

Second, as it is easily understood, not all pupils have a room of their own at home where they can sit and learn without distractions. In other words, not only the lack of suitable equipment, but also the lack of a suitable home environment, may have, to my mind, also impeded the right of poorer children to have proper access to a school. Third, online education has the side-effect of exposing children to and familiarizing them with a hazardous environment, i.e. the internet, not to mention dangers to the mental health of children, caused by lack of socialization with friends and, generally, people other than the family.

Further, one may not overlook the learning loss during distance learning.[25] As research shows, [26] remote schooling may lead to reinforcement of existing achievement gaps, as there is little room for real time adjustments to the instruction, and teachers cannot overview pupils properly and accurately assess their progress. Moreover, synchronous distance learning offers limited possibilities for interaction between pupils and teachers, and predominantly among pupils. Last but not least, distance learning makes it more difficult to deliver special education services, namely education services to pupils with disabilities, as pupils with disabilities are a diverse group with a wide range of abilities and needs that call for individualized education programs. In fact, in Greece pupils with disabilities returned to their schools physically during the second phase of the pandemic precisely because remote teaching was much less suitable for them.[27]

In summary, synchronous online education tends to be worse education than the one provided in person, and it is also unequal for poorer children or children from technologically illiterate families. Therefore, a government's decision to prolong it must be adequately justified in terms of necessity and of lack of alternative means of education, especially given the structural importance of education for the enactment and development of other basic liberties.[28] If it is assumed that socialization, meaning in-person interaction, is a scarce resource during the pandemic, it has to be distributed in a fair way, after due regard of conflicting interests of constitutional importance. During the second phase of the pandemic, some mobility was permitted and not all activities were shut down. In other words, there was some socialization to spare. A good number of commercial activities were operating, including department stores, and quite characteristically, beauty salons before Christmas, while schools remained physically closed, and operated online.

In that respect, it is not obvious that the Government struck a fair balance between constitutionally protected goods: economic liberty on the one hand, and education on the other hand. Had there been a judicial challenge against the ministerial decisions shutting schools down to ascertain the constitutionality thereof, evidence would have to be presented before the Courts (e.g. studies, estimations, expert advice) to substantially justify the grave and prolonged compromise of educational activities during the second phase of the pandemic. Besides, judicial review is not suspended during an emergency. Moreover, as Wiley and Vladeck also support, when the emergency perpetuates itself and becomes a long-lasting crisis, then a mere rational basis test has to be replaced by ordinary judicial review, either of intermediate level or even strict scrutiny, depending on what is at stake. [29] As Dabrowska-Klosinska has pointed out, during a long-lasting crisis, a multitude of decisions are being made that need to be continually reviewed and reassessed by the Courts, and of course by Parliament, which has to decide in case of scientific uncertainty.[30]

C. Data Privacy

The set-up of e-classes by the Ministry of Education also invoked some aspects of data privacy concerns. In fact, the Greek Data Protection Authority (DPA) issued an opinion in November 2021, stating that the data processing agreement the Ministry of Education had concluded with the private videoconferencing platform did not respect

[24] See Joint Ministerial Decision 30746/ΓΔ8 published in Gov. Gaz. B' 1046/17.03.2021 regarding the Project "Digital Care" (*Ψηφιακή Μέριμνα*).

[25] Op.cit., FN 22, p. 3.

[26] Op.cit., FN 22, p. 11.

[27] See Ministerial Decision No 27707 published in the Gov. Gaz. 1825/B/5.5.2021.

[28] Martha Nussbaum, in her well-known "capability approach" to rights, lists education among the central capabilities that the Government should, by all means, protect, as it has an "architectonic" and "fertile" role for the development of other basic liberties, like freedom of thought and political expression. See Martha C. Nussbaum. "Creating Capabilities. The Human Development Approach", Cambridge Mass., London, Harvard University Press, 2011, pp. 17-45.

[29] Lindsay F. Wiley & Stephen I. Vladeck. "Coronavirus, Civil Liberties, and the Courts: The Case against "Suspending Judicial Review" (2020) 133 Harv L Rev F 179, p. 183. Also, Lindsay F. Wiley. "Democratizing the Law of Social Distancing" (2020) 19 Yale J Health Pol'y L & Ethics 50, p. 36.

[30] Patrycja Dabrowska-Klosinska. "The Protection of Human Rights in Pandemics - Reflections on the Past, Present, and Future" (2021) 22 German LJ 1028, p. 181.

the GDPR in various aspects.[31] The right to data protection is also guaranteed by the Greek Constitution (Article 9A).[32] First, according to the Greek DPA, the private service provider was entitled, based on the data processing agreement with the Ministry of Education, to process electronic data generated while using the services, for further purposes, i.e. for its own business purposes namely for data analysis and strategy, as well as for the amelioration of the services provided. These further processing activities occurred, noted the Greek DPA, without the consent of the data subjects, and moreover, without having informed the data subjects in an appropriate way within the meaning of Articles 12 and 13 of the GDPR. Second, there had been data transfer to the USA, a destination which is not recognized as safe for European data after the invalidation of the Privacy Shield Adequacy Decision by the EU Court in July 2020.[33] Yet, according to the Greek DPA, the Ministry of Education had not performed a due assessment of the risks inherent in the particular data transfer and had not agreed to supplementary measures that could eventually mitigate the risks of the processing activity. As a result, the Ministry of Education was reprimanded by the Greek DPA for the above deficiencies and was called to redress them.

4. Remote Work

A. Shifting the Model

Working from home turned from an exception to the rule during the pandemic. Work schedules and shifts were disrupted and, all of a sudden, clear-cut lines between private life and work life blurred. Remote work brought about a great transformation of the employment relationship, signaled a drastic change in the traditional work culture, and it will certainly be years before we fully understand how this shift to a remote model of work has affected the economy and the labour market. Research conducted by the American Enterprise Institute summarised, at an early stage of the pandemic, the pros and cons of remote work as follows:

> *"For employers, remote work provides opportunities for increased productivity, operational cost savings, competitive advantages in talent recruitment and retention, and positive environmental impacts. This comes with the potential costs of a loss of organizational culture, complications in managing a remote workforce, exposure to security risks, difficulty adapting remote-work policies to diverse business needs, and disparate impacts on non-remote workers.*
> *Workers may find that remote work increases satisfaction with their jobs and personal lives, which can improve their well-being. They can also save on costs associated with working in the office and may find that increased professional autonomy helps them create more comfortable working conditions.*
> *On the downside, remote work can erode boundaries between work and life, weaken social ties and informal communication on the job, slow career advancement, cause communication challenges, and increase fear of job loss as companies import remote talent globally."*[34]

A year later the same Institute sounded less optimistic.[35] Increased electronic monitoring by employers had been found to limit the anticipated increase in worker autonomy. It was acknowledged that working from home may harm the mental and physical health of employees. Employers did benefit from increased worker productivity and the opportunity to reduce real estate footprints and costs. However, they faced challenges with company culture, cybersecurity, and new legal risks associated with equal treatment of in-office and remote employees. Simultaneously, increased use of private internet and computers has led to a 239% increase in cyberattacks during the pandemic.

Before the pandemic, Greek legislation already accommodated working from home. However, this framework was in no case cut out for a very rapid transition to a remote model of work. For instance, respective legislative provisions foresaw that, in case of transition to remote work, there had to be a period of three months of adjustment, during which either party could terminate remote work and the employee could return to his/her prior po-

[31] Greek Data Protection Authority, Decision No 50/2021, published in the official webpage of the Greek DPA: <https://www.dpa.gr/sites/default/files/2021-11/50_2021anonym.pdf>

[32] Article 9A of the Greek Constitution provides: "All persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, which is constituted and operates as specified by law." A translation of the Greek Constitution in English published by the Greek Parliament is available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf>

[33] C-311/18, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems, <https://curia.europa.eu/juris/liste.jsf?num=C-311/18>.

[34] Op. cit., FN 4, p. 1.

[35] Orrell, Brent. "Looking Back on a Year of Remote Work to See the Way Forward" Washington D.C., American Enterprise Institute, September 2021.

sition in the company.[36] It is evident that such an adjustment period was impossible during the pandemic, and it also lacked any practical meaning, since the curtailment of activities lasted usually for shorter periods, whereas termination of remote work and return to the former status was not for the interested parties to decide, but by the Government based on the intensity of the health crisis. Consequently, the shift to remote work took place on the basis of emergency regulation issued to restrict the spread of the virus and protect public health.[37]

B. Data Privacy and Integrity

The Greek Data Protection Authority reacted quickly and in April 2020, during the first phase of the pandemic, issued guidelines to address the need to safeguard both the employee's privacy, as well as the integrity of business data, especially in case the employees were using their own devices and network.[38] The Greek DPA emphasized the need for every employer to lay down new company policies specific to the dangers emanating from remote work, and to train the employees to abide by these policies with the assistance of the Data Protection Officer (DPO). Furthermore, the Greek DPA suggested specific security measures to be undertaken by the enterprises, for instance VPN connection and other safe protocols, as well as encryption of portable devices. Additionally, the Greek DPA pointed out to the need for employees using their own devices to get acquainted to techniques of separating private from business files, as well as private from business mail on the same device.[39]

Moreover, in August 2021 the Greek DPA issued a more detailed Decision on remote work, [40] after having established that, during the first phase of the pandemic, 26,2 % of the employees shifted to remote work, whereas it is estimated that 40% of the employees were working remotely by November 2020. The Greek DPA underlined the obligation of employers to conduct a Data Protection Impact Assessment study (DPIA)[41] to address the specific dangers and risks related to remote work, and elaborated on the "right to disconnect", already set out in a resolution of the European Parliament.[42] The Greek DPA was greatly concerned about employers monitoring and recording employees' activities. On the one hand, it is plausible that an employer wishes to monitor whether an employee meets the obligations agreed in the employment contract, especially because the employee is not in office. On the other hand, remote work provides enormous opportunities to monitor an employee's activity and behaviour in real time, as well as to record it. The Greek DPA emphasized the importance of the principle of proportionality and of data minimization[43] in assessing the legality of data processing of employees, and in fact, came to the conclusion that a systematic, perpetual and generalized collection of personal data leading to profiling of employees could hardly be considered as compatible with the principle of proportionality.

Furthermore, facing the challenges of remote work led to legislative adjustments. Earlier in summer 2021 the Greek Parliament passed a law on remote work in the public sector and replaced the old provisions on remote work in the private sector.[44] Under Law 4807/2021 on remote work in the public sector,[45] it is crucial that remote work is foreseen as a right, and not as an obligation of the public servant. Namely, based on this new legal framework, a public servant may choose to work 44 days a year remotely, whereas it is not permitted to opt for remote work at the period between July 15 and August 31, during summer, when normally ordinary leaves are granted. A public servant may be obliged to work remotely only in case of a public health emergency. Additionally, it is very important that it is explicitly forbidden to record moving images (videos) of public servants either during a teleconference or in order to evaluate the public servant's performance at work. A video recording may only exceptionally be permitted for a

[36] Article 5 of Law 3846/2010 published in Gov. Gaz. A 66/11.5.2010.

[37] Op.cit., FN 12. See also Dimitris Ladas. "Τηλεργασία και άδεια ειδικού σκοπού" (Telework and special purpose leave), ΔΕΝ 2020, p. 833.

[38] Greek Data Protection Authority, Guidelines No 2/2020 regarding security measures in the framework of remote work, published in the official webpage of the Greek DPA: <https://www.dpa.gr/sites/default/files/2020-05/gnomodotisi%202_2020anonym.pdf>.

[39] See also Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work, 17/EN, WP 249, June 8, 2017, p. 16, <https://ec.europa.eu/newsroom/article29/items/610169/en>.

[40] Greek Data Protection Authority, Decision No 32/2021, published in the official webpage of the Greek DPA: < https://www.dpa.gr/sites/default/files/2021-08/32_2021anonym.pdf>.

[41] Article 35 GDPR.

[42] European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), < https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html>

[43] Philip Scholz. "§ Datenvermeidung und Datensparsamkeit", in Spyros Simitis (Hrsg.). "Bundesdatenschutzgesetz", 7. Neu bearbeitete Auflage, Nomos, Baden Baden, 2011, pp. 393-412.

[44] Article 67 of Law 4808/2021 published in Gov. Gaz. A΄ 101/19.06.2021, replaced Article 5 of Law 3846/2010.

[45] Law 4807/2021, published in Gov. Gaz. A΄ 96/11.6.2021.

limited scope and if it is absolutely necessary for the task to be performed. Last, public service normally provides the equipment for remote work. If that is not possible, the public servant may use his/her own equipment.

Contrary to the above, for private sector employees, Law 4808/2021 provides that the duration of remote work is a term of the employment relationship to be agreed upon between the parties.[46] Also, the right to disconnect is explicitly foreseen. However, there is no general, explicit prohibition of the video recording of employees. The respective law provision is more abstractly formulated, stating that the employer may check the performance of the employee working remotely, while respecting their private life and rights under data protection laws. In that respect, the guidelines issued by the Greek DPA are more than useful for the interpretation of this general clause in a way protective of the employee's privacy. Last, it is explicitly forbidden by the Law itself to use a web cam to monitor the performance of an employee.

C. Gender Equality

Remote work has affected gender differences in ways yet to be explored in the future.[47] However, it is possible that remote work may prove to have some positive impact on gender equality. Certainly, remote work has put to question stereotypes around employment that were rather male-oriented. As Michelle Travis points out *"the pandemic has made it impossible to defend continued reliance on unproven assumptions that nearly all jobs are location- and time-dependent, and that nearly all occupations require an entirely uninterrupted work-life"*.[48] To my mind, such assumptions fell harder on women, especially mothers of young children. Workplace flexibility, remote work and telecommuting options had, even prior to the pandemic, been demanded by women to better support their caregiving responsibilities.[49] On the other hand, as indicated in the beginning of this paper, it is rather early to draw conclusions on long-term effects. Remote work during the pandemic has, in other aspects, disproportionately harmed women because of lack of schools, day care, summer camps, and other childcare activities due to the curtailment of various activities and movement restrictions.[50] If remote work is to help bridge the gender gap in the field of employment, then it has to be adequately organised.[51] Namely, it has t

o be attractive for both men and women and equally distributed. Otherwise, it may marginalise women (working remotely) and deepen payment inequality. Last, remote work has to be organised in a way that would encourage intra-household fair allocation of tasks between fathers and mothers.[52]

5. Public Administration and Privatization of the Processing of State Information

Collective bodies in the public sector have been convening remotely since the beginning of the pandemic. Based on emergency legislation, bodies of the public sector, including elected bodies, such as the municipal councils,[53] and political bodies including the Government,[54] could convene remotely for reasons of public health.

In fact, over the past decades, ordinary legislation (i.e. the Code for Administrative Procedure) permitted remote sessions for public administration, either in total or in part, due to the geomorphology of Greece, which might impede easy transportation during winter.[55] During the pan-

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[46] Law 4808/2021, published in Gov. Gaz. A' 101-19.6.2021. See also I. Liksouriotis. "Τηλεργασία: Μια 'εισαγωγή' για το μέλλον της εργασίας" (Telework: An 'Introduction' to the future of employment), ΕΕΡΓΔ, 2021, p. 1283; D. Lembesi. "Οι εργασιακές σχέσεις 20 μήνες μετά από την COVID-19: τηλεργασία – υποχρεωτικός ή μη εμβολιασμός" (Employment relations 20 months after COVID-19: telework – mandatory or non-mandatory vaccination), ΔΕΝ 2021, p. 1713; S. Zavitsanou. "Το νέο εργασιακό πλαίσιο. Παρουσίαση βασικών σημείων του ν. 4808/2021" (The new labour law framework under Law 4808/2021), ΔΦορΝ 2021, p. 490.

[47] See for example Sanna Nivakoski and Massimiliano Macherini. "Gender Differences in the Impact of the COVID-19 Pandemic on Employment, Unpaid Work and Well-Being in the EU", Intereconomics 2021, pp. 254-260.

[48] Michelle A. Travis, "A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility" (2021) 64 Wash U J L & Pol'y p. 203, 229.

[49] Nussbaum, op.cit., FN 28, pp. 146-149 (Gender), pp. 149-152 (Disability, Aging, and the Importance of Care).

[50] Travis, op.cit., FN 48, p. 229.

[51] Manuela Tomei. "Teleworking: A Curse or a Blessing for Gender Equality and Work-Life Balance?" Intereconomics 2021, pp. 260-264.

[52] Melanie Arntz, Sarra Ben Yahmed and Francesco Berlingieri. "Working from Home and COVID-19: The Chances and Risks for Gender Gaps", Intereconomics 2021, pp. 381-386.

[53] See Article 11 of Governmental Act of Legislation published in Gov. Gaz. A΄ 55/11.3.2020, ratified by Law 4862/2020.

[54] See Article 32 of Governmental Act of Legislation published in Gov. Gaz. A΄ 68/20.3.2020, ratified by Law 4863/2020. For collective bodies in private sector see Article 42 of Governmental Act of Legislation, published in Gov. Gaz. A' 75/30.03.2020, ratified by Law 4864/2020.

[55] Article 14 para 13 of Code for Administrative Process (Law 2690/1999). Also, based on the recent Law 4727/2021 published in Gov. Gaz. B' 1324/05.04.2021 on the digital transition, remote conferencing is foreseen as a new option to address the citizen's applications and requests. An implementing Ministerial Decision has also been

demic a new ministerial decision was issued to supplement, and in fact, substitute the old digital platform utilized for remote sessions.[56] The old platform was named "syzefkis" and it was a built-in public sector platform. The new platform, named "e-presence", is the property of a state-owned entity (EDYTE SA), however it also uses the infrastructure of a third-party platform. To my mind, this might prove of some constitutional significance, as it leads to the privatization of the processing of eventually core state information. State information is of course still owned by the Government, since it is the Government who is the data controller and owner of the data, but a private entity is also involved in the processing activities as a data processor.[57]

In the case of remote sessions of public bodies through private platforms, the government privatizes a service, namely part of the processing (not the control) of public records, which would otherwise be performed by in-house developed digital tools. Records of the sessions of public bodies (when kept), or the metadata thereof may include sensitive state information, or sensitive state information may be derived from them. Therefore, safeguards in the contracts are vital and should be concluded with the third-party platforms to protect confidentiality of state information and, at the end of the day, sovereignty, in case third parties are also foreign entities. Such a safeguard is, for example, the obligation to process and store state information exclusively within Greek territory or at least within EU territory.

6. The Parliament

A. A principled confrontation with the pandemic

The Greek parliament is situated in the center of Athens, in the former Palace of King Otto and Queen Amalia, built in the period 1836-1843, based on the design of Architect Friedrich von Gaertner.[58] It was before this Palace that the Greeks rose and demanded, in 1843, a Constitution from King Otto, who was ruling as an absolute monarch up to that time.[59]

The Greek Parliament is unicameral.[60] The Parliament is the House of Representatives. Apart from the Plenum, composed of 300 elected MPs, which discusses and passes the bills initiated almost exclusively by the Government, there are also a number of parliamentary Committees.[61] Their task is legislative; they prepare the bills to be discussed by the Plenum. Other Committees do not participate in the legislative process, and instead, deal with special matters, like defense and foreign policy, the state finances, oversight of the Independent Administrative Agencies (like the Greek Data Protection Authority), and parliamentary control on the Government.[62] The Regular Session of Parliament may not be less than five months.[63] Normally the Regular Session starts in October and ends in June. During summer, three consecutive Recess Sessions take place, during which bills may be passed, but not a handful of significant measures defined in the Greek Constitution, which are reserved exclusively for the Plenum.[64] Based on Article 40 of the Greek Constitution, the Parliament may once be prorogued for a maximum period of thirty days upon Government's advice by the President of the Democracy, or for a longer period or more than once, only upon Parliament's consent.[65] Article 40 of the Greek Constitution on the prorogation of Parliament by the Government and the President has never been applied since the establishment of our Constitution in the year 1975,

issued: See Ministerial Decision 3130 ΕΞ 2022 published in Gov. Gaz. B' 386/03.02.2022, on the procedure for addressing citizen's applications towards Municipalities in-person, by telephone call or by teleconference.

56 Joint Ministerial Decision 429 published in Gov. Gaz. B' 850/13.03.2020, which replaced Joint Ministerial Decision ΔΙΑΔΠ/Α/7841/19.04.2005 published in Gov. Gaz. B 359/2005.

57 See Article 29 Data Protection Working Party, Opinion 1/2010 on the concepts of "controller" and "processor", 00264/10/EN, WP 169, February 16, 2010, <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf>

58 On the transformation of the Old Palace to the Parliament see Andreas Giakoumakatos. "Στοιχεία για τη νεώτερη ελληνική αρχιτεκτονική" (Elements of Modern Greek Architecture), Athens, National Bank of Greece Cultural Foundation, 2003, p. 57.

59 See indicatively Nikos Alivizatos. "Το Σύνταγμα και οι εχθροί του στη νεοελληνική ιστορία. 1800-2010" (The Constitution and its enemies in Greek modern history. 1800-2010), Athens, Polis, 2011, pp. 88-95.

60 See Articles 64-72 of the Greek Constitution. A translation of the Greek Constitution in English published by the Greek Parliament is available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf>

61 See Articles 66 para 3, 68, 70 para 3 and para 6, 72 para 3 and 4 of the Greek Constitution. Also, see the Rules of the House (Κανονισμός της Βουλής), Articles 31-49Γ. (available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/%CE%9A%CE%91%CE%9D%CE%9F%CE%9D%CE%99%CE%A3%CE%9C%CE%9F%CE%A3%20%CE%9A%CE%9F%CE%99%CE%9D%CE%9F%CE%92%CE%9F%CE%A5%CE%9B%CE%95%CE%A5%CE%A4%CE%99%CE%9A%CE%9F%20%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%9F%CE%A0%CE%9F%CE%99%CE%97%CE%A3%CE%97%202021_3_F.pdf>)

62 Article 64 of the Greek Constitution.

63 Article 68 of the Greek Constitution.

64 Article 72 of the Greek Constitution.

65 Article 40 of the Greek Constitution.

after the fall of the Junta.[66] On the other hand, at the end of the nineteenth century and before the consolidation of the principle of parliamentary government in Greece, the King used to prorogue Parliament, if Parliament was opposed to the King's Government, to avoid opposition.[67]

During the pandemic, and after the lesson learnt from the above historical experience, the Parliament was not prorogued. Of course, the Parliament followed social distancing rules, which basically meant that fewer MPs were allowed to attend the plenary session and the committees' sessions. The number of MPs permitted to take part physically varied depending on the phase of the pandemic, never exceeding the number of 60 in the Plenum's Hall.[68] To accommodate this necessity, legal and practical changes had to take place: on the one hand, the Rules of the House (*Κανονισμός της Βουλής*) had to be amended to enable mail voting (*επιστολική ψήφος*) for MPs not present, and on the other hand Parliament's premises had to be equipped with videoconferencing hardware devices.

Indeed, the Hall of the Plenum and the rooms where the proceedings of the Committees take place were equipped so as to accommodate teleconferencing for MPs not present.[69] However, it is important to underline that the proceedings took place physically with the number of MPs allowed to be present based on social distancing rules, whereas remote connection was utilized only for the purpose of adding more MPs to take part to the session.[70] In other words, not only did the Parliament avoid sessions taking place entirely remotely, but also the essential part of the proceedings remained the one taking place physically in the legitimizing scenery of the Parliament. In other words, Parliament sat "normally" albeit with fewer MPs, and technology was used to allow further attendance to the extent possible. As the Greek Constitution does not require a quorum for the discussion of a bill, only for voting on it, [71] the physical presence of just a few MPs did not cost formal flaws to the discussion of a bill.

The voting procedure posed different risks. First, under Article 67 of the Greek Constitution, unless otherwise foreseen, the Plenum decides based on the majority of the MPs present, which however may not fall under 75 MPs. This means that at least 149 MPs have to be present for a decision to be taken.[72] However, that amount MPs were not allowed to be physically present in the Hall during the pandemic. Second, if the Parliament had to resort to mail voting or voting through a videoconferencing platform, the main challenge would be to guarantee freedom of the vote.[73] Before the pandemic, mail vote was permitted by the Rules of the House only for MPs who were on a trip abroad related to their public duties and in case of pregnancy.[74] The Rules of the House were amended to allow MPs, only in case of pressing reasons of public health, to vote by mail.[75] Prior to that, the

[66] Yiannis Tassopoulos. "Brexit: Η αναστολή των εργασιών της Βουλής, το δημοψήφισμα και η λήψη αποφάσεων για ζητήματα εθνικής στρατηγικής" (Brexit: The prorogation of Parliament, the referendum, and decision making on national policy issues). Syntagma Watch, 03.09.2019, <https://www.syntagmawatch.gr/trending-issues/brexit-i-anastoli-ton-ergasion-tis-voulis-to-dimopsifisma-kai-i-lipsi-apofaseon-gia-zitimata-ethnikis-stratigikis/>

[67] See Filippos Spyropoulos. Συνταγματικό Δίκαιο, [Constitutional Law], 2nd edition, Athens, Sakkoulas Publications 2020, p. 246; N.K. Alivizatos. "Πραγματιστές, δημαγωγοί και ονειροπόλοι" (Pragmatists, Demagogs and Dreamers), Athens: Polis, 2015, Chapter on King George I of the Greeks, pp. 53-57; Andreas Dimitropoulos. "Η γένεση του Κοινοβουλευτικού συστήματος και η ανάδειξη της Κυβέρνησης" (The rise of the Parliamentary System and the Appointment of the Government), Second edition, Athens/Thessaloniki, Sakkoulas Publications, 2014.

[68] Konstantinos Tassoulas. President of the Greek Parliament. "Η Βουλή στην περίοδο της πανδημίας. Πώς εξασφαλίστηκε η λειτουργία του Κοινοβουλίου παρά τους περιορισμούς" (The Parliament during the Pandemic, How the function of the Parliament was ensured despite the restrictions), Η Καθημερινή, 2.1.2021, available at <https://www.kathimerini.gr/politics/parliament/561213646/k-tasoylas-i-voyli-stin-periodo-tis-pandimias/>

[69] Op. cit., FN 68.

[70] Op. cit., FN 68.

[71] See Evangelos Venizelos. "Μαθήματα Συνταγματικού Δικαίου" (Lectures in Constitutional Law), New Edition, Athens/Thessaloniki, Sakkoulas Publications, 2021, p. 506.

[72] Article 67 of the Greek Constitution. In practice, counting of votes is necessary only in case of role-call vote. Otherwise, there is the presumption of party representation meaning that MPs not present are assumed to vote in accordance with the party's leader.

[73] Luckily no general elections had to take place in Greece during the pandemic, as the Constitution forbids mail vote for the election of the MPs (Article 51 of the Greek Constitution). However, the matter was extensively discussed in the USA with regards to the presidential elections of November 2020. See for example Humphreys, Brian E. "COVID-19: Remote Voting Trends and the Election Infrastructure Subsector" Congressional Research Service Report, June 10, 2020.

[74] Article 70 A of the Rules of the House (available at: https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/%CE%9A%CE%91%CE%9D%CE%9F%CE%9D%CE%99%CE%A3%CE%9C%CE%9F%CE%A3%20%CE%9A%CE%9F%CE%99%CE%9D%CE%9F%CE%92%CE%9F%CE%A5%CE%9B%CE%95%CE%A5%CE%A4%CE%99%CE%9A%CE%9F%20%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%9F%CE%A0%CE%9F%CE%99%CE%97%CE%A3%CE%97%202021_3_F.pdf

[75] Article 14 of the Rules of the House (published in Gov.Gaz. A΄ 106/24.6.1987) as amended by Parliament's

Scientific Council of the Greek Parliament had issued an opinion on the constitutionality of the exceptional expansion of mail vote. The Scientific Council reached the conclusion that mail vote, already foreseen by the Rules of the House, may be expanded in the exceptional case of pandemics and for the protection of public health.[76]

The lead party of the Opposition was against expanding mail vote. This party asserted that mail vote could jeopardize freedom of the vote for two reasons. First, because the MPs would not appear in person to directly express their vote, second because mail vote is first submitted to the secretary of the party in Parliament. This would enhance party whip rule and deter MPs from taking a different view than their party leader.[77] The lead party of the Opposition was in favour of voting through the videoconferencing platform, utilized during the discussions, but the President of the Parliament insisted that this was technically impossible for that time because, it was impossible to guarantee an uninterrupted connection of camera and video throughout the voting process. Additionally, since a stable connection was also dependent upon the home network of each MP, which went beyond the responsibility of Parliament, any interruption in the connection throughout the voting process would make the whole voting process invalid.[78]

Despite the above controversy, the Greek Parliament has lived through the pandemic sustaining its basic functions and verifying its central role.

B. The Physical Manifestation of the Nation

Why should we lay such great emphasis, as I have suggested, on the fact that the Parliament was not prorogued, as well as on the fact that physical access to Parliament remained, and that the main operations of Parliament took place in the physical, and not the digital, space during the pandemic?

The Parliament is in Greece, as in many other countries, the basic representative institution, and the center of democracy. To state it dramatically, democracy is born physically, in the physical space by the uprising of a people, naming itself a constitutive or constituent power and claiming for itself a constitution. Imaging the sovereign power of the people, of the nation, from which the constitutive power is derived, Greek Constitutionalist of the 19th century, Nikolaos I. Saripolos writes, only three decades after the outburst of the Greek Revolution, in his *Treatise on Constitutional Law*, that

> *"sovereignty demonstrates itself, when a nation assembles around a cross [a religious symbol], stuck into the mountain rock of Kalavryta by someone like Germanos [Metropolitan Germanos of Patras][79], when a nation stands by someone like William Tell against tyranny, when the trumpet of someone like Ypsilantis [the head of the Filiki Etaireia/Φιλική Εταιρεία) sounds so pleasant to the nation's ears, when women give men their weapons, and younger women encourage their would-be grooms to do so, when mothers teach their children to take revenge for their great mother's, their country's, shameful tyranny, when the first words of the babies are the songs of victory of the nation's heroes*".[80]

In other words, a nation exists and demonstrates itself in a bodily way and, as a constitutive power, gives (its) flesh and blood to the Constitution.

Even after the founding of the polity, the ideal of a nation, pictured now - as a constituted power - by its Representatives, has always been, under the influence of the French Revolution, that of an assembly convening face to face, body to body, and debating lively. The lively debate in the physical space is essential for the quality of the public debate itself. An idea is more thoroughly tested, if it is

Decision during the pandemic (published in Gov.Gaz. A' 187/01.10.2020).

[76] Press Release of the Greek Parliament, April 14, 2021, available at <https://www.hellenicparliament.gr/enimerosi/grafeio-typou/deltia-typou/?press=6d691714-a3b9-4c54-8649-ad0a00f77a03>

[77] Lambros Stavropoulos. "Κορωνοϊός – Βουλή: «Συνωστισμός» διαφωνιών και για την επιστολική ψήφο" (Corona-virus and Parliament: Disagreements on mail vote), Το Βήμα, 8.10.2020, available at <https://www.tovima.gr/2020/10/08/politics/synostismos-diafonion-kai-gia-tin-epistoliki-psifo/>; Giorgios S. Mpourdaras. "Επιστολική ψήφος: Σφοδρή αντιπαράθεση στη Βουλή", Η Καθημερινή, 15.4.2021, available at <https://www.kathimerini.gr/politics/561331354/epistoliki-psifos-sfodri-antiparathesi-sti-voyli/>

[78] Op. cit, FN 88.

[79] A scene at the Monastery of Ayia Lavra in Kalavryta symbolising the outbreak of the Greek Revolution against the Ottoman Empire at March 25, 1821.

[80] Nikolaos I. Saripolos. Πραγματεία του Συνταγματικού Δικαίου, Athens, 1851, p. 52: "Η κυριαρχία διαδηλούται, όταν εν έθνος τρέχη περί τον σταυρόν ον έπηξεν επί του βράχου των Καλαβρύτων εις Γερμανός, όταν εν έθνος συντάσσηται υπό ένα Γουλιέλμον Τέλλον κατά της τυραννίας, όταν η σάλπιγξ ενός Υψηλάντου ηχή τερπνώς εις τας ακοάς του, όταν αι σύζυγοι οπλίζωσι τους συζύγους των, όταν αι νέαι ενθαρρύνωσι τους μελλονύμφους των, όταν αι μητέρες διδάσκωσι τα τέκνα των πώς να εκδικηθώσι το της μεγάλης μητρός, της πατρίδος, δουλικόν αίσχος, όταν πρώτα των βρεφών ψελλίσματα τα επινίκια εισί των ηρώων της πατρίδος άσματα". I am indebted to Professor Yiannis Drossos for pointing out the importance and the beauty of this text during his lectures.

expressed in real time and real space in a community of listeners, ready to support, argue against or question what is being said. Not only the soundness of an idea, but also the impact of it is immediately tested. To my mind, the physical assembly of the MPs in the Parliament's premises and atmosphere ensures, to the greatest extent feasible, that the MPs are dedicated to the process taking place, uninterrupted by their home, family or other private affairs. A certain degree of "*methexis" (μέθεξις)* is required, meaning the participation in a process as a whole person - in mind, body, and spirit – which may only be achieved in the real space, like it did for the attendants of an ancient Greek tragedy who would, in the end, at least according to Aristotle's definition of tragedy, additionally reach *"katharsis" (κάθαρσις)*, meaning a tiresome, but reinvigorating way out of a problem.[81] It can be said, again dramatically, that some kind of *methexis* (as full participation – also compromised nowadays by the use of cellphones) remains an integral part of the ideal of a parliamentary debate.

In this respect, the reaction of Winston Churchill when he had the chance to rebuild and expand the Commons Chamber, after it had been completely destroyed by a bomb during the Second World War (May 10, 1941), was telling.[82] It is well known that the Commons Chamber is very small relatively to the number of MPs to be hosted. There are 650 MPs, whereas the Chamber provides seating for an estimated 437 MPs, including seating in the galleries.[83] This is why British MPs often attend the sessions standing up or sitting on the stairs. In fact, a very expressive image, resembling that of a spontaneous assembly of people in an open space, an Agora, sitting next to each other to be able to hear properly everything said, is being captured this way. Therefore, Winston Churchill chose not to expand the Commons Chamber, as he wanted everyone present to be close enough to be able to see and hear what was going on.[84] Some inconvenience is also part of "being" there. In other words, expanding the Chamber would mean risk losing or compromising the atmosphere of lively debate in a more convenient room.

7. The Courts

Like the Parliament, the Greek Courts have also proved quite reluctant in utilizing teleconference tools to substitute for core proceedings. As a general rule, remote oral Court hearings have not taken place during the pandemic, nor has there been governmental emergency regulation or parliamentary statute imposing resort to remote Court hearings.[85]

In fact, as in the case of remote work, existing legislation did address the issue of remote hearings, only in a way that did not match the circumstances of a pandemic. Presidential Decree No 142/2013[86] authorized the realization of remote proceedings in civil cases. This Decree was meant to make it easier for the parties to be heard by the Court or for the witnesses to be examined by the Court, without having to travel to the seat of the Court. In other words, the model trial of this Decree is that of a Court convening in its technologically equipped Court room, and of the parties with their lawyers and witnesses arriving in a specified public facility, e.g. an embassy (not their homes) and under the supervision of a public authority, attending and participating in the proceedings. This Presidential Decree, which also sought to effectuate EU Regulation 1206/2001,[87] has not been implemented in practice, and it would also not have helped during the pandemic, since it presupposed physical access to public buildings, which was pretty much restricted during the pandemic. In other words, the legislature did not envisage a situation in which there would be no physical location available to the Courts for their operations.

Therefore, during the pandemic, the hearings before the Courts were suspended with the exception of very narrow, emergency cases.[88] Also, the Court of Audit (*Ελεγκτικό Συνέδριο*), which is one of the highest administrative courts in Greece, responsible for supervising public expenses, issued a legal opinion to justify on constitutional grounds remote sessions of its justices, convening to issue a Court opinion. [89] The Court of Audit has balanced

[81] Aristotle. Ποιητική 1449b 24-28 (R. Kassel, OCT, 1965).

[82] The Palace of Westminster. Official Guide. Houses of Parliament, 2018, p. 55.

[83] Op. cit., FN 83, p. 58.

[84] Op. cit, FN 83, p. 55.

[85] Governmental Act of Legislation published in Gov. Gaz. A΄ 42/25.2.2020; Governmental Act of Legislation published in Gov. Gaz. A 55/11.3.2020; Governmental Act of Legislation published in Gov. Gaz. A΄ 64/14.3.2020. All three Acts were ratified by Law 4682/2020 published in Gov. Gaz. A 76/3.4.2020

[86] Presidential Decree 142/2013 published in Gov. Gaz. A΄ 227/22.10.2013).

[87] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Official Journal L 174, 27/06/2001 P. 0001 – 0024.

[88] Governmental Act of Legislation published in Gov. Gaz. A΄ 55/11.3.2020, Article 11, ratified by Law 4682/2020.

[89] Opinion of the Plenum of the Court of Audits of April 29, 2020, available at <https://www.elsyn.gr/sites/default/files/%CE%93.%CE%A3.8A%202020%20%CE%94%CE%99%CE%95%CE%9D%CE%95%CE%A1%CE%93%CE%95%CE%99%CE%91%20%CE%A4%CE%97

risks to the confidentiality of the proceedings, which by itself guarantees freedom of expression of the judges convening, against timely issuance of decisions and efficacy of justice, and concluded that a restricted risk for the confidentiality of the process is not a sufficient ground for the suspension of the Court's obligation to timely issue its opinions. Practically, the Court of Audit has implied that justices may convene remotely even after the pandemic to accelerate award of justice. After all, the problem of excessive delays continues to plague the justice system worldwide.

Later, in fall 2020, the matter of remote sessions in Courts on a permanent basis was resolved by the Greek Parliament. Article 36 of Law 4745/2020 on the acceleration of the award of justice establishes that remote Court sessions may take place only exceptionally, in case of insurmountable impediment of one or more members of the Court, notwithstanding confidentiality requirements.[90]

However, as in the case of Parliament, there has not been an endorsement of remote hearings by Courts. This is particularly important for criminal courts, where remote trials would implicate, to my mind, a number of matters of principle. Physical confrontation in criminal investigation is important in finding out the truth. This is why the physical presence of the accused and of the witnesses is a paramount condition in penal prosecution, first established at 1679 by the Habeas Corpus Act.[91] It is easier to lie and manipulate the others remotely.

In other words, Courts of all jurisdictions were not ready to abandon the formality of corpore trials. Wearing a gown "transforms" a private person to a judge or to another man or woman of duty depending on the case. Leaving the comfort and protection of the household makes a private person a citizen. Entering a Court Hall makes one realize in full his or her public role and enhances a sense of accountability. In that respect, the abandonment of a formality, to which physical presence is pertinent, may imply abandonment of some part of the essence, too.

8. Conclusions

The COVID-19 pandemic has affected political institutions and basic liberties in a number of ways at the global level and this is true in the example of Greece as well. One aspect of the multi-faceted impact of the pandemic is the acceleration of the digital revolution, which was already on track before Covid-19 hit. This acceleration has taken the form of a rash shift to the digitalization of human activities, i.e. the transition of many activities to an online environment. These activities include schooling and education, work, as well as the function of collective bodies in the public sector, ranging from administrative authorities to municipalities or even the Government and the Parliament. The Courts were also brought closer to new technologies during the pandemic, on the level of internal communication within a Court and of the sessions of the judges.

Some aspects of the digitalization shall remain after the pandemic; in fact, they have already integrated in our lives as a new normality. This is most definitely the case in the field of employment, as well as in public administration. The latter is expected to be modernized and become more efficient by resort to less time-consuming procedures made possible through the digital transition. A new law, Law 4727/2021 on digital transition, has been issued to address precisely the need for the respective public sector reform. Other aspects of digitalization, for example remote schooling, shall, in fact may remain only as an emergency solution to cope with future natural phenomena that will force us to stay at home on the basis of strict necessity. However, it is certain that in all fields of human activity digital solutions shall be implemented to reduce red tape, to overcome physical storage limitations (e.g. in the case of paper archives), to make communication quicker, and possibly to reduce traffic problems, and the environmental footprint produced by all means of transportation.

The online version of our lives poses significant risks to data privacy, as an aspect of a basic freedom to remain unattended and unrecorded throughout a good part of a day. It also threatens to enhance existing inequalities due to the digital divide between poor and more well-off, between technologically skilled and technologically illiterate groups of the population. One could be aware of and cope with the above problems. However, there is a core of human activities that has to remain offline and take place in person, in the physical space, and this core has to do both with the good function of democracy, as well as with the rule of law. Court hearings cannot be replaced with video sessions, without jeopardizing the discovery of truth, especially in criminal proceedings, as well

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[90] Law 4745/2020 published in Gaz. Gaz. A′ 214/6.11.2020.

[91] George Gerapetritis. "Αγγλο-Αμερικανικοί Συνταγματικοί Θεσμοί. Θεμέλια και αλληλεπίδραση με το δίκαιο της Ηπειρωτικής Ευρώπης" (Anglo-American Constitutional Institutions. Foundations and Interaction with the Law of Central Europe) Introduction by Nikos K. Alivizatos, Athens, Nomiki Vivliothiki, 2016, pp. 60-61.

as any proceedings involving examination of witnesses. The main political body, the Parliament cannot be substituted by an electronic version of it, without sacrifice to the quality, the liveliness and even the sincerity of the debate.

Last but not least, a dangerous aspect of the remote togetherness via the new technologies has to do with the fact of coming together remotely from homes. The real, not virtual, exodos from one's household and private environment is important for his or her functioning as a citizen, and not as a private person, in all aspects of social life. Being a citizen, i.e. a person aware of one's fellow beings and of the body politic, also has to do with experiencing togetherness in-person and on a premise, other than someone's home. The place, a Court Hall, the Parliament convey the sense of public duty, and of statesmanship or stateswomanship to those using them. In other words, in case of public bodies a sense of ceremony attached to their in-person function is part of a discipline inherent in public office for the sake of the common good.

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SECTION I – ESSAYS

Hungarian COVID-19 Response and Its Legal Background Some Practical Aspects of Digitalization*

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Abstract. The paper introduces the constitutional and legal background of the so-called 'special legal order' (SLO) in Hungary designed for a multitude of emergency situations, and amended as necessary with and since the entry into force of the new Fundamental Law in 2012. In this context, the paper also describes some of the challenges and solutions that Hungary faced with the outbreak of the COVID-19 pandemic, and the several steps that were taken to ensure the continued operation of the state and public services through applying innovation and digitalization solutions.

***Keywords**: COVID-19, Digitalization, Hungary, special legal order, emergency situations, courts, governance, constitutional court, data protection, citizen access, government services*

1. The General Context of Special Legal Order in Hungary

Democratic and constitutional societies from time to time may be confronted with situations that cannot be averted – or not with the necessary urgency – within the framework provided by the constitution.[1] Specific rules should therefore be drawn up for these exceptional situations, which loosen the constitutional constraints on executive and parliamentary action under the guise of 'emergency powers',[2] while at the same time providing substative protections against possible abuses of power.

The rules of what the new Hungarian constitution (Fundamental Law, FL)[3] calls "special legal order" (SLO) cover the "who does what in which kind of emergency and for how long" question. [4] They provide for the prohibition on the suspension of the constitution or certain provisions of the constitution, and allow for certain human rights derogations.

However, these rules still require the observance of the principles of temporality, necessity, proportionality, legality, and constitutionality. Along these lines the constitutional regulation of special legal order should be based on four principles: stability, abstraction, flexibility and guarantees.[5]

This article seeks to provide an overview of the complex legal background of SLO in Hungary, to outline some governance-related issue that Hungary had to face during the pandemic, and to present some of the innovative solutions relying on digitalization which helped our epidemiological and government authorities with contact research, certification of immunity or verification of house quarantine.

In exceptional situations, the state may operate under special rules recognized by the FL – under the umbrella term "special legal order" (SLO). These special rules are set out in the Fundamental Law, in which six types of special legal order can be distinguished: (I) state of national crisis, (II) state of emergency, (III) state of preventive defence, (IV) state of terrorist threat, (V) unexpected attacks, and (VI) state of danger.

Under (VI), a state of danger was induced in 2020 due to the Covid-19 pandemic, the first of its

* Manuscript closed on 20 September 2022

[1] Jakab András – Till Szabolcs: A különleges jogrend. In: Trócsányi László – Schanda Balázs: Bevezetés az alkotmányjogba, Hvg-orac, Budapest 2016. 430. For a European overview see the 2022 Issue of the European Review of Public Law (2022/1) entitled 'The State as a Protectior/Guarantor of Last Resort. (Ed: Gérard Timsit – Spyridon Flogaitis).

[2] For a focused but broader European view on this issue, see: Zoltán Nagy – Attila Horváth (eds.): Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19., with a Hungarian chapter by: Nagy, Zoltán – Horváth Attila: The (too?) complex regulation of emergency powers in Hungary? pp. 149-189. CEA Publishing, Ferenc Mádl Institute of Comparative Law, Budapest-Miskolc, 2022.

[3] The most up-to-date English-language text of the FL is available at the website of the Constitutional Court of Hungary at <https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf > accessed 15 February 2022. All references in this Article refer to this text and subsequent legislative texts of the Tenth Amentment, translated from Hungarian as indicated.

[4] Tímea Drinóczi: Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis, MTA Law Working Papers 2020/13. 3.

[5] See: Csink Lóránt: Mikor legyen a jogrend különleges? Iustum Aequum Salutare, XIII. 2017/4. 7-16.

kind in terms of level and scale.[6] Previously, no national-level state of danger was introduced but local restrictions were put in effect to tackle challenges caused mostly by flooding or industrial accidents, in total 16 times in the past 30 years.[7] The longest period for which these restrictions have been in place was 99 days, even since the FL entered into force. As Horváth observes, the effect of pre-2020 SLOs predominantly covered one specific geographic area (typically a county), however, the 2020 COVID-19 SLO was the first to have a national scale and scope, in this sense being a "general SLO" situation. Moreover, he adds that pre-2020 SLOs had a maximum term of 99 days, except in the case of a local industrial accident in the town of Kolontár referred below in fn 7.

Provisions in the FL relevant to SLO situations have been amended two times since its entry into force in 2012.[8] Previously unknown contexts and factors led the constitution-making power to complement, then restructure SLO situations. First, the Sixth Amendment introduced the situation of a terrorist threat in response to growing migratory pressures mixed with undercurrents of terrorism.[9] Then in 2021, the Ninth Amendment introduced a restructured set of SLO situations based on the experiences of the revised SLO framework and the experiences of managing pandemic-prevention. These provisions are expected to enter into force in 2023, and therefore will not be detailed extensively hereunder.

In general, however, it must be pointed out that the constitutional design of emergency reponses still leaves many questions unanswered, with regard to pandemic-prevention, responses in terms of which might vary geographically speaking. For instance, if the 'climate context' of constitutional and legal thinking in terms of emergency situations is considered, force majeure events (FMEs) such as fires, floods or viral outbreaks can be seen to induce different responses in different geographic areas.

In the US state of California, for climate reasons, many emergency contingencies might revolve around the prevention of wildfires, while in Hungary, for example, fire has not yet turned out to be something that requires specific constitutional protections. In Hungary, flooding and water-related FMEs are much greater causes for concern. This is just to briefly emphasise that the 'climate context' remains an important factor in creating further specific protections against the pandemic, as climate change might beneficially affect the longevity of certain viral strains and therefore might require specific legal response in the future.

A short presentation of some select Hungarian SLO provisions that are relevant to a basic understanding of pandemic prevention scenarios in effect follows, excluding detailed description of situations under (I) and (III)-(V) above that are pertinent to military operations and armed conflicts. Our analysis will focus on a short but concise delineation between two situations: state of emergency and state of danger, which are most often confounded at first sight.

1.1. Distinguishing between Danger and Emergency in the Special Legal Order

According to Art. 50 FL, the National Assembly declare the State of Emergency (SOE) in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death.

In a SOE, the President of the Republic can introduce extraordinary measures by presidential decree. These decrees can suspend the application of certain Acts, derogate from provisions of Acts, and take other extraordinary measures in order to mitigate the consequences. The President of the Republic can decide on the use of the Hungarian Defence Forces if the police and national security services proves to be insufficient. Presidential decrees remain in force for thirty days, but the National Assembly can extend them. However, with the termination of the SOE, the presidential decrees also cease to have effect.[10]

As regards the State of Danger (SOD) – the SLO applicable to the coronavirus pandemic – the main rules are laid down in the FL. Article 53 FL provides the legal basis necessary to trigger such an SLO in the form of a 'natural disaster of elementary force', and 'industrial catastrophe'. The specific rules of SOD are set out in two cardinal acts (legis-

[6] Gov. Decree No. 40/2020. (11 March) on the declaration of state of danger.

[7] 15 times for flood-protection on the River Tisza mostly, and 1 time for preventive action taken to avoid the consequences of a red sludge flooding as a result of an industrial accident in a bauxite plant. For a detailed overview of the duration and source of law of these SLO situations, cf. Horváth Attila: A 2020-as COVID-vészhelyzet alkotmányjogi szemmel. In: Nagy Zoltán – Horváth Attila (eds.): A különleges jogrend és nemzeti szabályozási modelljei. Mádl Ferenc Intézet, Budapest, 2021, pp. 149-150.

[8] Through two amendments to the Fundamental Law, the Sixth and the Ninth Amendment. (The text of the amendments has been incorporated into the text of the FL, which is available – without the Tenth amendment - in English at: https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf).

[9] Cf. Trócsányi László: Az alkotmányozás dilemmái – 10 év múltán. Acta Humana, 2021/2, 135-154, esp. 146-149.

[10] See fn 7 supra.

lative acts adopted by two-thirds majority of the National Assembly). These are the 2011 Disaster Prevention Act (DPA), and the 2020 Coronavirus Containment Act (CCA)[11]. The DPA adds further causes to the above in the form of 'danger "of other origin", especially a human (or animal) pandemic causing mass infection or danger thereof; disruption of critical infrastructures; and water contamination.[12]

Under the applicable rules, the Government can declare a SOD, in case of a natural disaster or industrial accident endangering life and property, to mitigate its consequences, and it may introduce extraordinary measures, including the adoption of decrees, the suspension of the application of certain Acts, derogation from the provisions of certain Acts and other extraordinary measures. These remain in force for 15 days, and the National Assembly may entend their effect, just as in the case of the adoption of the 2020 CCA, mentioned above.[13]

1.2. The Ninth Amendment of the Fundamental Law

The National Assembly of Hungary adopted the Ninth Amendment to the FL on 22 December 2020, which significantly renews SLO provisions. [14]Through this Amendment, instead of the above-mentioned six types of SL, starting in 2023, the Hungarian FL will only recognize three states: a state of war, a state of emergency, and a state of danger.[15]

The new SLO rules provide the Government with a central role in all three instances, unlike the current provisions, which gives extraordinary power to the National Defence Council (in case of the state of national crisis) or to the President of the Republic (in the case of the SOE).[16] In their response sent to the Venice Commission, the Hungarian Government pointed out that these changes became necessary to ensure a fast and responsible decision-making process in a political and legal sense.[17] However, the new Amendment could reinforce such critical views that argue the scales being recently tipped in favor of the executive power in the system of checks and balances.[18]

To briefly summarize, if and when they enter into force in July 2023, the new rules will result in the following changes:

(i) The SOD will be declared if an attempt is made to overthrow or subvert the constitutional order or launch a coup d'etat, or if any illegal act that endangers the security of life or property on a mass scale is made.
(ii) The SOE will require a two-thirds majority of the National Assembly to be declared for thirty days, unless the National Assembly extends for another thirty days.[19]

In addition, the Ninth Amendment also tightens up the definition for SOD so that it can only be declared in the event of a natural disaster or industrial accident that endangers the safety of life and property, and in order to eliminate the consequences thereof. Declaring a SOD would require a two-thirds parliamentary majority and last up to thirty days with a possible (parliamentary) extension.[20]

Based on this legislative framework, in the following Part 2, we will present the timeline of pandemic governance in Hungary.

2. Hungarian Pandemic Governance – A Chronological Overview

At the end of 2019, the coronavirus suddenly burst into the public consciousness. No one suspected at the time that it will change every aspect of our everyday lives. Despite news from abroad, Hungary had not adequately assessed the immediacy and scale of the possible dangers brought about by the spread of the pandemic in the beginning of 2020.

In early March, the Government and all the major news outlets communicated that there were no signs of COVID-19 in Hungary. The first case was reported on 4 March, and a week later, on 11 March 2020, the Government declared a SOD[21] on a national scale. (At that time Hungary only had 16 diagnosed cases[22] of COVID-19 according to the Government Information Site[23]).

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[11] English language legislative text available at < https://perma.cc/9LMR-YS3L > accessed 15 February 2022.

[12] See fn 7 supra.

[13] See fn 7 supra.

[14] See fn 7 supra.

[15] See fn 7 supra.

[16] See fn 7 supra.

[17] Venice Commission: Ninth Amendment to the Fundamental Law and Explanatory Memorandum 2021: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)045-e > accessed 21 January 2022.

[18] Szabó Zoltán: Alkotmányozás a koronavírus árnyékában – Az alkotmányoknak is meg kell küzdeniük a vírussal? Társadalomtudományi Kutatóközpont – Jogtudományi Intézet: < https://jog.tk.hu/blog/2021/12/alkotmanyozas-a-koronavirus-arnyekaban > accessed 21 January 2022.

[19] See fn 7 supra.

[20] See fn 7 supra.

[21] Gov. Decree No. 40/2020. (11 March) on the declaration of state of danger.

[22]<https://www.worldometers.info/coronavirus/country/hungary/> accessed 18 February 2022.

[23] < Újabb magyar nőnél diagnosztizáltak új koronavírus-fertőzést (gov.hu)> accessed 18 February 2022.

Extraordinary measures relating to the pandemic were set out in separate Government Decrees. During the first wave, the Government issued more than 100 decrees[24], not all of which were specifically related to the fight against the pandemic.

From 27 March 2020, the Government ordered a restriction on movement,[25] including the imposition of leaving a domicile, place of residence, permitted only for a justified reason – a list of which is also specified by a Government Decree, including, e.g., the performance of work, carrying out professional obligations, getting access to health care or health services, shopping in specified stores – mainly in groceries selling daily consumer goods – among other measures. According to the decree, businesses required to close – with a few exceptions - and a time window was introduced for those who were over the age of 65, enabling them to shop between 9 to 12 a.m. while excluding under 65s from grocery stores and pharmacies.[26]

The Government also mobilized the armed forces and introduced hospital commanders into hospitals to ensure the steady flow, logistics and protection of healthcare equipment and devices, supplies of medication.[27]

The argument could be made that the Government responded to the pandemic by simultaneously fearing the worst and assuming the best. The Prime Minister of Hungary and every major news and media outlet reported that the pandemic would be over before the summer of 2020.[28] It is true that by 16 June 2020, the National Assembly had lifted all coronavirus restrictions and officially terminated the SOD, but at the same time also passed a law instituting a 'state of epidemiological preparedness'.[29]

In this context, some argue that the Government erred many times by instituting certain measures, e.g. by ordering all hospitals to free up 60% of their beds by discharging non-COVID patients. [30] The Government seized control of hospitals through instituting military leadership, and moved patients (e.g. cancer patients) out of hospitals, and postponed almost every non-lifesaving surgery – in preparation for a worst-case scenario.[31]

During the first wave, Hungary had only 6139 confirmed cases of COVID-19 –a high number, but still low in comparison to the situation in the second, third and fourth waves. [32]

At the end of October 2020, Hungary recorded more new infections in a day than during the whole first wave.[33] On 11 November 2020, the Government reintroduced the SLO with extraordinary measures,[34] whereby Hungary ended up last in Europe to impose any kind of lockdown.

The Prime Minister announced a nationwide general curfew between 8 p.m. and 5 a.m. with an exception of those commuting to work. Businesses were required to close by 7 p.m., restaurants were limited to offering services in the form of home delivery, sporting events could only be held in empty stadiums, and family gatherings were limited to 10 people. Universities and high schools transitioned to distance or digital education.[35] Hungary was therefore faced with stricter rules, new and tightened restrictions, which were necessary on the one hand, but controversial on the other hand, especially considering the restrictions and numbers of COVID-19 cases in the first wave.

During this period, the National Assembly decided to adopt a new Act on the Healthcare Service Relationship,[36] which led to the termination of employment in the case of about 4000 doctors and nurses due to heavy resistance to the new law being enacted based on the conditions it offered. All this in a climate when the Hungarian public healthcare system was already crumbled under previous budget cuts, which further complicated effective defense against the pandemic.

In the following Part 3, we will look at some of the issues that arose in terms of the operation of

[24] See: Kiss Barnabás: Csak a változás állandó. A különleges jogrend alkotmányi-alaptörvényi szabályozásának alakulása Magyarországon. In.: Forum Acta Juridica et politica XI. 3. Szeged, 2021. 235.

[25] Gov. Decree No. 71/2020 (27 March) on restricting movement.

[26] See fn 21 supra.

[27] Gov. Decree No. 72/2020 (28 March) on hospital commanders and protecting healthcare supply.

[28] See statement of Prime Minister Orbán on the end of the coronavirus pandemic: Orbán Viktor: a járvány harmadik hullámát letörtük, lényegében le is győztük (koronavirus.gov.hu). Infectologist János Szlávik's statement on the coronavirus pandemic: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiC_r7U0bH6AhWhv0HHT_TCxIQFnoECBQQAQ&url=https%3A%2F%2Fhvg.hu%2Fitthon%2F20200213_Szlavik_A_nyarra_vege_lehet_a_koronavirusjarvanynak&usg=AOvVaw1Uv9SWqV5dVB7u04sUWox3

[29] Act LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness. Available in Hungarian: https://njt.hu/jogszabaly/2020-58-00-00.

[30] IV/320/2020/EFFHAT Order of the Ministry of Human Resources (EMMI) 2020.04.07.

[31] See fn 27 supra.

[32] See the statistics since 2020: https://www.worldometers.info/coronavirus/country/hungary/ accessed 9 September 2022.

[33] See fn 33 supra.

[34] Gov. Decree No. 478/2020 (3 November) on the declaration of state of danger.

[35] Gov. Decree No. 484/2020 (10 November) on the second phase of protective measures applicable during the period of state of danger.

[36] Act C of 2020 on Healthcare Service Relationship.

the judiciary, including the work of the Constitutional Court.

3. The Effect of the Pandemic on the Hungarian Judicial System

The global situation resulting from the pandemic has been causing radical changes in almost every aspect of the life of the people and the states, including the operation of certain public institutions. Naturally, it has also posed serious challenges – both procedural and administrative – regarding the functioning of the courts in Hungary as well.[37] To provide a broader picture for the climate in which the pandemic reached the Hungarian judiciary, we will shortly describe some issues of judicial administration in general below.

First, in 2011, the National Assembly enacted a law regarding new structures of judicial governance (Act CLXI of 2011 on the organization and administration of the courts, Court Organization Act, COA).[38] In accordance with this law, the administration of the justice system relies on two main actors, the President of the National Office of the Judiciary (NOJ) and the National Judicial Council (NJC).[39]

The NOJ and its president represent the central organization of judicial administration that supports, manages, controls, and supervises the main activities of the Judiciary. The president has wide-ranging powers over court administration, including the recruitment and promotion of judges, management of the judiciary's budget, and IT infrastructure, while the 15-member NJC serves as an oversight body over the NOJ and its president.[40]

The NJC expresses opinions regarding appointments, positions, relocations, or assignments of the judges.[41] It also expresses opinions on the annual budgetary plan of the court, the utilization of the approved budget, the organizational and operational policy, and the case allocation plan of the court. [42]

The NJC furthermore has the power to scrutinize the actions of the NOJ President, and in certain cases, exercise a veto, and ultimately, if the NOJ President becomes "unworthy" of the office, the NJC can request the National Assembly to vote on removing the NOJ President from office.[43]

This decade-old judicial reform has provoked widespread debate at national and international level as well, with one of the controversial points being with the constitutional status of courts and judges and the powers of the president of the NOJ and the administrative model that this represents.[44] Many saw this new strcture as a concentration of power, others as a loss of judicial autonomy,[45][46] as part of a "constitutional crisis".[47]

To describe the general context of judicial administration, we should start by mentioning that leading judicial positions are generally filled through application procedures.[48] The General Judicial Assembly (GJA, a consultative body to the NJC) –an essential part in these procedures[49] – gives its opinion on the applicants via secret ballot. In those cases where there is more than one applicant, the GJA must establish a ranking, beside providing opinions on the applicants.

If the NOJ President wants to appoint an applicant who did not receive the majority support of the GJA, the President must obtain the preliminary

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[37] On introducing the structures of the Hungarian justice system in light of the new Fundamental Law, see: Fleck, Zoltán. "Changes of the Judicial Structure in Hungary–Understanding the New Authoritarianism." *OER Osteuropa Recht* 64.4 (2019): 583-599.

[38] For a summary of the 2011 judicial reform, see: Osztovits András: Az új magyar bírósági szervezetrendszer. in: Rixer Ádám (ed.): Állam és Közösség. KRE ÁJK, 2012, Budapest; 381-388. and Raccuja Gergely: Judicial Reforms in Hungary, https://www.academia.edu/7791782/Judicial_Reforms_in_Hungary accessed 18 February 2022.

[39] For a summery on the NOJ and NJC see: https://birosag.hu/en/national-office-judiciary accessed 26. September 2022.

[40] https://www.encj.eu/images/stories/pdf/factsheets/obt_hungary.pdf.

[41] Kovács Ágnes: Ki védi meg a magyar bíróság függetlenségét? Személyzeti politika a központi igazgatásban. MTA Law Working Papers, 2019/10, 4-8.

[42] Section 76 of Act CLXI of 2011 on the organization and administration of the courts'.

[43] On what this meant in practice in a concrete case, see: Vadász Viktor: Krízis a bírósági igazgatásban? MTA Law Working Papers 2018/13. <https://jog.tk.hu/uploads/files/2018_13_Vadasz.pdf > accessed 24 January 2022.

[44] See, Opinion CDL-AD(2012)001 and Opinion CDL-AD(2012)020 of the Venice Commission.

[45] Balogh-Békési Nóra: A bírói hatalmi ág az Alaptörvény rendszerében. Iustum Aequum Salutare XII. 2016. 4. 10.

[46] Varga Zs. András: Judicial reform – why and how?, Pázmány Law Working Paper, 2018/14. < https://plwp.eu/files/PLWP_2018-14_VargaZs.pdf > accessed 17 February 2022.

[47] European Association of Judges: Report on the fact-finding mission of the EAJ to Hungary: < https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf> accessed 24 January 2022; European Commission: Recommendation for a Council recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary: European Commission: Recommendation for a Council recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary.

[48] For a summary on the appointment procedure see, Kovács Ágnes: Új modell a bírósági igazgatásban: Bírák Központi nyomás alatt, BUKSZ 2019: < http://buksz.c3.hu/190304/06.2_probkovacs.pdf > accessed 24 January 2022.

[49] Section 132(4) of Act CLXI of 2011.

opinion of the NJC in support of such appointment.[50] In exceptional cases, if the application procedure and the repeated application procedure were unsuccessful, the NOJ President has the power to fill a court executive position through mandate for a maximum term of one year.[51]

In the context of the "constitutional crisis" affecting the Hungarian judiciary on the level of administration, it should not be forgotten that the absence of an otherwise necessary cooperation between the NOJ President and the NJC have significantly strained the relationship of these organs and lead to an eventual parliamentary vote to keep the NOJ President in office, despite harsh tones of dissatisfaction with her activities.[52]

Finally, the National Assembly elected her for a position at the Constitutional Court, and by this act, everyone hoped that the "constitutional crisis" will be resolved. The Hungarian justice system was forced to deal with the new situation caused by the pandemic in this tense environment.

With the new President of the NOJ being elected, it has been seen that the imposition of the temporary rules during the SOD brought about by COVID-19 still in some terms prevents the proper functioning of constitutional institutions playing a key part in the judicial appointment procedures.

During the SOD, one of the first emergency measures taken by the president of the NOJ was to prohibit the meetings of the GJA, preventing the proper functioning of a constitutional institution essential in judicial appointment procedures.

3.1. Extraordinary judicial recess

In this context, from 15 March 2020, the courts instituted an extraordinary judicial recess.[53] As courts could thus not hold preparatory and trial hearings due to the pandemic, every hearing after this time had been indefinitely postponed.[54] Courts have informed litigants and parties about the postponement without setting new trial dates.[55] However, the judicial recess did not affect those duties of courts that could be taken care of without holding hearings.

According to the regulation in question, urgent procedural acts need to be carried out, if possible, by remote hearings.[56] When such an act could not be carried out this way, a special courtroom protocol was put in place. According to this, the persons present were required to keep at least two meters social distance, and to certify if they have been in an "affected area" in the previous 14 days, or met an infected person or their relative.[57] If it was deemed likely that an infected person was present in the courtroom, the trial would be immediately interrupted by the court.

With the entry into force of the special procedural rules during the SOD,[58] the extraordinary judicial recess has been terminated, and remote hearings were specified as a default from 31 of March, 2020.

3.2. Electronic correspondence with the litigants and parties, remote hearings

The primary aim of the relevant Government Decree specified above was to ensure the proper functioning of the courts, while still assuring the safety of the people. The first line of defence against the virus was to reduce and, as far as possible avoid, personal contact. The special procedural rules contributed to this by suspending personal consulting hours in the courts[59], holding preliminary procedures in writings, omitting preparatory hearings[60], requiring remote hearings[61], and allowing judicial employees to work from home, provided that such a working method suited the nature of their tasks.[62]

In order to reduce the length of procedures, the legislature required electronic correspondence to be selected as optional or mandatory in certain court procedures, and the courts had to adapt to this new situation. (NB company registration procedures have been exclusively electronic since 1 July 2008 in the first-instance, and since 1 January 2012 in the second-instance procedure[63] as well,

[50] Section 132(6) of Act CLXI of 2011.

[51] Section 133(2) of Act CLXI of 2011.

[52] See: Amnesty International and Hungarian Helsinki Committe: Constitutional Crisis in the Hungarian Judiciary, 2019, https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf accessed 26 September 2022.

[53] Gov. Decree No. 45/2020. (III.14.) on measures to be carried out during the state of danger ordered to prevent the human pandemic causing mass causalties and endangering the safety life and assets as well as to defend against its consequences in order to pretiect the health and life of Hungarian citizens.

[54] Decision 37.SZ/2020. (III.17.) of the president of the NOJ: https://budapestkornyekitorvenyszek.birosag.hu/sites/default/files/news/37.sz_.pdf accessed 26 September 2022.

[55] See above fn.

[56] See fn 57 supra.

[57] Decision 35.SZ/2020. (III.15.) of the President of the NOJ: https://birosag.hu/sites/default/files/2020-03/35.sz_veszelyhelyzet_elnoki_intezkedes_0.pdf accessed 26 September 2022.

[58] Gov. Decree No. 74/2020. (31. March) on procedural measures in effect during the state of danger.

[59] Section 12 (2) of Gov. Decree No. 74/2020. (31. March) supra.

[60] Section 21 of Gov. Decree No. 74/2020. (31. March) supra.

[61] Section 23 of Gov. Decree No. 74/2020. (31. March) supra.

[62] Section 7 of Gov. Decree No. 74/2020. (31. March) supra.

[63] Szalai Péter: Az elektronikus cégeljárás. In: G. Karácsony Gergely (ed.): Az elektronikus eljárások joga, Gondolat Kiadó, Budapest, 2018. 36.

so there were already institutional solutions for certain cases within the court system, that served as best practices.)

Over the past decade, civil procedures have also seen the benefits of significant digitalization.[64] Electronic correspondence between regional courts acting as court of first instance and their clients have been set out as an option in the legislation since 1 January 2013.[65] As of 2015, electronic correspondence is available at all courts, and as of 2016[66] it is not just an option, but it is mandatory for the parties acting with a legal representative.[67]

Since 2018, as part of digitalization efforts directed at improving the quality of the justice system, more than 100 courtrooms have been equipped for the performance of remote hearings in Hungary. According to the NOJ, in 2019 courts held 3163 remote hearings, most frequently in criminal procedures.[68]

At first glance, it may seem like these preceding reforms have significantly eased the necessity of the digital transition caused by the pandemic, but these impressions might be wrong, as will be discussed later on.

From mid-2020, the special procedural rules state that a hearing may be held also by way of an electronic communications network (called Via Video - an internal video conferencing system of the NOJ[69]) or other means suitable for the transmission of an electronic image and sound.[70] The guidance of the NOJ specified other audio-visual electronic means as such private applications or programs as Skype or Microsoft Teams,[71] but judges are free to make use of any other encrypted programs.[72] If none of the abovementioned electronic means are available or in cases where the physical presence of a party is necessary, the courts accept the parties' submissions in writing as a last resort.[73]

So far, no information is available on how many hearings were held using an electronic communication network during the SOD. The opportunity was given, however, in practice, the courts preferred not to use the option of remote hearings. Instead, they more likely postponed the proceedings as previously presented.

This not only raises practical concerns but also challenges fundamental principles of procedural law (as it will be described below), and seems to go contrary to the spirit of the Decree introducing the changes as well. As it was mentioned before, the primary purpose of the decree was to ensure the proper operation of the courts.

3.3. Issues with the right to a fair trial

One of the practical concerns raised by remote proceedings concerns the fundamental principle of publicity in a fair trial. Be it nomadic tribal structures or modern democracies, it can be argued that the operation of the administration of justice is a 'group activity', a community act, with an indispensable part being played by the individual. Members of a community were and are present in the proceedings, but not only in a concrete, distinguishable procedural roles (for example plaintiffs or defendants), but also as "controllers" (one might say assessors, not only to mean members of the jury, but as members of the public as well) to ensure the impartiality and independence of the justice system and of the trial courts.

In Hungary, the FL states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and judgment shall be announced publicly.[74] The main problem in this context is that the emergency regulation only superficially addressed the right to a public trial in electronic hearings, as discussed and explained above.

It goes without saying that, in a remote/electronic procedure, publicity can raise some practical issues. For its proper functioning, everyone must have the proper technological equipment, and the protection of personal rights and personal data must be ensured during the procedure. The emergency regulation did not contain a provision on publicity, so it was evident that the courts should have ensured the participation of the press or members of the society based on the otherwise applicable (subsidiary) provisions regard-

64 Pákozdi Zita: A polgári eljárásjog egyes aktuális kérdései. < http://acta.bibl.u-szeged.hu/30711/1/juridpol_doct_009_321-337.pdf > accessed 21 January 2022 .

65 See fn 67 supra.

66 Alexandra Bognár: Hungary: A new era in electronic litigation has begun, < https://www.lexology.com/library/detail.aspx?g=a9b39193-4d66-44e9-ac47-cebaf43ad6ef> accessed 18 February 2022.

67 Pál Emil Mészáros: The Evolution of Electronic Administration and Its Practice in Judicial Proceedings, Journal of law and social sciences of the Law Faculty of University J.J. Strossmayer, Vol. 34. No. 3-4. 2018.

68 < https://birosag.hu/en/news/category/about-courts/soon-184-courtrooms-will-be-available-remote-hearings > accessed 18 January 2022.

69 Chapter XLVII of the Hungarian Code of Civil Procedure; 19/2017. (XII.21.) decree of the Minister of Justice.

70 Section 23 (1) Gov. Decree No. 74/2020. (31 March) supra.

71 < https://birosag.hu/hirek/kategoria/ugyfeleknek/tajekoztato-veszelyhelyzet-ideje-alatt-ervenyesulo-egyes-eljarasjogi > accessed 18 January 2022.

72 DLA Piper: Remote courts in Hungary: ready or not? < https://blogs.dlapiper.com/advocatus/2020/04/remote-courts-in-hungary-ready-or-not/ > accessed 17 January 2022.

73 See fn 60 supra.

74 Art. XXVIII. of the Fundamental Law of Hungary.

ing publicity in the Civil and Criminal Procedure Codes.[75]

According to the Civil Division of the Supreme Court (Kúria) the publicity and the participation of the society in electronic hearings should have been adequately ensured, but the exact manner of doing so has not been determined. [76] The opinion of the Civil Division of the Kúria stated that the provisions on publicity in the Civil Procedure Code apply, with the exception - using a strange turn of phrase - stating that "the public must have access to the designated place of the hearing".[77] This literally is construed to mean where the judge is on the day of the trial. In practice this might even mean the actual place of residence or home office of the judge at the day of the trial, which might lead to complications. The rules further state that the above need to happen in compliance with further regulations on protective measures (personal distance, use of protective equipment, etc.).

However, this completely contradicts the purpose of emergency regulation, since during this period the courts were not allowed to take any procedural acts requiring personal presence. For these reasons, clients and the public were also precluded from entering court buildings.

After the Government reintroduced the SOD, Government Decree No. 112/2021. (III.6.) on certain procedural measures applicable during the period of SOD entered into force which extended the possibility of excluding the public during the term of the SOD.[78]

In summary, in the above-mentioned period, the practice under the emergency procedural rules basically violated the principle of orality, the principle of immediacy and publicity. These raise the question: Can a government decree overrule an essential element of the right to a fair trial?

Article 54 (1) FL states that certain elements of the right to a fair trial under Article XXVIII paras. (2)-(6) can be subject to restriction or limitation exceeding thresholds of necessity and proportionality in a SLO situation. Interestingly, these provisions exclude the principles of immediacy (tied to the requirement of reasonable time) and also exclude publicity, allowing a much needed space for the legislature to accommodate emergency situations like the one brought about by COVID-19. On another interesting sidenote, the right to appeal (remedy) is also excluded from those fair trial provisions that cannot be restricted or limited exceeding thresholds of necessity and proportionality, but we have not seen – thus far – such cases in which this might have been an issue. [79]

Continuing along the lines of constitutional issues, the next Part 4 describes certain issues that relate to the emergency operation of the Constitutional Court and some of the relevant cases that have been dealt with during the COVID-19 SOD until the end of 2021.

4. Hungarian Constitutional Justice during COVID-19

As a first response to the challenges of the pandemic, the President of the Hungarian Constitutional Court (HCC) requested an amendment to the Act on the operation of the HCC (HCCA) and instituted the possibility for ordering the digital operation of the Court by using electronic means in adjudicating on all matters in plenary and panel formation. By way of this rule, all sessions of HCC can be organized through means of electronic communication upon the decision of the President. Such a protocol has been in effect since the HCCA was amended on 18 May 2020.[80]

In October 2020, the Data Protection Unit of the Council of Europe in their Data Protection Report entitled 'Digital Solutions to Fight COVID-19' reported regarding the importance of emergency measures and their constitutional review that in Hungary "ordinary courts were closed thus preventing the Constitutional Court review of the proportionality of measures introduced under emergency conditions as this procedure could solely be initiated by ordinary courts."[81]

This above statement, however, is *prima facie* unsubstantiated by looking at the legislative framework underlying constitutional justice in Hungary. Ordinary courts (judges) are entitled to initiate proceedings in front of the HCC if in the case before them a constitutional question emerges as a precondition for their decision (under Article 25 HCCA)[82] but this in no way means that 'solely' ordinary courts could initiate such proceedings and that closing down therse courts due to the pandemic therefore prevented individuals from

[75] Section 231-232 of the Civil Procedure Code of 2016 and Chapter LXXI of the Criminal Procedure Code of 2017.

[76] 2/2020. (30. April) PK opinion of the Civil Division of the Supreme Court.

[77] Section 4 of 2/2020. (30. April) PK opinion of the Civil Division of the Supreme Court

[78] Ignácz György – Madarasi Anna: A bírósági tárgyalások nyilvánossága veszélyhelyzet idején. In Medias Res, 2/2020. < https://media-tudomany.hu/archivum/a-birosagi-targyalasok-nyilvanossaga-veszelyhelyzet-idejen/ > accessed 18 January 2022.

[79] See fn 6 supra.

[80] See: Article 48/A of the HCCA at: < https://hunconcourt.hu/act-on-the-cc > accessed 18 February 2022.

[81] See: Digital Solutions to Fight COVID-19. https://rm.coe.int/prems-120820-gbr-2051-digital-solutions-to-fight-covid-19-text-a4-web-/16809fe49c.

[82] See: Article 25 of the HCCA at: < https://hunconcourt.hu/act-on-the-cc > accessed 12 September 2022.

having recourse against these rules. Under Article 26(2) of the HCCA,[83] anyone (also individuals and organizations) that feel that their rights were violated by laws enacted, has a direct recourse to the HCC without any judicial proceedings being conducted at all (in the context of legislation that was adopted and violates rights due to its entry into force). (Also, this is without prejudice to such constitutional complaints that can indeed by filed by individuals or organizations against final judicial decisions in case a violation of a fundamental rights is alleged.)

In light of the above, we think it is important to mention that with due regard to maintaining a necessary and accessible record of all constitutional review proceedings in matters of "viral constitutional law" brought about by the pandemic, the HCC compiles a digital database of all COVID-19-related petitions and decisions,[84] but so far none had a specifically 'digital aspect' that would merit further analysis for the purposes of this paper.[85] To this day, there has only been 1 (one) COVID-related judicial initiative coming from ordinary courts to the HCC questioning certain rules imposed by Government Decree 522/2020 (XI.25.), which has been decided by HCC Decision 28/2021 (XI.5) AB határozat – as it can be seen in the database mentioned above under fn 86.

From among the other cases, one constitutional complaint (*alkotmányjogi panasz*) could be mentioned, however, as it deals with an issue of online scaremongering (spreading news that incite fear, during SLO) on social media. Petitioner in this case was an attorney-at-law, who felt personally affected by a violation of the right to freedom of expression because "*he publishes a lot on social media and online as part of public debate*", and a new provision introduced in the Criminal Code on scaremongering adds additional conditions to his exercise of his freedom of expression, and this is in violation of Art IX FL, adversely affecting him. While the HCC rejected the complaint, the Court defined a constitutional requirement stating that the "*new provision can threaten with punishment only such disclosures of fact, the falsity of which was known to the perpetrator at the time of committing the crime or they have distorted these facts themselves and which are suitable to obstruct or foil protective measures at the time of special legal order*".[86]

It remains to be seen whether in the future more specifically digital cases will make it the HCC for constitutional review of judicial decisions or legislative norms, which would be a great and interesting step forward, developing their jurisprudence adapting to the changing circumstances of life brought about by technology, some of which are going to be addressed in the next chapter.

5. Pandemic Prevention through Digitalization – A Showcase

After describing the general legal framework of the so-called special legal order (SLO) in Hungary tailored to the COVID-19 pandemic and the operation of certain state institutions in this period, this last section describes those aspects of digitalization and innovation that have been engaged and applied by the Government to try and alleviate the negative effects of the pandemic and offer electronic governance services and solutions to citizens.

A 2021 global survey (McKinsey Global Survey of executives)[87] found that responses to COVID-19 have sped up the adoption of digital technologies by several years – and that many of these changes could be here for the long haul due to such compelling state interests like the protection of public health otherwise called pandemic prevention.

During a pandemic, it is crucial that the authorities successfully carry out excessive contact research in order to follow the spread of the virus. Besides the extraordinary measures that were introduced with the SLO, the Government had to find new ways for "contact research", certification of immunity and verification of compliance with home quarantine obligations.

Before going into details on this front, a short description of the basic infrastructure that has successfully operated since the introduction of the SLO, or even before that is important.

In general, the most basic coordination of COVID-administration on the level of services is carried out by NISZ Zrt. (National Information Technology Service Provider), the Ministry of the Interior, the PM's Office and the Cabinet Office. In the coordination of these state bodies, the following are worth mentioning:

[83] See: Article 26(2) of the HCCA at: < https://hunconcourt.hu/act-on-the-cc > accessed 12 September 2022.

[84] Unfortunately only available in Hungarian: < https://alkotmanybirosag.hu/a-jarvanyugyi-veszelyhelyzettel-kapcsolatosan-indult-eloado-alkotmanybirora-szignalt-alkotmanybirosagi-ugyek > accessed 18 February 2022.

[85] Some cases dealt with ex post review of constitutionality of legidslation concerning the protection of employment in the SLO, with relevant aspects of regulating telework.

[86] HCC Dec. No. 15/2020 (VIII. 8.) AB határozat, decided on 8 August 2020.

[87] < https://www.mckinsey.com/~/media/mckinsey/featured%20insights/mckinsey%20global%20surveys/mckinsey-global-surveys-2021-a-year-in-review.pdf > accessed 31 January 2022.

- *Vakcinainfo.gov.hu*[88] (basic information on vaccine availability and registration for vaccination) and *koronavirus.gov.hu*[89] (basic information on the pandemic SLO)[90]
- *Secure video-conferencing platform* developed by NISZ and T-Systems - used in local government coordination of vaccination – called: *NISZ Videokonferencia – VIKI;*[91]
- *Government Window (Kormányablak)* app for one-stop-shop administration of various client needs during the SLO;[92]
- Use of the *Client Gate* (online admin tool) to gather statistical data analyzing the spread of COVID-19 (H-UNCOVER, ran by the Hungarian Central Statistical Office in 2020), in cooperation with four national univerisities (Semmelweis, Debrecen, Szeged, Pécs), from support awarded by the Ministry of Innovation and Technology (ITM).[93]

Partly connected to these issues, Ritó and Szabó also describe the basic roles of the Hungarian Central Statistical Office (see above), the National Authority of Customs and Tax Enforcement and the National Data Protection of Authority in their most recent article in December 2021. We shall elaborate on the role of the DPA below.[94]

In the following subchapter, there is a review of some of the applications and digital solutions that have been applied in Hungary to fight the spread or effects of the pandemic.

5.1. VirusRadar

VirusRadar is a free application developed by NextSense and donated to KIFÜ, the Governmental Agency for IT Development operating under the Minstry of Technology and Innovation. Its use is voluntary. The application records encounters between devices (through encrypted aliases) running the app in the background using the Bluetooth connection. This requires the devices to be within at least 2 meters of each other for at least 20 minutes. The app using a randomized pseudonymous identification code linked to the phone number; no other data – like geolocation information – is stored.[95]

If the epidemiological authority is notified or determines that the user is infected, the app sends the encounters stored over the past two weeks to a central server controlled by the Hungarian State, containing otherwise encrypted phone numbers. With this information the epidemiological authorities engaged in contact tracing can notify the identified contacts. In terms of popularity, the Ministry of Innovation and Technology has published some statistics regarding downloads between May and September 2020, that show 75000 downloads.[96] For comparison, the overall population of Hungary is close to 10 million, out of which 4M people use smartphones and thus have the capability to run the application. Upon a search conducted on the AppStore in Hungary, the seems application no longer available for iOS platforms. According to data available online it is available in North Macedonia (under the name Stop Korona!),[97] but the website of the developer seems to be out of commission[98]).

5.2. The Home Quarantine System

The application HKR was developed by Asura Technologies and helps verifying compliance with home quarantines. According to Government Decree No. 181/2020 (4 May) on the electronic monitoring of official home quarantines ordered with respect to the human epidemic endangering life and property and causing disease outbreaks, the epidemiological authority shall order that compli-

88 < https://vakcinainfo.gov.hu/ >.

89 < https://koronavirus.gov.hu/ >.

90 See: Privacy Policy for the site under https://koronavirus.gov.hu/sites/default/files/sites/default/files/imce/adatkezelesi_tajekoztato_koronavirus_honlap_20200520.pdf specifying that the Ministry for the Interior operates the site, but the content is edited by the Cabinet Office of the Prime Minister.

91 For a description, see https://www.nisz.hu/szolgaltatasok/telekommunikacio or https://me.str.video.gov.hu/hu/contents/contact (secure online surface only available for designated, authorized personnel).

92 https://kormanyablak.hu/hu/impresszum (The State Secretary responsible for Territorial Administration together with NISZ edits and operates the app.).

93 https://www.portfolio.hu/gazdasag/20200428/koronavirus-magyarorszagon-eddig-nem-latott-adatokat-ismerhetunk-meg-428752; https://semmelweis.hu/hirek/2020/05/05/h-uncover-szurovizsgalat-a-pozitiv-eredmenyrol-24-48-oran-belul-ertesites-erkezik/. A short description of the program is available (in Hungarian) in the 2021 National Reform Programme of Hungary submitted to the EU Commission as part of the European Semester (p. 48.) at: https://ec.europa.eu/info/sites/default/files/2021-european-semester-national-reform-programme-hungary_hu.pdf.

94 Ritó Evelin – Szabó Balázs: Gondolatok a Covid-világjárvány közigazgatási rendszerünkre gyakorolt hatásairól. In Medias Res, 2021/2, 273-286, esp. 279-283. (In Hungarian) < https://media-tudomany.hu/wp-content/uploads/sites/13/2021/12/imr-2021-2-05.pdf >, accessed 20 February 2022.

95 < https://www.elte.hu/content/virusradar-mobilalkalmazas.t.21894 > accessed 31 January 2022 .

96 < https://koronavirus.gov.hu/cikkek/itm-mar-tobb-mint-75-ezren-toltottek-le-virusradar-alkalmazast > accessed 31 January 2022 .

97 See: https://rm.coe.int/prems-120820-gbr-2051-digital-solutions-to-fight-covid-19-text-a4-web-/16809fe49c, p. 29.

98 https://stop.koronavirus.gov.mk/en .

ance with the rules relating to official home quarantine be monitored by using an electronic software suitable (i) for tracking the movements of, and (ii) for transferring the facial image of and the health data provided by, any adult having capacity to act. The application can be used if the adults concerned has an appropriate device and they voluntarily install and use the software. If so, the users must register with an identification card or by providing their personal data manually or by scanning an ID document.[99]

After registration, the epidemiological authority checks if the registrant is in the police house quarantine database, and activates the app. The system then sends remote verification requests to the user at random times via SMS. The remote verification request must be replied by the user within 15 minutes by launching the application and logging in.

The application starts the camera and the user must follow the instructions appears on the screen, until he / she get "Remote verification successful" message. Finally, the app also notifies the users at the end of the official house quarantine. The data stored in the application my be used in criminal proceddings for violation of epidemic control regulations, and no further specific uses are allowed.[100]

In the context of different state approaches to introducing/imposing the use of contact tracing and similar softwares, Ritó and Szabó make the remark that more democratic patterns of use are characteristic to Europe, while in other places, and they mention Australia, the population is mandated to use these applications. As they observe, this might be the cause of the number of infections being lower in Australia, concluding that policies of mandated use (such that have not been seen in Hungary) undoubtedly make tracing and information gathering uncomparably more effective.[101]

5.3. EESZT Covid Control – Developments in the E-Health Infrastructure

In 2016, the Decree of the Ministry of Human Resources (EMMI) No. 39/2016. (21. XII.) on the detailed rules for the National eHealth Infrastructure (EESZT) introduced a digital infrastructure for mandatory data reporting to General Practitioners, booking appointments for treatments, and other undertakings. To this day, one can easily get access to such services as booking appointments, test and exam results or prescriptions.

According to the Government Decree No. 60/2021. (12. II.) on certifying immunity to coronavirus, immunity to coronavirus shall be certified by either an official verification card or an application after February 2020. This application is the so-called EESZT CovidControl, so certification of immunity "moved online" as well, as part of the EESZT surface, allowing to book vaccination appointment and get access to various COVID-19 test results. It is important to note that the online surface and the parallel app may also be used for both purposes, with access being provided with the validation of the social security number (SSN) provided or through logging in via the Client Gate e-government portal.[102]

After the identification of the person concerned, the application certifies the vaccinated status of the person concerned relying on data from the EESZT such as name, SSN, date of vaccination, vaccine type or the fact of having gone through the infection in the form of an EU recovery certificate or attesting the fact or absence of natural immunity.

5.4. KRÉTA

KRÉTA (CHALK) is the Core System of Public Education and Teaching Registration. It is used by the public school system and is based on a vast legal background of Acts, decrees in the different education sectors. Schools generally use the software to communicate with parents, recording the grades of the students among other fuctions.

During Covid-19, a new app interface has been added, which parents can use to inform the school – by providing name, e-mail address and a contact telephone number – if there is a COVID-19 infected person in the same household as the student, which may exempt the student from attendance obligations, if there are any.[103]

6. Towards a Conclusion: Some Remaining Concerns?

While the pandemic seems to move very slowly towards its conclusion, this paper discusses the Hungarian COVID-19 response through some examples reaches its peak. Public dissatisfaction with many state measures that have been introduced to prevent further damage is omnipresent everywhere in Europe, but there are some legal concerns as well that may need to be shortly intro-

[99] < https://hazikaranten.hu/ > accessed 31 January 2022 .

[100] Ibid.

[101] Ritó Evelin – Szabó Balázs: Gondolatok a Covid-világjárvány közigazgatási rendszerünkre gyakorolt hatásairól. In Medias Res, 2021/2, 273-286, 286. (In Hungarian) < https://media-tudomany.hu/wp-content/uploads/sites/13/2021/12/imr-2021-2-05.pdf >, accessed 20 February 2022.

[102] < https://www.eeszt.gov.hu/hu/covid-controll-app > accessed 31 January 2022.

[103] < https://tudasbazis.ekreta.hu/pages/viewpage.action?pageId=53772362 > accessed 31 January 2022.

duced. This is the case for Hungary as well. This last part presents some of the legal challenges that have been voiced against regulations adopted within the framework of Hungarian pandemic governance.

Previously, this paper has intentionally presented many aspects regarding the protection of personal data and privacy in terms of the apps described. This brings us to a petition[104] that has been filed to the Hungarian Data Protection Agency (NAIH) by the Hungarian Civil Liberties Union (HCLU) concerning the imminent danger of a violation of the right to personal data (protected under Article VI of the FL), which requested a recommendation by the DPA to end such violations.

The petition revolves around legal questions raised by the app EESZT CovidControl as it is alleged not to be in compliance with data protection by design principles and Article 25 of the GDPR. The reason for this is identified by the petitioner in the fact that it is technically possible to grab the screen of the app and therefore record personal data appearing therein. It has also been raised as an issue that the basic app to certify immunity contains different data sets but the purpose of processing is the same. While the physical card contains passport and ID info + QR code, the "app card" (virtual card accessible via reading a QR code does not contain ID, passport information by the SSN. The argument is then made that the SSN could not at all be accessible to those doing the checks in the public interest, so the purpose of data processing is ill-defined. The petition was filed in July 2021, but no decision has been reached yet that would be available to the public or the scientific community.[105]

In a broader European context, the EU Fundamental Rights Agency conducts cyclical investigations in terms of the different practices of human rights in the Member States and this is also the case during the pandemic. In terms of Hungary, the 2020 Pandemic Report contained information (May) that– based on information available – that there is no contract tracing app in operation at that time, then later was corrected in July[106] by citing numbers of 15.000 downloads and addressing issues of availability for various different platforms, just as we did above. At the same time, FRA cited concerns raised by Amnesty International that those who do not voluntarily submit to electronic monitoring of home quarantine, should expect regular and rigorous in person control by the authorities.[107]

We are not convinced that during a pandemic situation accompanied by a special legal order this instance is actually a grave concern resulting in the violation of human rights, because compelling state interests justify derogations from many rights in emergency situations and under emergency powers.

This is just another piece of evidence that not all rights issues are unambiguous in times of crisis such as the one brought about by COVID-19, but we are looking forward to the quick conclusion of this period and hope that things might quickly return to normal, even if it is a 'new normal', but without the pandemic.

[104] Available here (in Hungarian): < https://tasz.hu/a/files/Nemzeti-Adatvedelmi-es-Informacioszabadsag-Hatosag-beadvany_EESZT-TAJ.pdf > accessed 18 February 2022.

[105] For a description of all egla issues described in Hungarian, cf. fn 81 supra.

[106] Remark: Differences in available data and lack of pertinent national information might at times be due to the fact that the Hungarian reporting for the purposes of FRA data collection is being carried out not by a national company or NGO but by a Brussels-based Belgian company, Milieu Law and Policy Consulting SRL as part of FRANET (a network of different stakeholderws responsible for data collection and research corresponding to the purview of FRA).

[107] See: Coronavirus Pandemic in the EU – Fundamental Rights Implications. Hungary (country report), 2 July 2020. 24. available at: < https://fra.europa.eu/sites/default/files/fra_uploads/hu_report_on_coronavirus_pandemic_july_2020.pdf > accessed 17 February 2022.

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SECTION I – ESSAYS

The Human Rights Challenges of Digital documentation of COVID-19 in Uganda

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Abstract. In Uganda like other countries in the World, the COVID-19 pandemic has altered lifestyles and has caused unprecedented governmental actions such as lockdowns and they have imposed physical and social distancing measures as a response to control the spread of COVID 19 . As a result, there has been an increase in digital documentation by internet usage for social interaction, advocacy work, contact tracing and information sharing, online transactions, virtual judicial proceedings. From the on-set of COVID-19 responses, there was a significant increase in the collection and processing of personal data as the government traced persons suspected to have contracted or been exposed to the virus. As part of efforts to combat COVID-19, the government passed various regulations that provided the legal basis for testing, possible quarantine contact tracing. The measures and regulations developed against (COVID-19) pandemic in Uganda affected the realization of digital rights. The private data collection and conduct of surveillance appear to have lacked sufficient oversight, safeguards, or transparency. Further, it appears there was breach of individual privacy because there were reports of some Ugandans using online platforms, mainly Facebook and WhatsApp, to share personal contact details of the suspected COVID-19 patients with threats of further exposure should they fail to report for testing. This has led to the breach their rights to privacy as provided for in the Data Protection and Privacy Act, 2019. The purpose of this paper is to examine how the use of digital documentation of COVID-19 has affected the realization of human rights in Uganda.

***Keywords**: Challenges, Digital Rights, Human Rights, Uganda*

1. Introduction

In Uganda there has been an increase in the use of the internet. The Uganda Communications Commission has reported that during the first quarter of 2021, more than 400,000 new devices were connected to the internet which is consistent with the previous two quarters.[1] The commission further reports that between April and June, there was a 2% growth of the internet usage, and by September, a consistent growth of 2% making it to 21.9 million subscribers as opposed to 21.5 million users in June 2021 and 20.1 million subscribers in the third quarter of 2020.[2]This is attributed to the continued prevalence of social media and the internet during the extended Covid-19 control protocols across the country.[3] Statistics such as these make the discussion on digital rights in Uganda relevant. Various digital means were used to combat and control the spread of COVID 19 in Uganda and these included the use of surveillance through the national integrated disease surveillance and response framework,[4] and the use of COVID 19 certificates to track and record the progress made in protecting the masses against COVID 19 and have accurate data about the vaccination progress in Uganda,[5] and the use of advertising in radio and television stations to sensitize the masses about the corona virus and the measures put in place to control the spread of Covid 19.[6] According to the Uganda Economic update, the increased use of dig-

[1] Uganda Communications Commission, "Market performance report 1Q2021" <https://www.ucc.co.ug/wp-content/uploads/2021/07/UCC_1Q21-MARKET-PERFOMANCE-REPORT_-compressed.pdf> accessed on 17 March 2022.

[2] Ibidem.

[3] Ibidem.

[4] Isaac Kadowa, "Using evidence and analysis for an adaptive health system response to COVID-19 in Uganda in 2020" EQUINET Case study paper, November 2020. <https://www.equinetafrica.org/sites/default/files/upl.oads/documents/Uganda%20COVID-19%20Rep%202020.pdf> accessed on 7 June 2020.

[5] Morgan Mbabazi, "Digital Solutions Key in Boosting Uganda's COVID-19 Health Response, Aiding Faster Economic Recovery" (World Bank July, 2020) <https://www.worldbank.org/en/country/uganda/publication/uganda-economic-update-digital-key-covid-recovery> accessed on 7 June 2022.

[6] Transaid, "Communication and COVID-19: raising awareness in Uganda and Zambia" (Transaid, September 3rd 2020) <https://www.transaid.org/news/communication-and-covid-19-raising-awareness-in-uganda-and-zambia/> accessed on 7 June 2022.

ital technology during COVID 19 pandemic shows its great potential to not only support the health response in the country, but also its ability to aid in faster economic recovery and strengthen resilience against similar shocks in the future.[7]

As part of efforts to combat COVID-19, the government passed various regulations that provided the legal basis for testing possible quarantine contact tracing. These included the Public Health (Control of COVID-19) Rules, 2020 under the Public Health Act which gave medical officers and health inspectors powers to enter any premises to search for cases of COVID-19, and to order the quarantine or isolation of all contacts of the suspected COVID-19 patients. Another was the Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, 2020 which allowed a medical officer to test for COVID–19, any person arriving in Uganda. There are additional Guidelines on Quarantine of Individuals which required all quarantined persons to provide their name, physical address, and telephone contact to the health ministry monitoring team.

This paper analyses how digital documentation has affected the realization of human rights during the implementation of COVID-19 measures and the attendant regulatory framework. This paper is structured into three main sections. Normative Overview of Digital Rights as Human Rights in Uganda documentation during COVID-19 in Uganda and a conclusion. The article further examines the shortfalls of the legal and regulatory framework in protecting digital rights during COVID-19 and provides recommendations how the human rights can be protected during the use of digital documents in a pandemic such as COVID-19.

2. Overview of Digital Documentation of COVID-19 in Uganda

There are several types of digital documents that are being used during COVID-19 in Uganda.

2.1 Digital Certificate of Diagnostic Test of COVID-19 Results

The Digital certificate of diagnostic test is a result certificate that attests to the fact that an individual has been tested for COVID-19.[8] It may be used as proof of a negative or positive test of COVID-19.[9] A test result certificate includes minimal data about the individual who has been tested, the type of test conducted, the sample collection date and time, the test result, and other data in the core data.[10] A test result certificate is a health document, and it is not intended for use as an identity document.[11] It is a report that contains a clinical interpretation of the test and relevant detailed medical information for use by authorized health workers for ongoing clinical care, early detection and infection containment measures (e.g. contact tracing and case reporting).[12] A test report does not have an expiration date, and it may not necessarily be verifiable by a third party. It can be purely digital and stored either in a smartphone application or on a cloud-based server), or it can be a computable representation of a test report rendered as a paper test result certificate.[13] It is within an electronic personal health record held on a smartphone and or digital health wallet.

The delivery of test results may be via email, text message (i.e., a PDF sent via WhatsApp), or physical copy. The results have to be properly linked in the electronic system used by the airport.[14]

2.3 Web-based Information Hub on COVID-19

The Ministry of Health established a government, web-based information hub on COVID-19, the COVID-19 Response info Hub, summarises the statistics, interventions and reports in a 'one-stop' online centre .[15] The data are analysed and displayed on the dashboard.[16] It is easily accessible for use by the different pillars and teams involved in the response and by policy- makers, researchers, the media and the public.[17] The hub provides real time data on how the pandemic is unfolding to support rapid and evidence-based decision making for the wide range of stakeholders involved in or affected by the response.[18] It is updated daily with

[7] Morgan Mbabazi , "Digital Solutions Key in Boosting Uganda's COVID-19 Health Response, Aiding Faster Economic Recovery" (World Bank July, 2020) < https://www.worldbank.org/en/country/uganda/publication/uganda-economic-update-digital-key-covid-recovery> accessed on 7 June 2022.

[8] WHO, Digital Documentation of COVID-19 Certificates: Test Result Technical Specifications and Implementation Guidance, 27 August 2021 https://apps.who.int/iris/rest/bitstreams/1415502/retrieve accessed on 18 June 2022.

[9] Ministry of Health, Uganda National COVID-19 Vaccination Certification Portal <https://epivac.health.go.ug/certificates/#/> accessed on 18 June 2022.

[10] *Ibidem*.

[11] *Ibidem*.

[12] *Ibidem*.

[13] *Ibidem*.

[14] *Ibidem*.

[15] Republic of Uganda, Ministry of Health, COVID-19, Response Info Hub https://covid19.gou.go.ug/

[16] *Ibidem*.

[17] *Ibidem*.

[18] *Ibidem*.

current information on test results, recoveries, active cases, deaths, cases by district and other relevant information from the different arms of the public health response system, including the social determinants related to exposure from the assessment surveys and monitoring, described earlier.

2.4 COVID-19 Vaccination Certificate

The COVID-19 Vaccination Certificate is issued by the Uganda government once a person receives the 2nd dose that will confirm that he or she has been inoculated.[19] The certificate carries all the basic details of the beneficiary like name, age, gender, and also all the details of both vaccination doses i.e. date, batch number, vaccine, manufacturer, dose, vaccination site.[20] It is generated 14 days after the last dose of a vaccine i.e. second dose of the vaccine (if you are vaccinated by a two-dose vaccine) or first dose for a single dose vaccine.[21]

The Vaccination certificates are obtained through the online portal which is Uganda's Official online public COVID-19 Vaccination Certificate and Verification Platform.[22] The person generates the certificate by entering the Identification ID number she or he used during vaccination such as National Identification Number or any other registered alternative Identity Document the person who registered during COVID-19 vaccination for example Passport Number, Employee Identity card, Driving Permit, Local Council Identity card, etc. as written on the Vaccination Card) and the last 6 digits of your registered phone number during vaccination.[23] Once the vaccination record is verified meeting all the certification requirements, a certificate is generated and downloaded as a PDF file that you can directly print or save as an electronic copy.[24]

2.5 DHIS2 Android Capture App

The DHIS2 Android Capture App is an integrated adaptation of an Electronic Integrated Disease Surveillance Response (eIDSR) tracking system.[25] It tracks and captures real-time data and monitoring using an app that is downloaded onto drivers' mobile phones. It captures traveller details such as Bio data, Identification, Photo ID, country of departures and travels in the last 14 days, destination and address in Uganda, information on whether samples were collected or the driver was put in isolation, and clearance for travel among other data points).[26] A colour paper pass is printed for the travellers bearing their photo, QR code and some of the details above, to be presented at different checkpoints for QR scanning and updating POE systems on their location at a given date and time.[27] If cleared to travel, the traveller carries their travel pass with them and is required to present it at the different checkpoints within the country. At these checkpoints, the date is captured, time, and GPS location, so if COVID-19 test results for that traveller are returned as positive, the Ugandan health authorities can identify the traveller's last checkpoint and intended destination, and either locate the traveller or alert the next checkpoint to stop him/her.[28]

2.6 Laboratory management information systems

The Central Public Health Laboratory developed an app (RESTRACK-UG) to track the movement of the collected sample from the collection point to the testing laboratory.[29] This app builds on a pre-existing system for referral of laboratory samples from lower health facilities to the relevant laboratory.[30] It was then adapted for use in tracking the collection and transportation of COVID-19 samples up to the testing laboratories.[31] Once the samples are tested and the results obtained, all the COVID-19 accredited testing laboratories in Uganda upload their results into an online electronic Laboratory Information Management System (LIMS). This LIMS has a component for dispatching results called an 'electronic results dispatch system', which can be translated into a printable report that is accessible by those who have access to the system[32] The test results are disaggregated into different categories, namely: Ugandan citizens who have just returned to the country and are in quar-

[19] Ministry of Health, Uganda National COVID-19 Vaccination Certification Portal <https://epivac.health.go.ug/certificates/#/> accessed on 18 June 2022

[20] *Ibidem*.

[21] *Ibidem*.

[22] *Ibidem*.

[23] *Ibidem*.

[24] *Ibidem*.

[25] Ministry of Health, Using DHIS2 for COVID-19 Point of Entry Screening and Travel Pass Printing in Uganda https://dhis2.org/uganda-covid-surveillance/ accessed on 18 June 2022.

[26] *Ibidem*.

[27] *Ibidem*.

[28] *Ibidem*.

[29] Isaac Kadowa, "Using evidence and analysis for an adaptive health system response to COVID-19 in Uganda in 2020" EQUINET Case study paper, November 2020 <https://www.equinetafrica.org/sites/default/files/uploads/documents/Uganda%20COVID-19%20Rep%202020.pdf> accessed on 7 June 2020.

[30] *Ibidem*.

[31] *Ibidem*.

[32] *Ibidem*.

antine or self-isolation, termed returnees, Healthcare workers, Foreign and national truck drivers, People who are suspected to have been exposed or have symptoms and have therefore called the surveillance call centre (termed 'alerts'); and People listed as contacts of positive cases who themselves test positive.[33]

2.7 Communication and Innovation as Critical Levers

A key part of the adaptive response is the communication of evidence and information to the public and the measures that they imply, evidence has been gathered and regularly used to design, plan and assess measures and their implementation.[34] The COVID-19 information hub, print media (public and private), social media, TV and other plethora of FM radio stations scattered across different regions of the country have helped communicate evidence to the public and a wide range of stakeholders.[35] A toll-free call centre for COVID-19 response receives public information and calls, including reporting any suspected cases and alerts. This has helped in quick response to any suspected case or alerts by the district teams or the national response teams.[36] The sector specific SOPs such as those for restaurants, markets, public transport are shared through targeted dissemination.[37]

Innovations in information technology have greatly improved access to and use of real time data to inform decision-making for the response.[38] The RECDTS use of information technology was described earlier, as were the online platforms tracking tests from sampling to results, and reporting on results.[39] The country's surveillance system has grown overtime and is supported by several digital applications: GoData is a field data collection platform focusing on case investigation variables.[40] An Open Data Toolkit collects, aggregates, stores and manages data and M-Track provides real time monitoring of health data through mobile phones.[41] U-reports is a social messaging tool and data collection system, enabling citizen engagement and feedback, with a dashboard that facilitates case investigation, contact follow up, visualisation of transmission chains, data exchange as well as supervision, assessment and reporting.[42] For quick decision-making, the government COVID-19 response Info Hub provides real time data on how the pandemic is unfolding.[43] Many of these systems were already in place, making it easier to adapt them for the COVID-19 response.[44]

3. Normative Overview of Digital Rights as Human Rights in Uganda

The Constitution of the Republic of Uganda 1995 as amended under Article 29 (1) provides for the right to freedom of expression including the media.[45] Thus every Ugandan has a right to use the internet either for expressing one's views or gathering information without any governmental interruption. The Constitution also provides for the right of access to information in the possession of the state or any other organ or agency of the state under Article 41.[46] The Article also provides that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

Besides these domestic guarantors of the right to freedom of expression, Uganda is a signatory to key International Covenants that provide for the rights to freedom of expression including online rights. The Universal Declaration of Human Rights Article 19 (1) provides that everyone has the right to freedom of opinion and expression and this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[47] Further, the International Convent on Civil and Political Rights under Article 19(2) provides that everyone shall have the right to freedom of expression and this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[48] In addition, the African Declaration on Human and Peoples' Rights under Article 9 provides that every individual shall have the right to

[33] *Ibidem*.
[34] *Ibidem*.
[35] *Ibidem*.
[36] *Ibidem*.
[37] *Ibidem*.
[38] *Ibidem*.
[39] *Ibidem*.
[40] *Ibidem*.
[41] *Ibidem*.
[42] *Ibidem*.
[43] *Ibidem*.
[44] *Ibidem*.
[45] The Constitution of Uganda, 1995 as amended, Art. 29.
[46] Ibidem.
[47] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> accessed 21 June 2022.
[48] United Nations (General Assembly). "International Covenant on Civil and Political Rights." *Treaty Series*, vol. 999, Dec. 1966, p. 171.

receive information and the right to express and disseminate his opinions within the law.[49]

Section 1 of the Data Protection and Privacy Act 2019 defines personal data to mean information about a person from which the person can be identified, that is recorded in any form and includes data that relates to the nationality, age or marital status of the person, the educational level, or occupation of the person, an identification number, symbol or other particulars assigned to a person, identity data or other information which is in the possession of, or is likely to come into the possession of the data controller and includes an expression of opinion about the individual.[50] Therefore this definition includes data that is obtained during COVID-19 such as number of people who have tested and their status, those who have died and vaccinated.

4. Human Rights Challenges and Digital documentation during COVID-19 in Uganda

As part of COVID-19 measures and responses, there was a significant increase in the collection and processing of personal data as the government traced persons suspected to have contracted or been exposed to the virus. The Government of Uganda also enacted Data Protection and Privacy Act, 2019 and Regulations of 2021 and various regulations that provide protection of data and provide the legal basis for collection data related to testing, contact tracing and vaccination. The responses and measures have brought challenges for upholding human rights during COVID-19. The major challenges are analysed below.

4.1 Right to Data Protection

Data Protection is a right to privacy that people have against possible unauthorized use of personal information by a data processor. Its purpose is to protect the privacy of a person at risk for the collection and misuse of personal data.

Article 27 of the Constitution provides for the right to privacy including of the person, home, property, correspondence and communication.[51] The Data Protection and Privacy Act, 2019 Act makes provisions for protection of the privacy of the individual and of personal data by regulating the collection and processing of personal information, to provide for the rights of the persons whose data is collected and the obligations of data collectors, data processors and data controllers, to regulate the use or disclosure of personal information and other related matters.[52]

Section 3 of Uganda's Data Protection and Privacy Act provides for several principles of data protection under subsection 1. It states that a data collector, processor or controller or any person who collects, processes, holds, or uses personal data shall:

a. Be accountable to the data subject for data collected, processed, held, or used;
b. Collect and processes data fairly and lawfully;
c. Collect, process, use, or hold adequate, relevant, and not excessive or unnecessary personal data;
d. Retain personal data for the period authorised by law or for which the data is required;
e. Ensure quality of information collected, processed, used, or held;
f. Ensure transparency and participation of the data subject in the collecting, processing, use and holding of the
g. personal data; and
h. Observe security safeguards in respect of the data.

Under section 3(2), the National Information Technology Authority-Uganda (NITA-U) is required to ensure that every data collector, data controller, data processor or any other person collecting, or processing data complies with the principles of data protection and this Act. In addition, to the above, NITA-U is responsible for:

a. responding to data breaches and determine whether the data subject should be informed of the breach;
b. maintaining the Register, where it records every person, institution or public body collecting or processing personal data and the purpose of collecting such data;
c. making data in the Register available for inspection by any person; and
d. investigating any complaints regarding data protection and privacy.

Section 10 provides for protection of privacy of data. Thus it requires a data collector, data proces-

[49] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> accessed 21 June 2022.

[50] The Data Protection and Privacy Act 2019, Sec 1.

[51] The Constitution of the Republic of Uganda, 1995.

[52] The Data Protection and Privacy Act, 2019 Act, Preamble.

sor or data controller not collect, hold or process personal data in a manner which infringes on the privacy of a data subject.

Mandatory consent is required before the collection or processing of personal data except where the collection or processing is authorised or required by law, where it is necessary for national security, where it is for the public interest, prevention, detection, investigation, prosecution or punishment of an offence or breach of the law or for medical purposes.[53] However, the Act does not specify legitimate interests of the data controller as a legal basis for processing.

It is worth noting that upon withdrawal of the consent provided by the data subject, data collection or processing must cease immediately. In addition, under Section 8 of the Act, the collection and processing of data relating to a child is prohibited unless it is with the prior consent of the parent or guardian or any person giving authority over the child.

Under Section 23 of the Act, it is mandatory to notify NITA-U of any unauthorised access or acquisition of data, in addition to the remedial action taken. However, it is left to the discretion of NITA-U to determine whether the data subject should be notified of the breach. Overall, the Act places a strong emphasis on data security and maintenance of a robust security system with continuous updates to address new risks and deficiencies.

As a general rule, the Act does not set duration for the retention of data. However, it stipulates that personal data should not be retained for a period longer than is necessary to achieve the purpose for collection or processing of the data, unless the retention of data is required or authorised by law, the retention is necessary for a lawful purpose related to function/ activity for which the data is collected or processed, the retention is required by a contract between parties; or the data subject consents to the retention of the data.[54]

In addition, the retention of data for national security purposes, judicial or legal proceedings and historical, statistical or research purposes is permissible and the general rule on data retention is not applicable.

According to Section 8 of the Act and Regulation 11 of the Regulations, every data collector, processor and controller is mandated to establish a system to ascertain the age of persons whose personal data is to be collected, processed or stored and where such data relates to children, the manner of obtaining consent of a parent or legal guardian. The collection or processing of data relating to children is to be carried out with the prior consent of the parent or guardian or any other person having authority to make decisions on behalf of the child.

The Act expressly bars the collection of special personal data which has over time been used to profile individuals and run political adverts. In Uganda, information collected by the Uganda Bureau of Statistics is exempted from this provision. In the following exceptional circumstances, the collection and processing of special personal data is permitted.[55] These include the collection or processing of the data is in the exercise or performance of a right or an obligation conferred or imposed by law on an employer, the information is given freely and with the consent of the data subject or the collection or processing of the information for the purposes of the legitimate activities of a body or association which is established for non-profit purposes, exists for political, philosophical, religious or trade union purposes and relates to individuals who are members of the body or association or have regular contact with the body or association in connection with its purposes, and does not involve disclosure of the personal data to a third party without the consent of the data subject.

Pursuant to the above, operations of data analytics companies might be constrained in Uganda unless they operate within the parameters for exemption set by the Act.

Data subject rights are set out through Sections 24 to 28 of the Act. These rights are the right to access personal information, the right to know the purpose for which the information is collected, the right to prevent processing of personal data, the right to prevent processing of personal data for direct marketing purposes and the right not to be subjected to a decision affecting the data subject which is solely based on processing by automatic means.

The data subject has the right to know the purpose for which the information is collected. A data collector, processor or controller who collects or processes personal data without the prior consent of the data subject contravenes Section 7 of the Act and is liable, on conviction to a fine not exceeding three currency points for each day the contravention continues.

The data subject has a right to access their personal information from the data controller subject to provision of proof of identity. This can include confirming whether the data controller holds personal data about that data subject, or to request that a description of that personal data is given by controller, etc. If information also relates to another individual, their consent must be sought or a

[53] *Ibidem*, Section 7 (2).

[54] *Ibidem*, Section 18.

[55] *Ibidem*, Section 7 (2)Section 9 (3).

court order to the same if it is not reasonable in the circumstances to comply with the request without the consent of the other individual. To weigh this with reasonableness, the controller must look at any duty of confidentiality owed to the other individual, and the steps taken by data controller to seek consent of other individual among other factors.

The Act also provides for the right to rectification, erasure, blocking and destruction of personal data. In cases where the subject data complains to NITA-U that the personal data is inaccurate, it may order the controller to rectify, update, block, erase or destroy the data. With this comes the obligation to inform third parties to whom the data has been previously disclosed of the rectification, blocking, updating or destruction.

There is also a strong emphasis on the destruction of data in a manner that guarantees that it cannot be reconstructed in an intelligible form.

Data subjects are also empowered with the right to prevent the processing of personal data, done by way of writing a notice to the controller or processor especially if the data is likely to cause unwarranted substantial damage or distress to the data subject. The controller has 14 days from receipt of such notice to inform the subject in writing of compliance, intent to comply or the reasons for non-compliance. The Act also provides the right to prevent processing of personal data for direct marketing[56]

A data subject may also notify a data controller in writing requiring them to ensure that any decision taken by or on behalf of the controller which significantly affects the data subject is not based solely on the processing by automatic means of personal data in respect of that data subject. Response to this must be within 21 days of receipt and must indicate the steps taken to comply.

The Government of Uganda passed various statutory instruments that gave legal basis for contact tracing. These included the Public Health (Control of COVID-19) Rules, 2020 under the Public Health Act,[57] which gave powers to a medical officer or a health inspector to enter any premises in order to search for any cases of COVID-19 or inquire whether there is or has been on the premises, any cases of COVID-19.[58] Additionally, Rule 5 of the rules empowers the medical officer of heath to order the quarantine or isolation of all contacts of the suspected COVID-19 patients. The other regulation was the Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, 2020 that allows a medical officer of health to examine for COVID–19, any person arriving in Uganda and, for this purpose, to board any vehicle, aircraft or vessel arriving in Uganda and examine any person on board the vehicle, aircraft or vessel.[59]

Unfortunately, several measures adopted by Government and online practices by private persons did not meet the minimum threshold of principles of data protection principles. In some instances, during the COVID-19 pandemic data collection there were no guarantees to protect patients' data as there was no clear data protection plan in place. People's COVID-19 status were open for reveal and shaming because telephone numbers, National Identification Numbers were given for COVID relief.

Further, for the travellers who returned to the country just before the international space was closed, all passengers were required to fill a physical form with details of where they would stay, their telephone contact and that of next of kin. Travellers were also required to fill a form indicating where they were coming from, if at all they had come into contact with a person who had COVID-19. They had to indicate if they had symptoms of COVID-19 like flu, cough, and fever. They were also asked to provide their phone numbers and emails.

4.2. Right to Privacy and Confidentiality on the Internet

Data Privacy is focused on how data should be collected, stored, managed, and shared with any third parties, as well as compliance with the applicable privacy laws.

Under the disease surveillance mechanisms deployed as part of COVID-19 response measures empowered authorities to conduct searches and require mandatory disclosure of personal data. Contact tracing was one of the response mechanisms. Contact tracing is the identification, listing and follow-up of persons who have come into contact with cases.[60] It has s three main elements that include contact identification, contact listing and contact follow-up. [61]

Privacy is a fundamental human right guaranteed by international human rights instruments including the Universal Declaration of Human Rights in its Article 12 and the International Covenant on

[56] *Ibidem*, Section 26.

[57] The Public Health Act Cap. 281.

[58] Rule 6(1) of the Public Health (Control of Covid-19) Rules of 2020.

[59] Rule 2 of The Public Health (Prevention of COVID - 19) (Requirements and Conditions of Entry into Uganda) Order, 2020.

[60] World Health Organisation, "Contract tracing in the context of Covid 19" (WHO, February 2021) <https://bit.ly/3y7dstg> accessed on 22 June 2022.

[61] *Ibidem*.

Civil and Political Rights, in its Article 17. Article 27 of the Constitution of Uganda provides for the right to privacy including of the person, home, property, correspondence and communication.[62]

Contact tracing mechanism resulted in unlawful disclosure of citizen's data.[63] During the early stages of the pandemic the health authorities struggled to locate several individuals who travelled on the same flights with persons who tested positive for the coronavirus, there was therefore an attempt to use information from the immigration department and telecom companies to locate them.[64] Further, there were reports of some Ugandans using online platforms, mainly Facebook and WhatsApp being used to share personal contact details of the suspected returnees, with threats of further exposure should they fail to report for testing, [65] this breached the right to personal privacy of these individuals as provided for in the Data Protection and Privacy Act, 2019.

4.3 Right to Freedom of Expression

This right includes the freedom of the press and media which provides that of communication and expression through various media, including printed and electronic media, especially published materials, should be considered a right to be exercised freely.

"Freedom of expression underpins all other human rights and freedoms.[66] Individuals must be free to exercise their rights to think, form an opinion, freely seek, receive and impart ideas and opinions, in order for them to effectively realise all their other human rights that are prerequisite for their human dignity.[67]

Article 29 (1) (a) of Constitution of Uganda provides that every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.[68] The right to freedom of expression in Uganda has three facets that include the right to seek, receive and impart information and these three go hand in hand and must all be realized for concurrently.[69] This freedom forms the core of the process of a democratic process.[70] The Government of Uganda has enacted a number of laws that have limited the enjoyment of the right to freedom of expression in Uganda and these include the Press and Journalist Act, the Uganda Communications Act, 2013, the Computer Misuse Act, Anti-Pornography Act and the Penal Code Act, among others.[71] The limitations on the enjoyment of this right as stated by the Constitutional Court is framed around the fact that Under Article 43 of the Constitution one cannot exercise his or her freedom of expression, if through the exercise of such a right it would result into the abuse of others' rights.[72]

The right to freedom of expression exists as much online as it does offline.[73] Article 19 of the UDHR states that "everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Further, Article 19(2) of the ICCPR is explicit that the right to freedom of expression applies "regardless of frontiers",[74] and the United Nations Human Rights Council (UNHRC) General Comment No. 34 further clarifies that this includes internet-based modes of communication.[75]

In Uganda the COVID 19 pandemic presented an avenue for the violation of this right as a lot of people and transactions flooded the internet and media, the Uganda communications commission issued public advisory notices,[76] in order to mini-

[62] The Constitution of the Republic of Uganda, 1995.

[63] Collaboration on International ICT Policy for East and Southern Africa (CIPESA), 'the impact of digital taxation on digital rights in Africa workshop', July 8 2021, <https://cipesa.org/?wpfb_dl=450> accessed on 21 March 2022.

[64] *Ibidem*.

[65] *Ibidem*.

[66] Centre for Public Interest Law, "Your Right to Freedom of Expression" (CEPIL, 2020) <https://bit.ly/3HI4oOx> Accessed on 22 June 2022.

[67] *Ibidem*.

[68] Chapter 4 Uganda, 'What You Need to Know about Your Expression And' 250 <https://chapterfouruganda.org/sites/default/files/downloads/What-You-Need-To-Know-About-Your-Expression-and-Assembly-Freedoms_0.pdf>. accessed on the 5th March 2022

[69] Ibidem.

[70] Charles Onyango Obbo V Attorney General Constitutional Appeal No. 2 of 2002/

[71] Chapter 4 Uganda (n 17).

[72] Charles Onyango Obbo V Attorney General Constitutional Appeal No. 2 of 2002.

[73] UNESCO, "Freedom of expression and the internet" (UNESCO, 2012). <https://unesdoc.unesco.org/ark:/48223/pf0000246670> accessed on 11 May 2022.

[74] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, <United Nations, Treaty Series, vol. 999, p. 171, <https://www.refworld.org/docid/3ae6b3aa0.html> accessed 11 May 2022

[75] Human Rights Committee, "General comment No. 34 Article 19: Freedoms of opinion and expression" (Human Rights Committee, 29 July 2011) <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accesed on 11 May 2022.

[76] Uganda communications commission, "public advisory notice on circulation of fake news."22 March 2020.

mise the risk of misinformation and disinformation related to COVID 19, which it believed had the potential to distort facts and cause panic among members of the public, suspicion and social unrest.[77] As a result many people were sanctioned or arrested for offending the Uganda Communications Act of 2013 and Computer Misuse Act 2011. With such public advisory statements, the government severely limited the enjoyment of freedom of expression and conscience and thought guaranteed under the Constitution of Uganda.[78]

Section 171 of the Penal Code Act which prohibits wilful unlawful or negligent acts that could spread the infection of any disease dangerous to life has been used to arrest, detain and charge several individuals over allegations of spreading false news. It is important to note that this provision was declared unconstitutional in the case of Charles Onyango Obbo and another vs Attorney General,[79] but the Government of Uganda continued to apply it in disregard of the Court ruling hence violating the freedom of expression of Ugandans.

Under section 5 of the Uganda Communications Act which empowers the Uganda Communications Commission to among others, regulate standards within the communications sector was used to curtail the making of statements the Government feared were reckless, accordingly in March 2020, Uganda Communications Commission issued a public advisory against publication, distribution and forwarding of false, unverified, and/or misleading stories and reports, with threats of possible apprehension and prosecution of perpetrators.[80] Citizens who critiqued the Government's COVID-19 response or shared concerns and grievances through social media faced increased arrests and intimidation. Journalists, human rights defenders and bloggers were especially targeted for sharing "unverified information" about the virus.[81] For example the arrest of Adam Obec on April 13, 2020 for distributing and circulating information on social media that Uganda had recorded its first COVID-19 death in Koboko district causing fear and panic and undermined the government's effort to fight the virus.[82] Additionally, Kakwenza Rukirabashaija was allegedly arrested on 21 April 2020 for criticizing the president's restrictions against the COVID-19[83] and thereby violating section 171[84] of the Penal Code Act, who was later released on bail. Samson Kasumba, a TV news anchor at NBS TV was arrested on April 20, 2020, with no formal charges and later released.[85]Furthermore, on 28 March 2020, the police of Uganda arrested a city pastor Yiga (deceased) who through his Television station ABS told the public that there was no Coronavirus in Africa basing on the fact that no single death had been declared in a number of countries, yet in the western nations that were battling the disease had lost lives in hundreds.[86] Upon his arrest, police released a public statement that Pastor Yiga's utterance undermines government efforts in fighting the pandemic and exposes the public to dangers of laxity in observing the guidelines issued by the Ministry of Health on its control and prevention.[87]

4.4 Right to Internet Access and Affordability

Under Article 41 of the Constitution every citizen to access information in the possession of the state or any other organ of the state except where the release of the information is likely to interfere with the security of the state or the right to the privacy of any other person.[88]Uganda was among the first African countries to enact a right to information

<https://twitter.com/UCC_Official/status/1241725721367756800?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1241725721367756800%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fglobalvoices.org%2F2021%2F01%2F12%2Fin-uganda-covid-19-rules-are-perfect-instrument-for-criminalizing-dissent%2F> accessed 19 March 2022.

[77] Uganda communications commission, "fighting covid 19 out of Uganda- UCC is with you," 21, April 2020. <https://www.ucc.co.ug/fighting-covid-19-out-of-uganda-ucc-is-with-you/> accessed on 19 March 2022.

[78] Article 29 of the constitution of the republic of Uganda, 1995 as amended.

[79] *Charles Onyango Obbo and Anor v AG, UGCC* 4 (21 JULY 2000) <https://ulii.org/ug/judgment/constitutional-court-uganda/2000/4> accessed on 7 June 2021.

[80] Collaboration for ICT Policy in East and Southern Africa, " Digital Rights in Uganda" (CIPESA 40TH Policy Review, 2021) < https://cipesa.org/?wpfb_dl=451> accessed on 7 June 2021

[81] Sandra Aceng, "In Uganda, COVID-19 rules are 'perfect instrument for criminalizing dissent" 12 January 2021 <https://globalvoices.org/2021/01/12/in-uganda-covid-19-rules-are-perfect-instrument-for-criminalizing-dissent/> accessed on 19 March 2022.

[82] *Ibidem*.

[83] *Ibidem*.

[84] *Ibidem*.

[85] Sandra Aceng, "In Uganda, COVID-19 rules are 'perfect instrument for criminalizing dissent" 12 January 2021 <https://globalvoices.org/2021/01/12/in-uganda-covid-19-rules-are-perfect-instrument-for-criminalizing-dissent/> accessed on 19 March 2022

[86] Editorial, 'City pastor arrested for misleading COVID-19 messages' The independent (Kampala 28 March 2020) <https://www.independent.co.ug/city-pastor-arrested-for-misleading-covid-19-messages/> accessed on 20 March 2022.

[87] *Ibidem*.

[88] The Constitution of the Republic of Uganda, 1995.

law, the Access to Information Act (ATIA), 2005 and later the Access to Information Regulations, 2011. The Act was enacted to promote the right to access information, promote an efficient, effective, transparent and accountable Government and to enable the public to effectively access and participate in decisions that affect them as citizens of the country. Section 3 (b),[89]states have to give effect Article 41of the Constitution by providing the right to access to information held by organs of the State, other than exempt records and information,[90] more so Section 5 (1)provides every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.[91]

In April 2021 as Uganda was in the middle of a second wave of COVID-19 the government instituting a 42-day lockdown that prohibited all public gatherings, inter-district travel, and public transport,[92]the government instituted a new 12 per cent tax on internet data as a part of a new tax package passed under the Excise Duty (Amendment) Act 2021 which took effect on July 1, 2021. The Act repealed the controversial excise duty that was imposed on over the top services (OTT tax) which was first introduced in 2018 requiring the internet user to pay a daily service fee of 200 Uganda shillings [93] which was used by President Yoweri Museveni as a way to curb "widespread rumour mongering" on social media and to raise revenue.[94]According to UCC data, 8 million Ugandans paid the OTT tax in July 2018, the first month when it was imposed, and 6.8 million paid the tax in September 2018, likely reflecting a combination of a decline in social media use and an increase in the use of VPNs to evade the tax.[95]

The increase in data prices denied access to and affordability of digital technologies by a large majority and thus denied a large population access to critical COVID-19 related information that was being shared through social media platforms.

4.5 The Right to Full Participation in Social, Cultural and Political Life

As a measure to control the spread of COVID 19 public gatherings of any kind were suspended because they were deemed hotspots for the spread of COVID19.[96] Under the Public Health (Control of COVID-19) (No. 2) Rules, 2020 under rule 5 this led to the closure of various places and units such as all shops and stores where non-food items are sold, salons, gymnasiums and massage parlours, hotels and lodging houses. This measure it is believed would have prevented people from gathering in such places and thus would prevent the spread of COVID 19. Internet freedom in Uganda also declined significantly during the coverage period, as the government imposed more digital restrictions during the contested January 2021 general elections.[97]On 12th January, 2021, the Uganda Communications Commission ordered all Internet Service Providers (ISPs) within Uganda to block access to internet-based social media platforms and online messaging applications including Facebook, Twitter, Whatsapp, Instagram, and others, in addition to the online mobile application stores, Google Play Store and Apple Store.[98]Additionally, on 13th January, 2021 the day before Uganda's recent presidential and parliamentary elections of 14th January, 2021 - the Government of the Republic of Uganda further directed all ISPs in Uganda to block all access to the internet, thereby inducing a total internet shutdown that lasted five days, from the 13th of January, 2021 to the 18th of January, 2021.[99]

4.6 Unenforced COVID-19 Data Collection Regulations

During the COVID-19, the relevant law applicable was the Data Protection and Privacy Act, 2019 Act and the implementing regulations of only come in-

[89] The Access to Information Act 2005.

[90] The Access to Information Act, 2005.

[91] *Ibidem*.

[92] Daniel Mwesigwa, promoting effective and inclusive ICT policies in Africa 'Uganda Abandons Social Media Tax but Slaps New Levy on Internet Data' July 1 2021 <https://cipesa.org/2021/07/uganda-abandons-social-media-tax-but-slaps-new-levy-on-internet-data/ >accessed on 21 March 2022.

[93] *Ibidem*.

[94] Stephen Kafeero, 'To control speech, Uganda is taxing internet usage by 30%' July 3 2021.https://qz.com/africa/2028653/uganda-replaces-ott-social-media-tax-with-tax-on-internet-bundles/ accessed on March 21, 2022.

[95] UCC, @UCC_Official, Report on revenues and subscribers, January 25. 2019,https://twitter.com/ucc_official/status/1088826918957404160 accessed on 21 March 21, 2022

[96] Ibidem.

[97] Freedom on the net 2021 https://freedomhouse.org/country/uganda/freedom-net/2021 accessed on 20 March 2022.

[98] Unwanted witnesses, 'Uganda 2021 general elections: The internet shutdown and its ripple effects' 25 January 2021.< https://www.apc.org/en/news/uganda-2021-general-elections-internet-shutdown-and-its-ripple-effects> accessed on 20 March 2022.

[99] Ibidem.

to force in mid 2021. These Regulations are intended to implement the Act and provide for a number of forms to be used to take certain types of actions including the manner in which an application to object to the collection/processing of personal information can be made[100] application for registration/renewal of registration[101]the form of undertaking not to process or store personal data outside Uganda[102] the template for a certificate of registration[103] the format for an application for a certified copy of the extract/entry in the Data Protection Register[104] ('the Register') complaint concerning processing personal data without appropriate security measures.[105] The manner in which a notification of breach can be made[106]request to confirm possession of personal data (Section 35(1) of the Regulations), complaint concerning inaccurate personal data in the possession of a data controller [107]the decision on a complaint in respect of inaccurate personal data in the possession of the data controller[108] complaint concerning infringement or violation of the Act[109] and the form of an appeal to the Permanent Secretary, Ministry of Information and Communications Technology and the Minister's decision.[110]

The Regulations provide for data protection impact assessment. Thus, where the collection or processing of personal data poses a high risk to the rights and freedoms of natural persons, the data collector, processor or controller shall prior to the processing and/or collection carry out an assessment of the impact of the envisaged collection or processing operations on the protection of personal data.[111]

The Regulations require that every Data Protection Impact Assessment shall conclude a systematic description of the envisaged processing and the purposes of the processing, an assessment of the risks to personal data and the measures to address the risks and any other matter the office may require.[112]

The National Information Technology Authority (NITA-U) developed a privacy policy for the COVID-19 tracing app developed by the Ministry of Health and NITA-U26, but accessing the policy on NITA-U's website requires prior authorisation. The requirement for "prior authorisation" to access a document held by a public body, which has not been classified as an "exempt record", runs counter to the proactive disclosure of information practices under international law and Uganda's Access to Information Act, 2005. Additionally, "this authorisation requirement suggests that NITA-U failed to fully respect the public's right to know.

Besides concerns about the public availability of the policy and the need for prior authorisation, a separate issue is whether these guidelines were implemented. To-date, the Ministry of Health, NITA-U and other entities that run contact tracing applications have not provided any public information on what and how much data was collected, where it is stored, how it was utilised, and if the apps have since been discontinued. Since NITA-U is the statutory authority which, under section 3(2) of the Data Protection and Privacy Act, is responsible for collection, control and processing of personal data and the custodian of the national data protection register, it was imperative that it issued guidelines to govern all COVID-19 related data collection and use, and not just for the app it helped to found. Moreover, NITA-U should have monitored how the various apps and government departments and private companies such as telecom service providers were collecting, storing and using data, and whether their practices were in conformity with the country's laws and international best practice.

5. Conclusion

The fight against COVID-19 has been characterised by an assortment of measures that have resulted in the violation of digital rights in Uganda. The pandemic-related emergency measures, such as the collection of personal information of individuals, contact tracing and surveillance activity, undermined individuals' data rights, with some amounting to involuntary surrender of personal data yet measures to ensure the security of data collection, storage and processing were not clear or guaranteed. The data protection mishaps around COVID-19 bode badly for broader government-led digitalisation programmes, particularly those that entail collecting citizens' data.

Emergency situations including epidemics like COVID-19 have been found to create atmospheres that enable the unauthorised collection and use of personal data. Hence, it is imperative that relevant stakeholders including governments, civil society, academia, and the private sector take actions towards guaranteeing data protection and privacy of

[100] Regulation 16(1).
[101] Regulation 16(4) of the Regulations.
[102] Ibidem.
[103] Regulation 19(2) of the Regulations.
[104] Section 28(3) of the Regulations.
[105] Section 32(3) of the Regulations.
[106] Section 33(2) of the Regulations.
[107] (Section 39(3) of the Regulations.
[108] Section 39(5) of the Regulations.
[109] Section 41(2) of the Regulations.
[110] Section 46(1) & (7) of the Regulations respectively.
[111] Section 12(1) of the Regulations.
[112] Section 12(2) of the Regulations.

data subjects. The following actions can be undertaken. The first one is to combat COVID-19's spread and provide for expiry of periods within which to process personal data collected by these systems. Second, the government institutions with data should issue transparency reports detailing the COVID-19-related surveillance activity, such as the tools and technologies used, state agencies and private entities involved, number of persons whose data werecollected, types of data collected, entities that accessed the data, and safeguards instituted to guard against misuse of the data and the surveillance apparatus. Third, the Government should advocate for dismantling of the surveillance apparatus constituted to combat COVID-19's spread and provide for expiry of rights to process personal data collected by these systems.. Fourth, steps should be taken to desist from mandating untrained and unregulated actors, such as motor bike riders (boda boda) riders and salon operators to collect personal data. Sixth, there is need to develop capacity among public institutions on engineering good data governance practices and respect for digital rights. Finally, the Government should resist the urge to share identifiable personal data in their possession with government agencies without following provisions of the law, including the notification of data subjects.

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SECTION I – ESSAYS

COVID-19 and Digitalization: The Italian Experience

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Abstract. The article aims to describe the lessons that can be drawn from the Italian experience, focusing on three examples. The article explores the controversial digital tool that was introduced during the pandemic, the tracking app, to examine its weaknesses and reasons for failure. It also addresses the topic of immediate measures connected with the digital transformation adopted during the pandemic, to understand if and to what extent the pandemic was an opportunity to take measures for which the country was late or which were urgent. Finally, it assesses the structural reforms relating to the digital sector brought about by COVID-19, to understand if they are adequate to bridge the current gap that exists between Italy and other EU nations.

***Keywords**: COVID-19, digitalization, Italy, pandemic, lessons*

1. Introduction

To describe the lessons that can be drawn from the Italian experience, this article will focus on three examples.

First, the article will focus on the controversial digital tool that was introduced during the pandemic, the tracking app, to examine its weaknesses and reasons for failure.

Second, the article will address the topic of immediate measures connected with the digital transformation adopted during the pandemic, to understand if and to what extent the pandemic was an opportunity to take measures for which the country was late or which were urgent. Third, the article will assess the structural reforms relating to the digital sector brought about by Covid-19, to understand if they are adequate to bridge the current gap that exists between Italy and other EU nations.

The analysis will focus on interventions on public administration, health, and education: these are the sectors in which public intervention has been most evident and relevant. The research will also focus on Italy, so the interventions promoted by the European Union uniformly for all countries will not be discussed, except in relation to their application in the Italian legal system.

2. The Tracking Tools

The Immuni app, introduced on 1 June 2020 to allow easy tracking of infections[1], had been downloaded by 10.5 million users at the beginning of June 2021, with a percentage of 23%[2]. In other EU countries, contact tracing apps have not been particularly successful[3].

The greatest concern is focused on privacy, since sensitive data, in particular relating to the state of health of people, is involved in the tracking process.[4] These are privacy concerns that the Ital-

[1] Article 6 of the decree law of 7 October 2020, no. 125 (converted with amendments by Law no. 159 of 27 November 2020), which establishes the "Covid-19 alert system", a "single national platform for managing the alert system for subjects who, for this purpose, have installed, on a voluntary basis, a specific app".

[2] The data can be found on the website Immuni <www.immuni.italia.it/dashboard.html>, accessed 2 October 2022.

[3] With reference to app failures, from an ethical perspective, see Lucie White, Philippe van Basshuysen, 'Without a trace: Why did corona apps fail?', Journal of Medical Ethics (2021) 1(1) https://jme.bmj.com/content/medethics/47/12/e83.full.pdf, accessed 10 February 2022. From an economic perspective, see Margherita Russo, Claudia, Cardinale Ciccotti, et al., 'The systemic dimension of success (or failure?) in the use of data and AI during the COVID-19 pandemic. A cross-country comparison on contact tracing apps' (2021) 1(1) Demb Working Paper Series https://iris.unimore.it/retrieve/handle/11380/1250047/358882/0193.pdf accessed 10 February 2022. The Openpolis study reports that in the EU only 5% of cases have been traced, in Italy only 1% < https://www.openpolis.it/lo-scarso-successo-delle-app-di-tracciamento-durante-la-pandemia/>.

[4] Carlo Colapietro, Antonio Iannuzzi, 'App di contact tracing e trattamento dei dati con algoritmi: la falsa alternativa fra tutela del diritto alla salute e protezione dei dati personali' (2020), Diritti fondamentali, 772 *<http://dirittifondamentali.it/wp-content/uploads/2020/06/Colapietro-Iannuzzi-App-di-contact-tracing-e-trattamento-dei-dati-con-algoritmi.pdf>* accessed 10 February 2022.

ian Parliament has, however, as in other countries[5], addressed[6].

The reasons behind the failure, however, have also been identified in further elements that are peculiar to the Italian legal system. It was observed that the public health system did not evince a belief in the potential of tracing, that there was an inadequate public communication, which did not bother to demonstrate the reliability of the results, the delays in the production of the impact assessments (and only at the request of the Authority), and that the app was published late (at the end of June 2020, when it was hoped that the pandemic was over)[7].

Another form of problem concerned the relationship between institutions, as there was a conflict between the Ministry of Health and the Regions (Regioni) regarding the management of health, with two effects: the loading of the codes, necessary for the correct functioning of the 'app, and a climate of mistrust that was created towards the "central government" app, since some Regions were organizing their own tracking systems independently[8].

A third type of problem concerned the digital divide, since the subjects most exposed to the risk of contagion, the elderly and the poor, did not have or did not know how to use smartphones and apps[9].

It should be noted that a significant growth in the number of downloads has been recorded since July 2021, which led to more than 20 million downloads at the beginning of February 2022: in six months the app downloads have doubled[10]. The increase, however, is due to the new "passport" function introduced in the app[11]. In fact, with the entry into force of the Green Pass tool[12] as a mandatory document to access sporting and entertainment events, cafes and restaurants, long-distance means of transport, and also to be able to work[13], the Immuni app has been adopted as a tool to show the Green Pass in a simple way. It can also be viewed on another app, Io[14], which requires the SPID and is therefore more difficult to access[15].

The lessons that can be derived from how the institutions behaved highlight clear and convinced policy choices, adequate public communication, collaboration between institutional levels, prompt action and finally, if not to resolve, at least to address the digital divide[16], would have been necessary. These are actions that cannot be improvised, and that, if they are not the result of constant practices, fail to unfold their effects at the right time. Another lesson is that the use of nudging, incentives, benefits, and rewards should be studied more thoroughly, because it could determine the success of some policies[17].

[5] Hannah van Kolfschooten, Anniek de Ruijter, 'COVID-19 and privacy in the European Union: A legal perspective on contact tracing ' (2020) Contemporary Security Policy, 41, 3, 478.

[6] See art. 6 of the decree law 30 April 2020, no. 28 (converted with amendments by Law no. 70 of 25 June 2020), and the 'Provvedimento di autorizzazione al trattamento dei dati personali effettuato attraverso il Sistema di allerta Covid-19 - App Immuni' (Provision of authorization for the processing of personal data carried out through the Covid-19 alert system - App Immuni) of 1 June 2020 of the Italian Data Protection Authority (Garante per la protezione dei dati personali).

[7] The causes are discussed by Dianora Poletti, 'Contact Tracing e App Immuni: Atto Secondo' (2021), *Persona e mercato*, <http://www.personaemercato.it/wp-content/uploads/2021/03/Poletti2.pdf> 92, 96 accessed 10 February 2022.

[8] *Ibidem*, and see, on a more general point, Andrea Romano, 'I rapporti tra ordinanze sanitarie regionali e atti statali normativi e regolamentari al tempo del Covid-19' (2020) 1 (1) Federalismi.it <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=43499> accessed 10 February 2022.

[9] Ibidem.

[10] Also this data can be found on the website Immuni <www.immuni.italia.it/dashboard.html>, accessed 3 October 2022.

[11] The function is indicated on the home page: <https://www.immuni.italia.it/>.

[12] Pursuant to art. 9 of the decree law of 22 April 2021, no. 52 (converted with amendments by Law no. 87 of 17 June 2021).

[13] Pursuant to art. 1 of the decree law of 21 September 2021, no. 127 (converted with amendments by Law no. 165 of 19 November 2021).

[14] Seethe website Io <https://io.italia.it/certificato-verde-green-pass-covid/>, accessed 3 October 2022. IO is a free Italian mobile app, created with the aim of making all public administration services accessible to citizens on a single platform.

[15] The SPID is the Public Digital Identity System <spid.gov.it>, a digital identity consisting of a pair of strictly personal credentials (username and password), which allows access to the online services of the Public Administration.

[16] See Paolo Zuddas, 'Covid-19 e digital divide: tecnologie digitali e diritti sociali alla prova dell'emergenza sanitaria' (2020), Osservatorio AIC, 284, 299 <https://www.osservatorioaic.it/images/rivista/pdf/2020_3_17_Zuddas.pdf> accessed 10 February 2022.

[17] See Fulvio Costantino, 'Paternalismo e Immuni' (2021) *Apertacontrada* < https://www.apertacontrada.it/2020/05/29/paternalismo-e-immuni/> accessed 10 February 2022.

3. Italy's Immediate Response to the Pandemic

The 2020 Digital Economy and Society Index (DESI) of the European Commission[18] placed Italy in 17th place out of 28 countries for internet connectivity, in the last place for digital skills of people (42% have basic digital skills compared to 58% of the EU average and 22% of higher digital skills, compared to 33% in the EU), and in 26th place in internet use[19].

In 2019, only 10% of Italian companies sold their products online and only one in 10 museums had digitally catalogued their heritage[20], a particularly low percentage for a country with a tourist economy such as Italy. In January 2020, before the pandemic, public workers in smart working were 1.7%[21]. The pandemic has imposed an immediate transformation both in terms of the way in which work is carried out and in the provision of services to citizens, which will be examined below.

3.1 Public Administration

As for the public administration, smart working was massively imposed from the beginning of the pandemic[22]. By May 2020, public employees in smart working were over 87% for central administrations[23]. On February 28, 2021, the obligation for administrations to use only SPID (Public digital identity system) and CIE (electronic identity card)[24] to identify citizens[25] and to make the main

[18] Available at the website of the Digital Strategy <https://digital-strategy.ec.europa.eu/en/policies/desi> accessed 3 October 2022.

[19] On these issues, see as already in-depth analyzes had been developed by Pierluigi Ciocca, Filippo Satta, 'La dematerializzazione dei servizi della P.A.: un'introduzione economica e gli aspetti giuridici del problema' (2008) Dir Amm 283.

[20] See the data in Duccio Vitali, Covid-19 e sfida digitalizzazione, ultima chiamata per l'Italia (Sole 24 ore 29 July 2020) <https://www.ilsole24ore.com/art/covid-19-e-sfida-digitalizzazione-ultima-chiamata-l-italia-ADauBwg> accessed 12 February 2022.

[21] Smart working implies that the work performance is performed partly inside company premises and partly outside, without establishing a fixed location; the only time constraint is the maximum duration of daily and weekly working hours, deriving from the law and collective bargaining. 'Monitoraggio sull'attuazione del lavoro agile nelle pubbliche amministrazioni Novembre 2020' (Report on the implementation of smart working in public administrations November 2020) <https://www.funzionepubblica.gov.it/sites/funzionepubblica.gov.it/files/documenti/SW_COVID/Monitoraggio/notasw.pdf>, 7, accessed 12 February 2022.

[22] Articles 18-24 of the Law 22 May 2017 no. 81 regulate smart working with criteria also applicable in the public sector. With the Directive no. 3 of 2017 on smart working, signed by the President of the Council of Ministers and the Minister for Simplification and Public Administration, smart working is introduced in public administrations, in implementation of paragraphs 1 and 2 of article 14 of the Law of 7 August 2015, no. 124, which delegated the government to the reorganization of public administrations. Starting from February 2020, following the spread of the Covid-19 pandemic, some measures have been issued to simplify and spread Smart Working in the administration. On the basis of the law decree number 6 of 23 February 2020, converted with amendments by Law 5 March 2020, no. 13, art. 3 paragraph 1 of the dPCM (Prime Ministerial Decree) February 23, 2020 established that smart working "is automatically applicable to any employment relationship in areas considered at risk in national or local emergency situations in compliance with the principles dictated by the aforementioned provisions and even in the absence of agreements individuals provided therein ". The decree-law 2 March 2020, no. 9, the Directive no. 1 of 2020 "COVID-2019 epidemiological emergency" of the Minister of Public Administration, Circular no. 1 of 2020 of the Minister of Public Administration, Directive no. 2 of 2020 of the Minister of Public Administration, the "Cura Italia" (Save Italy) decree law, 18 of March 17, 2020, converted, with amendments, by law April 24, 2020, no. 27, of which see in particular articles 39, 74, 75, 87 "smart working is the ordinary way of carrying out work in public administrations" until the end of the state of emergency, Circular no. 2/2020 of the Minister of Public Administration.

[23] See Report, cit., 7. See also the Relaunch decree (decree law 19 May 2020, no. 34, converted into law 17 July 2020, no. 77), which then provided for the extension for 50% of public administration employees of smart working until 31 December, the dPCM of 13 and 18 October, the decree of the Minister for Public Administration of 19 October on smart working, with the regime extended on 23 December 2020. The decree law 31 December 2020, no. 183 (so-called "Milleproroghe" "Thousand-extension"), converted with amendments by law February 26, 2021, no. 21 set 30 April 2021 as the deadline for using the simplified smart working procedure for public administration workers. The so called Decreto Riaperture - Reopening Decree (law decree of 22 April 2021 no.52, converted with amendments by Law 17 June 2021, no.87), which entered into force on 23 April 2021, extending the state of emergency, also extended the adoption of the procedure simplified until July 31st. With the Decreto Proroghe – Extensione Decree (law decree 30 April 2021, no.56), approved on 29 April by the Council of Ministers, it was established that until the definition of the smart working discipline in the collective agreements of the public employment, and in any case no later than 31 December 2021, public administrations can continue to use the simplified procedure for smart working, without the constraint of 50% of the staff. With the decree of the President of the Council of Ministers of 23 September 2021 it is established that from 15 October 2021 the ordinary way of carrying out work in the public administration will return to being in presence.

[24] <https://www.cartaidentita.interno.gov.it/>

[25] Art. 24 of the decree law 16 July 2020, no. 76, converted with amendments by law 11 September 2020, no. 120.

services available through the app IO, which was released in April, came into force in Italy[26].

3.2 Healthcare

Regarding the digitization of the health sector, in Italy there have been many complications of vaccination booking software, notably as in Lombardy[27]. There was difficulty in the relationship between doctors and patients on both sides. The starting point was that 60% of specialist doctors and general practitioners (GPs) had sufficient basic digital skills (Digital Literacy), related to the use of digital tools in daily life, but only 4% a satisfactory level in all areas of professional digital competences (eHealth Competences)[28]. General practitioners in most cases used the telephone in dealing with patients, while more limited use was made of the so-called multi-channel methods (i.e., email, SMS, and WhatsApp messages) [29]. More rarely, video calls were used with patients (with the use of platforms such as Zoom, Skype) that need constant contact, mainly with diabetics[30]. The Televisit system was little used, most likely due to the requirement of patient training and collaboration[31]. The response therefore took place with commonly used and non-specialist tools, failing to resort to the ordinary and widespread use of telemedicine. Also, in this case, the State and the Regions intervened subsequently to promote and regulate remote instruments[32]: the pandemic was thus an opportunity to regulate, albeit with a guilty delay, a phenomenon that still needed to be regulated.

On the other hand, the crisis lowered legal and administrative resistance. A simplified regime for processing health data, of a temporary nature, was allowed for the duration of the state of emergency only [33]. Consequently, the right to process personal data was attributed to the bodies responsible for facing the emergency, including the Protezione Civile (Civil Protection), the offices of the Ministry of Health and the Istituto Superiore di Sanità (Italian National Institute of Health), the public and private structures operating within the Servizio Sanitario Nazionale (National Health Service) and the subjects appointed to monitor and guarantee the execution of extraordinary measures[34]. It is also provided that the data can be communicated to other public and private subjects (i.e., local authorities, public security authorities, and employers), as well as spread, if this is essential for the purpose of carrying out the activities related to the management of the ongoing emergency[35].

On the other hand, the Electronic Health Record (EHR) has spread. The previous concerns of EHR lay in the centralization and processing of sensitive data, in the complexity of the mutualistic articulations, and in requesting the opening of the file only

[26] <https://io.italia.it/roadmap/>.

[27] Sara Monaci, 'Lombardia, azzerati vertici Aria. Tutti i flop: dai vaccini al sistema informatico' (Sole 24 ore, 22 March 2021) <https://www.ilsole24ore.com/art/sistema-informatico-tilt-appalti-sotto-inchiesta-e-scarsa-pianificazione-ecco-perche-la-centrale-acquisti-aria-non-funziona-ADEp37RB> accessed 12 February 2022.

[28] *Osservatorio Innovazione Digitale in Sanità* of the School of Management del Politecnico di Milano. The main data can be found at the web address <https://www.osservatori.net/it/ricerche/comunicati-stampa/sanita-connessa-dopo-emergenza> accessed 12 February 2022.

[29] Ibid.

[30] Ilaria Rubbo, 'Topics: emergenza COVID – ricognizione delle esperienze di Telemedicina in Veneto e TAA. L'esperienza della provincia autonoma di Bolzano', <https://www.siditalia.it/pdf/veneto-trentino-altoadige/congresso-11-2020/Rubbo.pdf>.

[31] Ilaria Rubbo, 'Topics: emergenza COVID – ricognizione delle esperienze di Telemedicina in Veneto e TAA. L'esperienza della provincia autonoma di Bolzano', <https://www.siditalia.it/pdf/veneto-trentino-altoadige/congresso-11-2020/Rubbo.pdf>

[32] "Indicazioni per l'attivazione di servizi sanitari erogabili a distanza (televisita)". The Conferenza Stato Regioni (State Regions Conference) approved the "Indicazioni nazionali per l'erogazione di prestazioni in telemedicina" (National guidelines for the provision of telemedicine services) on December 17, 2020. In addition, regional resolutions adopted guidelines and organized services for specific pathologies (52mo Instant Report Covid-19 dell'Altems, l'Alta scuola di economia e management dei sistemi sanitari dell'Università Cattolica del Sacro Cuore) <https://d110erj175o600.cloudfront.net/wp-content/uploads/2021/05/17112432/altems- Report52.pdf>. See for all the Lazio Region: the decree of the commissario ad acta of 25 June 2020, no. U00081, implemented with DGR no. 406/2020, containing the "Piano di riorganizzazione, riqualificazione e sviluppo del Servizio Sanitario Regionale 2019-2021" (Plan for the reorganization, requalification and development of the Regional Health Service), and the Decree of the commissario ad acta of 22 July 2020, no. U00103, concerning "Attivazione servizi di telemedicina in ambito specialistico e territoriale. Aggiornamento del Catalogo Unico Regionale (CUR)" (Activation of telemedicine services in a specialist and local area. Update of the Single Regional Catalog) and the Lombardy Region, DGR no. XI-3528/2020, of 05/08/2020, containing "Indicazioni per l'attivazione di servizi sanitari erogabili a distanza (televisita)" (Guidelines for the activation of health services that can be provided remotely - remote medical examination).

[33] Art. 17-bis of law decree 18 of March 17, 2020, cit.

[34] Art. 17-bis par. 1 of law decree 18 of March 17, 2020, cit.

[35] Art. 17-bis par. 2 of law decree 18 of March 17, 2020, cit.

on a voluntary base[36]. The emergency has stimulated the adoption in Italy of specific rules, which have made the opening of the record automatic[37], and the State intervened as a substitute for some lagging Regions[38].

3.3 Education

Regarding education, the most recent OECD survey (2018), TALIS - Teachers and Learning International Survey, reported that only 35% of Italian teachers felt prepared for the use of Information and Communication Technologies (ICT) in teaching[39]. Yet, as consequence of the emergency[40], from 5 March 2020, teaching activities in presence in the educational services for children, in schools of all types and levels, in universities[41] were suspended throughout the national territory and at the same time distance learning was activated[42]. Various provisions were subsequently introduced to ensure resuming teaching activities.[43] However, starting in October 2020, in consideration of the increase in cases on the national territory, new provisions limiting the teaching activities in presence were established, then mitigated during 2021[44].

The situation, however, was problematic.[45] During the lockdown, 45.4% of students had diffi-

[36] Tiziana Frittelli, Enrico Martial, 'Sanità digitale oltre l'emergenza: le tendenze in Italia e Ue nel post covid', 18 May 2021, <https://www.agendadigitale.eu/sanita/sanita-digitale-oltre-lemergenza-le-tendenze-in-italia-e-ue-nel-post-covid/>, accessed 12 February 2022.

[37] Art. 11 of the law decree 19 May 2020, no. 34*, cit.* See Elisa Sorrentino, Anna Federica Spagnuolo, 'La sanità digitale in emergenza Covid-19. Uno sguardo al fascicolo sanitario elettronico' (2020) *Federalismi.it*, <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44367>; Giorgia Crisafi, 'Fascicolo sanitario elettronico: "profilazione" e programmazione sanitaria' (2021) *Federalismi.it*, <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44918>.

[38] Enrico Martial, 'Perché l'Italia batte Francia e Germania sul Fascicolo sanitario elettronico', Start Magazine, 10 April 2021, <https://www.startmag.it/sanita/perche-litalia-batte-francia-e-germania-sul-fascicolo-sanitario-elettronico/> accessed 13 February 2022.

[39] OECD, TALIS 2018 Results (Volume I): Teachers and School Leaders as Lifelong Learners (2019) OECD Publishing, Paris, chapter 2. The table relating to Italy is available at the internet address <https://www.oecd.org/education/talis/talis-2018-compare-your-country.htm>.

[40] Francesca Di lascio, Il sistema nazionale di istruzione di fronte all'emergenza sanitaria (2021) *Federalismi.it* <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44901>. See also Camera dei Deputati Documentazione parlamentare, 'Le misure adottate a seguito dell'emergenza Coronavirus (COVID-19) per il mondo dell'istruzione (scuola, istruzione e formazione professionale, università, Istituzioni AFAM)' <https://temi.camera.it/leg18/temi/le-misure-adottate-a-seguito-dell-emergenza-coronavirus-covid-19-per-il-mondo-dell-istruzione-scuola-istruzione-e-formazione-professionale-universit-istituzioni-afam.html> 4 October 2021, accessed 13 February 2022.

[41] Art. 1, paragraph 2, lett. d) and f) of the decree law 23 February 2020 no. 6, converted by law 5 March 2020 no. 13.

[42] Art. 1, paragraph 1, lett. g), h), i) of the law decree 23 February 2020 no. 6, cit., asked school managers to activate distance learning; the dPCM February 25, 2020 recognized the mere faculty of activating distance learning for educational institutions, the dPCM March 4, 2020 made it mandatory; the regulatory provision was confirmed by the dPCM of March 8, 2020 and by the dCPM of March 9, 2020. Art. 1 paragraph 12 letter. p) of the law decree 25 March 2020 no. 19, converted with amendments by law 22 May 2020, no. 35 extended the possibility of carrying out the educational activities of schools of all levels and levels remotely throughout the national territory. Art. 2, paragraph 3, of the law decree 8 April 2020 no. 22, converted with amendments by law 6 June 2020 no. 41, imposed on teachers to ensure distance learning.

[43] The law decree of 16 May 2020 no. 33 (converted with amendments by law no.74 of 14 July 2020) and the DPCM of 11 June 2020 allowed the meetings of the collegiate bodies in presence. The law decree no. 22/2020, cit., contained the indications for the beginning of the 2020/2021 school year. The decree law 30 July 2020, no. 83, converted with amendments by law 25 September 2020, no. 124 and the DPCM of 7 August 2020 and 7 September 2020 subsequently intervened.

[44] On this point, see the decree law 7 October 2020, no. 125, converted with amendments by law November 27, 2020, no. 159, the dPCM of November 3, 2020, art. 4 of decree law no. 1 of January 5, 2021, the content of which was transferred into law no. 6 of January 29, 2021, converting law decree no. 172 of 2020 (art.1-quater), decree law no. 2 of January 14, 2021 (converted with amendments by law no. 29 of March 12, 2021), dPCM of January 14, 2021 and March 2, 2021, law decree no. 44 of April 1, 2021, converted with amendments by law no. 76 of May 28, 2021, law decree no. 52 of April 22 2021 (converted with amendments by law no. 87 of June 17, 2021).

[45] Silvia Nicodemo, 'The school: from the past to the future, across the emergency suspension bridge (COVID-19) ' (2020) <https://www.federalismi.it/nv14/ Articolo-documento.cfm?Artid=42379> Federalismi.it, 6 notes that the digital animator and the digital team are present in the schools, but these are school teachers who have a technical coordination role to ensure the consistency of the activities carried out with the objectives set out in

culty with teaching at a distance, and 12% of children did not have access to a PC or tablet (20% in the South of Italy). Moreover, only 11% of the schools involved all children in distance learning and 99% of the schools had to provide the means to make it possible to follow the lessons from home[46]. Funding has intervened, but not in the immediacy of the emergency[47].

3.4 Lessons

Again, the lessons learned are quite intuitive. The transition to the massive use of the online mode for each activity was difficult to manage due to the absence of a prior implementation of greater (and in any case unavoidable) digitization, which would have made the situation less problematic. At the same time, simplification, as demonstrated in the ability to overcome legal and administrative obstacles, must not constitute a policy to be adopted in times of emergency, to avoid it being applied incorrectly and too hastily.

4. The Structural Changes Brought about by the Pandemic

A fundamental role for the implementation of the reforms is assumed by the National Recovery and Resilience Plan, which is part of the Next Generation EU (NGEU) program, the 750 billion euro package, set up to about half from grants, agreed by the European Union in response to the pandemic crisis.

The premise of the Plan states that the pandemic has hit the Italian economy more than other European countries[48]. In 2020, the Gross Domestic Product fell by 8.9 percent in Italy, and in the European Union by 6.2 percent[49]. Between 1999 and 2019, the GDP in Italy had grown by 7.9 percent, whereas in Germany, France and Spain, the increase had been more than 30 percent [50]. In terms of productivity, from 1999 to 2019, GDP per hour worked in Italy grew by 4.2 percent, in France and Germany by 21 percent[51].

Total factor productivity decreased by 5.8 per cent between 2001 and 2019, while it increased at the European level[52]. Among the causes of the decrease in productivity is the lack of digital transformation[53], due both to the lack of infrastructure, and to the productive fabric, characterized by a prevalence of small and medium-sized enterprises, more reluctant to innovation[54]. Connected to this is the story of public and private investments, which grew by 66 per cent from 1999 to 2019, compared with 118 per cent in the euro area[55]. From 1999 to 2019, the share of public investment decreased from 14.5 per cent to 12.7 per cent[56].

These data are also associated with evidence from a Bank of Italy study, which assessed the macroeconomic impact of structural reforms adopted in Italy between 2011 and 2017 (such as liberalization in services, incentives for innovation and the functioning of justice) and noted how thanks to them the level of GDP grew, at the end of 2019, by a value between 3 and 6 percent and the potential product between 4 and 8 percent[57].

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the plan of educational offer, without a pedagogical role or emotional support.

[46] Istat, 'Rapporto BES 2020: il Benessere Equo e Sostenibile in Italia' (10 March 2021) <https://www.istat.it/it/files//2021/03/BES_2020.pdf> 68; Censis, 'Italia sotto sforzo. Diario della transizione 2020. L'Italia e i suoi esclusi' (9 June 2020) <https://www.censis.it/sites/default/files/downloads/Diario%20della%20Transizione.pdf>.

[47] With the funding of the law decree of 17 March 2020 no. 18 cit., 432 thousand devices and teaching aids were purchased and 100 thousand connections to the web were established, with the aim of ensuring the continuity of teaching. With the funding of the law decree 19 May 2020, no. 34, cit., 331 million euros were provided to the various schools to allow students to follow teaching at a distance. The law 28 October 2020, no. 138 (so-called refreshment decree) provided for 85 million euros for schools to purchase digital tools and internet connections to be offered, on loan for use, to students.

[48] Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, 2.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Valentina Meliciani, Marco Pini, 'Digitalizzazione e produttività in Italia: Opportunità e rischi del PNRR', Policy Brief, Luiss 14/2021 <https://sep.luiss.it/sites/sep.luiss.it/files/Digitalizzazione%20e%20produttivita%CC%80%20in%20Italia.pdf> accessed 16 February 2022.

[54] See on this topic 'Country Report Italy 2020 Accompanying the document 2020 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011 {COM(2020) 150 final', Executive Summary, CSR 2 and 3, 4.3.2. Vocational education, adult learning and digital skills, 4.4.1. Productivity, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0511&from=IT>.

[55] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) https://www.governo.it/sites/governo.it/files/PNRR.pdf, 3.

[56] Ibid.

[57] Emanuela Ciapanna, Sauro Mocetti, Alessandro Notarpietro, 'Gli effetti delle riforme strutturali: evidenza per l'Italia' (2020) <https://www.bancaditalia.it/pubblicazioni/temi-discussione/2020/2020-1303/en_Tema_1303.pdf>.

In terms of digitization, the Government has adopted reforms since 2020, to gradually overcome the mere contingent response to the crisis, to aspire to the role of system reforms. The so-called Cura Italia decree has appointed experts for technological interventions[58]; the so-called Relaunch decree established a fund for technological innovation and digitization for the digitization of public administration services for citizens and businesses[59]; the so-called Simplifications decree intervened on the CAD (Digital Administration Code)[60]; a new three-year plan for IT in public administration 2020-2022 was released[61]; a political strategy for a national cloud was published[62].

The most important act, however, is the PNRR[63], which has among its main missions *digitization, innovation, competitiveness, culture and tourism*[64]. Despite the unfortunate title, as digitization is not only connected to the sectors alongside which it is located, it transversally[65] concerns both the horizontal reforms of public administration and justice[66], and the enabling mission of simplification[67]. Digitization also effects other missions included in the plan: green revolution and ecological transition[68], infrastructures for sustainable mobility[69], education and research[70], inclusion and cohesion[71] and health[72]. As regards the public administration, there is particular attention to automation and digitization (including infrastructures, migration to the cloud, interoperability between public bodies, platforms and services, and cybersecurity)[73].

On the citizen side, the aim is to provide more services, more accessible and in line with EU standards.[74] Therefore, the focus is particularly on greater dissemination of the main enabling platforms for public services (despite the deadline of 28 February 2021, the administrations that allow access via SPID to at least one online service were just under 8,000), to offer digital services for citizens (i.e., identity, digital address, notifications, payments), as well as to strengthen basic digital skills [75].

Furthermore, preparatory measures for the reforms are the development and acquisition of skills for public employees, the simplification of procedures, the reduction of the backlog of judicial practices (also thanks to investments in digitalisation), and the innovation of the regulatory system to speed up ICT procurement[76].

The PNRR also promotes the digitalisation of the production system, providing incentives for (i) investments in technology, (ii) research and development, (iii) the reform of the industrial property system, (iv) support for high-tech and synergistic sectors, (v) measures to support internationaliza-

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58 Art. 76, law decree 17 March 2020, no. 18, which provides for the introduction of technological innovation solutions through a team of experts for the development of transformation.

59 Art. 239, law decree 19 May 2020, no. 34.

60 Art. 23 and following of law decree no. 76 of 16 July 2020.

61 DPCM (Decree of the Prime Minister) 17 July 2020.

62 The decree can be consulted at <https://docs.italia.it/italia/cloud-italia/strategia-cloud-italia-docs/it/stabile/index.html> accessed 3 October 2022.

63 Published on 23 April 2021. A first comment is by Maria Alessandra Sandulli, 'Health, general enabling measures on simplification and justice in the PNRR' (2021) Federalismi.it <https://www.federalismi.it/nv14/ Articolo-documento. cfm? Artid = 45757> accessed 16 February 2022.

64 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 83.

65 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 83.

66 In the paragraph on public administration reform, digitization is mentioned several times (pages 44, 45, 47, 48, 50), as well as in that on justice reform (pages 52, 53, 54, 57).

67 On simplification, see 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, pages 64, 66, 70.

68 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, pp. 118, 122, 125, 147, 148, 150.

69 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, pp. 156, 157, 164-169.

70 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, pp. 183, 186, 196.

71 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 204, 219.

72 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 222, 223, 225, 228, 229, 231.

73 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 84.

74 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 84.

75 For digital address, pursuant to art. 1 of the legislative decree n. 82 of 7 March 2005 (CAD), means the "electronic address elected from a certified e-mail service or a qualified certified electronic delivery service, as defined by regulation (EU) of 23 July 2014 no. 910 "(so-called eIDAS Reg.).

76 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 86 and sgg.

tion and (vi) competitiveness processes for small and medium-sized enterprises, a strongly characterizing element of the Italian production system, in particular for the most innovative and strategic ones, and investments for ultra-broadband networks[77].

Regarding health (mission 6) and education (mission 4) fields, in general both the infrastructure profile and the development of skills are addressed. In the field of health, centralized processes are affirmed at the state level for digitization [78]. The PNRR insists on the Electronic Health Record, it aims to invest in telemedicine (to which 1 billion euro of resources is dedicated) and in a better capacity of delivery and monitoring of the Livelli Essenziali di Assistenza – LEA (Essential Levels of Assistance) through more effective information systems [79].

In terms of education, among the various objectives of the PNRR is the improvement of digital skills.[80] The aim is to integrate the redevelopment of buildings with technological modernization, to open innovative schools with wired classrooms and laboratories [81]. As regards high schools, the PNRR focuses on technical institutes, hoping for public-private collaboration, to make them usable both by schools and by the production system, to integrate schools and businesses and to develop continuous training methods [82].

It is difficult to make an assessment on this last point, since for the moment it is a list of interventions and that, although the first measures have been adopted[83] and published several calls for

[77] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 97 and sgg.

[78] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 223.

[79] It was observed that, while France and Germany promote the spread of technological tools, leaving a good degree of responsibility to doctors and operators, Italy has a less favorable approach to bottom-up dynamism and tends to be more rigid, following the principle of certification of individual software products, where other countries limit themselves to provide a list: Tiziana Frittelli, Enrico. Martial, 'Sanità digitale oltre l'emergenza: le tendenze in Italia e Ue nel post covid', cit.

[80] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 171.

[81] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 171.

[82] 'Piano Nazionale di Ripresa e Resilienza #nextgenerationitalia' (2021) <https://www.governo.it/sites/governo.it/files/PNRR.pdf>, p. 171.

[83] To develop digital skills, the "Fondo per la Repubblica Digitale" (Fund for the Digital Republic) was established, set up on an experimental basis for the five-year period 2022-2026 and intended exclusively to support projects aimed at training and digital inclusion, with the aim of increasing digital skills, also by improving the corresponding indicators of the DESI (art. 29 of law decree no. 152 of November 6, 2021, converted with amendments by law December 29, 2021, no. 233). With reference to the acquisition of skills, art. 1 of law decree no. 80 of 9 June 2021, converted with amendments by law 6 August 2021, no. 113, has provided, until 31 December 2026, for the recruitment and assignment of appointments to experts, in order to implement the digitization interventions in the public administration. To encourage the use of digital services, art. 39 lett. c) of the decree law 31 May 2021, no. 77 established for 2021 that online certificates are exempt from stamp duty and secretarial fees and, in any case, without charges for the applicant, resulting in economic savings; art. 38 of the same decree made the digital address mandatory for those who do not yet have one; the same article provides for the establishment of the Sistema di Gestione Deleghe – SGD (Delegation Management System) which will allow anyone to delegate access to one or more services to a holder of the digital identity. Law Decree 11 November 2021, no. 157 also introduced simplification measures relating to digital services, as it will be easier to activate the digital address; the Comuni (Municipalities) will have a single source for retrieving personal data and information and, consequently, will be able to provide integrated and more efficient services (article 27). To allow the interoperability of information systems and databases of public administrations and public service managers with businesses, art. 39 paragraph 2 of the law decree 31 May 2021, no. 77 eliminated the possibility of making agreements between administrations for access to data, in order to obtain that the consultation of databases of national interest takes place through the Piattaforma Nazionale Dati (National Data Platform), established by article 50-ter of the CAD. Then the art. 28 of law decree no. 80 of 9 June 2021 provided that the Camere di Commercio (Chambers of Commerce) make the online connection with the Platform available to companies, so as to allow them to carry out automated checks, to acquire certificates relating to their facts, status and quality, to collect and keep information about the accesses and transactions made. With regard to procurement procedures, art. 53 of the law decree no. 77/2021 cit., reformed the Banca Dati Nazionale dei Contratti pubblici dell'Autorità Nazionale Anti Corruzione (National Database of Public Contracts of Italian National Anti-Corruption Authority), which allows contracting authorities to directly verify the data concerning participation in tenders and their outcome; in addition, Decree no. 148 of 12 August 2021, issued by the Dipartimento della funzione pubblica della Presidenza del Consiglio dei ministri (Department of the public function of the Presidency of the Council of Ministers), has adopted a regulation laying down procedures for digitizing public contract procedures. With regard to the verification of the results, art. 41 of the law decree 31 May 2021, no. 77, converted with amendments by law 29 July 2021, no. 108 recognizes that Agenzia per l'Italia Digitale - AGID (Agency for Digital Italy) has supervisory powers over compliance with the provisions of the CAD and any other legislation on technological innovation and digital-

tender[84], the results will have to be measured over time.

In this sense, the latest DESI report, dated November 24, 2021, places Italy in 20th place among the 27 EU member states, in overall indicators, compared to the 25th employed in 2020[85]. Given that it intervened a few months after the publication of the PNRR, some indicators still refer to the 2019 data, making the comparison harder, because the methodology has changed since the last report.

The slowness in climbing the ranking makes it enough clear that it takes time to transform a country, especially to develop skills and build infrastructures, and that at the same time it is necessary to intervene very quickly, also because other countries are equally affected by rapid transformation processes.

However, the data on the economic situation, productivity and on the impact of the reforms on GDP lead us to believe that the shock produced by the pandemic could be a unique opportunity to reform the administration in a more incisive way, with important effects on the production structure – health, education.

isation of the public administration, including those contained in the guidelines and in the three-year plan for IT in the public administration. The AGID can proceed ex officio, or upon reporting by the Difensore Civico Digitale (digital ombudsman), to ascertain violations by public administrations, public service managers and publicly controlled companies. Violations are relevant for the purpose of measuring and assessing the individual performance of the public officials responsible. In the event of failure to comply with the request for data, documents or information, the AGID is entitled to impose administrative fines of a pecuniary nature. On the latest reform, see Camera dei Deputati, Servizio Studi - Dipartimento Bilancio, 'Dossier D.L. 152/2021 - Disposizioni urgenti per l'attuazione del PNRR e per la prevenzione delle infiltrazioni mafiose' (17 December 2022) <http://documenti.camera.it/leg18/dossier/testi/D21152a.htm?_1645041238592>; Giorgia Cavalcanti, 'Dalla riduzione del digital divide alla semplificazione dei servizi online: le nuove misure del decreto di attuazione del PNRR' (*Irpa.eu*, 15 February 2022) <https://www.irpa.eu/dalla-riduzione-del-digital-divide-alla-semplificazione-dei-servizi-online-le-nuove-misure-del-decreto-di-attuazione-del-pnrr/> Alessandro Mastromatteo, PNRR, dalla Piattaforma nazionale dati alla Repubblica digitale ecco come innovare la PA (agendadigitale.eu 7 December 2022) <https://www.agendadigitale.eu/documenti/pnrr-dalla-piattaforma-nazionale-dati-alla-repubblica-digitale-ecco-come-innovare-la-pa/>.

[84] For example, the call for the development of innovative schools <https://italiadomani.gov.it/it/news/ Formazione--al-via-i-primi-bandi-pnrr--5-2-miliardi-per- asili - s.html>, for the construction of 5 national centers dedicated to frontier research in technological fields <https://italiadomani.gov.it/it/news/ricerca-- Aperto-il-bando-per-i -5 - national-champions-.html>, for the realization of 12 Ecosystems and at least 30 research and technological innovation infrastructures <https://italiadomani.gov.it/it/news/pnrr--ministero-universita- e-research-publishes-calls-for-2-88-billion.html>, for the implementation of ultra-broadband <https://italiadomani.gov.it/it/news/pnrr-per-il-digitale- -first-call-for-fast-internet-.html>.

[85] Available at <https://ec.europa.eu/newsroom/dae/redirection/document/80494>. See on this Michela Stentella, 'DESI 2021: Italia avanti piano, il vero nodo sono ancora le competenze' (FPA Digital 360, 19 November 2021) <https://www.forumpa.it/pa-digitale/desi-2021-italia-avanti-piano-il-vero-nodo-sono-ancora-le-competenze/> accessed 16 February 2022 and Michele Benedetti, Luca Gastaldi, Francesco Olivanti Desi 2021, l'Italia va male ma c'è speranza: ecco perché (Agendadigitale.eu 13 November 2021) <https://www.agendadigitale.eu/cittadinanza-digitale/desi-2021-lita lia-va-male-ma-ce-speranza-ecco-perche/> accessed 16 February 2022. Italy achieves better results than the EU average in terms of offering digital public services for businesses and open data. In the "Integration of digital technologies" dimension, ie in the digitization of the production sector, in tenth place, there is a weakness in the use of big data and technologies based on artificial intelligence, the most innovative technologies, and in electronic commerce. The worst data are in the area of human capital (digital skills): in this field in DESI 2020 Italy was last in terms of human capital, in 2021 25th out of 27 states. Only 42% of people between 16 and 74 have at least basic digital skills, only 3.6% of employed people specialize in the technology sector. DESI looks positively to the Strategia Nazionale per le Competenze Digitali (National Strategy for Digital Skills) launched in 2020 and to its operational plan, which includes 17 projects dedicated to the public sector. In the "Connectivity" dimension, in 23rd place, the data are positive for the progress made both in terms of coverage and diffusion of the networks, but they are disappointing on the very high-capacity network and on 5G: with regard to gigabit broadband the rules still do not provide for real simplifications for operators and there is a lack of the necessary expertise: with regard to the connection, DESI mentions the "Piano Voucher" (Voucher Plan) to facilitate access to broadband connection for families and, in terms of education, the "Piano Scuole Connesse" (Connected Schools Plan) is mentioned, for the spread of broadband in schools. Italy ranks 18th in the field of "Digital public services": despite the improvement of digital public services and the acceleration in the release of SPID and in the use of the IO app, and although the percentage of internet users which also uses online public services has increased, from 30% in 2019 to 36% in 2020, the EU average is 64%. Precisely because the number of users has not increased significantly, knowledge of the available services, accessibility, must be promoted, and interoperability and skills must be addressed. With regard to health, the use of electronic health records by citizens and health professionals remains uneven on a regional basis.

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SECTION I – ESSAYS

Building Resilience on Innovation? Indian Judiciary, Digitalization, and the COVID-19 Pandemic.

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Abstract. The COVID-19 pandemic had posed hitherto unseen challenges in every aspect of governance. The need for reducing physical contact to prevent the spread of the virus had forced different institutions to swiftly find out alternative methods of functioning. The present paper presents a sketch of such attempts by the judiciary in India. While digitization of the judiciary in India had been already underway since the 90's, the threat of pandemic had presented unique challenges to judicial functioning. The resilient response of the judiciary to overcome such challenges by aggressive use of technology is the subject under study in the present paper. To do so, it first goes through the innovative initiative taken by the judiciary to use the internet to overcome the challenges of physical distancing, it then traces the history of digitization initiative in India. The paper then establishes a link between the history and the present by showing how the challenges presented by the pandemic was used as an opportunity to make access to justice more expansive with the help of technology. At the same time the paper warns of the challenges that the resilient e-judiciary will have to overcome post-pandemic.

***Keywords**: COVID-19, Digitalization, Judiciary, Access*

1. Introduction

COVID-19 had left the world in shatters since its advent. Hitherto unseen in a health crisis, the onslaught of COVID-19, the complete cluelessness about what to do with it as well as the opportunity it presented for executive consolidation of power has sparked different reactions among the governments across the world, ranging from temporary special laws to adopting constitutional emergency measures to measures which have dubious legal standing. India did not remain outside this onslaught of responses.[1]

The pandemic forced the Indian government to implement unprecedented 'lockdown' measures, which had adverse effects on the populace and especially the marginalized.[2] COVID-19 affected all institutions of the state alike. However, some institutions could not afford to wait for effective discharge of the responsibility until the cure for COVID-19 has been found. Needless to say, the judiciary was one such institution which was required to adopt innovative measures in order to keep the faith of the people intact during the troubling time of COVID-19. In India, during the first days of the pandemic, the judiciary came to a complete halt, with the suspension of hearing of matters except 'extremely urgent' ones. What those 'extremely urgent matters' were, was an open-ended question raising critical questions on access to justice for people in distress.[3] What constituted extreme urgency was left at the discretion of the judge to be listed

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[1] See generally, Joelle Grogan (ed), 'COVID-19 and States of Emergency' (*Verfassungsblog*, April- May 2020) <https://verfassungsblog.de/category/debates/COVID-19-and-states-of-emergency-debates/> accessed 15 Nov 2021); Juliano Zaiden Benvindo, Oran Doyle, Chiara Graziani (eds) Sympozium, 'Editorial: COVID-19 and the Future of Constitutionalism' (*IACL-AIDC Blog* ,7 September 2021) <https://blog-iacl-aidc.org/COVID-1919-future-constitutionalism/2021/9/7/editorial-COVID-19-and-the-future-of-constitutionalism> accessed 1 Nov 2022.

[2] The Hindu, 'Protect human rights of the marginalized during COVID-19 Crisis: Academics' (The Hindu 14 May 2021) <https://www.thehindu.com/news/national/protect-human-rights-of-the-marginalised-during-COVID-19-crisis-academics/article34560779.ece> accessed 1 Nov 2022: See Generally, Ranabir Samaddar (ed) Borders Of An Epidemic: COVID-19 and Migrant Workers (Kolkata, Calcutta Research Group, 2020).

[3] Selvi Palani, 'The pressing need to present parameters for extremely urgent cases' (*Bar and Bench* , 8 June 2020) https://www.barandbench.com/columns/lockdown-diaries-the-supreme-court-of-india-framing-parameters-for-extremely-urgent-cases accessed 10 Feb 2022.

accordingly.[4]Commonly, a study finds that in the initial days of the lockdown, matters of extreme urgency were limited to issues of COVID-19 and related matters only.[5] Regular dispensation of justice had suffered a blow. A dispute purely of commercial nature had a thus lesser chance of being listed as an extremely urgent matter, even though livelihoods might depend on it in troubled times. However, as was the practice developed by the Indian Judiciary, High Courts and the Supreme Court extended all interim orders and waived off the period of limitation during the pendency of the lockdown measures.

Additionally, the advisories issued by the Government warranted the reduction of physical presence before the Courts to reduce the risk of transmission. The need for reduced physical presence in Courts was also described by the judiciary as 'not only a matter of discretion but of duty' to not contribute further to the spread of the virus.[6] Consequently, the challenge was not only of increasing Court-time to come out of only 'extremely urgent matters' mode and begin regular dispensation of justice but was also of enabling easier access to the courtrooms.

Depending on the rise of cases due to uncertainty in variants of the virus, the Government adopted a slew of measures to contain the spread of COVID-19. The initial response to the total shutdown has slowly given way to more permissive forms of lockdowns. Consequently, the resumption of physical hearings has also undergone a rise and fall. Physical hearings were suspended when there was a fresh outbreak – the so called second wave of COVID-19 in India- and rise in number of cases,[7] and resumed along with video-conference hearings (the combination being called 'hybrid mode') slowly when it subdued – on its way towards normalcy.[8] The question, however, relates to the aggressive use of technologies, and direction of all endeavours towards virtual courts, what would be the nature of this new normalcy in the day-to-day functioning of the Indian judiciary?

In order to explore the virtual judicial functioning in India and understand the possibilities that the e-judiciary drive offers as well as the challenges that faces, the present paper is arranged in the following manner. Section II explores the initiatives taken by the Judiciary to surmount the challenges posed by the pandemic. Section III traces the history of digitization initiative in the judicial sector in India. Section IV then links the initiatives taken by the judiciary during the pandemic with the drive towards digitization that had started much earlier. The threat of the virus is met with resilient initiatives by the judiciary to step up the digitization efforts. The section also reminds the challenges that remain to be overcome by this technology-based judicial work.

2. Initiatives by the Judiciary

With time the crisis has presented itself as an opportunity to not only restore but expand access to justice, through an aggressive reshaping of the technical aspects of the judicial process. The Indian judiciary embraced the technology by making 'virtual' hearing a regular norm and attempted the normalcy in the justice delivery system. Though the use of technology presented a challenge to courts in semi-urban areas, it made the participation of the litigants in the judicial process more convenient.[9]

a. Online Filing Process Petitions and Accompanying Documents

The Supreme Court, via a circular dated 27 July 2020 made e-filing or online filing of soft copies of necessary documents mandatory. It mentioned that without the same, even after filing all the physical papers at the filing counter, matters would not be listed for hearing.[10] Prior to this,

[4] Supreme Court of India, Notice dated 22 March 2020 <https://main.sci.gov.in/pdf/LU/22032020_161235.pdf> accessed 2 March 2022.

[5] Sweta Sahu and Moazzam Khan, 'Tapping into the 'extremely urgent' hearings during the COVID-19 lockdown' (*Bar and Bench*, 19 Apr 2020) <https://www.barandbench.com/columns/tapping-into-the-extremely-urgent-hearings-during-the-COVID-19-lockdown> accessed 4 Feb 2022.

[6] *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*, Suo Motu Writ (Civil) No 5/2020 (SC).

[7] Saurabh Kumar, 'Second Wave of COVID-19: emergency situation in India' (2021) 28(7) Journal of Travel Medicine 1 <https://academic.oup.com/jtm/article/28/7/taab082/6284095> ; Lisa Margakis, 'Coronavirus Second Wave, Third Wave and Beyond: What Causes A COVID-19 Surge' (*Hopkins Medicine*, 21 October 2021) <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> accessed 1 Nov 2022.

[8] Debayan Roy, 'Supreme Court to begin hybrid mode hearings: Lawyers to have option to appear either physically or virtually in physical courts' (*Bar and Bench*, 13 February 2022) <https://www.barandbench.com/news/litigation/supreme-court-to-begin-hybrid-mode-hearings-physical-court> accessed 1 Nov 2022 .

[9] *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*, Suo Motu Writ (Civil) No 5/2020 (SC).

[10] Supreme Court of India, Circular dated 27 July 2020, https://main.sci.gov.in/pdf/LU/27072020_124229.pdf.

though e-filing option was there in the Supreme Court, filing of physical documentation was the dominant form. Even after the advent of COVID-19 physical filing was being permitted. While the circular of 27 July 2020 does not completely do away with physical, in person filing of the petitions and accompanying documents it definitely boosts the drive towards digitizing the judiciary.[11]

The Supreme Court e-committee in a more recent move sent a letter to all High Courts to make digital filing compulsory for all petitions and documents of Government from 1st January 2022 onwards.[12] Even for the individual litigants, e-filing has been directed to be mandatory in certain type of cases such as revenue, tax, arbitration, commercial disputes and any other category of cases 'deemed fit by the High Court' for compulsory e-filing.[13]

The filing process, due to its digitization and judicial insistence, significantly eases the process. Physical filing of petitions and documents is dependent on human power, and as such the facilities for it are available only for a particular time within a day. The e-filing process marks a departure from this time limit and opens up the time for filing towards the convenience of the advocate-on-record, as e-filing can be done any time of the day, provided the advocate-on-record or the petitioner in person has prior registration or makes a new registration.[14]While regular physical filing counters are not shut down yet, digitization of the filing process has transformed the procedural aspect of the administration of justice.

b. Online Payment Facility

Along with opening up facilities for e-filing of documents, steps have been taken for online payment of court fees. A dedicated portal of payment named 'E-pay' has been initiated, where payment of Court fees, court deposits, penalties, and fines can be paid in respect of cases in district courts as well as high courts around the clock.[15]

c. Summons Notices and Other Papers are Allowed to Be Sent Over E-mediums as Well as Instant Messaging Applications.

The Indian Judiciary has struggled in the past over the acceptance of digital communications concerning court cases. Before the advent of COVID-19, the judiciary was already weighing up the option of e-communication for cases.[16] The constraints resulting from the pandemic has accelerated that effort.

As early as 2010, the Supreme Court felt the need to allow service of notice and summons over emails. Buoyed by the e-governance drive by the judiciary as well as taking cognizance of the huge delays in judicial work due to service of notice by normal postal mode, the Court allowed email notification of the same along with postal communication of hard copies and asked the advocate-on-records to furnish their email ids so that the Court registry could send notices there.[17] As it can be seen, the initial e-communication drive was to supplement, or be in addition to regular communication via registered post.

As can be seen, the initial e-communication drive was to supplement or be in addition to regular communication via registered post.

The pandemic, however, has increased the drive towards e-communication. Due to the need for reducing physical presence in public spaces as well as the use of lockdowns, the Supreme Court allowed the service of notices, summons, and exchange of pleading or documents through e-mail, fax, or 'commonly used instant messaging services such as WhatsApp, Telegram, Signal, etc.' [18] However, notice over instant messaging apps requires a simultaneous communication via e-mail to the other party, on the same date.[19] This additional feature came as a result of exchange in the Virtual Courtroom where the Advocates

[11] Ibid.

[12] 'Supreme Court Directs High Courts To Make E-Filing Mandatory In Certain Categories From January 2022' (*Livelaw*, 27 October 2021, 7.40 pm) <https://www.livelaw.in/top-stories/e-filing-mandatory-in-certain-categories-from-january-2022-supreme-court-directs-high-courts-to-make-e-filing-mandatory-in-certain-categories-from-january-2022-183810> accessed 1 Nov 2022 .

[13] Aneesha Mathur , ' SC directs high courts to make e-filing mandatory in certain categories (*India Today*, 17 Oct 2021) <https://www.indiatoday.in/law/story/sc-directs-high-courts-mandatory-e-filing-certain-categories-1865666-2021-10-17> accessed 1 Nov 2022 .

[14] Supreme Court of India, 'Practice Directions For E-Filing (Phase II) In The Supreme Court of India' (e-Filing Manual) <https://main.sci.gov.in/efiling> accessed 1 Nov 2022.

[15] EPay – ecourts digital payment, <https://pay.ecourts.gov.in/epay/> accessed 1 Nov 2022.

[16] Vaidehi Misra, Aditya Ranjan and Deepika Kinhal, Summons in the Digital Age: ICT Integration in the Service of Summons 14-17 (Vidhi Centre for Legal Policy, 2020) <https://vidhilegalpolicy.in/research/summons-in-the-digital-age-integrating-information-and-communication-technology-in-the-process-of-serving-summons/> accessed 1 Nov 2022 .

[17] Central Eletricity Regulatory Commission v National Hydroelectric Power Corporation Ltd , (2010) 10 SCC 280 (SC).

[18] I.A. No. 48461 /2020, *In Re. Cognizance for Extension of Limitation*, Suo Motu Writ Petition (c) no. 3 of 2020 (SC).

[19] Ibid.

pointed out to the Court that the double blue ticks of WhatsApp signalling that the recipient of the message has 'seen' the contents can be manipulated, as such features can be disabled by a recipient not willing to be served a notice.[20] The ultimate dependency of e-communication through instant messaging apps on email communication carries weight, as almost all such messaging apps contain features to disable the sender's knowledge of the receipt.

d. Hearing through 'Virtual Court'

Due to the need for reducing physical presence in Courts during the COVID-19 pandemic, the Courts have switched to video conferencing for hearings of the petition. The Supreme Court had mandated hearings through the application 'Vidyo'.[21] In a standard operating procedure released by the Apex Court on 23 March 2020, the advocates (then appearing in 'extreme urgent matters') had to download the app either on desktop or on mobile phones, while the link for the Video Conference would be sent to their registered email ids or 'WhatsApp' numbers by the Registry.[22] The Apex Court, through a Bench consisting of S.A. Bobde, the then CJI, Chandrachud, J. and Rao, J.,also issued guidelines regarding video conferences, invoking jurisdiction under Article 142.[23] The Court has mandated the Supreme Court and the High Courts to adopt measures required for video conference technologies along with a helpline to facilitate on quality and audibility of feed during the proceedings.[24] The resource constraint on the use of technology was also acknowledged by the Court. It was stated that "The Court shall duly notify and make available the facilities for video conferencing for such litigants who do not have the means or access to video conferencing facilities. If necessary, in appropriate cases courts may appoint an amicus-curia and make video conferencing facilities available to such an advocate."[25] For dispensation of justice, the Courts were quick to adapt to the change and integrated Information and Communication Technology with the judicial proceeding as a matter of constitutional duty.

3. Digitization: The Journey

The journey of the Judiciary in India towards digitization, however, did not start after the advent of the COVID-19 pandemic. The judiciary's efforts towards digitization started during the beginning of the 1990s but were mostly confined to the Apex Court and High Court level. In the later part of the 1990s, the District Courts were encouraged to adopt necessary measures for digitization and adequate support was extended by the governments.[26] By 2004, the need was felt for concerted action in the judiciary towards digitization and implementation of Information and communication technology. The enactment of the Information Technology Act, 2000, during this time, has contributed to institutionalisation of a technology-driven ecosystem in the judicial system in India.[27]

a. The Impact of Information Technology Act, 2000

The Information Technology Act, 2000 was enacted to provide for the legal recognition of electronic transactions and communications, digital storage of information, and to facilitate electronic filing of documents with government agencies in conformity with the requirement of the United Nations Model Law on Electronic Commerce.[28] The Act gives legal recognition to the usage of electronic signatures as a substitute for physical signatures,[29] authorises the use of electronic records and electronic signatures in government agencies, retention of records or audits reports in electronic form, [30] or publication of laws by-laws ordinances, etc., in e-

[20] Dhananjay Mahapatra, 'SC okays summons over WhatsApp, email' (*Times of India*, 11 July 2020) <https://timesofindia.indiatimes.com/india/sc-okays-summons-via-whatsapp-email/articleshow/76902823.cms> accessed 4 March 2022.

[21] Shruti Mahajan, 'Coronavirus: Supreme Court notifies modalities for hearing matters of "extreme urgency" through video-conferencing app "Vidyo" (*Bar and Bench*, 23 March 2020, 9.54 pm) <https://www.barandbench.com/news/litigation/coronavirus-supreme-court-notifies-modalities-for-hearing-matters-of-extreme-urgency-through-video-conferencing-app-vidyo> accessed 1 November 2022.

[22] Supreme Court of India, Notice dated 23 March 2020 <https://main.sci.gov.in/pdf/LU/23032020_153530.pdf> accessed 15 Nov 2021.

[23] *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*, Suo Motu Writ (Civil) No 5/2020 (SC).

[24] Ibid.

[25] Ibid. Para 6 (vi).

[26] E-Committee of the Supreme Court of India, 'National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary' (New Delhi, 2005) 5.

[27] Information Technology Act, 2000 (Act no. 21 of 2000).

[28] The Information Technology Act, 2000, Statement of Objects and Reasons, <https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf> accessed 1 Nov 2022.

[29] Ibid s. 5.

[30] Ibid s. 7 and 7a.

gazette.[31] Nonetheless, these provisions do not create a right in favour of a person to insist only on an electronic document by the concerned government agency.[32]

As part of the drive provided by the Information Technology Act, the Government of India approved the National e-Government Plan (NeGP) in 2006, to take a holistic view of and integrate e-governance initiatives across the country, to make government services citizen-centric and ensure the transparency, reliability, and efficiency of such services at affordable costs to realise the basic needs of the common man. [33] The judiciary was not out of its ambitious scope and this resulted in the E-Court project, which will be discussed in the following section.

b. E-Court – Towards Transparent and Effective Administration of Justice

The E-Court was conceptualized with a vision to transform the Indian judiciary by making use of technology. [34] It has a clear objective "to re-engineer processes and enhance judicial productivity both qualitatively and quantitatively to make the justice delivery system affordable, accessible, cost-effective, transparent and accountable."[35] The idea had its genesis in a Chief Justice's Conference in 2004, wherefrom the Supreme Court set up an 'E-Committee for Monitoring Use of Information Technology and Administrative Reforms in the Indian Judiciary' (e-committee).[36] The e-committee had framed, after consultation with the stakeholders,the National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary, whereunder the e-courts represent an ongoing project towards digitization and 'virtualization' of the Indian justice system.[37]

The E-Court implementation strategy consists of three phases, which started in 2005. Phase I sought to set the foundation for a future shift towards digitization. A large number of District and subordinate Courts were computerized and judicial officers and staffs were trained in the hardware and software knowledge.[38] Phase II (ongoing) focuses on, *inter alia*, operationalizing video conferencing for all courts, digitization of Court records, interlinking of law libraries, unified case information system for all courts, optimum automation of case workflow, judicial performance assessment through information and communication technology, timely and comprehensive updating of data on the national judicial data grid portal, etc, basically to enable litigants and lawyers to access court data online.[39] The yet to be implemented Phase III of the project envisages, *inter alia*, ICT coverage of judicial processes from filing to execution and all administrative activities. [40] The third phase emphasizes developing the ecosystem for a digital justice delivery system, which involves transforming procedures to make them suitable for a digital environment and not merely substitution of paper-based work.[41]

c. The E-Court Website: Towards Citizen-Centric Services

The E-Court's website has a dedicated portion called 'citizen-centric services', which promises litigants and advocates easy access to all information and services regarding their cases. It includes the 'e-pay' service for payment of court fees, fines penalties, and similar assessments, with the 'e-courts services' portal consisting of the daily causelists, case status, including daily orders and judgments, 'e-filing' for online filing process, short messaging services (SMS) and automated email services to send details of cases and processes to

[31] Ibid s. 8.

[32] Ibid s. 9.

[33] Ministry of Electronics and Information Technology- Government of India, 'National e-Governance Plan' <https://www.meity.gov.in/divisions/national-e-governance-plan> accessed 2 February 2022.

[34] Department of Information Technology- Ministry of Communications and Information Technology, Government of India, 'Saransh: A Compendium of Mission Mode Projects under NeGP' (2011) 107 <https://www.meity.gov.in/writereaddata/files/Compendium_FINAL_Version_220211(1).pdf)> accessed 15 May 2022.

[35] Id.

[36] Shalini Seetharam and Sumathi Chandrashekharan, 'e-Courts in India: From Policy Formulation to Implementation' (Vidhi Centre for Legal Policy, 2016) 5. <https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/eCourtsinIndia_Vidhi.pdf> accessed 2 May 2022.

[37] E-Committee of the Supreme Court of India, 'The National Policy and Action Plan for Implementation of Information and Communication Technology' (New Delhi, 2005).

[38] Ibid 31-37.

[39] Shalini Seetharam and Sumathi Chandrashekharan, e-Courts in India: From Policy Formulation to Implementation (Vidhi Centre for Legal Policy, 2016) 11.

[40] E-Committee of the Supreme Court of India, 'The National Policy and Action Plan for Implementation of Information and Communication Technology' (New Delhi 2005) 41.

[41] Satya Muley, 'Digitalizing India's Judiciary: COVID-19's Silver Lining' (*The Bastion*, 9 Dec 2021) <https://thebastion.co.in/politics-and/tech/digitalizing-indias-judiciary-COVID-19s-silver-lining/> accessed 14 March 2022.

litigants and lawyers, along with setting up of touch screen kiosks at court premises to gather the same information.[42] The National Judicial Data Grid provides for centralized court data, from the district and *taluka* courts to the High Courts.[43] The E-Courts project thus establishes a common system between all levels of the judiciary in India for gathering information regarding cases. It makes interconnectivity possible between all courts, from the district or *taluka* level to the apex court. Operationalization of the 'Virtual Courts' section of the portal has the possibility of eliminating the need for physical presence before the courts themselves.

d. The E-Committee

The body overseeing the project is the e-committee of the Supreme Court. It is the principal body in policy planning and providing strategic direction and effective implementation of the project.[44] The Committee consists of the Chief Justice of India as the Patron-in-Chief, the Judge in charge of the Committee, and regular members overseeing the different aspects of the project, namely, processes, project management, human resources, and systems.[45] The regular members are mostly drawn from the senior cadres of the judicial service.[46] In addition, there is an expanded room for invitee members from the bar and government.

The Committee works under the principle of harnessing technology to 'empower and 'enable' to avoid viewing technology as merely the automation of conventional processes but rather as a tool of transformation towards empowering and enabling the citizens. It further is required to ensure access to justice for all – aiming at making technology accessible to all bridging the technological divide. It also works towards creating an efficient and responsive judicial system.[47] It is guided by the objectives of interlinking all courts in the country, ICT enablement of the Indian judiciary, qualitative and quantitative enhancement of judicial productivity, and making the justice delivery system accessible, transparent, cost-effective, and accountable.[48]

4. Digitisation: Impact of/Driven by COVID-19

The government and the judiciary meticulously planned the adoption and adaptation of technology in improving the ICT infrastructure in every court. Notably, COVID-19 has created a compelling atmosphere to use technology for the cause of the justice delivery system. The pandemic converted 'discretion' into 'duty' for the judiciary in the matter of adoption of technology. The pandemic situation acts as a catalyst, necessitating the fast transformation toward an e-judiciary.

a. The COVID-19 Effect: Transformation of One Way Access to Two-Way Process

Prior to the advent of the pandemic, the digitalization of the Indian Judiciary mostly remained in the stage of creating the groundwork necessary for welcoming a technological shift. The process was thus one-way; the use of technology allowed lawyers and litigants to view information about cases such as the case history, case status, daily orders, cause lists, and other useful information online. It minimized the visit to the court or to the lawyers for eliciting information related to pending matters. Again, this benefit was mostly available with the higher tiers of the Indian Judiciary, namely the Supreme Court and the High Courts. Lower Courts predominantly had to focus on manual modes of gathering information, even though the computerization process had started early.

While before the pandemic the process of digitization in the judiciary was slow- depending upon the readiness of the institutions and its people to accept the change – the extremities associated with the advent of the pandemic has forced the institution to accommodate new methods of the dispensation of justice – paving way for the technological shift. In other words, what was being delayed due to considerations of acceptance and adaptability of the people concerned, the pandemic has necessitated and forced the adaptation of the same. Initially, the technology was used to gather information by litigants about the litigations, whereas the COVID-19 has introduced an interactive process between the judiciary and the litigants by way of virtual hearings.

[42] E-Court Services, <https://ecourts.gov.in/ecourts_home/> (accessed 1 Nov 2022).

[43] Ibid.

[44] E-Committee of the Supreme Court of India, 'Policy and Action Plan Document: Phase II of the e-Courts Project' (2014) 23.

[45] E-Committee Supreme Court of India, Administrative Set-up, <https://ecommitteesci.gov.in/administrative-setup/> accessed 1 Nov 2022.

[46] N 44, 23-26. Except the member overseeing the systems, which is a post-retirement membership from the senior officials with sufficient experience in software and technical know-how from the National Informatics System, the implementing Agency of the project.

[47] E-Committee of the Supreme Court of India, 'Vision and Objectives' <https://ecommitteesci.gov.in/about-department/vision-objectives> accessed 12 May 2022.

[48] Ibid.

b. Virtual Reality or Actual Reality Via Technology? The Transformation Toward E-Judiciary

The adversities faced by the judiciary in dispensing justice during the pandemic have helped the judiciary to build resilience through technological means. The use of technology in judicial proceedings had earlier found recognition by the Supreme Court. In *State of Maharashtra v Praful B. Desai,*[49]the question before the Apex Court was whether a recording of evidence by person not present before the Court through video conferencing is permissible under Indian law. The Court held that it was. By video conferencing, the 'presence' of the accused was ensured to satisfy the requirements of the Indian criminal procedure law, [50] and the requirement of 'procedure established by law' under Article 21.[51] It had dispelled the arguments of video conferencing being opposed to the right to life because of the subjection of the same to a procedure established by 'virtual reality' the court recognized that the same was not virtual, but actual reality as, "Video conference is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facilities and ease as if he is present before you". Therefore, "…so long as the accused and/or his pleader are present when evidence is being recorded by video conferencing, the evidence is being recorded in the 'presence' of the accused". [52] The text of the judgment thus creates important imagery of equating audio-visual presence with actual presence and paves the way for welcoming technological assistance in the judicial process. This understanding was therefore approvingly accepted by the Supreme Court after the advent of the pandemic when it issued guidelines for video conferencing of the judicial process.[53]While *Praful B. Desai* in pre-pandemic times was confined to the use of technology to record evidence, *In re Court Functioning* extends the logic of using technological advancements in the aid of justice to the whole of the judicial process before courtrooms. [54] The pandemic and consequent necessity to rely on technology thus provides an opportunity for transformation from e-Courts to e-judiciary.

c. The Perils of Technology Dependence: the Persistent Problems

Though the technology-driven transition towards virtual courts appears to be the need of the hour, it also raises critical questions about access in the digital divide prevalent in the country. Digital literacy of the concerned stakeholders is a massive issue. The success of a technology-driven justice delivery system depends upon the awareness of the users, including the officials of the courts. It is warranted that all the stakeholders technically equip themselves to understand the nuances involved in the e-judicial process. In absence of strong digital literacy, the whole process and access to justice may remain an elusive concept.[55] While Government initiatives towards e-literacy of the citizens are underway, an e-literate citizenry ready for a technological transition towards e-judiciary, especially the marginalized and the poor who need constitutional justice the most is yet to be developed.[56] Needless to emphasise that there is a need to create a robust data protection mechanism in the legal system concurrently in order to institutionalise the e-judiciary for the larger benefit of people.[57]

The judiciary in India is also a massive source of employment for several people, excluding the advocates. The judicial process, initiating with the filing requires the service of professionals at every stage, such as the law clerks,[58] and the industry

[49] (2003) 4 SCC 601 (SC).

[50] The Code of Criminal Procedure, 1973, s. 273. Reads as, 'Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.'

[51] Constitution of India (1950), Art 21. 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

[52] (2003) 4 SCC 601, 604 (SC).

[53] *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*, Suo Motu Writ (Civil) No 5/2020 (SC).

[54] *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic*, Suo Motu Writ (Civil) No 5/2020 (SC).

[55] The digital literacy rate in India was at a staggeringly low level of 38%, a study found, based on data available till 2019. See, Venugopal Muthkoor and Fatima Mumtaz, 'The Digital dream: Upskilling India for the future' (*Ideas for India*, 23 March 2021) <https://www.ideasforindia.in/topics/governance/the-digital-dream-upskilling-india-for-the-future> accessed 1 April 2022.

[56] Basu Chandola, Exporing India's Digital Divide (*ORF-Observer Research Foundation*, 20 May 2022) <https://www.orfonline.org/expert-speak/exploring-indias-digital-divide/> accessed 1 Nov 2022.

[57] Siddharth Sonkar, 'Privacy Delayed is Privacy Denied' (*The Wire*, 24 May 2021) <https://thewire.in/tech/data-protection-law-india-right-to-privacy> accessed 30 March 2022; Usha Ramanathan, 'The Future of Freedom' (*Frontline*, 18 Jan 2019) <https://frontline.thehindu.com/cover-story/article25878618.ece> accessed 12 April 2022.

[58] This is part of the reason for resistance to e-filing of documents etc, as it demolishes the need for law clerks, who oversee the filing process.

associated around the court premises ranging from photocopying facilities to food vendors. The digitalization drive – enabling online filing and reducing the need for physical presence in the court itself - threatens the livelihood of so many layers of service providers.

Apart from these issues, the preparedness of the system itself to accommodate the technological leap remains an open question. Despite claims of ICT-enabled judicial process and its enhancement in the recent pandemic propelled phase, the actual infrastructural scene depicts a poor scene, even at the High Court level. This can be exemplified by an almost unprecedented judicial outburst from the Calcutta High Court in recent times. Faced with routine technical problems and connectivity issues in virtual court, Justice Sabyasachi Bhattacharyya recorded in his order his complaints of connectivity issues and electronic interference becoming a daily feature and lamented the inability of the Court "to provide the minimum virtual services and connectivity in order to ensure that justice is rendered appropriately."[59] Justice Bhattacharyya further issued a show-cause notice to the Central Project Co-ordinator and refused to hold court till the issue was resolved, because, "sitting in Court and playing dumb charades during virtual hearings with the advocates, due to major disruptions in the virtual services, has become a joke by now and does not amount to adjudication of matters but is a mere circus on the show before the public".[60] He did not mince his words.

5. Conclusion

The pandemic has necessitated many changes in daily lives as well as institutions. Technology has stepped up to help in adjudication, without which recourse to justice would have been suspended. What follows from the above discussion is that the Indian judiciary, working as it was towards ICT enabled process, or towards digitalization of itself, has used the challenges put forth by the pandemic to start aggressively restructuring its institutional capacities with the help of technology. The pandemic situation offers a justification – impetus – towards its goal of virtual court processes.

However, digitalization unmindful of the social realities and social impact creates an adverse impact on sections of the populace. While the technological innovations are necessary in the testing times of the pandemic, in the long run, a complete overhaul of the system towards aggressive digitalization cannot remain unmindful of the social impacts. The adverse impact of technology has to take into account the social factors. Also important is developing the right infrastructure to support such a robust mechanism. While the Calcutta High Court order may seem exasperating to one individual judge, it does stress the need to first develop the infrastructural base properly. Unless the perils of technological transition are addressed holistically and inclusively, the digital architecture cannot be effectively put to the service of the citizens – and the perils will come to haunt the benefits of technology. As the scourge of pandemic is subsiding, it is desirable to systematically institutionalise the technological intervention in the judicial process to make 'access to justice' a reality than rhetoric for the common person.

[59] Jadav Saredar v BasudebTarafder, C.O 891 of 2021 (Cal HC).

[60] Ibid.

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Pandemic and Digitalization Effects on Judiciary: the End of the Global Expansion?

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Abstract. The pandemic has posed a problem of redesigning the separation of powers. After years of global expansion of the judiciary and depoliticization processes, visible eg. in the affirmation of independent administrations and technical regulation, the Executives have taken center stage again. Technique appears to play an ambiguous role. It is now founding new supranational policies which also involve a return of state administration. Digitization processes result in centralization policies. The judicial response to the emergency - diversified in the various countries - remains an essential cornerstone for the preservation of the rule of law.

***Keywords**: Pandemic, Rule of Law, Global expansion of judiciary in the last decades, towards the end of the global expansion, the role of technique and digitization*

1. Digitalization and Minimum Level of Response of the Judiciary: An Immediate Effect of the Pandemic

The coronavirus emergency raises the issue of the role of the judiciary in the post-pandemic world. Until the onset of the pandemic, there was no doubt regarding the centrality of the position of the judiciary in constitutional systems, underlining that over the years a growing crisis of parliaments and the role of regulation has been accompanied by the growth of the judicial function[1].

Claudia Cavicchioli focused her attention on the first context analysis and on the answers that were given by the different national judicial systems[2]. In that paper, a first consideration is centered on the impact of the emergency on the right to access justice: "Given the potential impact on the right to access justice in a timely, fair and effective manner, the European Law Institute (ELI, 2020) has elaborated a document intended to guide all European States, detailing fundamental principles that should be complied with when adopting and implementing measures related to the Covid-19 pandemic. Pursuant to these principles, the judicial system should "do all that is reasonably practicable to continue to conduct proceedings and trials, particularly though the use of secure video and other remote links where available to the courts. In any case, the judicial system should maintain a minimum level of operations to deal with urgent matters, safeguard the rule of law and provide proper remedies to litigants, provided that the right to a fair trial, including the right to defense, is not infringed" (ELI, 2020, p. 3). The ELI principles could also serve as a source of inspiration for the measures that will be taken after the pandemic (Lasserre, 2020).

At the European level, the Covid-19 crisis has acted as a stress test for the resilience of national systems (EC, 2020a). Most European countries have enacted specific measures to extend the procedural deadlines and the activity of the judicial systems has been significantly reduced (Jean, 2020a).

An overview of Covid-19 related measures has been established by the European Commission in a comparative table that sets out the impact on the judicial organization of each European Member State (EC, 2020b).

By way of example (ELI report):

- in Belgium, all hearings in civil matters that were scheduled between 10th April and 17th June 2020 were either cancelled or postponed, depending on an analysis to be conducted on a case-by-case basis by each court;

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[1] Giovanni Maria Flick, *Giustizia in crisi (salvo intese). Leggi, giudici, processi e carcere di fronte alla pandemia.* (Baldini & Castoldi Milano 2020).

[2] Claudia Cavicchioli, 'Challenges and Opportunities Raised by Covid-19 for the Judicial Systems in Europe' [2021] *21*(3) OAJ 250,259 <https://doi.org/ 10.13128/form-10086> .

- in Denmark, each court had to identify which cases had to be given priority status and therefore be heard and which cases could be postponed;
- in England and Wales, hearings were largely held on a wholly remote basis. For instance, on 19 March 2020, Mr. Justice Teare ruled that the trial *of National Bank of Kazakhstan and Another v. The Bank of New York Mellon and Oth*ers would be held remotely, although it related to a complex commercial case and it involved testimony from expert witnesses in different jurisdictions. The case was held via Zoom and streamed live on YouTube (Whittam, 2020);
- in Finland, the national court administration has provided guidelines, notably indicating that physical presence should be limited to urgent cases and that all other cases should be heard via videoconference or any available technological mean;
- in France, the government enacted a series of derogatory measures in the field of civil justice by way of orders, aiming at adapting the judicial system, the conduct 1[2020] EWHC 916 (Comm). of the proceedings and the rulings of the court (Cadiet, 2020b). Between 17th March and 10th May 2020, courts have dealt only with urgent cases, namely hearings regarding civil freedom and custody in civil matters, child protection, family court cases, emergency interim proceedings. Order No. 2020-304, dated 25 March 2020, allowed hearings to be held by way of videoconference or by telephone, enabled the court to opt for a procedure without hearing when the parties were represented by a lawyer and provided that cases could be transferred to a different jurisdiction (Ord. n° 2020-304 du 25 mars 2020).This order was then amended to take into account the extension of the state of health emergency (Ord. n° 2020-595 du 20 may 2020) and it remains to be seen how these measures will continue to apply in the future (Brochier & Brochier, 2020);
- in Germany, each court had large flexibility and could decide, on a case-by-case basis, which measures would be appropriate. More online hearings have been conducted and some hearings were postponed;
- in Italy, most civil hearings between 9th March and 11th May 2020 were postponed, except in the case of urgent matters[3]. In case of an urgent matter, the hearing could take place via remote connection if only the lawyer's presence was required. In any other case, the hearing would be substituted with an online exchange of written submissions [4];
- in the Netherlands, between 17th March and 11th May 2020, all courts were closed, with the exception of extremely urgent cases. All other cases were dealt with by way of written procedure or via audio or videoconferencing.

In light of the urgency of the situation, the measures taken therefore differed from country to country and in some cases from court to court. The Council of Bars and Law Societies of Europe (CCBE) has highlighted that from a fundamental right perspective, this diversity of measures is problematic when it comes to equal treatment of citizens[5]. In this respect, it would be important to establish objective criteria and guidelines to priorities cases, in the context of a comprehensive national strategy, to be established in connection with all key actors of the justice chain, including the prosecution, law enforcement, lawyers, civil society groups and relevant social support services[6]. From a more general perspective, given these temporary restrictions to the judicial activity, the CCBE has also emphasized the risk of denying access to an independent and impartial judiciary[7] and of hindering fundamental rights such as access to justice and the right to due process[8].

The European Commission for the Efficiency of Justice[9] (CEPEJ), on behalf of the Council of Europe, has drawn up an initial assessment of the measures taken by the national courts in their organizations, the priorities identified, the use of new technologies and the guarantees of a fair trial[10]. As highlighted in this assessment, the Covid-19 pandemic has provided an opportunity to reconsider some aspects of traditional court functioning, such as the recourse to alternative dispute resolution and the level of use of technology in court proceedings[11]. Digitization and

[3] Cesare Pinelli, 'Il precario assetto delle fonti impiegate nell'emergenza sanitaria e gli squilibrati rapporti fra Stato e Regioni' [2020] < https://www.amministrazioneincammino.luiss.it/2020/04/29/il-precario-assetto-delle-fonti-impiegate-nellemergenza-sanitaria-e-gli-squilibrati-rapporti-fra-stato-e-regioni/>.

[4] Gaetano Silvestri, 'Covid-19 e Costituzione', (2020) www.unicost.eu <https://www.unicost.eu/covid-19-e-costituzione/>. The author points out that suspensions of fundamental rights are not allowed but only emergency measures.

[5] CCBE (*Council of Bars and Law Societies of Europe)* 2020.

[6] UNODC (United Nations Office on Drug and Crime), 2020.

[7] CCBE, 2020.

[8] CCBE, 2020.

[9] CEPEJ (European Commission for the Efficiency of Justice), 2020.

[10] CEPEJ, 2020.

[11] CEPEJ, 2020.

maintenance of the minimum level of efficiency of the judicial response appear to be the prospects[12].

2. The Judge's Lawmaking and Policymaking in the Future: A Good Reason to Focus on The Effective Role of Judiciary.

In law studies, the phenomenon of judges making public policies is frequent and well known [13]. Being a democracy does not necessarily require support for the expansion of judicial power, however the circumstances under which many democracies are being constructed implies the inclusion of a strong judicial power. This phenomenon is closely connected with the trend to democratization in Latin America, Asia and Africa. Another international factor is the influence of American jurisprudence and political silence.

In Europe, the European Convention and Court of Human Rights in Strasbourg have been of great importance in spreading the gospel of judicialization. This happens through the rulings of the Court, but also trough the debates initiated in the working of the system of protection of human rights.

Currently, this process is at risk for geopolitical reasons but also for the wide crisis of democracy[14]. Consistently it has been argued that globalization paradoxically revealed truth about democracy, and nothing was more expressive of this than the pandemic15. In a global context without a unifying system of law and a hierarchy of norms, with non-binding provisions, competition or conflict between legal orders and where a principle of obedience (replaced by one of compliance) is missing, how do different legal orders coexist? 16 In order to keep the democratic system alive, is the judiciary really the correct body to answer that question?

The fracture of democracy would have been the reaction to an incisive, organic and comprehensive

[12] One of the first effects of the pandemic had on the use of judicial power was the necessity and inevitability of the digitalization of the court and its functions. As a result, was necessary to balance the new way of "not relational" working of the judiciary with the fundamental principles of fair trial, rule of law, due process and with the fundamental rights of human beings. At the beginning research and guidelines concerned the use of remote working tools by lawyers. In relation to these, CCBE stated: «In that context, the following aspects stand out: (a) Fundamental Rights: Issues related to fundamental rights will clearly arise in all cases where there is Professional Secrecy / Legal Professional Privilege but may do so in slightly different ways. All communications will be protected under Article 8 ECHR, whether in connection with prospective or pending litigation, or in connection with commercial negotiations, employment law advice, property transactions or any other of a myriad of other areas of a non-contentious nature where legal advice may be involved; whereas communications relating to crimilan proceedings or commercial and other litigation will also be protected under Article 6 ECHR. It should be remembered that Article 8 ECHR rights are qualified (albeit that lawyer-client communications enjoy a higher level of protection); whereas Article 6 ECHR rights are absolute […]».This "new way of working remotely" involved the introduction of the data as a new element in the balancing between fundamental principles of fair trial and the digitalization. The main concerns are the flow of data; the access to them; their privacy and security of data held by Cloud providers and the risks related to how technically secure the platform is; the uncertainty, effectiveness and availability of remedies; the data storage and protection of privacy; the use of common standards across the EU. CCBE affirmed: «In order to try to gain an understanding of the practical issues which arise in relation to legal practice, the CCBE prepared a number of individual research papers examining the terms and conditions of a number of frequently used platforms, in order to compare them1. As a result of this exercise, certain common issues emerged, namely: 1. How accessible and transparent are the relevant terms and conditions? 2. Who is the data controller? 3. Where is the data stored? 4. To what extent do the platform providers sell or share personal data? 5. What surveillance might confidential data that is held in the cloud be subjected to? 6. How technically secure is the platform? ».CCBE, *Guidance on the use of remote working tools by lawyers and remote court proceedings*, 27.11.2020. These papers may be found at *https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SV L_20201127_Annex_Analyses-of-videoconferencing-tools.pdf* This was also considered by the European Data Supervisor (EDPS) in its *Public Paper on Outcome of own-initiative investigation into EU institutions use of Microsoft products and services*, 2 July 2020, part. 2 and 4. Not only is a change in the way of working and in the use of judicial power needed, but the effect on democratic values by this and any other changes needs to be investigated.Apart from the privacy and the "surveillance capitalism", the actual procedures related to the use of AI programs, are matter of ethical, methodological and epistemological concerns.

[13] C Neal Tate and Torbjorn Vallinder (edited by), *The Global expansion of judicial power* (first published 1995, New York University press, New York, 1997).

[14] Pasquale Costanzo, 'La democrazia digitale (precauzioni per l'uso)' *1 (2019) Dir. pubbl.* 71 < https://www.rivisteweb.it/doi/10.1438/93720>

[15] Gianni Ferrara, *Democrazia e globalizzazione* (*L'Europa dei tre disincanti.,* edited by Paolo Carnevale and others, Editoriale Scientifica, Napoli, 2021, 379). He argues that globalization has revealed truth about democracy and «discovered its contradiction by using it». Specifically, it would be the particular form of capitalist globalization that has resulted in the detachment of *kratos* from *demos*, taking the former away from the latter and attributing it to the possessors of capital.

[16] Sabino Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (Donzelli Editore, Roma, 2009).

process of extending the power of the of the "demos" beyond the traditional boundaries of political democracy. The pandemic effect in any working scenario sometimes of growing corruption in public sector and policy of fear17, instability and the crisis of democracies are the principal factors of challenge[18].

People everywhere asked for more stronger policies and governments do their work, including restrictive measures such as lockdown, quarantine, social distancing, facemask policies, and contact tracing protect the right to life and health during the corona-crisis. They also drastically limit fundamental rights and freedoms and come with high social and economic costs, sometimes through the informal affirmation of a series of new 'sources of law', such as the declarations of committees of experts, sometimes influencing the structure of the sources of law and, through it, also the form of government. For example, Italian Decree Law N. 6/2020 provided the executive with the 'legal basis' for the subsequent DPCMs, establishing a non-exhaustive casuistry for the adoption of subsequent measures limiting constitutionally guaranteed freedoms, potentially allowing for the circumvention of the constitutional legal reserves placed to safeguard these freedoms[19].

In this way, in the justification of necessity and urgency, it was the executive power that intervened in the balance of the sources of law, assigning solely to the judiciary the task of verifying which act 'remedied' or 'implemented' the precedent. The problem, in effect, can be shifted from the sources used to their justification, namely, what was the determining factor that guided institutional action and what message was conveyed to Italian citizens.

The task of answering this question, which is purely political, has been entirely, if not explicitly, delegated to the judiciary. The result is not only the expectation that this process will become a part of national governance, with an undue encroachment of the judiciary into the realm of politics and economics, but also that in some cases it will take the place of politics, using its powers not for their intended function, but instead systematizing public policy objectives with constitutional architecture, controlling customs as well as crimes, proposing palingenetic purposes of social structures, and establishing direct relations with public opinion and the media.

Thus, as this expands, the role of judges becomes distorted and, this contributes to its inefficiency[20]. Governments have to use discretion to balance these rights and interests, not judges at first. Several scholars emphasized the essential role of courts in controlling governments in the fight against the pandemic. Ginsburg and Versteeg describe how courts worldwide have interfered with the government's responses to the pandemic[21].

Not all courts, however, actively scrutinize the government. In France and Belgium, the Council of State was criticized for deferring cases and neglecting its monitoring role[22].

Risk of substantial abdication and improper deference of judicial scrutiny is concrete and concerning[23]. The legitimacy argument has extra weight when parliamentary acts are at stake, coined as the counter-majoritarian difficulty, but is also an effect of the constitutional rule of judiciary

17 Francesca Rescigno, 'La gestione del coronavirus e l'impianto costituzionale. Il fine non giustifica ogni mezzo' 3 (2020) Riv. AIC 253 <https://www.osservatorioaic.it/images/rivista/pdf/2020_3_15_Rescigno.pdf>

18 Massimo Luciani, 'L'antisovrano e la crisi delle costituzioni' 1 (1996) Riv. Dir. Cost. 124; Giuseppe Guarino, 'Pubblico e privato nell'economia. La sovranità tra Costituzione ed istituzioni comunitarie' 1 (1992) Econ. dir. terziario, 321.

19 Cfr., on different positions, Cesare Pinelli, cit. e Francesca Rescigno, cit.;

20 Sabino Cassese, *Il governo dei giudici* (Laterza, Roma, 2022).

21 Tom Ginsburg and Mila Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic' 52 (2020) UVA Law <https://ssrn.com/abstract=3608974>; 747 (2020) University of Chicago, Public Law Working Paper <http://dx.doi.org/10.2139/ssrn.3608974>.

22 For France, see Liberté Libertés Chéries, 'Liberté, Libertés Chéries: Covid-19: Le Président de La Section Du Contentieux En Chevalier Blanc' (Liberté, Libertés chéries, 12 April 2020) <https://libertescheries.blogspot.com/2020/04/covid-19-lepresident-de-la-section-du.html> accessed 15 February 2021; Paul Cassia, 'Le Conseil d'Etat et l'état d'urgence Sanitaire: Bas Les Masques!' Club de Mediapart (15 February 2021) <https://blogs.mediapart.fr/paul-cassia/blog/100420/le-conseil-detat-et-l-etat-d urgence-sanitaire-bas-les-masques> accessed 15 February 2021; Sébastien Platon, 'Reinventing the Wheel… and Rolling over Fundamental Freedoms? The Covid-19 Epidemic in France and the 'State of Health Emergency'' (2020) 8 The Theory and Practice of Legislation 293. For Belgium, see the opinion piece by 25 constitutionalists, 'Haal het parlementuit quarantaine en maak een coronawet' De Standaard (2 November 2020).

23 Patricia Popelier and others, 'The Role of Courts in Times of Crisis: A Matter of Trust, Legitimacy and Expertise' (European Court of Human Rights, 2021). Also Patricia Popelier and others 'Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts' (2021) 12(3) Eur. J. Risk Regul. 618, 643.

subjection to the law[24]. The argument points out that unelected courts lack the legitimacy to second guess the outcome of balancing exercises that belong to the political sphere. The argument of expertise insulates evidence-based administrative action from judicial review and is used in particular concerning regulatory agencies established to act as expert bodies.

It seems all the more appropriate for courts to take a deferential stance during emergencies because they cannot act with the required speed and flexibility. Judicial deference enables governments to deal with crises effectively while remaining within legal confines. At the same time, the unprecedented impact of health measures on fundamental rights[25], on the societal and economic organization and on state budgets, call for judicial monitoring.

A counterweight is needed, especially in times when parliamentary oversight is easily reduced[26].

Indeed, the judge's role is to be interpreter of norms, and their obligation to interpret in a way that conforms to the Constitution. The pandemic has highlighted both the weakness of the prescriptive charge of the canons of interpretation, as is the case with the systematic criterion and conforming interpretation, as well as a certain political propensity to decline responsibility for the public policy choices made, devolving to judges the attribution of a constitutionally legitimate structure and, therefore, attributing to judges a political role protected by legal instruments such as constitutionally conform interpretation, "rhetorical figures, presumptions such as those of the coherence and completeness of the system, the will of the legislature, constitutionally conform interpretation, the unfavorable presumption against abrogative interpretation"[27] . The duty to respect procedural legality thus risks becoming the condition for assigning judges the task of giving normative acts, among all possible meanings, the one that is constitutionally compliant. The pandemic thus risks turning the duty of constitutionally oriented interpretation into an instrument of constitutional legitimization of political, rather than constitutional, choices.

A reply to the counter-majoritarian difficulty relies on an alternative form of democratic

Legitimacy would be the assumption that courts in their own way voice the public's sentiment, after and in-between elections. If people trust in judiciary no problem: counterweight is well assured. But in certain countries, as Italy, there is no doubt that the judiciary is in crisis after years of excessive protagonism centrality even unwanted.

The centrality of judiciary must be maintained but the condition is the reduction of judicial policy-making and – at the same time - the underlining of the judiciary guarantee and control function to protect human dignity. This implies a renunciation of expansive tendencies in order to focus on the too often forgotten core of judicial function.

When facing a crisis or confronting a foreign threat, citizens tend to exhibit higher support for their political leaders. This phenomenon is known as the *Rally-Round-the-Flag-Effect* and has been intensively studied in the United States during the Cold War17 and the 9/11 terrorist attacks and in Europe in the aftermath of Charlie Hebdo attacks in France,19 11 March 2004 terrorist attacks in Madrid, and in light of growing tensions between Russia and The West. Recent surveys conducted during the Covid-19 crisis also reveal an increase of citizen's trust in the governing party, the prime minister, or the president in the initial stage of the

[24] This argument involved the role of European institutions in situations of parliamentary crisis. A possible solution to this problem would be to strengthen the Union but this may be a just requirement, but in the end it may even prove counterproductive. In fact, if one believes that the biggest problem is the lack of political perspective, operating exclusively on the current institutions without strengthening their connection to society could produce undesirable effects. It would define an arrangement with European institutions that are stronger, but considered even more alien, if not hostile, by the populations they purport to govern, thus risking aggravating the legitimacy crisis within which the Union is gripped. Expanding the decision-making power of institutions without bridging the gap between them and the subjects they govern may give rise to an invisible technocratic form of government, where key policy decisions are made by technicians, according to a principle of division of labor and expertise. This is a prospect in substantial continuity with the current arrangement, which suffers from a historical deficit of democracy. Therefore, it is not by relying on the autonomy of institutions and neutralizing the choice of a political nature that one can think of pulling Europe out of its crisis, which is instead fully political and social. See, in this regard, Gaetano Azzariti, *Cambiare l'Europa?'*(*L'Europa dei tre disincanti.,* edited by Paolo Carnevale and others, Editoriale Scientifica, Napoli, 2021, 1); Andrea Manzella, *Il ruolo del Parlamento europeo nella* governance *della crisi. La cooperazione interparlamentare*, in Id., *Sui principi democratici dell'Unione europea* (Editoriale Scientifica 2013).

[25] Francesca Rescigno, cit.; Paolo Carnevale and others (edited by), cit.

[26] See Beniamino Caravita, 'L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana' 6 (2020) *Federalismi.it*; Michele Belletti, "La 'confusione' nel sistema delle fonti ai tempi della gestione dell'emergenza da Covid-19 mette a dura prova gerarchia e legalità" 3 (2020) Riv. AIC 174.

[27] Roberto Bin, 'L'interpretazione conforme. Due o tre cose che so di lei' 1 (2015) Riv. AIC .

crisis as well as an increase in their satisfaction with the country's democracy and a greater interest in politics[28].

The court's reaction to give wide deference to the government when it comes to expert-based safety measures is justified from a legitimacy perspective. With an overly stringent attitude that is not backed by the public, the courts would risk overplaying their hand.

Recent surveys, reported in cited paper of European Court of Human Rights, however, show that after this initial surge of trust, public trust drops again in later stages of the crisis, even below the pre-corona level.

This, in turn, widens the room for judicial scrutiny of crisis measures. The expertise obstacle further delineates the room for judicial scrutiny, where it questions the courts' training and knowledge to second guess the necessity and adequacy of crisis measures. This means that even if courts have the legitimacy to review crisis measures, the expertise obstacle refrains them from using that room.

The arguments that have just been presented make it clear that the future of the judiciary will increasingly depend on politics but at the same time on the relationship that will be created between law and science. The health risk associated with the COVID-19 virus outbreak and its spread throughout Italy has emphasized the pre-existing power vacuums, absence of regulation, and demonstrated the urgent need to act on these matters.

The most urgent problem posed by the onset of the pandemic concerns not just the ability of the judiciary to clear the backlog of cases in five years, as outlined in the implementation of the NRP, or whether the remedies (procedural and especially organizational) are prepared to prevent a recurrence of this overextension in the judicial power will prove fit for purpose. In fact, the main issue is what relationship will be established between the judiciary and the politicians, in the context of a system that calls on politics to act quickly and entrusts the judiciary with the task of restoring order and balance to these choices, revealing and elaborating their political motivations and identifying their constitutional basis.

Indeed, the pandemic has posed a very relevant set of questions to which the judiciary is also called upon to answer, albeit partly outside its role. What do we talk about when we talk about health? A problem, a goal, or a tool? In each case, it is an essential topic in a truly democratic society, because only a healthy society in good social condition can participate in and sustain democratic dynamics.

To talk about health is to talk about science, and this raises the problem of the relationship between science and those who should listen to it in order to define the terms in which government and law deals with health as a general policy issue. This relationship should ensure accountability for policy choice and not shield policy from accountability. Could it be said, then, that health is so important today because the debate about it also reveals the health of our democratic structure? How has the concept of health changed in this dynamic of transformation created by the pandemic? Our changing idea of health is defined in three respects: the psychological, the organizational (drive to dialectical relationship, to measure up to one another, coming out of an autarkic way of thinking) and the enormous acceleration of digitization. In terms of health, has digitalization moved from a niche phenomenon to a mass phenomenon with real opportunity? Indeed, we talk about the centrality of health, but from what do we derive it, if not from the level of policy choices? Is it enough that health policy is linked to the state of emergency?

Whilst the pandemic has changed our perspective on health, having moved it from an individualized sector to one more concentrated on the needs of the whole population, such collectivist attitude must be considered with regard to the risk of giving too much control to the state. Again, what is the political dimension of the digitization of the judicial function? What is the political dimension of the analysis of the world carried out by artificial intelligence systems? What are the social and material consequences of the inclusion of artificial intelligence with its algorithms in the decision-making processes of social institutions such as education, health care, finance, government, labor relations and employment, communication systems, and the judiciary? [29]

Artificial intelligence, through which digitization is expressed, therefore also affects the judicial system and its power. It is now an actor in knowledge formation, communication and power. These configurations are occurring at the level of epistemology, principles of justice, social organization, political expression, culture, and subjectivity, but we can go even further. Artificial

[28] Francesca Rescigno, 'Il fine non giustifica ogni mezzo', cit.

[29] Indeed, from the analyses on this topic, it appears that technical classification schemes can reinforcing hierarchies and amplifying inequity. See Kate Crawford, *Atlas of AI. Power, Politics, and the the Planetary Costs of Artificial Intelligence* (Yale University Press 2021). Ma anche Remo Bodei, *Dominio e sottomissione. Schiavi, animali, macchine, Intelligenza Artificiale* (il Mulino, Bologna, 2019).

intelligence, as a more specific footprint of digitization, is politics conducted by other means, although it is rarely recognized as such[30].

As Ursula Franklin writes, "the viability of technology, like democracy, ultimately depends on the practice of justice and the imposition of limits on power"[31]. Here, then, is where the issue of digitization and, for it, artificial intelligence-and justice connect: addressing the fundamental problems of AI and planetary computation requires connecting to issues of power and justice, to understand what is at stake and to make better collective decisions about what should come next, bearing in mind that AI systems are built with the logics of capital, policing and militarization, and this combination further exacerbates existing power asymmetries. As a condition for change on our planet, we should simultaneously heed demands for data protection, workers' rights, demands for climate justice, racial equity, health protection, and efficiency of the justice system. The interconnectedness of all these demands for justice informs how we understand AI and make possible alternatives of planetary politics.

3. Crisis of Democracy Means the End of Global Expansion of Judiciary?

It is true that the observance of the rule of law[32], "based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention", may never be more relevant than in times of crisis and emergency. Judicial independence has repeatedly been recognized as a prerequisite to the rule of law and as a fundamental guarantee of a fair trial.

Respecting human rights and setting limits against the abusive use of power, first of all an independent judiciary, are the main implications of the rule of law. They are inherent to the notion of democracy itself that is more complex than respecting the will of the majority. But "financial constraints, ineffective procedures and the inability to deliver speedy justice remained." In addition, rule of law concerns observed in some countries have been exacerbated by the crisis[33].

Further, some participating States have seen a power shift during the pandemic away from the judiciary towards the executive, with a concern that this may become "normalized" and permanent. Additionally, in some jurisdictions, the absence of a functioning Constitutional and Supreme Court impeded effective oversight of emergency legislation" (Primer OCSE p. 10). We see that in certain European States, namely Hungary and Poland, we can speak of majoritarian democracy in the new sense, as democracy centered on the will of majority and a reduction of the role of judiciary. Russia and China are "popular democracy" with a strong role of executive and weak independence of judiciary and these countries play a relevant role in contemporary geo-politics.

Thus, it is not the problem of the backwardness of digital infrastructures that is central, but their role and relationship to the mechanisms of democracy and, above all, to forms of democratic control and participation. Is the judiciary progressively receiving attributions that give the judiciary a kind of political responsibility?[34]

In several case also in western countries we observe a more or less profound intolerance of the rule of law. In Italy, a country of deep constitutional democratic tradition, and a Constitution that contains strong guarantees of the independence of judiciary, we are witnessing a moral crisis of free judicial associationism which is accompanied by the crisis of the self-governing body of judges (CSM). The most general explanation that is given goes to the economic and social effects of globalization in our western societies accompanied by the ongoing technological revolution[35].

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[30] The reason why we must confront AI as a political, cultural and scientific force is well illustrated by Kate Crawford, cit. 27: «L'intensificazione del potere tecnocratico è un processo in corso da molto tempo, ma attualmente in accelerazione anche in virtù della concentrazione del capitale industriale in un momento di austerità economica e di outsourcing, che comprende il taglio dei fondi ai sistemi di assistenza sociale e alle istituzioni che un tempo fungevano da freno al potere del mercato». Aggiungono Alondra Nelson, Thuy Linh N. Tu e Alicia Headlam Hines (edited by), *Introduction: Hidden Circuits, in Technicolor: Race, Technology, and Everyday Life* (New York University Press 2001 1,12): «le controversie in campo tecnologico sono sempre collegate a lotte più ampie per la mobilità economica, a questioni politiche e alla costruzione di comunità».

[31] Ursula M. Franklin, *The Real World of Technology (Anansi* 2004 5).

[32] See Massimo Luciani, 'Il sistema delle fonti del diritto alla prova dell'emergenza' (2020) Giurcost.org < https://www.giurcost.org/LIBERAMICORUM/luciani_scrittiCostanzo.pdf> accessed 15 September 2022.

[33] Silvio Troilo, 'La tutela dello Stato di diritto nell'Unione europea post Covid-19' 4 (2021) Forum di Quaderni Costituzionali <https://www.forumcostituzionale.it/wordpress/> accessed 15 September 2022.

[34] Carlo Casonato, 'Costituzione e Intelligenza artificiale: un'agenda per il prossimo futuro', 2S (2019) BioLaw Journal – Rivista di BioDiritto [S.I.] 711,725 <https://teseo.unitn.it/biolaw/article/view/1403>

[35] Mario Patrono, 'International Law and Global Politics in a Post-Pandemic World: Homo Sapiens?', 52(4) 2022 897,936.

The longstanding compromise between capitalism and liberal democracy is over[36].

Loss of jobs, reduction of income, paralyzed economic and social ladders create damages in the lives of many. Political parties have become ossified. Administrative institutions govern without having a political direction anymore but by virtue of policies decided in supranational fora by elites detached from specific social referents. A new class of plutocrats live vis a vis most of the others, who have been losing jobs and income. The protection of human rights proves to be a weak barrier to counter these trends. Trust in the judiciary decreases.

The pandemic leads to an undoubted concentration of powers in the executives. Thus, it is not only a matter of the fact that the manifestation of the Covid-19 virus has made swift and decisive interventions necessary, intervening in fundamental rights including the right of defense, but of the consequence that apparently non-urgent judicial activities have been suspended, harming the fundamental right of defense. Above all, it is about the fact that this can now be the premise for establishing a kind of relationship between pandemic, judicial power and executive power and their digitization that is capable of tracing the direction and features of the current crisis of democracy. More and more intense forms of responsibility are being demanded for judges who now risk influencing their function.

The rule of law is subordinated to the needs of economic recovery and this is evident in the PNRR[37]. National courts are stressed by supranational orders.

This sometimes results in a deep reaction: German Bundesverfassungsgerichte has invoked the theory of ultra vires to define a sphere of untouchability of national identity believing that they can directly review acts of EU bodies. The Italian Constitutional Court has expressed the same requirement with the counter-limit theory, with a more respectful attitude towards the EU Court.

The dialogue between the Courts takes place in increasingly politically troubled waters and tending to reduce the role of the judiciary. If it is true that the EU is unity in diversity, we all seek a balance between the demand for national identity and the leveling forces expressed by global law. Multilevel constitutionalism is causing the weakening of the force of the judged allowing the preliminary questions of European law to call into question the structures of interests defined by national administrative processes and procedures.

The future is not easily predictable. But the risks of rejection of a centuries-old tradition based on the rule of law are very high. On the positive side, the pandemic has created an incentive for countries to review and reform justice systems. This has reignited discussions, for example, on virtual justice and remote delivery, as well as debates on how to reduce over-criminalization and over-incarceration by enhancing the use of non-custodial sentences and community-based approaches to offender treatment (e.g., refraining from responding to minor, non-violent offences with imprisonment).

In some jurisdictions, decisions on how to manage courts during and post-pandemic have been taken by the executive authorities, with or without consultation from the judiciary. In some States and contexts, measures have been set out in legislation and procedural laws, while others have been determined by the judicial authorities such as judicial councils or by judges themselves. For some matters, it was a combination of these actors. In Italy most of the decrees were adopted by Government and converted in law by the Parliament.

We recall the OCSE recommendations in pandemic:

1. Flexible exit strategies for emerging from restrictions imposed by the pandemic should be considered by courts.
2. States should avoid “hyper-production” of laws, decrees, regulations and instructions on emergency measures for the judiciary from different levels of power (legislative, executive, judicial). Such laws, decrees, regulations and instructions should not be contradictory or vaguely formulated and should be clear on the time when the measures start and end.
3. Laws and regulations adopted as a response to the emergency should include sunset clauses, be temporary in nature and preferably be kept separate from regular, non-emergency legislation.
4. Courts should ensure that the right to a fair trial is respected during states of emergency and that nobody is ever subject to measures that would circumvent non-derogable rights.
5. Judicial oversight should be available to review both the constitutionality and legality of any declaration of state of emergency, and any implementing measures, to evaluate the proportionality of the restrictions, as well as procedural fairness of application of emergency legislation.

[36] Gianni Ferrara, ‘Democrazia e globalizzazione’, cit., 379 ss.; R. Bodei, *Dominio e sottomissione*, cit.

[37] Gianni Ferrara, ‘Democrazia e globalizzazione’, cit.

6. Higher judicial authorities and court presidents should issue guidance to assist individual judges in determining how to manage their responses to the pandemic. Feedback should be sought, and guidance should be amended accordingly.
7. Courts, when determining measures, should consider how to maintain a balance between clarity and predictability and judicial discretion and flexibility.
8. Courts could consider the establishment of committees to propose and oversee measures to manage the pandemic.
9. The judiciary should identify ways to share practices on their responses to the pandemic, among and across different courts, different regions of the country and different jurisdictions.
10. Dialogue should be established with a wide range of professions, in particular with lawyers and bar associations, in order to ensure that considerations of access to justice and safety measures are adequately taken into account.
11. When designing their protocols and responses to the pandemic, courts should consider the needs of vulnerable persons and the particular impact on their rights to fair trial and access to justice.
12. Any measures and protocols should be communicated to all users, rapidly and regularly, and in ways which are accessible and which take account of vulnerabilities. Those attending court should be provided with detailed guidance.
13. Alternative means of communicating with court users should be considered in order to reduce the numbers of persons attending court in person.
14. The secure and confidential transmission of data needs to be ensured in the provision of any technology used by the courts.

All correct recommendations but a doubt remains with which we conclude this short paper: if the post pandemic world is a world that we think rebuilt on a resilient basis, will it not be that it requires a marginalization of social conflicts and an inevitable reduction of the rule of law[38]?

[38] Alessandro Pajno and Luciano Violante (edited by), *Biopolitica, Pandemia e democrazia.* Rule of law *nella società digitale, (Vol. 3, Pandemia e tecnologie: l'impatto su processi, scuola e medicina)* (il Mulino Bologna 2021).

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