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# Covid-19 : a further executive overreach, was it worth ?

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Many authors have been able to explain how the Covid19's related emergence has allowed authoritarian regimes to restrict fundamental rights as, for instance, freedom of movement and freedom of expression<sup>2</sup>. Yet, very few of them have noted that the same tendency has indeed "infected" democratic governments as well, which have exploited the pandemic to enhance executive's power, producing what law scholars define as "executive aggrandizement" or "executive overreach"<sup>3</sup>. They have done so to the detriment not only of the legislative power and the judiciary, but also of the citizens' constitutionally granted rights. Executive aggrandizement obtained through emergencies isn't, indeed, a novelty in Western democracies. For example, as Canadian author Peter D. Scott noted<sup>4</sup>, in the United States, with the "Executive Order 12656" of February 1988<sup>5</sup>, 'a totally legitimate program dating back to Eisenhower, of planning extraordinary emergency measures for an America devastated in a nuclear attack, was now converted to confer equivalent secret powers on the White House for anything it considered an emergency.'

Later on, following the 9/11 attacks, the US Congress issued the so-called "Patriot Act"<sup>6</sup> which implemented unprecedented and breakthrough limitations of fundamental rights of American citizens even on the national territory. The consequent longstanding "war on terror" furtherly increased

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<sup>2</sup> See, for example, Zeynep Tufekci: "How the Coronavirus Revealed Authoritarianism's Fatal Flaw", *The Atlantic*, February 22, 2020. [Online] Available at: <https://www.theatlantic.com/technology/archive/2020/02/coronavirus-and-blindness-authoritarianism/606922/> ; see also Haas, L. J.: "Iran's coronavirus response highlights authoritarianism's dangers." *The Hill*, March 27, 2020. [Online] Available at: <https://thehill.com/opinion/international/489802-irans-coronavirus-response-highlights-authoritarianisms-dangers>

<sup>3</sup> Regarding for example the United States, McConnell effectively summarizes the concept writing that it is the administration's "tendency to push unilateral executive power beyond constitutional and customary limits", which relies on a presidential lack of "a proper respect for constitutional checks and balances". McConnell, M. (2012). "Democrats and Executive Overreach". *The Wall Street Journal*, January 10, 2012.

<sup>4</sup> Scott, P. D. (2014). *The American deep state: Wall street, big oil, and the attack on US democracy*. Rowman & Littlefield. (pag.30).

<sup>5</sup>"EO 12656 Assignment of Emergency Preparedness Responsibilities". The full text of the EO is available online at: <https://www.wbdg.org/ffc/fed/executive-orders/eo-12656>

<sup>6</sup> The full denomination of that law is: "The USA Patriot Act: Preserving Life and Liberty" (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). An archived, integral copy of it is available at: [https://web.archive.org/web/20090309172100/http://www.lifeandliberty.gov/what\\_is\\_the\\_patriot\\_act.pdf](https://web.archive.org/web/20090309172100/http://www.lifeandliberty.gov/what_is_the_patriot_act.pdf)

presidential and White House's exceptional powers, a tendency which the Obama Administration didn't reverse but ulteriorly exploited<sup>7</sup>. Intriguingly, from then on, the limitations of fundamental rights and the governmental control of citizens has continued to be pursued not only by the executive power, but also by the legislative one<sup>8</sup>. The Jihadists' menace – or, in some cases, its overestimated perception<sup>9</sup> - has represented another force which pushed democratic governments to restrict or, in some cases, even temporarily suspend fundamental rights of their citizens<sup>10</sup>.

The recent Covid19 emergence has represented another tempting opportunity for executives' overreach. Let's have a look, for example, at what happened in some countries of the European Union. In Italy, because of the emergence of the coronavirus, the government by means of many “*decreti legge*”, i.e. executive acts having law power but missing any parliamentary intervention, temporarily suspended institutional and personal rights granted by the Constitution. At this regard, the emeritus President of the Italian Constitutional Court, Gaetano Silvestri, in an unusually tough article<sup>11</sup>, by reminding a similar situation experienced by Italy during the right- and left-wing terrorism in the seventies and the early eighties, noted that such rights can't even be suspended. Moreover, he warned about the temptation of evoking Carl Schmitt's theory on the supposed sovereignty belonging to who is ruling a state in a case of emergence. He reminded also that the Italian Constitution, as many other European ones, doesn't have an article stating the “case of necessity” precisely because of what happened during the Germany's Weimar Republic, whose article no. 48 of its Constitution was

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<sup>7</sup> Restad, H. E. (2012). *The War on Terror from Bush to Obama: On Power and Path Dependency*. NUPI Working Paper 798, Oslo: Norwegian Institute of International Affairs. [Online] Available at: <https://nupi.brage.unit.no/nupi-xmlui/bitstream/handle/11250/226353/NUPI-WP-798-Restad-2.pdf?sequence=3>. The author starts from the question: “is a concentration of power in the executive in a time of national crisis reversible?” (p.12) and her conclusions are rather unexpected. In fact, she finds that, although candidate Obama informed his presidential campaign by fighting Bush Administration's interpretation of presidential war powers, then, as President, “found that the policies and accumulated power of Bush were the right answer to a difficult time” (pag.45) and therefore maintained them. See also: Fox News: “Obama Signs Last Minute Patriot Act Extension”. *Fox News*, May, 27, 2011. [Online] Available at: <https://www.foxnews.com/politics/obama-signs-last-minute-patriot-act-extension> .

<sup>8</sup> Adler-Benn, S. “Why The Hell Democrats Just Extended Patriot Act?” *New Republic*, November, 20, 2019. [Online] Available at: <https://newrepublic.com/article/155793/hell-democrats-just-extend-patriot-act> . The “Patriot Act” itself “was passed nearly unanimously by the Senate 98-1, and 357-66 in the House, with the support of members from across the political spectrum.” Source: see footnote 5.

<sup>9</sup> On the supposed overestimation of Islamist terrorists' menace in Europe, and its consequences on citizens' rights, see, for example, Heath-Kelly, C. "Counter-Terrorism and the Counterfactual: Producing the 'Radicalisation' Discourse and the UK PREVENT Strategy." *The British Journal of Politics & International Relations* 15.3 (2013): 394-415.

<sup>10</sup> Among many cases, see, for example, for the Australian one: Head, M. (2002). “Counter-terrorism laws: A threat to political freedom, civil liberties and constitutional rights.” *Melbourne University Law Review*, 26, 666.

<sup>11</sup> Silvestri G. “Covid 19 e Costituzione.” [Online] Available at: <https://www.unicost.eu/covid-19-e-costituzione/> .

invoked for paving the way to the Nazi take-over. President Silvestri explained also that even in case of a war – the most ever exceptional possible situation – the Italian Constitution doesn't put apart the parliamentary democracy, providing that the parliament could assign the executive only the “*necessary powers*” and not the “*full powers*”. In Germany, because of the coronavirus emergence, a similar executive overreach limiting citizens' rights has occurred, later followed by popular protests. However, after the local authority of a city of the German state of Hesse had issued a ban against a public gathering, the German Constitutional Court reportedly ruled saying that: “The local authorities had incorrectly assumed that the provision by the Hesse state government to fight the coronavirus includes a general ban on gatherings of more than two people who don't live in the same household and has therefore violated the constitutional right to assembly”<sup>12</sup>.

In England, former Supreme Court judge, Lord Sumption, during an interview with the British Broadcast Service (BBC) on the emergency related decisions taken by the UK government under popular pressure, critically said: “The real problem is that when human societies lose their freedom, it is not usually because tyrants have taken it away. It is usually because people willingly surrender their freedom in return for protection against some external threat. And the threat is usually a real threat but usually exaggerated. That's what I fear we are seeing now.” Then, by referring to the facts, reported by the press, concerning the police trying to stop people that, without going against the regulations, didn't follow what the ministers said they would prefer people not do (for example, going out alone for a short walk), he added: “The police have no power to enforce ministers' preferences, but only legal regulations which don't go anything like as far as the government's guidance. [...] This is what a police state is like. It's a state in which the government can issue orders or express preferences with no legal authority and the police will enforce ministers' wishes.”<sup>13</sup>

Another area in which, during the recent pandemic, democratic governments have been “infected” by authoritarian regimes is the massive control of the population through technological devices and artificial intelligence. Actually, this too is not a completely new issue, with the US, again, leading the way towards mass surveillance of American citizens by their own government<sup>14</sup>. Not surprisingly,

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<sup>12</sup> Reuters, “*Germans have the right to protest during coronavirus pandemic: court.*” [Online] Available at: <https://www.reuters.com/article/us-health-coronavirus-germany-protests-idUSKCN21Y220>.

<sup>13</sup> The full transcript of the interview is available at: *Unherd*: “Lord Sumption on the national “hysteria” over coronavirus”. [Online] Available at: <https://unherd.com/thepost/lord-sumption-on-the-national-coronavirus-hysteria/>.

<sup>14</sup> The basic – but not the only one – reference here is Greenwald, G. (2014), *No place to hide: Edward Snowden, the NSA, and the US surveillance state*. Macmillan. On the effects of Snowden's revelations on world politics seen from a sociological angle, see: Bauman, Z., Bigo, D., Esteves, P., Guild, E., Jabri, V., Lyon, D., & Walker, R. B. (2014). After Snowden: Rethinking the impact of surveillance. *International political sociology*, 8(2), 121-144. For a very rare public

the coronavirus related emergence offered another, greedy opportunity to be exploited for increasing government's intrusive surveillance, with, once again, the legislative power's approval<sup>15</sup>. What nowadays appears as rather new and quite concerning is the “*de facto*” alliance between governments and the tech companies, in particular the so-called big three (Amazon, Google, Microsoft), with the latter providing, during the pandemic, massive data without any limitation to the former<sup>16</sup>. If in the past the relationship between the two was, at least apparently, a conflictual one - with the tech companies declaring themselves as the defendants of privacy's and freedom of expression's rights against the pressing quests for data disclosure by the governments<sup>17</sup> - in the current situation, governments and tech companies seem deeply united in making those rights wastepaper. The justification for such a massive, intrusive surveillance is, this time, a kind of national security's variation, i.e. the citizens' health, a reason which would indeed prove how prophetic was Michel Foucault's focus on the biopower exercised by governments on their citizens' health and bodies<sup>18</sup>. In any case, in some states, regardless of the nature of their governments, we have seen the birth of compulsory apps to be downloaded for monitoring movements of people. Taking again Italy as an example of a Western, parliamentary democracy dealing with the coronavirus emergence, not only the executive ordered the app should be downloaded by the population, but considered also – at least at the beginning of the process - limiting the constitutional right of free movement even in the national

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defense of mass surveillance projects by President Obama as well as his personal justification for his changed attitude towards them, see Nicholas and Gorman (2013), “Obama defends surveillance” in *The Wall Street Journal*, June 8, 2013.

<sup>15</sup> Grim, R. “Coronavirus Spending Bill Could Be Used To Cement Spying Powers, Surveillance Critics In Congress Warned.” *The Intercept*, February 27, 2020. [Online] Available at: <https://theintercept.com/2020/02/27/coronavirus-spending-bill-surveillance-patriot-act/>. See also: Johnson, J. “152 House Democrats Join GOP to Reauthorize 'Abusive Government Surveillance Powers'.” *Common Dreams*, February, 27, 2020. [Online] Available at: <https://www.commondreams.org/news/2020/03/12/152-house-democrats-join-gop-reauthorize-abusive-government-surveillance-powers>. Finally, on May 19, 2020, the US Senate voted to give law enforcement agencies the power to look into US citizens' browser history without owing a warrant. See. Weindling, J., “Senate Just Allowed FBI To Search Your Browser History Without Warrant.” *International Business Times*. May 13, 2020. [Online] Available at: <https://www.ibtimes.com/senate-just-allowed-fbi-search-your-browser-history-without-warrant-2975672>

<sup>16</sup> Kelion, L.: “Coronavirus: Google reveals travel habits during the pandemic”. *British Broadcast Company*, April, 3, 2020. [Online] Available at: <https://www.bbc.com/news/technology-52138076>. Concerning in particular the US, see: Holmes, A.: “Google, Facebook, and other tech companies are reportedly in talks with the US government to use your location data to stop the coronavirus — and to see if social distancing is really working”. *Business Insider*, March 17, 2020. [Online] Available at: <https://www.businessinsider.com/google-facebook-discuss-helping-government-track-coronavirus-spread-2020-3?IR=T>

<sup>17</sup> On the only apparent conflictual nature of the relationship, see for example: Reuters, “*Exclusive: Yahoo secretly scanned customer emails for U.S. intelligence – sources*”, *Reuters.com*, October 4, 2016. [Online] Available at: <http://mobile.reuters.com/article/idUSKCN1241YT> Last access 12.10.2016.

<sup>18</sup> Michelle Foucault, *The History of Sexuality* Vol. 1, 1976; *Security, Territory, Population: Lectures at the Collège de France 1977–1978*.

territory to people who wouldn't have downloaded the app<sup>19</sup>. With an even more authoritarian move, the Italian executive decided the establishment of a task-force having as its mission that of monitoring social media looking for “true” statements about the nature, the causes and the remedies of the Covid19 and, eventually, eliminating and sanctionings the “fake news” about it<sup>20</sup>.

Whereas the executive overreach resulted in democratic states by means of the coronavirus related emergence, questions arise about whether such an aggrandizement is reversible or, as the ones arisen because of the “war on terror” and the Jihadists’ menace, it will be maintained in the future. In other terms, it should be questioned whether the implementation of massive social control technologies and the contemporary limitation and suspension of fundamental rights will continue to represent for governments ready-to-use tools for dealing with any kind of emergence, regardless of its nature and dimensions. So far, few opponents of this institutional and political trend have spoken against it<sup>21</sup> and even fewer have been taken into consideration. Fear, as it was in the case of the “war on terror” and the Jihadists’ menace, appears at works within the societies for weakening social awareness and mobilization.

To conclude, the coronavirus related emergence has offered in liberal democratic states an opportunity for the executives to extend their power in controlling citizens and limiting fundamental rights granted by national constitutions. Strangely enough, such a disturbing tendency has not been properly adversed, within those countries, by the judiciary and the legislative power, neither it has been seriously opposed by citizens’ associations, NGOs or foundations devoted to citizens’ freedom of expression and of movement. This worrisome situation seems to represent a proof of Naomi Klein’s argument about the deliberate, opportunistic exploitation (in some case, even the production) of national emergencies by governments for achieving the precise, although covert, long-term goals of reducing democracy and freedom<sup>22</sup>. At the same time, the almost completely absence of popular

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<sup>19</sup> *Corriere della Sera*: “IMMUNI: chi non scarica l’app avrà limiti nella mobilità.” April 20, 2020. Now available only at the following link: <https://www.nextquotidiano.it/limiti-spostamenti-chi-non-scarica-app-immuni/> .

<sup>20</sup> *La Repubblica*: “Martella: task force a Palazzo Chigi contro le fake news” March 28, 2020 [https://www.repubblica.it/politica/2020/03/28/news/martella\\_task\\_force\\_a\\_palazzo\\_chigi\\_contro\\_le\\_fake\\_news-252554295/](https://www.repubblica.it/politica/2020/03/28/news/martella_task_force_a_palazzo_chigi_contro_le_fake_news-252554295/) .

<sup>21</sup> A remarkable exception has been the popular uprising against the lockdown and the restrictions of freedom in Germany. See: Reuters. “I want my life back”: Germans protest against lockdown”, April 25, 2020. [Online] Available at: <https://www.reuters.com/article/us-health-coronavirus-germany-protests-idUSKCN2270RD> .

<sup>22</sup> Klein, N. (2007). *The shock doctrine: The rise of disaster capitalism*. Macmillan.

mobilization against such tendency appears even more concerning, whereas social movements have been depicted by many authors as the most effective barrier against totalitarian drifts in democracies.

Finally, the governments' decision of heavily relying on technological devices for managing the emergence and controlling the population are going to increase not only their own power, but also profits and power of high tech corporations<sup>23</sup>. Such giants were already placed side by side to, or even surpassing, the so-called "military-industrial complex" in influencing the national and foreign policy decision-making processes of many democratic states<sup>24</sup> and it is very plausible that the way governments handled the Covid19 emergence will furtherly empower them.

Therefore, given the fact that the coronavirus is reportedly said to be back soon<sup>25</sup>, the words of the former British Supreme Court judge about the dangers of national hysterias should be kept in mind by citizens: "there's no particular reason why the scientific nature of the problem should mean we have to resign our liberty into the hands of scientists. We all have critical faculties and it's rather important, in a moment of national panic, that we should maintain them."<sup>26</sup>

Milan, June, 18th, 2020.

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<sup>23</sup> Klein, N. "How Big Tech Plans to profit from coronavirus". *The Guardian*, May 13, 2020. [Online] Available at: <https://www.theguardian.com/news/2020/may/13/naomi-klein-how-big-tech-plans-to-profit-from-coronavirus-pandemic> .

<sup>24</sup> For the United States in particular, see Lofgren, Mike, *The Deep State: The Fall Of The Constitution and The Rise Of A Shadow Government*. New York: Penguin, 2016, Chapter 9: "Silicon Valley and the American Panopticon".

<sup>25</sup> Sandler, R. "The Coronavirus Will Return In The Fall, Fauci Predicts, But The US Will Be Better Prepared." *Forbes* [Online] Available at: <https://www.forbes.com/sites/rachelsandler/2020/03/30/the-coronavirus-will-return-in-the-fall-fauci-predicts-but-the-us-will-be-better-prepared/#4bca2a5be39b> .

<sup>26</sup> Source: see footnote 13.