Constitutional Crisis, Security and Democratic Resilience

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EDITORS' PREFACE

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EMERGENCY POWERS AND CONSTITUTIONS. A EUROPEAN OVERVIEW

Valeria Piergigli

Keywords: Emergency; War; Constitutions.

1. We live in Times of Emergency*: an Overused Formula*

In recent decades, the term 'emergency' has become increasingly common, not only in everyday language, but also in public debate and scientific literature. First of all, we need to try to clear the field of 'false emergencies', *i.e.* all those situations which, although they require urgent intervention by the institutions, are not actually emergencies. It is not easy to define the concept of emergency, but we can attempt to focus on its main items.

In contrast to everything that can be classified as normal and ordinary, emergencies consist of exceptional and extraordinary circumstances, events that constitute a break, a parenthesis destined to close with a return to the pre-existing normal order or, in any case, to something similar. If this is true, critical situations – however serious – that are cyclical or structural in nature, such as those related to economic and financial conditions, the irreversible degradation of ecosystems and climate change,[1] and the increase of migration flows to the more developed countries of the West cannot be legally considered and treated as emergencies. Nor can crisis situations, that are destined to become chronic or even permanent, even if they were originally emergencies, be considered emergencies. In other words, the concept of a 'permanent emergency' is a contradiction in terms.[2]

Real emergencies are mostly sudden circumstances of difficulty or danger, of a temporary nature even if not short-lived, abnormal and serious, unforeseen or unpredictable, which require

[1] Carducci Michele, "Cambiamento climatico (diritto costituzionale)," in *Digesto delle discipline pubblicistiche, Aggiornamento*, edited by Raffaele Bifulco, Alfonso Celotto, Marco Olivetti (Turin: Utet, 2021), 51 ff.; Bifulco Raffaele, "*Rule of law* ed emergenza climatica," *Federalismi.it*, 5 (2025): 1 ff.

[2] Navot Suzie, "Emergency as a state of mind - The case of Israel," in *The Rule of Crisis Terrorism, Emergency Legislation and the Rule of Law*, edited by Pierre Auriel, Olivier Beaud, Carl Wellman (Berlin: Springer, 2018), 1 ff.

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timely intervention to protect overriding public interests, such as health, safety and security of citizens, public order, territorial integrity and independence of the state. In short, emergencies are legally relevant events, in the face of which the law and political decision-makers, sometimes with the support of appropriate technical and scientific knowledge, cannot remain indifferent. On the contrary, prompt action by the public authorities to contain and combat the situation is essential in order to prevent the aggravation or spread of the harmful consequences of the original event or even simply to ward off the threat of probable or possible future events of similar intensity and nature. Therefore, in emergency circumstances, the temporary adoption of exceptional measures and the possible establishment of a state of crisis, with inevitable consequences on the functioning of the state institutions, are considered legitimate as well as appropriate.[3]

Hence the widespread choice, especially on the part of contemporary legal systems based on pluralist democracy and the separation of powers, to entrust the constitution or the law with more or less detailed regulation of emergency situations. In this regard, solutions vary from country to country, but the objective is, in any case, to contain and limit the exercise of extraordinary powers, to protect a core set of constitutional guarantees and to allow the restoration of the *status quo ante* as soon as possible. In fact, within the framework of a democratic constitutional state governed by the rule of law, what characterizes (or should characterize) emergency regimes are the temporary nature of the derogations introduced to the established power and constitutional normality, the necessity, adequacy, reasonableness and proportionality of the measures adopted to effectively respond to the emergency, and the oversight on the use of derogatory powers.

The context is not irrelevant, as the approach to the issue may vary considerably depending on whether exceptional measures are taken within a democratic or authoritarian system. While popular legitimacy of power, checks and balances, and constitutional guarantees are the cornerstones of a democratic system, from which it is possible to deviate only temporarily and under very specific conditions, the opposite is true in autocratic systems. Here, the rule – and not the exception – is the concentration of power in a monocratic body, without real democratic investiture and (self-)empowered to operate, both in normal and extraordinary circumstances, in the absence of real counterpowers and limits.

It is undeniable that a margin of uncertainty can remain, even regardless the distinction mentioned above. In fact, only once the emergency period is over, it is possible to assess whether the activation of the exceptional regime actually contributed to the safeguarding of democratic institutions or, on the contrary, facilitated their overthrow, accompanied by the establishment of an order antithetical to the previous one. This is the distinction between 'commissarial dictatorship' and 'constituent dictatorship', to borrow the well-known theory developed by Carl Schmitt[4] in the early decades of the last century, with regard to the establishment, for emergency reasons, of a regime with concentrated powers aimed, respectively, at protecting and preserving the existing system or at overturning it.

Nor can it be ruled out that the management of an emergency situation in a given legal system, even if theoretically attributable to the *genus* of democratic constitutional state, may represent a pretext, whether accidental or provoked, for promoting the transition to an autocratic approach to power. This is particularly evident in democratically fragile or unstable sys-

[3] Richard Albert and Roznay Yaniv, edited by, *Constitutionalism Under Extreme Conditions. Law, Emergency, Exception* (Berlin: Springer, 2020).

[4] Schmitt Carl, *La dittatura. Dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria* (Rome-Bari: Laterza, 1921, Italian translation 1975).

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tems, or in those characterizing by the phenomenon of democratic retrogression or backsliding. There are numerous examples of this in all continents. Suffice to mention, in more recent times, the experience of Turkey, after the failed *coup d'état* in July 2016, which was followed by the proclamation of a state of emergency by the President of the Republic, constitutional reform in 2017 and the introduction of a presidential system without adequate checks and balances. Let's consider too the authoritarian change in Tunisia, where the declaration of a state of emergency motivated by the Covid-19 health crisis and the dissolution of Parliament by the Head of State in July 2021 were the precursors to the adoption, exactly one year later, of a new constitution that radically subverted what had seemed to be the most significant achievements of the movement known as the 'Arab Spring' and which had been enshrined in the 2014 constitution, now definitively outdated. And finally, although the examples could go on, it is unforgettable the situation in Hungary, which has long been openly considered by its own rulers to be an illiberal democracy, where the declaration of a state of emergency and the assumption of full powers by the Prime Minister to deal with the Covid-19 pandemic in the spring of 2020 was followed, in the spring of 2022, practically without interruption, by the establishment of a state of emergency originating from the Russian-Ukrainian war.

Starting from the lexical and semantic profiles underlying contemporary emergencies (para. 2) and the framing of the phenomenon within the European constitutions (para. 3), this contribution aims to analyze some of the best-known constitutional models (para. 4) and verify their application in the light of experience (para. 5). Finally, given that emergencies and the reactions of public authorities to emergencies can represent a stress test even in so-called consolidated democracies, we will attempt to formulate some concluding reflections, also in light of the recommendations expressed on several occasions by the Venice Commission (para. 6).

2. *Emergencies and States of Emergencies. Lexical and Semantic Profiles*

A considerable variety of terminology characterizes the legal approach to the issue of emergency (*rectius*: emergencies). The Anglo-Saxon system uses the notion of 'emergency' to refer generically to any situation that requires immediate intervention measures (so-called emergency powers), while the expression 'state of emergency' designates a specific legal institution that involves the suspension of the ordinary constitutional regime, and 'martial law' is equivalent to what, in continental law, is usually referred to as a 'state of *siege*'.

In the French legal system, the notion of '*urgence*' refers to both emergencies and any generic situation of necessity, but only emergencies in the strict sense can justify, in certain limited cases, the establishment of an '*état d'urgence*' and the derogation from the ordinary regime, including the separation of powers and the exercise of fundamental freedoms. Expressions and institutions such as '*état de siege*' and '*pleins pouvoirs*', in which power is exercised by the military authorities or by the President of the Republic respectively, are also specific to the French tradition. The 'full powers' or extraordinary powers of the Head of State were referred to in Article 48 of the Weimar Constitution of 1919, a historical example of crisis management, sadly famous for contributing to the fall of the Republic and opening the doors to Nazi regime. Emergency, urgency, state of necessity and state of exception, and also state of crisis, *état de siege*, state of tension, state of police and of public danger are the terms most commonly used in comparative law, which cannot be superimposed or transferred literally from one legal system to another. Indeed, the automatic and superficial transposition of these linguistic expressions,

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based on the simple assonance of their names, seriously risks to compromise any comparison between institutions which, while sharing the need to deal with extraordinary events, are in fact characterized by different disciplines. Thus, for example, the above-mentioned formula *état d'urgence*, which can be translated as 'state of emergency', is not at all similar to the apparently similar expression used in Italy in the 2018 Civil Protection Code.

The term 'state of emergency' is ambiguous too. It should be noted that the expression can be used as a synonym for emergency, and in this sense it refers to a situation that is particularly serious and problematic in the sense indicated above. However, in a technical meaning, the same formula is used with reference to the legal situation that follows the official ascertainment of the factual situation. On the basis of the declared state of emergency, the most appropriate measures will then be taken to avoid harm to the community and protect the established order. In this regard, the experience shows that, when an emergency occurs, the legal system can react by formally establishing a state (or regime or system) of emergency (or exception), whether or not predefined in advance by constitutional or legislative sources, or by resorting to ordinary bodies and procedures (the so-called business as usual model). In both cases, measures may be taken that alter the normal regime of constitutional powers and weaken certain rights and freedoms, to the point of totally or partially suspending the constitution, which temporarily nullifies the effectiveness of constitutional guarantees.[5]

To be more precise, although they are frequently used interchangeably, the terms 'state of emergency' and 'state of exception' refer to distinct concepts. Thus, a state of emergency relates to the exercise of an established power, and the aim is the confirmation of constitutional legality. Conversely, a state of exception implies the exercise of constituent power, and its purpose is to break constitutional legality. Therefore, static and conservative purposes, or dynamic and subversive purposes, would characterize each situation respectively.

The declaration (or proclamation) of a state of emergency has the legal advantage of informing both institutions and citizens that, as a result of the emergency, temporary exceptions to the previous ordinary regime may occur. At the same time, however, the introduction of the derogatory regime and the official declaration of a state of emergency, possibly accompanied by the suspension of the constitution, seem to evoke a sort of regression to the past, i.e. to the time when the King was the absolute holder of powers and prerogatives that could be exercised without parliamentary participation and control. For this reason, there is substantial opposition on the part of contemporary democratic legal systems to formalizing emergency regimes through the declaration of a state of emergency, both in the presence of external threats and internal dangers to the state.

Is it possible to draw up a taxonomy of emergencies? As a first approximation and from a descriptive point of view, if we take into account the dimension and the involvement of different states, emergencies are traditionally divided into *external* (or international) and *internal*, to which transnational and global emergencies should be added, since critical situations are often no longer confined to individual countries or portions of territory, but tend to affect vast geographical or geopolitical areas. Based on their origin, i.e. the event that triggers them, emergencies can be grouped by type. In this respect too, with the exception of the generalized discipline of the state of war, the constitutional and legislative lexicon is multifaceted and rather complex. On the one hand, there are *political* emergencies that arise from human activity and are aimed at challenging the established order and institutional continuity. On

[5] De Vergottini Giuseppe, *Diritto costituzionale comparato* (Milan: Cedam-Wolters Kluwer, 2022), 279 ff.

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the other hand, there are *technical* emergencies, caused by natural events and therefore politically neutral, which pose problems for the protection and safety of the population.[6]

The former include situations of a warlike nature, such as wars, revolutions, *coups d'état*, insurrections, popular uprisings, but also economic, financial, environmental and climatic crises, ecological disasters, as «unintended but foreseeable consequences»[7] of human choices and behaviours. The latter usually include natural calamities, such as earthquakes, floods, volcanic eruptions, epidemics and health crises. Moreover, taking inspiration from the crisis caused by the Coronavirus pandemic and its effects in terms of restrictions on civil liberties, as well as the distribution of power between political bodies and between the state and local authorities in many countries around the world, a further type of emergency has recently proposed. It can be defined as 'hybrid', as it originates from technical circumstances but it is capable of producing significant and long-lasting consequences on a political level, ultimately affecting the normal institutional order.[8] The factual and legal scenario of emergencies therefore appears to be extremely heterogeneous.

Even the war emergency, which appears easier to identify, requires some clarification from a terminological point of view in light of the conceptual evolution of the phenomenon, leaving aside the notion of 'Cold War' which, for almost fifty years after the end of the Second World War, served to designate the political, ideological and military confrontation between the major world powers (the USA and the USSR) and their allies. Alongside traditional warfare – aggression, conquest, defence – understood as an armed conflict between two or more states aimed at the annihilation of one of the parties, what is striking – once again – is the lexical and semantic heterogeneity underlying post-modern conflicts. These conflicts do not seem to fit into the classic definition of war, although the use of weapons and military apparatus by states or non-state organizations cannot be ruled out. Let's think to situations such as international terrorism or the operations of stabilization and reconstruction variously supported by the international community and commonly known as peace-keeping, peace-building, peace-making or peace-enforcement missions.[9]

There are also expressions in which the term war is accompanied by adjectives intended to emphasize the legitimacy of the purpose for which the conflict is initiated and conducted. In this regard, while the concept of 'holy war' is not uncommon in certain contexts, more widespread and commonly accepted is the use of formulas that refer to the idea of lawful or legal, just, preventive war, or that replace the term 'war' with seemingly more neutral and nuanced circumlocutions. We then speak of international police operations, of the use of armed forces abroad, of military actions motivated by the *raison d'État*, of humanitarian or peace missions, of low-intensity conflicts. Not to mention the so-called hybrid wars, i.e. forms of hostility, not necessarily fought between sovereign states, which employ unconventional methods and exacerbate the often asymmetrical confrontation between the belligerents on the diplomatic, economic and technological levels.

[6] Piergigli Valeria, *Diritto costituzionale dell'emergenza* (Turin: Giappichelli, 2023).

[7] Pizzorusso Alessandro, "Emergenza, stato di," in *Enciclopedia delle scienze sociali* (Roma: Istituto della Enciclopedia italiana,1993), 552.

[8] Vedaschi Arianna, "Covid19 and the Notion of "Emergency": Towards, New Patterns?," in *Blog-iacl-aidc.org* (September 7, 2021).

[9] Vedaschi Arianna, "Il dinamismo del concetto di guerra: una sfida per il diritto," *Meridiana*, 110 (2024): 143 ff.

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3. *Emergencies and Constitutions: Approaches and Trends in Europe*

It has been already said that emergencies are legally relevant events, i.e. phenomena that disrupt the normal order and to which the law and political actors cannot remain indifferent. Emergencies require a timely and effective response from public authorities, which must protect citizens and the fundamental interests of the state from effects that could prove irreparably harmful, without renouncing, at least within the framework of democratic systems, the values that inspire liberal constitutionalism.

Yet, at first glance, emergencies and the law seem to be irreconcilable elements. Can events that are not always fully predictable or even unpredictable be regulated by specific rules, in a general and abstract way? What could be the most suitable sources for their regulation?

In a hypothetical top-down ranking, emergency powers may be entrusted to: a) the constitution, which may refer to subordinate sources for further details, b) pre-designed legislative provisions, c) *ad hoc* legislative provisions, i.e. specifically approved for the management of a particular emergency. It is also possible that, in the absence of express constitutional and legislative norms, the executive may decide for the self-assumption of emergency powers, subject to *ex post* ratification by Parliament. However, it is widely believed in contemporary constitutionalism that the prerequisite for the exercise of extraordinary powers must be sought implicitly within the constitution. The "doctrine of necessity" as an unwritten and external source of law, which was frequently invoked during the 19th-century monarchies and which does not seem to offer sufficient guarantees for the safeguarding of democratic values, cannot be accepted.[10]

In concrete terms, approximately 90% of the constitutions in force around the world contain provisions dedicated to emergencies and their management. Explicit provisions governing states of emergency, variously defined in lexical terms, are also found in most of the constitutions of the European Union countries, although not always with the same level of detail and frequently with reference to other legislative sources (constitutional, organic, cardinal and ordinary laws) for more specific regulation.[11] Exceptions to this are the constitutions of Italy, Belgium, Austria, Denmark and Sweden, which limit their focus to the state of war. The decision to constitutionalize emergencies appears to be linked to the rationalization of parliamentary form of government and the strengthening of guarantee institutions in the post-war constitutions. Consequently, the constitutions identify the conditions for states of emergency, define the procedure for their declaration and termination, provide for the organization and distribution of powers, without prejudice to the maintenance of certain fundamental guarantees. Apart from a general homogeneity in the regulation of the state of war, the constitutional approach to other emergencies reveals considerable heterogeneity, which makes it impossible, even from this point of view, to reduce them to a common taxonomy.

The *factual circumstances* that justify the formal declaration of a state of emergency may be internal or international, political or technical, as explained above, and may affect the entire national territory or limited areas. Where references are not limited to wars, armed attacks and unspecified public emergencies, the constitutions frequently mention: imminent danger to the sovereignty, independence and unity of the state, to territorial integrity, to democratic

[10] Gross Oren and Ní Aoláin Fionnuala, *Law in times of crisis. Emergency powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

[11] Khakee Anna, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper no. 30 (Geneva Centre for the Democratic Control of Armed Forces, 2009).

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institutions or the constitutional order, to internal order, security, life, health and property, as well as the threat of terrorist attacks and the occurrence of industrial or ecological accidents, disasters, calamities or natural catastrophes and the spread of infectious diseases.

The *declaration procedure* is usually divided into the stages of proposal, approval, proclamation and publication. In some legal systems, this procedure is initiated or authorized by the Parliament, sometimes by an absolute majority or a qualified majority of two-thirds or three-fifths of its members, possibly on the initiative of or after consultation with the executive (Bulgaria, Greece, Portugal, Slovenia, Slovakia, Lithuania), but more frequently the reverse is provided. Therefore, unless the procedure is entirely determined by the President of the Republic in consultation with certain institutional bodies (*e.g.* Article 16 of the French Constitution), a state of emergency is generally declared by the Government (by the Prime Minister in urgent cases) or by the President of the Republic on the initiative or after consultation with the Government, which then informs Parliament. The parliamentary assembly then intervenes subsequently to approve or reject the declaration of a state of emergency (Latvia, Romania, the Netherlands, Malta). Sometimes, it is expressly provided that, in the event of a negative vote, the activation of the state of emergency will have no effect or will be considered null and void (Cyprus and the Czech Republic). In some of the situations mentioned above, if Parliament is unable to meet or there are reasons of particular urgency, the resolution on the state of emergency is adopted by a special permanent parliamentary committee, subject to ratification as soon as possible by the plenary session of the legislative assembly (Portugal), or by the President of the Republic, who is required to notify the legislative body immediately (Slovenia, Bulgaria, Greece, Lithuania). In general, it is expressly provided that states of emergency, in their various forms, are temporary: normally lasting from fifteen days to six months, the emergency regime can only be prolonged by an act of parliament.

Sometimes, depending on the type of emergency, there is a different allocation of powers relating to the introduction of a state of crisis, with a shifting of the center of gravity towards the Parliament in particularly serious circumstances, especially those that jeopardize the fundamental values of the legal system. Thus, the German constitution of 1949, as amended in 1968, distinguishes between states of emergency, state of tension and state of defence – not only on the basis of their internal or international origin, or on the basis of their political or technical nature – but first and foremost according to a gradation of levels of intensity for national security (or threat to security), which corresponds to the activation of increasing institutional guarantees, starting with the progressive involvement of the legislative body in the management of the crisis. The prominence of Parliament reaches its peak in the 'state of defence', which is comparable to a state of war and is declared by the President of the Republic, at the request of the Government and with the approval of the upper house (*Bundesrat*), followed by confirmation of the lower house (*Bundestag*) with a law approved by a two-thirds majority of votes and in any case equal to at least the majority of MPs. A variation on the model mentioned above is the option adopted by the Spanish Constitution of 1978 which, as it will be discussed later (para. 4), classifies states of emergencies – states of alarm, exception and *siege* (*alarma, excepción, sitio*) – according to the source of danger from which each arises and whose assessment has important implications for the balance of powers, similar to the German system.

Similar provisions are found in more recent constitutional provisions. For example, the Czech constitutional law no. 110/1998 grants the government the power to declare a state of emergency in the event of a natural disaster, environmental or industrial accident, or other situation that may threaten life, health, property, internal order or security, specifying that

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strikes in defence of economic and social rights or interests do not constitute an emergency situation. Where sovereignty, territorial integrity or democratic institutions are threatened, the power to ascertain such circumstances belongs to the Parliament on the proposal of the government; furthermore, parliamentary approval must be expressed by an absolute majority of each assembly. The constitution of Estonia, after granting the President of the Republic both the power to propose to Parliament the declaration of a state of war or emergency and the power to declare war in order to repel an attack, recognizes the Government's power to declare a state of emergency, in all or part of the national territory, in the event of a disaster or natural calamity or to prevent the spread of an epidemic. However, it is Parliament that, by an absolute majority, may, on the proposal of the President of the Republic or the Government, declare a state of emergency for no more than three months in the event of a threat to the constitutional order of the Republic, i.e. for reasons of national defence, and it is always Parliament that declares a state of war on the proposal of the President of the Republic. The Constitution of Poland takes a slightly different approach, distinguishing between a state of war, a state of emergency in the event of a threat to institutions, security or public order, and a state of natural disaster. In the first two situations, the power to declare a state of emergency belongs to the President of the Republic, on the proposal of the Council of Ministers, who is obliged to submit his decision to Parliament within 48 hours, which may annul it by an absolute majority of votes and with the participation of at least half of the MPs. Instead, in the event of a disaster or accident, the Council of Ministers has the power to declare a state of natural disaster in order to prevent or remove any harmful consequences, without any intervention of the Parliament. Following the reforms of 2020 and 2022, the Hungarian Constitution assigned the declaration of a state of war and a state of emergency to Parliament, while the Government decides on a state of emergency. In this regard, it is interesting to note that a state of danger is linked to natural disasters or industrial accidents, but also to events "of an armed conflict, war, situation of humanitarian catastrophe in a neighbouring country" (Article 51), i.e. situations that immediately remind to the war unleashed by Russia against Ukraine in 2022, which may pose risks to neighbouring countries, such as Hungary.

The declaration of a state of emergency, however named, affects the *structure and functioning of constitutional bodies*, generally resulting in the temporary transfer of powers to the executive and/or the Head of State. These bodies are competent for the adoption of ordinances or decrees with the force of law or, in any case, for taking unspecified measures or regulatory powers, up to including derogations or suspensions of existing laws. Where this power is granted to the President of the Republic, its exercise may be subject to a proposal and countersignature by the Government (Croatia, in the event of a threat to the independence, unity and existence of the state). Sometimes, the President can act, on the proposal of the Government, only if Parliament is unable to meet and with the obligation to submit the measures adopted to the legislative assembly for the ratification (Poland, Slovenia, Croatia). If the Government adopts ordinances with the force of law, the constitution may provide for them to be subject to the veto of the President or Vice-President of the Republic, in addition to their expiry at the end of the emergency period (Cyprus). It is also possible, if Parliament is unable to meet because it has been dissolved or its term of office has expired, that its powers will be assumed, according to an express constitutional provision, by *ad hoc* bodies, such as a joint committee of both Chambers (German Constitution) or a standing committee acting as an emergency parliament with reduced legislative functions (Spain). Parliament retains both the power to approve or reject, with amendments if necessary, the legislative acts adopted by the executive, and the

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power to delegate the latter to take any measures it deems appropriate. Finally, as the European ones adopt parliamentary or semi-presidential systems of government, with the sole exception of the presidential republic of Cyprus, the principle of the Government's political accountability before the Parliament remains firmly established everywhere.

Frequent reference is made for *restrictions and/or suspensions of fundamental rights*, unless the option of completely excluding the possibility of suspension prevails, as specified in the constitutions of Belgium and Luxembourg. In this regard, the approach of the constitutions is multifaceted and rather asymmetrical. In fact, sometimes the formula that generically provides for the possibility of temporarily limiting the exercise of human rights is accompanied by an analytical explanation of the single rights that cannot be restricted. In general, these rights are: the right to life, the prohibition of torture, the rights to a fair trial and the presumption of innocence, the principle of legality of crimes and penalties, the right to privacy, the freedom of opinion and worship (Bulgaria and Croatia), together with the right to citizenship, the principle of equality and non-discrimination, the right to compensation for moral or material damage suffered as a result of unlawful conduct by others, family rights, the right to health, the prohibition of extradition, the right to one's national identity, the right to address state and local public offices in the official language and to receive a response in the same language (Estonia). Sometimes, conversely, the rights that may be derogated from (the Netherlands) or restricted in the event of war or other emergencies (Lithuania) are listed. The Polish regulations is more detailed, distinguishing between rights that cannot be restricted in a state of war or emergency and rights that may be restricted in the event of a natural disaster.

The Cypriot and Greek constitutions use the concept of suspension rather than restriction or limitation, and provide in largely overlapping terms for the possibility of suspending, in emergency situations, the right to life as a result of an act of war, the prohibition of forced labour, personal freedom and freedom of movement, the right to domicile and confidentiality of correspondence, freedoms of opinion, assembly and association, the right to fair compensation in the event of expropriation, the right to choose a job and the right to strike, to which the Greek constitution adds the power to suspend clauses concerning the establishment of military courts and special courts for political offences. The Slovenian constitution refers indiscriminately to the power to temporarily "suspend or restrict" fundamental rights, with some exceptions, in situations of war or emergency, while the Spanish constitution allows both the suspension of certain individual guarantees in the context of investigations for terrorist acts and the general suspension of some rights. However, as it will be discussed in more detail (para. 4), general suspension, i.e. imposed on the entire population or large communities of citizens, can only take place if a state of exception or *siege* has been declared, whereas the declaration of a state of alarm only allows the restriction – not suspension – of constitutional rights. Conversely, the Portuguese constitution lists the rights that cannot be suspended during a state of *siege* or emergency; these are the rights to life, personal integrity, personal identity, civil capacity and citizenship, as well as the non-retroactivity of criminal law, the right to a judicial defence, the freedom of conscience and religion.

Modalities and conditions governing the application of the constitutional provisions summarised above may be regulated in detail in the measures adopted by the executive to manage the emergency or in the act declaring a state of emergency, provided that the constitution does not refer in this regard to a law or a constitutional law or, in any case, to a law requiring a particularly high majority for approval. In some cases, it is specified that the restrictions must be necessary, appropriate and proportionate to the situation to be addressed, avoiding discriminatory treatment (Croatia and Poland) and without leading to the elimination of the right itself (Romania).

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As it can be seen, most of the constitutions of the EU member states provide for regulations, sometimes quite detailed, governing the conditions for exercising freedoms in times of war or other emergencies. However, it should be noted that not all constitutions that contain an emergency statute also deal with (or are required to deal with) the fate of individual and collective freedoms in such circumstances. Any omission in this regard does not prevent the introduction of restrictive, derogatory or suspensive measures, provided that such measures, like all those that may be taken during a state of emergency, are aimed at preserving, and not subverting, the established order.

The general and almost always explicit prohibition to amend the Constitution serves to *guarantee the fundamental values* and the continuity of the legal system during any state of emergency. Moreover, the prohibition of dissolving the Chambers is generally mentioned, together with the provision of their regular or extraordinary convening during states of emergency. Alongside the prolongation of the Chambers, the extension of the mandate of the President of the Republic (Slovenia) and of the representative local bodies (Estonia) is sometimes enshrined. Furthermore, for the purpose of constitutional guarantee, there are provisions establishing: a) the exclusion of referendums on the act introducing the state of emergency, as well as on the act authorizing its extension or declaring its termination (Hungary and Estonia), b) the judicial review over the declaration of a state of emergency and the consequent decisions (Slovakia), c) the prohibition of amending the laws on the election of the national Parliament, local assemblies and the President of the Republic, as well as the legislative sources on the production of emergency law (Poland). Finally, the Hungarian constitution prohibits the suspension of the Constitution and the limitation of the functions of the Constitutional Court.

4. *Focus on Selected Constitutional Models: France and Spain*

At this point, the investigation turns to two constitutional models, those of France and Spain. The analysis is useful, not only to highlight the different approaches taken by the respective constitutions, but also to test the application of those formal provisions to the emergencies in practice.

The French constitution devotes three provisions to emergency situations. Article 35, as amended in 2008, regulates the 'state of war' and the possibility of military intervention abroad, emphasizing in both cases the role of Parliament and dialogue with the executive. In fact, the Parliament authorizes the declaration of war and must be informed of any Government decision to send armed forces outside the national borders. Parliamentary authorization is also required if a mission abroad is extended beyond four months, without prejudice to the Government's faculty to ask the National Assembly (i.e. lower Chamber) to take the final decision. Worthy of note, on the other hand, is the explicit rejection of war of conquest and the use of armed force against other peoples, which is found in the preamble to the 1946 constitution, in turn referred to in the preamble to the current 1958 constitution, and which echoes the repudiation of war of aggression enshrined, among others, in the Italian constitution.

Article 36 provides for a 'state of *siege*' to be declared by the Council of Ministers for a period of twelve days, which may only be prolonged with the authorization of Parliament.

Finally, the wording and contents of Article 16 are significantly different from the abovementioned provisions. Inspired by Article 48 of the Weimar Constitution, Article 16 emphasizes the role of the Head of State and gives him/her the almost exclusive decision to assess

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the extraordinary circumstances summarily indicated in the constitutional text and to exercise the related exceptional powers. According to the constitution, in situations that seriously and immediately threaten "the institutions of the Republic, the independence of the nation, the integrity of the territory or [the] fulfilment of international commitments", interrupting the regular functioning of constitutional public powers, the President of the Republic is empowered to take the "measures required by the circumstances", after a (mandatory but not binding) consultation with the Prime Minister, the Presidents of both the Chambers of Parliament and the Constitutional Council (*Conseil constitutionnel*) and after informing the nation with a message. These measures are aimed at restoring constitutional normality "as swiftly as possible", thereby implicitly ruling out any reform of the constitution itself, while the Parliament shall sit as of right and the dissolution of the National Assembly is prohibited. The aforementioned constitutional amendment of 2008 added a time limit, in the sense that the exercise of exceptional powers cannot exceed thirty days, unless a different opinion of the Constitutional Council, which rules on the request of the Presidents of the assemblies or a parliamentary minority and, in any case, *ex officio* after sixty days have elapsed. Overall, the model identified in Article 16 is a generic emergency model in terms of its objective assumptions, weak from a procedural point of view, and extremely vague and flexible in its application, as it is ultimately left to the interpretation and discretionary assessment of the authority managing the emergency, albeit in compliance with the mild requirements indicated above. On the other hand, the President of the Republic is not accountable for acts performed in the exercise of his functions, in addition to the fact that the exercise of the powers conferred by Article 16 are expressly exempt from the requirement of Government countersignature (Article 19). Therefore, it is not conceivable that forms of political or judicial control could be activated against the President of the Republic, without prejudice to the power of the Chambers to initiate impeachment proceedings, but only where there is evidence of a "breach of his duties patently incompatible with his continuing in office" (Article 68, paragraph 1).

The constitutional provisions are supplemented by law no. 55-385 of 3 April 1955, which has been amended several times over the years. Enacted before the current constitution came into force, due to the need to manage the uprisings that broke out in Algeria at various times (1955, 1958 and 1961), this law provides for the declaration of the *état d'urgence* by decree of the Council of Ministers for a period of twelve days, unless extended by law of Parliament "both in case of imminent danger resulting from a serious threat to public order and of events which, by their nature and gravity, constitute a public disaster" (Article 1). The *état d'urgence* may cover the whole or part of the national territory, including Corsica and the overseas territories and departments.

Differently from France, Spain chose to lay down precise and rigorous constitutional rules for emergency situations. In doing so, the Spanish drafters implicitly were inspired by the German constitution as amended in 1968. At the same time, however, they drew on the constitutional tradition that had been consolidated on this issue during the 19th century until the advent of the Second Republic (1931), not without the adjustments made necessary after the fall of the Franco regime in the mid-1970s by the affirmation of the democratic principles. The 1978 Constitution grants the King, with the authorization of the *Cortes Generales* (Parliament), the power to declare war and conclude peace (Article 63, paragraph 3). The powers relating to the procedure for declaring the states of emergency (Article 116) are distributed between the executive and the legislature. The latter provision refers to a specific organic law, not only for detailed regulations, but above all for the identification of the conditions that may give rise to the specific emergency situations contemplated by the constitution. Article

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116 establishes a gradation of states of crisis – distinguished as states of *alarma*, *excepción* and *sitio* – which is reflected in the procedure to be followed for their respective proclamation, in the different rules regarding their duration, contents and legal effects, and in the role assigned to the executive and the Congress, while the Senate is not involved in any of these procedures. In summary, while the participation of Congress is subsequent to the declaration of the *estado de alarm*a, which is the responsibility of the Council of Ministers without prejudice to the obligation for the Government to immediately inform the Congress, which may decide to extend it, the intervention of the latter is preventive when it comes to authorizing the *estado de excepción* and, again, the balance between the two bodies changes in the *estado de sitio*, which sees Congress take a central role, voting by absolute majority on the declaration proposed by the Government. Whatever state of emergency is declared, it is expressly forbidden to dissolve the Congress or interrupt the normal functioning of the Chambers and other constitutional powers, including the Government and its officials, for whom the principle of accountability enshrined in the constitution and laws remains firm. In the event that, in one of the emergency situations, the Congress is unable to meet because it has been dissolved or its term of office has expired, its functions shall be assumed by its standing committee. Furthermore, limited to the cases of a state of *excepción* and a state of *sitio*, Article 55, paragraph 1, provides – as already mentioned – for the possibility of suspending the rights explicitly set out. Finally, to complete the constitutional picture, it is worth mentioning the express prohibition on amending the constitution in any of the situations indicated in Article 116, as well as in times of war, and the reference to the law to regulate the exercise of jurisdiction in the event of a state of *sitio*.

In order to implement the constitutional provisions, the organic law no. 4/1981, required by Article 116 of the constitution, regulated the conditions, contents, powers, limitations and control mechanisms for each of the situations indicated by the constitutional provision. In this regard, it should be noted that the modulation of the rules governing the three states of emergency within the organic law does not depend on the severity or intensity of the danger to be faced, ascertained according to a quantitative criterion, but rather on the need to prepare different mechanisms for different situations, so that political decision-makers are given the opportunity to decide, on the basis of a qualitative assessment, the most appropriate solution for each of the emergency circumstances that may actually arise. The '*estado de alarma*' relates to serious alterations to normality and may consist of natural or man-made disasters (calamities, health crises, paralysis of public services, significant shortages of basic necessities). It is declared by decree of the Council of Ministers, which specifies its territorial limit, effects and duration, which may not exceed fifteen days, in accordance with Article 116 of the constitution. Any prolongation of the state of alarm, at the request of the Government, must be expressly authorized, but without any particular majority, by the Congress, which may contribute to define its limits and conditions. The '*estado de excepción*' presupposes a situation of serious disturbance of public order, i.e. of the political and constitutional order, which cannot be maintained or restored by ordinary powers. In such circumstances, at the request of the Government, the Congress may authorize the declaration of a state of exception, specifying its effects, the financial penalties, its territorial scope and its duration, which may not exceed thirty days, unless extended under the same conditions for an equal period of time. Finally, the '*estado de sitio*' may be declared by the Congress by an absolute majority, on the exclusive proposal of the Government, in the event of insurrections or acts of force, real or potential, that can jeopardize the very foundations of the state, such as sovereignty, territorial integrity or the constitutional order. The declaration must specify the geographical

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extent, conditions and duration which, unlike the states of emergency mentioned above, are not predetermined by the legislature. Following the declaration, the Government assumes extraordinary powers and may utilize the designated military authority, which remains subordinate to the directives of the executive. Civil authorities are responsible for all functions not conferred on the military, with which they are nevertheless required to cooperate. If a state of *excepción* or *sitio* has been declared, the authorities may decide, as already mentioned, to suspend a wide range of fundamental rights (Article 55, paragraph 1 of the Constitution).

Important corollaries to the aforementioned provisions are the laws on the national civil protection system (law no. 17/2015), on national security (law no. 36/2015), as well as the organic laws on national defense (organic law no. 5/2005) and the protection of citizens' security (organic law no. 4/2005): a veritable regulatory arsenal in which the Government plays a leading role, albeit in relation to regional and local administrations, other state powers, civil society, and the armed forces.

5. *The Models and the Use of Emergency Powers in Practice*

An examination of the French and Spanish experiences on the use of emergency powers reveals interesting points for comparative reflection. As illustrated above, both legal systems regulate emergency situations, albeit in different ways; in both countries, constitutional provisions are supplemented by primary sources of law. Despite these similarities, individual emergencies have been managed in slightly different ways in the two countries. For their part, the constitutional guarantee bodies – the *Conseil constitutionnel* and the *Tribunal constitucional*, for France and Spain respectively – have contributed to the interpretation of emergency powers, revealing a substantial asymmetry in this respect as well.

In France, unlike the other constitutional provisions mentioned above and which have never been applied, Article 16 has been used only once: during the Algerian War in 1961, President De Gaulle resorted to extraordinary powers in an attempt to quell the uprisings that had broken out in the then French colony. After those events, Article 16 has never been applied again. Yet France, like other European democracies (and not only), has had to deal with numerous circumstances over time that can be variously classified as emergencies: from movements for independence in some overseas territories, to social, political, economic and cultural protests that were sometimes accompanied by violent actions, to political terrorism in the 1970s, to the terrorist attacks following September 11, 2001, and the Covid-19 health emergency in more recent history.

Given that none of these circumstances could justify a state of war, or even a state of *siege*, why was it decided not to invoke Article 16? How, using what legal provisions and with what results, if not by resorting to the mechanisms established by the constitution, were the various emergency situations dealt with?

On several occasions, the aforementioned law no. 55-385 was applied, specifically to quell the unrest that broke out in New Caledonia (1985) and in the suburbs of some large cities in France (2005), with the consequent strengthening of the administrative powers of the Minister of the Interior and the prefects. In 2015, following the Islamist attacks in Paris, at the headquarters of the satirical newspaper Charlie Hebdo and in several public places, including the Bataclan, the *état d'urgence* was declared for the first time across the entire country, without even considering the possibility of invoking Article 16 of the Constitution. Therefore, alongside various legislative measures, which had been introduced since 2001 to

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make criminal law and criminal procedure more repressive, the use of the 1955 law, which had been repeatedly amended and supplemented, enabled France to manage the difficult challenge that it faced in that moment, alongside other Western countries, with the aim of combating international terrorism and ensuring internal security. The *état d'urgence*, declared by the Council of Ministers pursuant to law no. 55-385, was repeatedly extended with parliamentary authorization and maintained for a total duration of approximately two years, until the definitive transposition of most of the measures adopted in law no. 2017-1510 for the strengthening of internal security and the fight against terrorism. The legislature thus contributed to the so-called normalization of the emergency, i.e. making permanent the measures dictated by emergency situations. Furthermore, in 2015, the Government decided to activate – similar to what the United Kingdom had done after the 2005 terrorist attacks in London – the derogation procedure provided for by the ECHR (Article 15).

During the health emergency of 2020, French lawmakers chose to disregard, once again, the model based on Article 16 of the Constitution, as well as the framework of the 1955 law, which was considered unsuitable for addressing a crisis such as Covid-19 due to its security-oriented approach, especially in light of the reforms that had taken place. However, along the lines of the aforementioned law, *ad hoc* legislation was hastily approved to amend the 2000 Public Health Code and introduce the *état d'urgence sanitaire* (Law no. 2020-290), which was declared by the Council of Ministers with effect throughout the national territory for an initial period of two months, and extended several times with specific legislative authorizations until 2022. Thus, with the health emergency, there was a double departure from the constitutional model and from the model outlined in the 1955 law, leading to a state of emergency tailored to the specific needs of the current health crisis. Similar to what has been seen in most countries affected by the pandemic, in France too the management of the health emergency has led to significant restrictions on numerous freedoms in order to protect public health. It has also enabled the Government and the Prime Minister to assume a preferential role and the simultaneous marginalization of Parliament, especially in the initial and most critical phase of the emergency. When dealing with emergency management, the Constitutional Council has taken a deferential approach toward political bodies, confirming in principle the constitutional legitimacy of emergency regulations. However, with regard to anti-terrorism legislation, the *Conseil constitutionnel* specified that derogations from the regime of freedoms must be reasonable and proportionate to the actual seriousness of the circumstances and that it is up to the legislature to strike the right balance between security interest and the protection of individual rights (*e.g.*, DC 2004-292 and DC 2005-532). With regard to the management of the health emergency, the *Conseil* recognized the legitimacy of introducing a 'new' state of emergency, seeking not to interfere more than strictly necessary in the sphere of political discretion and to refrain from taking openly confrontational positions. Thus, for example, in a series of judgments between 2021 and 2022 concerning preventive measures relating to laws on the extension of the *état d'urgence*, the introduction of the green pass and mandatory vaccination for certain categories of workers, the *Conseil* broadly recognized the legitimacy of the powers exercised by the Government and the fair balance achieved by the legislature between the constitutional purpose of protecting health and other rights, which had therefore been appropriately restricted.

Not even in Spain, where the constitutional model for emergencies – as illustrated – is precise and detailed, has a state of *excepción* or *sitio* ever been invoked, nor has a state of war ever been declared. Incidents of domestic terrorism, mainly attributable in the 1970s and 1980s to the actions of the armed Basque independence movement (ETA), were dealt with through

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the application of police measures and legislative interventions that modified criminal law and criminal procedure in order to suppress terrorist crimes. The political response to post-2001 Islamic terrorism and the 2004 Madrid train station bombing took the form – as in France – of adapting existing sanctions legislation to the new terrorist threats. Therefore, internal and international emergencies did not lead to the invocation of the constitutional clause on states of emergency. The first occasion, which remained an isolated precedent for a long time, when it was decided to activate a state of alarm throughout the country dates back to December 2010-January 2011, when a massive strike by air traffic controllers led to the interruption of air traffic and the paralysis of an essential public service. More recently, the Covid-19 health emergency has once again led to the activation of Article 116 of the Constitution.

Therefore, the reaction of the Spanish institutions to the pandemic emergency has been different from that seen in France. The Government activated a state of alarm throughout the country three times between 2020 and 2021, making use of the prolongations authorized by the Congress, in accordance with Article 116 of the Constitution and the aforementioned organic law no. 4/1981. Similar to what has been seen elsewhere, in Spain too, the emergency led to a temporary shift in the balance of powers which showed a centralization of the Government and the Prime Minister, and a decline in the role of Parliament, while dialogue between the central state and the regions (*Comunidades autónomas*) was not easy, especially in the initial phase of the emergency. In Spain, too, there have been significant restrictions on the exercise of fundamental freedoms, to the point of raising doubts as to whether these were actually restrictions and limitations or rather suspensions. As already mentioned, the Spanish constitution provides for the possibility of suspending certain rights in the event of a state of *excepción* or *sitio* (Article 55, paragraph 1), but not during an *estado de alarma*. This aspect has fueled a lively doctrinal debate and a bitter confrontation, both at the political and judicial levels, on the adequacy and constitutionality of the regime that has been activated. The *Tribunal constitucional*, which was appealed by a parliamentary minority, took a far from complacent stance toward the decisions taken by political bodies, going so far as to dismantle much of the strategy adopted by the Government to manage the health crisis. In particular, in the most emblematic decision concerning the constitutionality of the first state of alarm (judgment no. 148/2021), the Tribunal used a material and quantitative rather than a formal and qualitative conception of the mechanism of suspension and declared a partial unconstitutionality of the decree that had ordered the first state of alarm. According to the majority of judges, in fact, there is a relationship between the limitation and suspension of rights, in the sense that every suspension translates into a limitation, but not vice versa. Consequently, the Tribunal did not doubt the necessity, suitability and proportionality of the measures taken by the Government to stem the spread of infection, in line with what had been experienced elsewhere, but considered that the restrictions imposed in general on the enjoyment of certain rights (freedom of movement, freedom of assembly in private places) were so pervasive, drastic and intense that they had, actually, caused their emptying, deprivation and cessation, albeit temporary and with exceptions. In addition to declaring the partial illegitimacy of the first state of alarm, the constitutional judges went so far as to suggest to political bodies that the most appropriate way to manage the health emergency should have been a state of *excepción*, thus placing the Government and Parliament in a serious dilemma should a similar situation arise in the future, without prejudice, of course, to any reform of the organic law on states of emergency or perhaps of the constitution itself. However, more recently, with a sort of overruling the Tribunal has established, in relation to the issue of public health, that the intensity of the restric-

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tions imposed on fundamental rights is not a determining criterion for distinguishing between limitation and suspension and that even intense restrictions are legitimate provided that they comply with the principle of proportionality (judgment no. 136/2024).

6. *Concluding Remarks. Emergency Powers in the Interpretation of the Venice Commission*

The diversity of approaches to emergencies in the legal systems examined above does not detract from the importance of a fact that, actually, brings together and links the experiences of many countries, which over time have found (and continue to find) themselves, facing situations variously defined as crises or emergencies. This is what is commonly referred to as the 'normalization of emergencies', a widespread and multi-faceted phenomenon that tends to blur the perception and distinction between normality and exception, with obvious risks for fundamental freedoms and the maintenance of the rule of law. Let's consider, in a first sense, what happens when ordinary instruments are preferred to deal with emergency situations without too much fuss, or, in a second sense, when the exceptional measures occasioned by the occurrence of a particular emergency are prolonged over time.

Faced with the risks and challenges that states of emergency pose today, what is the role of international organizations? In this regard, it should be noted that the actions taken by the UN, and in particular by the Security Council, have been largely ineffective, especially since 1989 and the end of the East-West bipolarization. Many scholars have pointed out that the different emergencies affecting the planet would require a deep modernization and rationalization of the United Nations system and its specialized agencies in order to promote effective collaboration between the national, regional and international levels, as was the case after the Second World War. Nor does the analysis of the role of the European Union seem to lead to more encouraging results at present. In areas such as safety and public health protection, the EU has no powers other than those aimed at supporting, complementing and encouraging the actions of member states, with an explicit duty to refrain from harmonizing national laws and regulations. On the other hand, the lack of a common European model for emergency management has also contributed to the heterogeneity of the responses offered by individual legal systems during the Covid-19 pandemic, but it is clear that any reform of the EU Treaties in this regard would require the willingness of all the member states and their readiness to further cede their sovereignty. While awaiting reforms at the international and European level, which seem far from being approving, legal systems faced with emergency situations should not neglect to constantly monitor compliance with values and institutions, first and foremost the separation of powers and the guarantee of fundamental rights, which constitute the most significant achievements of liberal constitutionalism.

The Venice Commission, an independent advisory body of the Council of Europe, has on several occasions addressed the problems that the establishment of a state of emergency is likely to cause, even in consolidated democracies, reiterating the need to respect certain core elements of the rule of law.[12] Already in a 1995 study,[13] the Commission focused in particular

[12] Castellà Andreu Josep Maria, "Preserving Democracy and the Rule of Law in Pandemic. Some Lessons from the Venice Commission," in *Populism and Contemporary Democracy in Europe. Old Problems and New Challenges,* edited by Josep Maria Castellà Andreu and Marco Antonio Simonelli (Barcelona: Palgrave Mcmillan, 2022) 253 ff.

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on the principle of legality and judicial guarantees, conceived as the cornerstone of the concept of the rule of law. The advisory body returned to this concept, which could be dangerously distorted in times of crisis, on subsequent occasions.[14] In a list presented by the Commission itself as non-exhaustive and non-definitive, it was specified that the fundamental elements of the rule of law must include the principles of legality and legal certainty, the separation of powers and the mechanism of checks and balances, equality before the law and the principle of non-discrimination, the due process of law and the guarantee of independent and impartial judges, the protection of fundamental rights and the defence of democratic institutions. Is it possible to legitimately derogate from the above indicators, and if so, which ones, in a state of emergency? The Commission's answer is affirmative, but accompanied by some *caveat*: derogations, in the form of limitations and even suspensions, from the regime of rights and freedoms are admissible, according to the exceptions laid down in Article 15 of the ECHR, as well as from the principle of separation of powers with the consequent concentration of activities in a restricted body that usually coincides with the national executive, provided that the derogations introduced are temporary, proportionate to the circumstances, appropriate and necessary to restore normality as quickly as possible. Furthermore, it was added that, in any case, the system of checks and balances must be safeguarded: both by Parliament with regard to the activities carried out by the Government and the public administration, and by judges and Constitutional Courts with regard to the exercise of emergency powers.

More recently, the reports mentioned above were followed by further documents, the drafting of which was prompted by the spread of the pandemic in 2020. In a collection of opinions and reports,[15] the Commission specified that, without prejudice to the margin of national appreciation in assessing whether, in concrete terms, the conditions for establishing a state of emergency are met, that appreciation cannot be exempt from supervision by the bodies of the Council of Europe, including, if necessary, the European Court of Human Rights. In other words, the margin of appreciation of states in this area cannot be considered unlimited. Furthermore, that document emphasized the need of constitutional regulation of states of emergency, which is considered capable of offering greater guarantees for respect for the rule of law, unlike what can be seen in the presence of regulations entrusted to ordinary legislation or to specific interventions dictated by the urgency of dealing with specific emergencies. This was followed by a further recommendation to avoid – during a state of emergency – constitutional reforms, even if aimed at introducing an *ad hoc* emergency clause, in accordance with the provisions of many constitutions in force.

In a subsequent document on respect for democracy, human rights and the rule of law in emergency situations,[16] the Commission made reference to previous studies, focusing on a number of aspects, including: the principles governing states of emergency (rule of law, proportionality, necessity, temporariness, effectiveness of controls), the conditions for declaring states of emergency and exercising emergency powers, the measures that can be taken in practice and the consequences of such measures, for example with regard to the enjoyment

[13] CDL-STD (1995)012. Emergency Powers.

[14] CDL-AD (2011)003. Report on the Rule of Law; CDL-AD (2016)007. Rule of Law Checklist and, more recently, CDL-AD (2025)002. The Updated Rule of Law Checklist.

[15] CDL-PI (2020)003. Compilation of Venice Commission. Opinions and Reports on State of Emergency.

[16] CDL-PI (2020)005. Respect for Democracy, Human Rights and the Rule of Law During States of Emergency - Reflections.

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of fundamental rights, including electoral rights, and the distribution of power between state bodies and local authorities. In view of the derogations that a state of emergency is likely to bring about in the enjoyment of rights and freedoms and in the relations among constitutional powers, the Commission reiterated the need of constitutionalizing the states of emergency, guaranteeing the effectiveness of controls, both political and judicial, and ensuring the continuity, transparency, accuracy and completeness of information even in times of crisis.

In short, in the opinion of the Venice Commission, it is legitimate and necessary for any state to defend citizens and institutions during emergencies, but without contradicting the principles of the rule of law and without endangering the values of constitutional democracy. These arguments were confirmed in the concluding section of a report published shortly afterwards, which focused on the measures taken by EU member states in response to the health emergency and their impact on democracy, fundamental rights and the rule of law[17] (Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020). According to that document, nine EU countries had declared a state of constitutional emergency *de jure* (Spain, Portugal, Bulgaria, Hungary, Finland, the Czech Republic, Estonia, Luxembourg and Romania); the declaration was issued mainly by the executive branch and only in two countries (Bulgaria and Portugal) by the Parliament. On the other hand, five countries, each for different reasons, opted to declare a state of emergency on the basis of ordinary legislation (Germany, Latvia, France, Italy and Slovakia), despite the fact that some of them have a fairly detailed constitutional emergency statute (France, Germany and Slovakia). Finally, thirteen countries had resorted to a *de facto* state of emergency, mostly using ordinary public health legislation that had been adapted to better manage the pandemic situation (Austria, Belgium, Croatia, Cyprus, Denmark, Greece, Ireland, Lithuania, Malta, the Netherlands, Poland, Slovenia, Sweden, and the United Kingdom). Even within this category of countries, it should be noted that some of them have detailed constitutional provisions relating to different types of emergencies, but have chosen not to use them, preferring to use ordinary legislation (Lithuania, Cyprus, Greece, Ireland, the Netherlands and Poland).

In conclusion, while the Commission clearly favours the constitutional model of states of emergency because of the greater protection it seems to offer against possible abuses, it nevertheless insists on the need to limit the exercise of emergency powers by providing for certain fundamental guarantees, which consist of "[s]trict limits on the duration, circumstances, and scope of [emergency] powers", without neglecting that "State security and public safety can only be effective secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse".[18]

[17] CDL-AD (2020)018. Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights.

[18] CDL-AD (2011)003. Report on the Rule of Law, para. 51.

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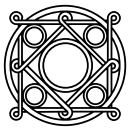

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