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ARTICLE

Emergency Regimes in the European Constitutions – A Comparative Overview

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Abstract

European constitutions differ greatly in the depth to which they deal with emergencies: while many constitutions devote more or less detailed regulation to emergency regimes, others almost completely neglect these issues or dedicate only some very short and vague references to emergency situations and powers. This article aims to carry out a systematic comparison of the emergency-related provisions of forty European constitutions, focusing on (1) the level of detail of the regulation, (2) the emergency regimes addressed, and (3) the restrictions on fundamental rights. As the study points out, only two out of the forty constitutions are completely silent on emergency powers. However, the remaining thirty-eight constitutions show wide variation in the level of detail of the emergency regulation; the vast majority of the emergency regimes are related to war or armed attack (or the danger thereof), to internal crises threatening the constitutional order, and to natural disasters. Concerning fundamental rights, the examination of the constitutional texts confirms that twenty-five out of the forty constitutions encompass some provisions on the restriction of these rights in a state of emergency.

Keywords: constitutions; emergency power; emergency regimes

I. Introduction

"The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Although more than 200 years have passed since the publication of Alexander Hamilton's essay in *The Federalist*,[1] his thoughts perfectly highlight the basic dilemma associated with the regulation of emergency powers and emergency regimes. The central question can be formulated in a rather straightforward way: how are public emergencies dealt with in the legal (primarily, in the constitutional) framework of a given country? If one scans the constitutions focussing on the public emergency provisions, striking differences emerge. While a number of constitutions devote more or less detailed regulation to emergency regimes, others almost completely neglect these issues, or dedicate only some very short and vague references to emergency situations and powers. For example, the German Basic Law puts an "unusually strong emphasis" on emergency regimes,[2] while, at the other end of the

[1] A Hamilton, J Madison and J Jay, *The Federalist Papers* (first published 1787) (Oxford, Oxford University Press 2008) 114.

[2] A Jakab, "German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse" (2006) 7 German Law Journal 453.

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spectrum, the Constitution of Bosnia and Herzegovina devotes not even a single word to this issue.

Examining and comparing the emergency provisions of different countries is, of course, not without precedent, although it would be an exaggeration to say that much attention has been paid to this issue. While the literature on the theory of emergency powers is incredibly vast,[3] the constitutional and legal framework has attracted less attention among scholars. In this respect, attention should be paid to the Thematic Report prepared by the International Commission of Jurists in 1983, featuring country studies of over fifteen nations that had experienced states of emergency in the 1960s and 1970s.[4] In her analysis, Khakee examines the regulation of the use of emergency powers in twenty-seven European states and attempts to assess to what extent and in what ways the existing rules protect the democratic order.[5] To a certain extent, similarly, a policy paper by the International Institute for Democracy and Electoral Assistance (International IDEA) offers a general overview of emergency powers and regimes[6] but does so in rather an exemplary way, highlighting some characteristic elements of this regulation worldwide. Heymann's article centres on the theoretical questions associated with models of emergency powers, concluding that "The serious questions for any State are whether and how to regularize, and give legal form to, the handling of grave emergencies."[7] In his studies, Gross examined the constitutional arrangements of several states, focussing on the emergency regimes and on the authority that is entitled to declare an emergency, but he has not undertaken a comprehensive review and categorization thereof.[8] Ramraj examined the emergency regimes in the Asian constitutions, claiming that "Formal constitutional analysis provides a useful way of approaching the problems of governance, but it rarely provides a complete solution."[9] A recent volume investigates emergency powers in Central and Eastern Europe, paying special attention to the legal background.[10]

Other studies deal with fewer countries, making in-depth comparisons. Ganev analysed the emergency powers provisions of eight East Central European constitutions, focussing on institution-building strategies adopted by the constitution makers after the

[3] Among Others, see B Ackerman, "The Emergency Constitution" (2004) 113 The Yale Law Journal 1029; G Agamben, *State of Exception* (Chicago–London, The University of Chicago Press 2004); J Ferejohn and P Pasquino, "The Law of the Exception: A Typology of Emergency Powers" (2004) 2 International Journal of Constitutional Law 210; D Dyzenhaus, "Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order" 27 Cardozo Law Review (2006) 2005; D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press 2006); O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge, Cambridge University Press 2006); KL Scheppele, "Legal and Extra-Legal Emergencies" in KE Whittington, R Daniel Kelemen and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (New York, Oxford University Press 2008) 165.

[4] International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva, International Commission of Jurists 1983).

[5] A Khakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe* (Policy Paper – №30) (Geneva, Geneva Centre for the Democratic Control of Armed Forces 2009) available at https://www.files.ethz.ch/isn/99550/pp30_anna_khakee_emergency_powers.pdf.

[6] E Bulmer, *Emergency Powers* (International IDEA Constitution-Building Primer 18) (Strömsborg, International Institute for Democracy and Electoral Assistance 2018) available at https://www.idea.int/sites/default/files/publications/emergency-powers-primer.pdf.

[7] PB Heymann, "Models of Emergency Powers" (2003) 33 Israel Yearbook on Human Rights 1, 12.

[8] O Gross, "Providing for the Unexpected: Constitutional Emergency Provisions" (2003) 33 Israel Yearbook on Human Rights 13; O Gross, "Constitutions and emergency regimes" in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Cheltenham–Northampton, Edward Elgar 2011) 334.

[9] VV Ramraj, "Constitutions and Emergency Regimes in Asia" in R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Asia* (Cheltenham–Northampton, Edward Elgar 2014) 221.

[10] Z Nagy and A Horváth (eds), *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19* (Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing 2022).

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post-transition period.[11] Cornell and Salminen's article offers a comparative constitutional law analysis of the relative constitutional silence in Sweden and Finland concerning emergency powers.[12]

Bjørnskov and Voigt challenged the standard claim that "each emergency constitution is a unique document that does not lend itself to easy comparison."[13] Drawing on 351 constitutions (both current and defunct) and relying on thirty-one different variables for capturing the most important features of emergency constitutions, the authors identified six such clusters and showed that emergency constitutions often share many similarities.

The fight against the COVID-19 pandemic also attracted the attention of the Venice Commission, which published a report[14] and a compilation[15] on states of emergency, although it touched upon this issue for the first time in the 1990s.[16]

II. Goals and method

The basic goal of this study is to explore and compare the emergency-related provisions of the European constitutions while seeking answers to three questions: How detailed are the regulations? What types of emergencies are addressed? And to what extent are the restrictions on fundamental rights allowed?

In doing so, the study aims to carry out a more systematic comparison than previous studies. In addition, it goes beyond the Member States of the European Union, including those constitutions that tend to receive less attention.

The central concept of the study is the emergency regime. By emergency regime, we understand a special legal framework, a subset of coherent provisions whose basic goal is to react and overcome a certain type of threat (e.g. state of war, martial law, state of emergency, state of danger). The introduction of an emergency regime signifies a departure from the ordinary legal order, often entailing "derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the state".[17]

The examination focusses on the constitutional text, emergency regimes regulated at the sub-constitutional level (statutory schemes) are disregarded. This is not to suggest that the various legislative acts do not play a significant role in the legal framework (eg, even the prominent French *état d'urgence* was institutionalised by a parliamentary act and not by the constitution), but rather to keep the comparison within reasonable limits. However, sub-constitutional regulation has not been completely neglected since, in some cases, we had to rely on this to map the nature and application scope of a certain emergency regime if the constitution was too laconic. For example, the Constitution of Spain stipulates three emergency regimes – state of siege, state of emergency, and state of alarm – although it gives no guidance as to the circumstances in which they may be declared. Therefore, it was inevitable that we should scan the organic law on states of emergency so as to learn the nature of the three emergency regimes.

[11] VI Ganev, "Emergency Powers and the New East European Constitutions" (1997) 45 The American Journal of Comparative Law 585.

[12] A Jonsson Cornell and J Salminen, "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland" (2018) 19 German Law Journal 219.

[13] C Bjørnskov and S Voigt, "The Architecture of Emergency Constitutions" (2018) 16 International Journal of Constitutional Law 101, 124.

[14] Venice Commission, CDL-AD(2020)014.

[15] Venice Commission, CDL-PI(2020)003.

[16] Venice Commission, CDL-STD(1995)012.

[17] Venice Commission, CDL-STD(1995)012 3.

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The analysis covers 40 European countries, while polities without uncodified constitutions[18] (San Marino and the United Kingdom) and transcontinental countries (eg, Georgia, Russia and Turkey) were excluded. The Constitution of Belarus was also omitted as we had no access to the English translation of the current version of the document.

To overcome the language barrier, we used English translations of the constitutions. The documents were accessed primarily from the websites of governmental bodies (eg, parliaments and constitutional courts). In the absence of official translations, we relied on the database of the Constitute Project.[19] We thoroughly examined every constitution one by one, seeking provisions related to emergencies. The following keywords were applied during the investigation: *armed, catastrophe, danger, disaster, emergency, exceptional, extraordinary, martial, urgent, war.* As we were interested in the regulation of public emergencies, provisions that only mention these words without any public emergency relevance (eg, provisions on the protection of victims of war, prohibition of propaganda for war, disaster management, organisation of the armed forces) were excluded from further analysis. It should be noted that the examination covered the entire text of the given constitution, even if this included a separate emergency chapter, as other scattered provisions may affect the regulation of emergency regimes. (For example, some constitutions stipulate that they cannot be amended during a state of emergency or martial law. However, as a general rule, these prohibitions are not to be found in "general" emergency provisions but in another part of the constitution [eg, in Estonia and Spain]).

III. Level of detail of regulation

After mapping and evaluating the constitutional provisions, it was clear that, with some simplification, constitutions may be classified into one of four categories based on the degree of codification (Table 1).

Concerning the first category, we found only two constitutions that are completely silent on emergency regimes: the constitutions of Bosnia and Herzegovina and Monaco devote not even a single word to this issue. Regarding the former, the lack of emergency-related provisions may be traced back to the constitution's "minimalist" approach towards the national government.[20]

The second category embraces eleven constitutions. In contrast to the situation in the previous countries, these constitutions dedicate some short and vague references to emergency rules, although they do not stipulate any clear-cut emergency regime at all. For example, the Constitution of Denmark stipulates that "In an emergency, the King may, when the Folketing cannot assemble, issue provisional laws, [. . .]", although it provides no cues to aid in the interpretation of "emergency". The Constitution of Iceland works in a similar vein: "In case of urgency, the President may issue provisional laws when *Althingi* is not in session". However, the Constitution does not clarify the circumstances that may trigger urgency. The Swiss Federal Constitution uses the terms "exceptional situation" (the armed forces "shall support the civilian authorities [. . .] in dealing with exceptional situations"), "politico-military strife" ("The Confederation shall ensure that the country is supplied with essential goods and services in the event of the threat of politico-military strife [. . .]") and "emergency" ("In cases of emergency, it [the Federal Council] may mobilise the armed forces") but fails to clarify these concepts.[21]

[18] As for Sweden, the Instrument of Government served as a basis for analysis.

[19] See available at https://www.constituteproject.org/.

[20] FL Morrison, "The Constitution of Bosnia-Herzegovina" (1996) 13 Constitutional Commentary 145.

[21] Cf. O Ammann and F Uhlmann, "Switzerland: The (Missing) Role of Parliament in Times of Crisis" in MC Kettemann and K Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (Oxford, Bloomsbury Publishing 2021) 182–184.

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Table 1. Emergency provisions in European constitutions.

Category 1	Category 2	Category 3	Category 4
No provisions at all	Short reference, no clear-cut emergency regimes	More detailed regulation with one or more emergency regimes	Most detailed regulations with typically two or more emergency regimes
1. Bosnia and Herzegovina	1. Austria	1. Andorra	1. Albania
2. Monaco	2. Belgium	2. Bulgaria	2. Germany
	3. Czech Republic	3. Croatia	3. Hungary
	4. Denmark	4. Cyprus	4. Poland
	5. Finland	5. Estonia	5. Serbia
	6. Iceland	6. France	6. Sweden
	7. Italy	7. Greece	
	8. Liechtenstein	8. Ireland	
	9. Luxembourg	9. Latvia	
	10. Norway	10. Lithuania	
	11. Switzerland	11. Malta	
		12. Moldova	
		13. Montenegro	
		14. Netherland	
		15. North Macedonia	
		16. Portugal	
		17. Romania	
		18. Slovakia	
		19. Slovenia	
		20. Spain	
		21. Ukraine	

Source: Author's compilation.

Other constitutions make reference to war but fail to establish the "state of war" as a distinct emergency regime. The Constitution of Austria provides an example of this: "The National Council and the Federal Council meet as the Federal Assembly in joint public session at the seat of the National Council for [. . .] the adoption of a resolution on a declaration of war". Similarly, the Constitution of Finland stipulates: "The President decides on matters of war and peace, with the consent of the Parliament."

In contrast to the previous constitutions, the Italian constitution does use the term "state of war" ("Parliament has the authority to declare a state of war [. . .]") but does not describe this emergency regime.

As for Categories 1 and 2, it must be emphasised that the laconic wording of the constitutions does not entail that the lawmaker has completely overlooked the emergencies, and the sub-constitutional level may offer a comprehensive legal framework.

The third category consists of constitutions with more detailed regulations. As more than half of the examined constitutions fall into this category, one may conclude that this is the "normal" way to deal with emergency power at the constitutional level. In contrast to the situation in the second category, these constitutions mention emergencies not only in passing but offer a somewhat more comprehensive approach. While the constitutions of the second category speak about "emergency" or "urgency" in general, the constitutions of the third category define at least one, but typically two or three emergency regimes and include some basic provisions regarding the institutionalised emergency regimes. Some of these constitutions summarise the emergency provisions within a distinct chapter or articles (eg, Estonia, Lithuania, Montenegro and North Macedonia). Others contain scattered provisions on emergency powers instead of a distinct regulation (especially Bulgaria, Moldova, Slovakia and Ukraine). As this category covers a number of countries, these constitutions show great variability in the elaborateness of the emergency

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provisions. Some of them address emergencies in a rather succinct way (eg, Andorra, Moldova, Latvia, Bulgaria, Romania and the Netherlands), while others devote more space to the topic (eg, Cyprus, Greece, Portugal and Spain).

Finally, the fourth category is reserved for the constitutions that include the most comprehensive and detailed regulations. Indeed, the emergency provisions of these constitutions may be labelled "emergency constitutions". These six constitutions have some common features that more or less distinguish them from the previous constitutions. First, they devote a whole separate chapter (or part) to the issue of emergency powers. These chapters are titled "Extraordinary Measures" (Albania and Poland), "Special Legal Order" (Hungary), "State of Defence" (Germany) and "War and Danger of War" (Sweden). (Serbia is an exception to a certain degree as the emergency provisions are incorporated into the chapter "Constitutionality and Legality".) Second, the emergency regimes are well-defined in terms of the circumstances under which they can be introduced. The German Basic Law distinguishes four different forms of emergency regimes. Meanwhile, the constitutions of Albania, Hungary and Poland regulate three types, and Serbia has two types. Sweden differs from the previous countries, as the Instrument of Government deals only with war and the danger of war (albeit in an unprecedentedly detailed manner). Third, the constitutional regulation is comparatively lengthy (some 6,000–16,000 characters) and detailed. In addition to the prerequisites of the emergencies, constitutions of the fourth category cover the details of the introduction, the roles and competencies of the main actors (ie, the heads of state, the parliaments and the governments), the duration of the states of emergencies, the conditions of extension, etc. Broadly speaking, these constitutions offer the most comprehensive legal framework for emergency situations.

Admittedly, this classification is somewhat intuitive as we did not specify any strict objective (eg, numerical) criteria for the differentiation. Accordingly, the borders between the categories may be partly fluid, and the position of some constitutions may be debated. (Particularly, the distinction between the third and fourth categories may be considered somewhat arbitrary.) However, we believe that this typology offers a point of departure for more sophisticated assessments and sheds light on the heterogeneity of constitutional regulations.

One might pose the question if there is any correspondence between the age of the constitutions and the elaborateness of the emergency powers. Figure 1 attempts to illustrate this issue using a scatter plot that depicts the year of adoption of the examined constitutions and the length of the emergency-related provisions of the constitutional texts (calculated in characters).[22] While one cannot identify an obvious direct connection, some remarks can be made.

First, it is quite spectacular that only three out of the nine pre-1945 constitutions fall into the third category and none of them into the fourth. On the other hand, the constitutions of the last decades seem to attach greater importance to emergency regimes (with the notable exception of Bosnia and Herzegovina). To sum up, we might draw the tentative conclusion that newer constitutions are prone to incorporate more detailed provisions on public emergencies.

Discussing the causes of divergence is beyond the scope of this study; however, it is safe to say that historical experiences and the date and circumstances of the birth of the constitutions are decisive. As Gross puts it, "The question whether to incorporate

[22] It must be noted that the figure does not take into account whether a given constitution contained the emergency provisions in its original wording (ie, at the time of the adoption). For example, the German Basic Law, in its original wording, virtually lacked emergency provisions as the emergency-power amendments were introduced only in 1968 (C-Christoph Schweitzer, "Emergency Powers in the Federal Republic of Germany" (1969) 22 Political Research Quarterly 112.).

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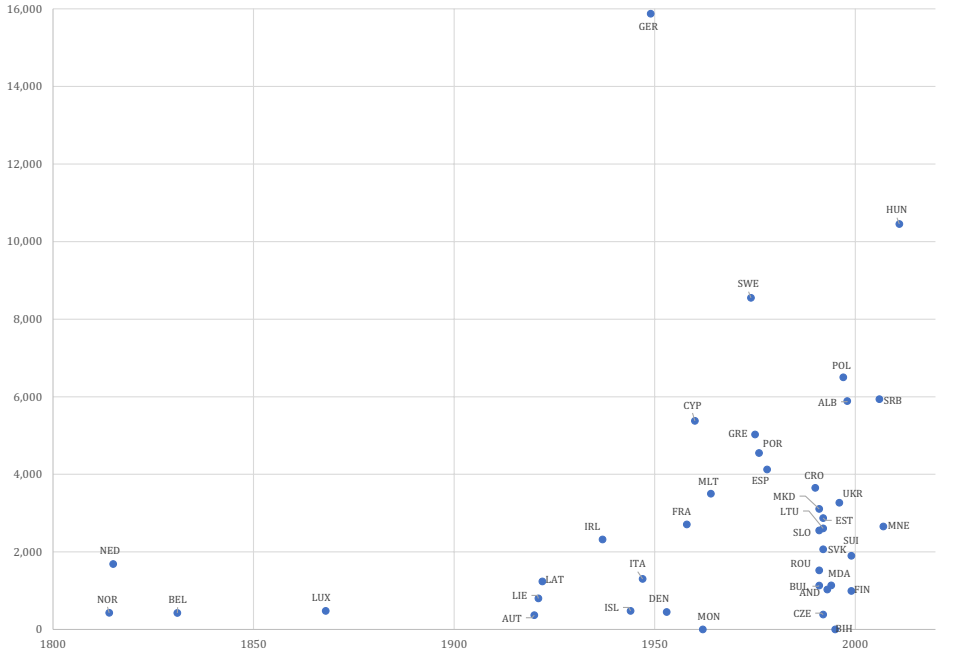


Figure 1. Age of constitutions and elaborateness of emergency powers.
Source: Author's compilation.

emergency provisions into national constitutions was subject to heated debates in Europe",[23] while Kelemen points out that the imprints of the historical traditions of the twemtieth century are to be found in each constitution.[24]

IV. What types of emergencies?

According to Hamilton's above-cited idea, "circumstances that endanger the safety of nations are infinite". Taking the various forms of crises of recent decades (natural disasters, global warming, a global pandemic, wars), one might assume that he is right. Similarly, Gross claims that "defining a state of emergency in advance is no easy task".[25] He also underscores that "many national constitutions differentiate between several types of emergencies, basing the distinctions between the various categories of emergencies on the factual circumstances under which a declaration of a particular type of emergency regime may be constitutionally permissible".[26] Therefore, instead of formulating a "proper" definition of emergency,[27] it seems to be more reasonable to focus on the emergency regimes, drawing on the definition provided in Section II. Even a cursory reading of the

[23] Gross (2011) (n 8) 337.

[24] R Kelemen, "Különleges jogrend az Európai Unió egyes tagállamainak alkotmányaiban" in Á Farkas and R Kelemen (eds), *Szkülla és Kharübdisz között – Tanulmányok a különleges jogrend elméleti és pragmatikus kérdéseiről, valamint nemzetközi megoldásairól* (Budapest, Magyar Katonai és Hadijogi Társaság 2020) 211.

[25] Gross (2003) (n 8) 20.

[26] Gross and Ní Aoláin (n 3) 41.

[27] For a comprehensive definition, see Section (A) para. 1(b) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency: "[P]ublic emergency means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is

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emergency provisions of the European constitutions makes it clear that most of them define one or – typically – more emergency regimes. Mapping these emergency regimes would help us to understand how the states "classify" the threats.

However, enumerating the emergency regimes in a given constitution is not always as easy as it might seem at first glance. Indeed, some constitutions unequivocally define these regimes. The Hungarian Fundamental Law serves as a textbook case as it stipulates that the "Special legal order shall include state of war, state of emergency and state of danger". Similarly, the Polish Constitution reads: "In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster". However, other constitutions are far less transparent in this regard, and in certain cases, it is a matter of the researcher's judgment whether to classify a set of provisions as a distinct emergency regime.[28] To illustrate this using an example, the "state of tension", the internal emergency and the state of defence in the German Basic Law are undoubtedly emergency regimes. Meanwhile, Article 35 (Legal and Administrative Assistance and Assistance during Disasters) is less clear-cut (although it clearly includes emergency-related provisions). Article 44(1) of the Greek Constitution reads: "Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content". Although the constitution does not label this provision as an emergency regime in an explicit way, one should treat it in this way since presidential acts of legislative content are considered to be a means of facing emergencies that are excluded from the scope of the state of siege.[29]

As a general rule, a given emergency regime reacts to a certain type of threat. For example, a state of war is related to an external armed attack; a state of emergency is typically (although not exclusively) intended to overcome an internal crisis threatening the constitutional order, etc. However, we can detect some "multifunctional" emergency regimes that address a broader range of dangers. For example, in Malta, a public emergency (the sole emergency regime in the constitution) may be declared either if the country is engaged in a war or if democratic institutions are threatened by subversion. Likewise, the Croatian special regime of "clear and present danger to the independence, integrity and existence of the republic" encompasses various forms of imminent danger to the state, both of internal and external origin. The "state of siege" in Romania addresses all the threats to the state's sovereignty, independence, and territorial integrity.

Thus, the previous cases often approach the situation with the working logic "different forms of threat – one emergency regime", although examples of a contrasting logic also exist – ie, "one kind of threat – different types of emergency regime". This dual arrangement primarily affects the situation related to war and refers to the level of threat: a lower-level emergency regime is typically declared before war (eg, due to the threat of war), while a higher-level regime may be declared once war has broken out. Table 2 summarises these configurations.

In summary, with some simplification, it can be said that lower-level emergencies address a kind of preliminary stage of a wartime situation (ie, [imminent] danger of armed attack). Meanwhile, the higher-level regimes may be declared if an armed attack has

composed" (RB Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79 The American Journal of International Law 1072, 1073).

[28] As Gross notes, "classifying and categorizing emergencies is not without its problems. Review of the existing classifications of states of emergency reveals a substantial (perhaps inevitable) degree of vagueness, ambiguity, and overlap among the different categories." (Gross (2011) (n 8) 339).

[29] AE Kouroutakis, "The Architecture of the Emergency Framework of Greece: Inactivity and Second Generation Emergencies" (2019) 7. https://doi.org/10.2139/ssrn.3333118.

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Table 2. Emergency regimes related to war.

	Lower level	Higher level
Bulgaria	Martial law	War
Croatia	Clear and present danger to the independence, integrity and existence of the republic	State of war
Germany	State of tension	State of defence
Latvia	State of emergency	War
Moldova	State of siege*	War
Romania	State of siege	State of war
Slovakia	State of war	War

Source: Author's compilation.
*Sometimes translated as "martial law".

already occurred. However, the state of defence in the German Basic Law is an exception, as it can be triggered even by an imminent threat of attack by armed force.

When it comes to the type of emergency, the Portuguese Constitution is quite unique in this regard, as it distinguishes the two types of emergency regimes (state of siege and state of emergency) on the basis of the severity of the threat rather than the nature of the danger. Whether actual or imminent aggression by foreign forces, a serious threat to or disturbance of democratic constitutional order, or public disaster, both of these emergency regimes may be declared – although the constitution offers guidance in this regard: "a state of emergency is declared when the preconditions referred to in the previous paragraph are less serious, and may only cause the suspension of some of the rights, freedoms and guarantees that are capable of being suspended". It follows from this wording that the state of siege is reserved for more serious dangers. It is noteworthy that the constitution stipulates that the choice between a state of siege and a state of emergency must respect the principle of proportionality.

In the next stage of the analysis, we turn our attention to the threats that the emergency regimes are intended to address. We detected as many as sixty-six emergency regimes in the scrutinised constitutions. ("Multifunctional" emergency regimes were counted as one.) Based on the wording of the constitutions, taking into account the sub-constitutional acts and the scholars' evaluation, we classified the emergency regimes into the following three categories:

- emergency regimes related to war or armed attack (or danger thereof)
- emergency regimes related to internal crises threatening the constitutional order (eg, subverting the constitutional order, greater disruption of public peace and order)
- emergency regimes related to natural or industrial disasters

Figures 2 and 3 illustrate the classification of the regimes.

As expected, emergency regimes related to war (or danger of war) are the most frequent in the constitutional texts.[30] (As noted above, some constitutions address wartime situations even using two different emergency regimes.) Hardly anything threatens the survival of a state more than war; in accord, thirty of the examined constitutions dedicate at least one emergency regime to wartime situations. (It may be worth mentioning that the Constitution of Andorra is the only one that contains

[30] Cf. Gross (2011) (n 8) 336.

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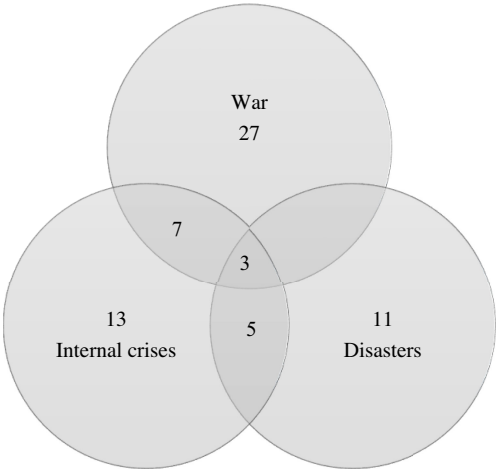


Figure 2. Classification of emergency regimes by type of threat.
Source: Author's compilation.

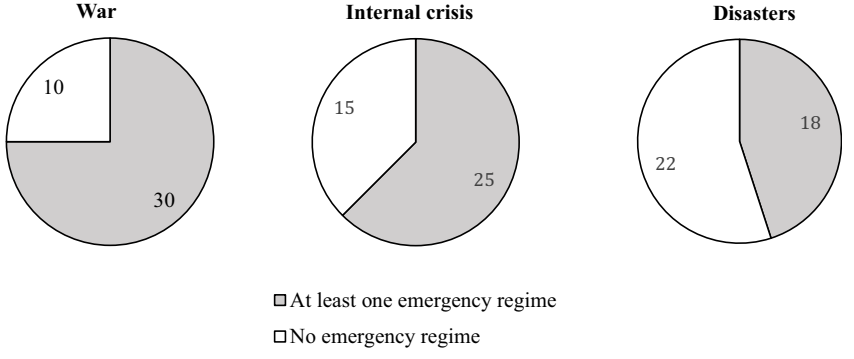


Figure 3. Frequency of emergency regimes in the constitutions.
Source: Author's compilation.

emergency regimes for the interruption of the normal functioning of democratic life [state of emergency] and for natural catastrophes [state of alarm], but not for war.) Emergency regimes reacting to internal crises come second. It may be somewhat surprising that only thirteen constitutions contain a *per se* regime for this type of threat. Emergencies related to natural disasters are the least frequent emergency regimes, as only eleven states consider it necessary to create a separate emergency regime to deal with natural disasters.

As can be seen, the constitutions contain several "multifunctional" emergency regimes. Seven may be declared for both war and internal crises. Meanwhile, five lie at the "intersection" of internal crises and disasters. Finally, we have three regimes (Portugal's state of emergency and state of siege and Malta's period of public emergency), the wording of which is broad enough to encompass every form of threat.

In examining the emergency regimes, one might pose a similar, albeit not equivalent, question: how many constitutions deal (either using separate or "multifunctional" emergency regimes) with the various types of emergencies at the constitutional level? (Fig. 2 does not help clarify the answer to this, mainly because some constitutions contain more than one emergency regime for a certain type of threat.) Figure 3 illustrates the frequency of emergency regimes in the constitutions (including "multifunctional" emergency regimes).

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The results are broadly in line with our previous findings. Three-quarters of the constitutions address war situations either through at least separate or "multifunctional" emergency regimes. As for internal crises, approximately two-thirds of the constitutional texts encompass provisions on emergency regimes related to threats to the constitutional order. Finally, less than half of the European constitutions dedicate emergency regimes to natural disasters.

V. Restrictions on fundamental rights

Emergency powers and fundamental rights are in a complex relationship. As widely recognised, some fundamental rights must be restricted or even suspended in times of a public emergency as they may hinder the government from swift decision-making and overcoming the crisis. It goes without saying that, for example, holding a mass demonstration during a pandemic may seriously undermine a government's effort to contain the epidemic. Likewise, full guarantees of media freedom or freedom of information (access to public information) cannot be expected during a state of war. As Bulmer puts it, "the requirement to protect civil liberties and human rights must be balanced against the obligation to protect the public and vital national interests, which may sometimes involve limiting those rights".[31]

However, various states of emergencies may be a hotbed of human rights violations.[32] The various international documents on the protection of human rights enable states to take measures derogating from their obligations regarding human rights once a state of emergency has been declared.[33] On the other hand, they also tend to define the boundaries of the restriction and provide safeguards (certain more basic ["absolute"] rights – for example, protection against torture or arbitrary killing – are never to be derogated from). As Criddlea and Fox-Decent note, derogations must conform to norms of notification, contestation, justification and proportionality.[34]

The above raises the question of whether the European constitutions contain special provisions on the restriction of fundamental rights and liberties in an emergency. An examination of the constitutional texts shows that twenty-five of the forty constitutions encompass some provisions of this sort. Referring to the categorization of Table 1, it is obvious that the constitutions of Bosnia and Herzegovina and Monaco do not address this issue as they are completely silent on emergencies. When it comes to the second Category, three out of the eleven constitutions (those of Finland, Liechtenstein and Switzerland) contain special provisions on the restriction of fundamental rights even though they touch upon public emergencies very briefly. As for the third and fourth categories, the rate is much higher, 17/21 and 4/5, respectively (France, Latvia, Moldova, Romania and Germany are the exceptions).

Focusing on these twenty-five constitutions, it may be concluded that the provisions allowing the restriction of fundamental rights are drafted in one of four ways (Fig. 4).

[31] Bulmer (n 6) 8.

[32] J Oraá, *Human Rights in States of Emergency in International Law* (Oxford, Clarendon Press 1992).

[33] See, eg, Art 4 of the International Covenant on Civil and Political Rights or Art 15 of the European Convention on Human Rights. For a critical perspective, see Gross and Ní Aoláin (n 3); A Greene, "Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights" (2011) 12 German Law Journal 1764. Hafner-Burton et al. claim that the concerns that derogations undermine human rights treaties by providing an authorized mechanism for states to abridge civil and political liberties have been overstated (EM Hafner-Burton, LR Helfer and CJ Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties" (2011) 65 International Organization 673, 703).

[34] EJ Criddle and E Fox-Decent, "Human Rights, Emergencies, and the Rule of Law" (2012) 34 Human Rights Quarterly 39, 86.

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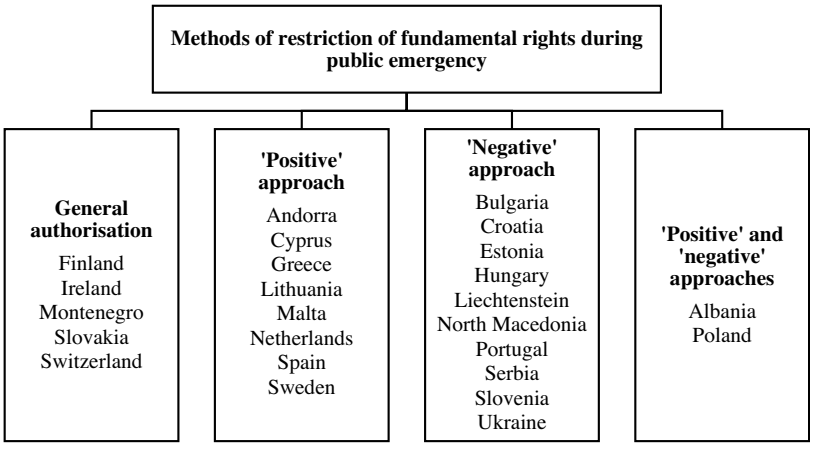


Figure 4. Methods of restriction of fundamental rights during a public emergency.
Source: Author's compilation.

The constitution makers of Finland, Montenegro, Slovakia and Switzerland decided to enact a general authorisation for the restriction of fundamental rights, providing the lawmakers with broad discretion to restrict these rights. The former stipulates that "Such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation may be provided by an Act or by a Government Decree to be issued on the basis of authorization given in an Act for a special reason and subject to a precisely circumscribed scope of application". The Constitution of Montenegro reads as follows: "During the proclaimed state of war or emergency, the exercise of certain human rights and freedoms may be limited to the necessary extent". The Constitution of Slovakia simply lays down that "The conditions and scope of limitations of the basic rights and freedoms during war, under the state of war, martial state and state of emergency shall be laid down by the constitutional law." The Constitution of Switzerland, as a general rule, lays down that "Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act." And the exception: "The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible". To a certain extent, the Irish Constitution works in a similar way: "Nothing in this constitution other than article 15.5.2° [prohibition of the death penalty – the Author] shall be invoked to invalidate any law enacted by the *Oireachtas* [the Parliament – the Author] which is expressed to be for the purpose of securing the public safety and the preservation of the state in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law".

The majority of the constitutions offer more detailed regulations on the restriction of fundamental rights. In doing so, the constitutional texts follow one of two different patterns. Some constitutions list the fundamental rights that *can be* restricted or suspended (let us call this the "positive approach"), while others follow a different logic, setting out the rights that *cannot be* restricted or suspended ("negative approach").[35] As the respective fundamental rights vary from constitution to constitution, it is not possible to

[35] Cf. Gross (2003) (n 8) 33–4.

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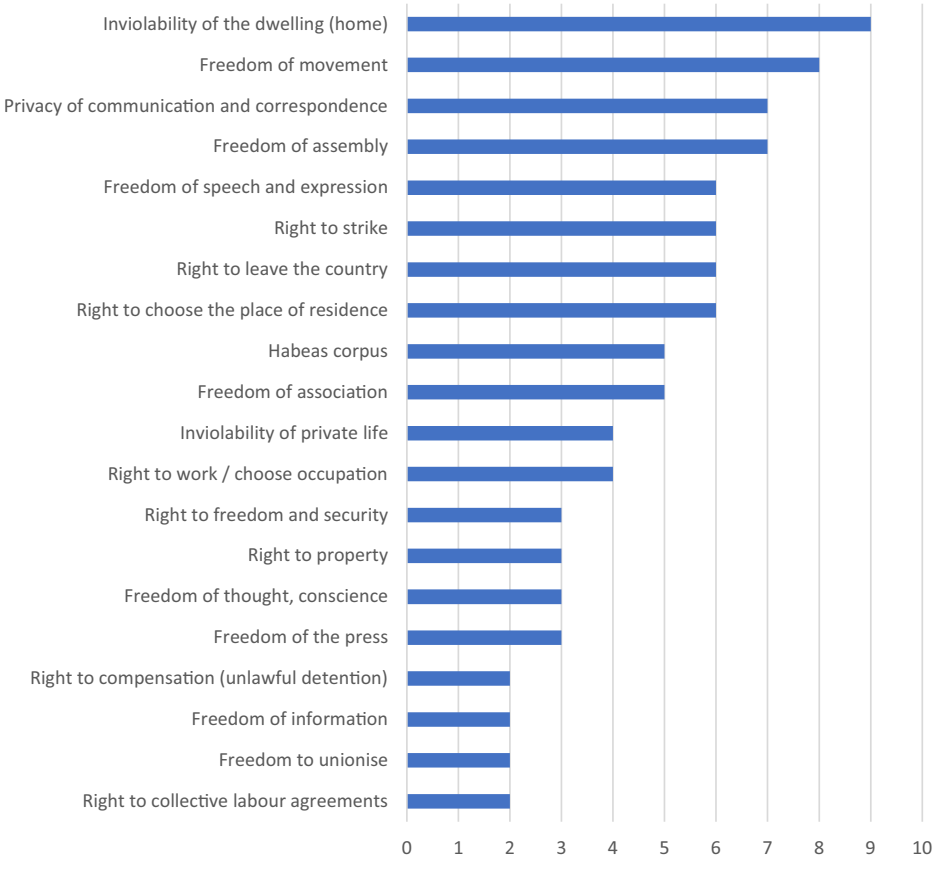


Figure 5. Fundamental rights that may be subject to restriction
Source: Author's compilation.
Note: For the sake of comparability, the proper names of the fundamental rights have been slightly simplified and standardised. The figure includes only fundamental rights that are mentioned at least by two constitutions.

say with absolute certainty which method is more tolerant of the limitation of fundamental rights. However, thinking logically, the negative approach seems to be more permissive since the general rule is that fundamental rights can be restricted, although with certain exceptions. In contrast, the positive approach works in favour of fundamental rights, given the fact that these rights, in principle, cannot be restricted, which means that the restrictions are the exceptions. The constitutions of Albania and Poland do not fit into either category as they combine the two methods. As for the state of war/martial law and state of emergency, both of the constitutions follow the negative approach; meanwhile, in the case of the state of natural disaster, the constitutions choose the positive approach. This method of regulation is based on the fact that it allows for a broader restriction of fundamental rights in states of war/martial law and state of emergency, whereas in times of a state of natural disaster, it allows for a narrower restriction.

As for the positive and negative approaches, it is worth taking a deeper look to reveal which fundamental rights may or may not be subject to restriction. Figures 5 and 6 attempt to enumerate the fundamental rights affected.

As Figure 5 reveals, most of the fundamental rights that may be subject to restriction fall into one of four categories:

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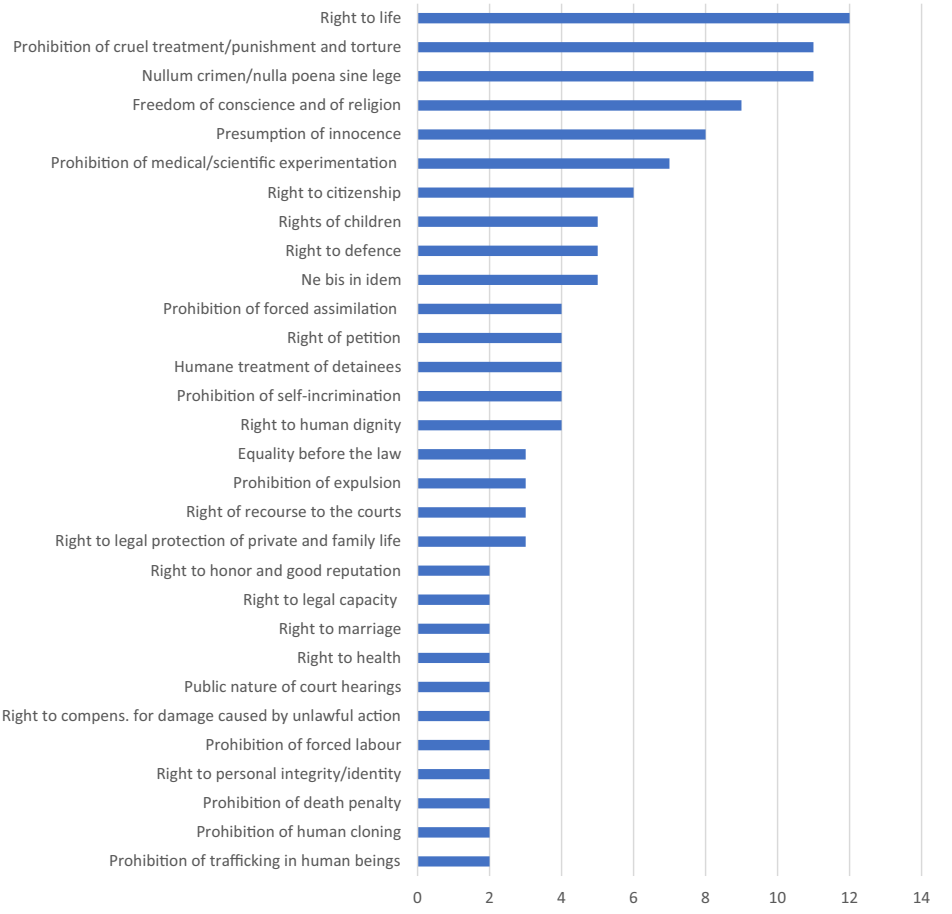


Figure 6. Fundamental rights that may not be subject to restriction.
Source: Author's compilation.
Note: For the sake of comparability, the proper names of the fundamental rights have been slightly simplified and standardized. The figure includes only fundamental rights that are mentioned at least by two constitutions.

- so-called communication rights (primarily freedom of assembly, expression and association)
- rights related to private life (dwelling, private communication)
- freedom of movement
- certain aspects of the right to work.

It is also noteworthy that five out of the ten constitutions allow some kind of derogation from the principle of habeas corpus.

Figure 6 focuses on the constitutions that apply the negative approach and highlights the fundamental rights that cannot be limited even during a public emergency.

It is in no way surprising that none of the twelve constitutions applying the positive approach allow restrictions on the right to life. The prohibition of cruel treatment/punishment and torture and the inviolability of *nullum crimen/nulla poena sine lege* principles are mentioned in eleven constitutions. As for the remaining fundamental rights, rights related to the dignity of human beings and procedural guarantees of justice are the most frequent limits to governments during a state of emergency.

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As noted above, in times of war or other public emergency threatening the life of the nation, Article 15 European Convention on Human Rights enables Member States to take measures derogating from their obligations under the Convention to the extent strictly required by the exigencies of the situation. However, the Convention allows no derogation from the right to life, the prohibition of torture, the prohibition of holding in slavery or servitude, and the *nulla poena sine lege* principle (Article 15 para. 2.). The constitutions taking the positive approach are obviously in line with these prohibitions as none of them authorises the government to bypass these guarantees. When it comes to the negative approach, as Figure 6 shows, the guarantees stipulated by Article 15 para. 2 are the most frequent ones mentioned by the examined constitutions (assuming that the prohibition of cruel treatment incorporates the prohibition of holding in slavery or servitude). Taking Article 15 para. 2 as a point of departure, it might be interesting to investigate the constitutions to examine if they go beyond the requirements of the Convention. The limits defined by the Constitution of Liechtenstein, in essence, coincide with those of the Convention – to put it another way, it is the Constitution that most narrowly defines the range of fundamental rights that cannot be limited. The constitutions of Bulgaria, Croatia, Hungary, North Macedonia and Portugal classify relatively few fundamental rights as absolute. On the other end of the scale, the constitutions of Estonia, Serbia and Ukraine list more than twenty rights in this respect.[36] One may conclude, on the one hand, that almost all of the constitutions applying the negative approach are more rigorous as they declare more fundamental rights/guarantees to be unlimited than the Convention does. On the other hand, the examination also reveals that the reviewed constitutions show great variability regarding the fundamental rights regarded as non-restrictable.

When comparing Figures 5 and 6, two observations can be made. First, the affected fundamental rights are almost completely different in the two figures. Of course, this is not contrary to our expectations at all since it is reasonable to assume that if a certain subset of fundamental rights is exempted from any restriction in a number of constitutions, then other constitutions will not mention them among the rights that can be restricted or even suspended. However, this does not mean that there is no overlap between the two figures, eg, the inviolability of private and family life is indicated in both figures. Meanwhile, some of the constitutions (those of Bulgaria, Estonia and Poland) qualify this fundamental right as absolute; other constitutions (eg, those of Greece, Lithuania and Sweden) explicitly enable the government to impose restrictions on this right if necessary.

Second, the constitutions applying the negative approach show a higher degree of variety regarding the fundamental rights concerned. The latter is to be understood that when examining the wording of these constitutions, a broader set of fundamental rights can be detected in the relevant provisions. Figure 6 contains thirty fundamental rights (liberties) (of course, some of these overlap), but the constitutions mention at least twenty further rights in this area (as a reminder: Figures 5 and 6 include only fundamental rights that are mentioned by at least two constitutions.) In contrast, the constitutions taking the positive approach show somewhat greater similarity. Figure 5 contains only twenty fundamental rights that can be limited, and this subset can be completed by a further ten rights if the rights mentioned only in one constitution are taken into account. To sum up, one may conclude that, with certain simplifications, it seems to be easier for the constitution-makers to determine the fundamental rights that can be restricted than those that cannot.

[36] However, it should be noted that it may be a bit misleading to simply count and compare the rights that cannot be limited since the wording of the constitutions significantly varies. Thus, to a certain extent, it is subjective which constitutional stipulations shall be counted as a "separate" fundamental right. For example, only the Serbian Constitution labels "freedom to procreate" as an absolute right – but it does not follow that other constitutions tend to impose restrictions on this right during a state of emergency.

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VI. Conclusion

While outlining the characteristic features of the problem of emergencies in modern times, Ferejohn and Pasquino stressed that "contemporary emergencies cannot easily be limited in time or space".[37] The COVID-19 pandemic perfectly underpinned their views. Meanwhile, the pandemic also drew attention to the constitutional and legal frameworks of emergency powers:

> it has been demonstrated that the practical application of constitutional provisions has proven to be challenging in a multitude of cases.[38] To contribute to the ongoing discourse on the constitutional background of emergencies, this study aimed to carry out a systematic comparison of the emergency framework of the constitutions of European countries.

According to a study by Bjørnskov and Voigt, about 171 constitutions worldwide contained *at least* [emphasis added] some emergency provisions in 2013.[39] The findings of this article are in line with the latter, as only two out of the forty constitutions that were examined were completely silent on emergency powers. However, the remaining thirty-eight constitutions showed wide variation in the level of detail of the emergency regulation. The categorisation we used may highlight the differences between the constitutional texts and contribute to a better understanding of the regulation of emergency powers. (Figure 1 also confirms that the post-1989 constitutions are overrepresented among those that contain the most elaborate schemes.) However, the question remains as to whether there exists a constitutionally "ideal" approach to the regulation of emergency regimes. In its 1983 Thematic Report, the International Commission of Jurists made several recommendations on the emergency provisions of the constitutions; it stipulates, *inter alia,* that constitutions should enumerate and define situations that justify departure from the normal legal order; various types of emergencies should be distinguished; a procedure for declaring a state of emergency should be established etc.[40] The Paris Minimum Standards of Human Rights Norms in a State of Emergency works in a similar vein as it outlines several normative requirements for constitutions, including the stipulation that "the constitution of every state shall define the procedure for declaring a state of emergency".[41] The Venice Commission also underscores the significance of constitutional regulation: "The emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution. In other words, the existence of a real and imminent danger should be clearly specified."[42] Although the aforementioned documents call for constitutions to include detailed provisions on states of emergency, it is evident that at least one-third of the European constitutions examined (Categories 1 and 2) do not align with these criteria. However, strict adherence to the detailed constitutional provisions indicates that only six constitutions (Category 4) can be regarded as offering a comprehensive legal framework for emergency regimes. It is important to note, though, that the presence of superficial constitutional provisions does not necessarily mean a country's legal system fails to adequately address states of emergency. For instance, while the constitution of the Czech Republic mentions states of war only briefly, a separate

[37] Ferejohn and Pasquino (n 3) 228.

[38] MC Kettemann and K Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (Oxford, Bloomsbury Publishing 2021).

[39] Bjørnskov and Voigt (n 13) 105.

[40] International Commission of Jurists (n 4) 432–4. For a summary see LC Keith and SC Poe, "Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration" (2004) 26 Human Rights Quarterly 1073–4.

[41] Section (A) para. 2.

[42] Venice Commission, CDL-STD(1995)012 30.

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constitutional act provides an extensive and detailed framework for managing states of emergency.[43] The study also confirmed that in European countries the so-called "Business as Usual model" is not prevalent, the latter meaning that a state of emergency is not deemed to justify a deviation from the "'normal" legal system, as the ordinary legal system is presumed to provide the necessary answers to any crisis without the need to resort to extraordinary governmental powers.[44]

As for the emergency regimes, it becomes clear that the vast majority of the emergency regimes are related to war or armed attack (or danger thereof), to internal crises threatening the constitutional order, and to natural disasters. Even without an examination of the sub-constitutional level, it can be concluded that war-driven emergency regimes (state of war, martial law, etc.) are the most frequent of these: only ten out of the forty constitutions do not offer any cue for the event of war. Regimes instigated by a state of war are followed by emergency situations related to internal crises,[45] although some of the investigated emergency regimes aim to enable coping with threats of both external and internal origin.

Concerning fundamental rights, the examination of the constitutional texts showed that twenty-five out of the forty constitutions encompass some provisions on the restrictions on those rights in a state of emergency. From the application of a differentiated positive and negative approach, it was revealed that there are major differences between the wording and working logic of the restrictive provisions. Taking into account the number of fundamental rights declared to be subject to restriction and those declared to be not subject to restriction, it may be noted that the latter category is more varied in the constitutions under examination. This leads to the tentative conclusion that there is greater agreement on the definition of the scope of the fundamental rights that *can be* limited. It has also been demonstrated that some constitutions take a very narrow view of the scope of fundamental rights that cannot be limited. Meanwhile, others are far more strict about the restriction of fundamental rights. A notable observation is that a significant number of European constitutions is not in compliance with the Paris Minimum Standards[46] or the Venice Commission's 1995 recommendation.[47] This non-compliance typically stems either from the omission of specific references to fundamental rights that may be or may not be restricted during emergencies or from the inclusion of only broad, general authorisations.

Looking at the diversity of the examined constitutions and taking into account the "permanent state of emergency"[48] of nowadays, one may pose the question of whether there is any chance of the slightly more uniform regulation of public emergencies. Although discussions on the European emergency constitution are ongoing,[49] for the time being, it seems unlikely that any unification process will begin in this respect.

[43] D Hojnyák and H Szinek Csütörtöki, "Dimensions of Emergency Powers in the Czech Republic" in Z Nagy and A Horváth (eds), *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19* (Budapest–Miskolc, Mádl Institute of Comparative Law – Central European Academic Publishing 2022) 129.

[44] Gross and Ní Aoláin (n 3) 252. The United States serves as a prime example for this model.

[45] Cf. Gross and Ní Aoláin (n 3) 41–2.

[46] "As the minimum, the constitution shall provide that the rights recognized as non-derogable in international law may not be affected by a state of emergency." [Section (B) para. 2 (e)].

[47] "The constitution should clearly specify which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances." [Venice Commission, CDL-STD(1995)012 31.]

[48] A Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Oxford, Bloomsbury Publishing 2018).

[49] C Kreuder-Sonnen, "Does Europe Need an Emergency Constitution?" (2023) 71 Political Studies 125.

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