

Emergency and Risk in Comparative Public Law

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As the entire world is struggling with the Covid-19 pandemic, academics have been rediscovering the debate on emergency in public law.

Our post explores whether the theory of disaster risk regulation can infuse the public law's approach to emergency with new conceptual tools that contribute to mitigating the impact of emergencies. In so doing, we would like to recall how comparative public law has approached emergency and we shall then look at the insights coming from the theory of risk.

Emergency in Comparative Public Law

Emergencies push legal orders to their pillars of Hercules. The rule of law struggles to regulate unpredictable scenarios. As a result, the notion of emergency belongs to the worst ones. For many constitutional comparative lawyers emergencies are a potential engine of constitutional change or even a cause of legal revolutions, due to the risk of political abuses subsequent to the centralisation of powers traditionally occurring in favour of governments. That is why the Venice Commission stated that "De facto state of emergency should be avoided, and emergency rule should be officially declared". Hence, the search for effective legal instruments that aim to uphold the rule of law against extraordinary circumstances is an essential task for any legal order. But can constitutions regulate emergencies? Is this desirable? Are emergency powers *intra ordinem* powers or, rather, *extra ordinem* powers that cannot be governed and tamed by constitutional provisions?

Post-WWII constitutionalism and its constitutional openness added a further level of complexity. Regardless of what national constitutions exactly say about emergency or emergency powers, the existence of macro-regional human rights charters such as the European Convention on Human Rights or the American Convention on Human Rights can contribute to limiting the subversive impact of emergencies through the protection of fundamental rights and the equilibrium of power. These international instruments protect precious interests deemed as essential both at national and international level. This is the case with Article 15.2 of the ECHR, which reflects the need to guarantee some fundamental rights even in times of emergency. It acknowledges also the fact that international organisations contribute to rationalizing political powers and fostering checks and balances.

This debate reminds us of the discussion about the codification of secession clauses. One of the reasons to avoid this option is the fact that this kind of clause would be a trap, favouring the instability of the system. This is why constitutions frequently rely on