European Journal of Risk Regulation (2025), **16**, 374–387
doi:10.1017/err.2024.101

ARTICLE

Conceptualising State of Emergency, Constitutional Crisis Management and Their Rule-of-Law Requirements

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Abstract

One of the goals of this paper is to define the most important concepts for the comparative study of the constitutional risk management of the V4 countries. For this purpose, first, it considers the theoretical difficulties of conceptualising emergencies, especially focussing on what kind of response can be given to the widespread view that considers emergencies as a kind of legal "black hole" due to their unpredictability. Then a general definition of "emergency" is discussed which is broad and flexible enough to serve as a basis not only for a comparative study but also for the constitutional discourse of emergencies. Constitutional crisis management as a core concept for such an undertaking is also canvassed. After defining the basic concepts essential for evaluation and comparison, the article outlines the general types of emergency regulatory regimes. The development of effective regulatory systems for emergencies also has to face certain problems that every constitutional polity must solve. Finally, the paper summarises assessment criteria necessary for the evaluation and a comparison of the emergency constitutions of different countries.

Keywords: concept of constitutional crisis management; concept of state of emergency; legal black hole; rule-of-law criteria

I. Introduction

As is well-known, there is no uniform or consensual concept of emergency in legal science, and the relevant national regulatory regimes vary widely. This is not unusual: in fact, a number of constitutional institutions and principles are very abstract and highly contested concepts, but this does not mean that there cannot be a rational discourse on the nature and requirements, say, of democracy, human rights or the separation of powers. As far as our subject matter is concerned, however, there is more to it than that: many legal scholars question whether emergencies can be interpreted in legal terms at all or whether they are extra-legal phenomena.

It is not expected that the jurisprudential debates on emergencies will be settled any time soon, but it is precisely the disagreements on this issue that make it essential for those who wish to contribute to the discourse on the subject to clarify their own definitions and the premises that delimit the scope of their conclusions.

I will, therefore, first consider the theoretical difficulties of conceptualising emergencies. In Part II, I will address the fundamental dilemma of whether they can be understood as legal categories or as situations outside the domain of law, as well as the

difficulty that arises from the diversity of national constitutional arrangements. My purpose is to give a general definition of emergency which is broad and flexible enough to serve as a basis not only for our comparative study but also for the constitutional discourse of emergencies. Part III is about the latter, which also defines the concept of constitutional crisis management. After defining the basic concepts essential for evaluation and comparison, I will explore the framework within which constitutional crisis management exists in practice. First, in this regard, the problems of developing the regulatory regimes will briefly be analysed, and I will then present the classification methods of these systems. Finally, the assessment criteria necessary for their evaluation and a comparison of the emergency constitutions of different countries will be summarised in Part IV.

It is my hope that the analytical framework composed of these elements will be suitable not only for better understanding the forms and systems of constitutional risk management but also for contributing to the discourse on their further development.

II. Conceptualising state of emergency

1. Conceptual problems

When examining the legal concept of the state of emergency, it is important to note that it does not necessarily encompass all possible conceptions of emergency. Indeed, there is a widespread and contested conceptualisation of it in legal theory, which locates such special situations in the extra-legal sphere. This is the so-called (neo-)Schmittian conception of the state of emergency, according to which it is a category outside the domain of law, creating a "legal black hole," ie, a situation that cannot be interpreted by legal tools and in relation to which the law can only determine who is the sovereign.

> The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and how it is to be eliminated. The precondition, as well as the content of jurisdictional competence in such a case, must necessarily be unlimited. (. . .) The most guidance the constitution can provide is to indicate who can act in such a case.[1]

According to Schmitt, the sovereign is the one who can decide on the state of emergency and the means to be used to avert it without any legal constraints. His theory is not only linked in time and space to the interwar period but also reflects his own more general conception of authoritarianism and his conviction that the greatest evil threatening the state is chaos, which must be avoided by any means. This approach can also be understood as a translation of the principle *salus populus suprema lex* into the language of law.

But the roots of this concept go back much further than Carl Schmitt's philosophy of law. It was according to the framework of John Locke's theory of the constitutional government that he concluded that the state, when confronted with a dangerous situation, could act "against the direct Letter of the Law, for the publick good,"[2] which view seems to allow the use of extra-legal means to protect the public interest.[3]

[1] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, University of Chicago Press 2005) 12.

[2] J Locke, *Two Treatises of Government* (Cambridge, Cambridge University Press 1988) 377.

[3] The idea of unlimited exceptional power during an emergency is usually traced back to the Middle Ages, following Gratian, who said *Quia enim necessitas non habet legem, set ipsa sibi facit legem* ("Necessity knows no law, but makes law") in his collection of canon law entitled *Decretum Gratianum*.

This conceptualisation also had a major impact in America, usually traced back to Alexander Hamilton.[4]

> . . . [emergency] powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. 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.

Thomas Jefferson was on the same page,[5] so he is often cited as an authority by the advocates of unbound executive power during a state of emergency.

The significant impact of Schmitt's authoritarian conception might be surprising since it does not see the rule of law and constitutional democracy as a starting point or a value to be defended by the state of exception. Some argue that the influence of his ideas is due to the fact that he drew attention to the challenges that crisis situations pose to liberalism.[6]

It is a curious paradox that even today, there are adherents of the Schmittian conception, even though their aspiration is to seek defence of the rule of law against the threat posed by the special legal order. Thus, the proponents of the so-called "extra-legal measures model of emergency powers" think that public officials who are in charge of managing emergencies may use extra-legal means if necessary, although they must be held responsible for the methods they use.[7] This position is ultimately based on the argument, already used by Carl Schmitt, that since dangers cannot be foreseen or calculated in advance, the way to avert them cannot be determined in advance, either. Furthermore, it is possible that the danger is so serious that it can only be managed by extra-legal means.

The other main school of thought understands emergencies very much within the legal system and sees them primarily as a legal institution.[8] According to such "legal positivist" views, emergencies and exceptional powers are in need of legal regulation, as they in themselves pose a significant threat to democracy and the rule of law: "a situation [. . .] in which the executive, elected or not, can simply declare a state of emergency on the basis of its own (honest or dishonest) judgment, and lay down and take the emergency measures involved without being subject to adjudicative challenge, is certainly incompatible (. . .) with democratic government."[9] This dichotomy is often characterised as the "post-Madisonian"[10] versus the "post-Schmittian"[11] approach.

[4] A Hamilton, J Madison and J Jay, *The Federalist or, the New Constitution* [No. 23] (New York, J.M. Dent & Sons 1911) 153.

[5] "A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself . . . " Cited by Jules Lobel, "Emergency Power and the Decline of Liberalism" (1989) 98 The Yale Law Journal 1393.

[6] VV Ramjay, "No Doctrine More Pernicious? Emergencies and the Limits of Legality" in VV Ramjay (ed), *Emergencies and the Limits of Legality* (Cambridge, Cambridge University Press 2008) 6.

[7] O Gross, "Extra-Legality and the Ethic of Political Responsibility" in VV Ramjay (ed), *Emergencies and the Limits of Legality* (Cambridge, Cambridge University Press 2008) 60.

[8] See, eg, D Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency* (Cambridge, Cambridge University Press 2006).

[9] T Campbell, "Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory" in VV Ramjay (ed), *Emergencies and the Limits of Legality* (Cambridge, Cambridge University Press 2008) 214.

[10] EA Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York, Oxford University Press 2011).

[11] T Ginsburg and M Versteeg, "The Bound Executive: Emergency Powers during the Pandemic" (2021) 19 International Journal of Constitutional Law 1498-1499.

Beyond these, a number of theories and analytical frameworks have been elaborated to explain the legal nature of emergencies, or for proposing a doctrinal mindset for managing state crises, such as the so-called "fiduciary"[12] or "reason of state theory"[13] of emergency constitutionalism, but discussion of them is beyond the scope of this article.

In fact, these approaches have had a significant impact on the discourse on emergencies, which has become particularly intense in the last two decades due to certain events and new phenomena. For example, these mainstream theoretical models were developed, or at least revived, in the aftermath of the terrorist attacks in the United States on 11 September 2001 in the context of the "war on terror" and after the terrorist attacks in Paris, London and other major European cities, focussing primarily on defending against violent attacks on states, while the early 2020s saw a lively scholarly debate in the wake of the COVID-19 pandemic. All these events have led to extensive legal theoretical debate, but this, due to its abstract nature, has provided little ammunition for the discourse on the actual constitutional management of emergencies. For instance, one of the central questions, as stated above, is whether the decisions of the "sovereign" in the Schmittian sense in emergency situations can be conceptually constrained by the legal system,[14] whereas in reality such situations are not handled by the sovereign (the constitution-making?) power, but by the government, the head of state and/or the parliament. In reality, moreover, even in the United States, despite the endless debate about the President's war powers, emergencies are managed by the executive branch largely on the basis of laws passed by Congress.[15] Another problem with the mainstream literature on emergency constitutionalism is that so far it has generally focussed only on specific types of threats (eg, terrorist threats or health risks), while the states of emergency should cover all types of serious crises, which are different in nature and require, accordingly, at least partly different responses.[16] Beyond this, an understanding of the problem that sees emergency situations as a threat to the mere existence of the state and seeks an explanation for the alleged paradox based on this black-and-white approach does not also provide a useful contribution to the discussion of the constitutional implications of the issue. As one such argument goes, in emergencies, the survival of the liberal democratic state is at stake because "[o]n the one hand, in resorting to such powers the state ceases to be liberal, while on the other, in not resorting to them, the state might well cease to be." This inescapably leads to another paradox that the "destruction of the state would mean the destruction of justice and liberal values too."[17] If we therefore accept these assumptions, then emergencies perceived in this way will definitely lead to the end of the liberal state, because either the state will cease to be, or it will remain, but it will no longer be liberal.

2. *The concept of state of emergency*

Thus, refusing the "legal black hole" theory of the state of exception, the starting point of this paper is that special legal orders, by which certain public authorities are granted exceptional powers to avert a threat to the State or other values, are within the scope of the law – ie, are themselves legal institutions. Since, by its very nature, the rule of law implies that social coexistence is governed by law, it is evidently incompatible with

[12] E Fox-Decent and EJ Criddle, "Human Rights, Emergencies, and the Rule of Law" (2012) 34 Human Rights Quarterly 39–87.

[13] T Poole, "The Law of Emergency and Reason of State" in EJ Criddle (ed), *Human Rights in Emergencies* (Cambridge, Cambridge University Press 2016).

[14] See, eg, G Agamben, *State of Exception* (Chicago, University of Chicago Press 2005) p 35; M Klamberg, "Reconstructing the Notion of State of Emergency" (2020) 52 George Washington International Law Review 56–7.

[15] Lobel (n 5) 1408.

[16] Ginsburg and Versteeg (n 11) 1509.

[17] NC Lazar, *States of Emergency in Liberal Democracies* (Cambridge, Cambridge University Press 2009) 2.

empowerment for the use of extra-legal instruments in any case. It is doubtful, on the one hand, whether the formal or informal, legal or political *ex-post* ratification of these extra-legal tools, as some adherents suggest deploying to counterbalance the risks of extra-legality,[18] may provide adequate compensation for the damage caused by the use of such methods; further, the inherently unlimited power to use extra-legal means poses an unreasonable risk to the subsequent restoration of the rule of law.

Like the rule of law and other abstract concepts, the concept of "state of emergency" is not precisely and consensually defined, but this does not mean that we should reject its use since, as a legal category, most legal systems use and define it for themselves. Based on this, the conceptual elements that are present in most constitutional systems can be determined. The most important conceptual components of an emergency as a legal concept are the fundamental constitutional values protected by a special legal order, the serious crisis or danger (risk) that threatens them, and the exceptional power granted to deal with that exigency. Within this conceptual framework, in general, the entire State and constitutional order, as well as society as a whole or the life, safety and property of a large number of citizens, are usually classified as fundamental constitutional values to be protected. The typical conceptual elements of the threat are its urgency, concreteness and scale.[19] The crisis, danger or threat must be immediate and can only be averted by expanding the State's options for action, ie, by providing exceptional power to the State.[20] Although it is not possible to determine in advance or, even in general terms, the severity or extent of the threat that justifies the introduction of a special legal regime,[21] it is precisely this uncertainty that justifies the need to lay down clear procedural rules for making such a decision.

Defining emergency situations is undoubtedly difficult, but the relevant regulation can create procedural and institutional rules for the bodies authorised to decide on the introduction of a state of emergency at a given moment. The legal approach to the state of emergency is therefore based on the following logic: in the case of a crisis or danger that seriously threatens the functioning of the State or society if the latter cannot be dealt with within the framework of the normal legal order, a special legal order may be introduced through which exceptional powers are granted to the State to enable it to overcome the crisis or avert the danger.[22] According to this logic, a state of emergency in the legal sense means an exceptional situation compared to the normal legal order, the purpose of which is to restore normalcy by removing the threat.[23]

Considering all these aspects, in this article, the concept of state of emergency covers all those special legal orders whereby a constitution or statutory law authorises specific public authorities to exercise exceptional powers in the event of a threat to certain fundamental state or social values in order to avert the threat and/or to restore the normal constitutional order. The authorisation allows for derogations from institutionalised forms of checks and balances and/or from certain fundamental rights and liberties

[18] Gross (n 7) 64–6. It is to be noted that the issue of the *ex-post* evaluation of the tools used by the executive during emergency was already raised by Albert V. Dicey, who argued that the executive's actions could be approved (or rejected) ex post by the legislature through an act of idemnity. AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982; originally: Macmillan and Co. 1915) 167.

[19] Lazar (n 17) 7.

[20] A Zwitter, "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy" (2012) 98 Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy 97–8.

[21] S Olsson, "Defending the Rule of Law in Emergencies Through Checks and Balances" (2009) 5 Democracy and Security 106–7.

[22] KC Lauta, *Disaster Law* (Abingdon, Routledge 2015) 41.

[23] O Depenheuer "The Exceptional Case in Situations of Normalcy" in J Jinek and L Kollert (eds), *Emergency Powers: Rule of Law and the State of Exception* (Baden-Baden, Nomos 2020) 31–2.

(allowing more severe restrictions or suspensions of those rights than in the normal legal order). The justification behind such an authorisation is the legitimately invoked *raison d'état*, that is, the protection of the constitutionally determined values and interests. Since the exceptional power *per se* poses a threat to democracy and the rule of law, the state of emergency can only be considered an *ultima ratio*, that is, only if the state bodies are unable to avert the threat with their general, constitutionally or legally defined powers.

From a legal point of view, emergency situations understood in this way involve two closely related dimensions based on the level of regulation since overcoming threats to state or society usually means an extraordinary situation and requires a temporarily introduced special legal order and exceptional power, which must be based, as a general rule, on the constitution. However, as a result of crisis situations of different types and intensities, specific laws have been passed in more and more countries that allow the introduction of a kind of "quasi-emergency" when only minor deviations from the normal legal order are allowed for the treatment of certain more limited or specific threats than the emergency constitution, authorising more limited and targeted state intervention. Nonetheless, there may not only be a difference between risk regulation at the constitutional and statutory level but also a close connection: since constitutions, due to their abstract nature, provide only the general authorisation or framework regulation, the detailed rules of crisis management are usually defined by laws even if a constitutional state of emergency has been declared.

Given this distinction, the concept of "constitutional crisis management" covers only those cases that involve the introduction or application of emergency situations defined in the constitutional text. According to this concept, "crisis management" includes all activities organised by the state that are carried out in order to prevent and eliminate the harmful consequences of the emergency in a special legal order by exercising exceptional powers. From a legal point of view, the objective is to restore the normal legal order. "Constitutional" crisis management includes all constitutional principles, procedures and instruments that authorise the exercise of exceptional power and determine its subject, content and limits. From this understanding, then, "emergency" means a serious threat to the state or society and the latter's particularly protected values due to direct risk or pre-existing crisis (that has already occurred).

The legal recognition of emergency situations is possible in several ways. The vast majority of constitutions contain provisions regarding emergency situations, but the emergency constitutions differ not only in the kind of threats they prescribe a special legal order for (or provide exceptional powers to state bodies for overcoming), but also in their regulatory logic.

The legal treatment of extraordinary circumstances is inherently difficult since it is precisely the deviation from normalcy that must be placed within a legal framework. The constitutional regulation of emergency situations must thus encounter many challenges. Before simply classifying or characterising the regulatory regimes, it is advisable to review the most important ones.

III. Constitutional crisis management

1. Regulatory problems associated with emergencies

The legal-constitutional understanding of the emergency or exceptional power must confront several problems. Some scholars consider it a paradox in itself if the "emergency

constitutions" (that is, the constitutions that provide for the state of emergency) temporarily suspend the constitutional order with the goal of later restoring it.[24] However, if a constitution regulates emergency situations, then it conceptually makes them part of the constitutional order, even if it treats them as exceptional legal orders.

It is a typical problem when designing legal responses to emergencies that constitutional scholars often take as their starting point historical examples – and classical pieces of work – which, as we have seen in the US example, referred to risks to the very existence of the state. Thus, Oliver Cromwell's famous saying "[n]ecessity hath no law" has become one of the oft-quoted arguments in debates about special legal orders and only intensified after the 9/11 terrorist attacks on the United States when, understandably, most analysts were concerned with the problem of legal responses to extreme dangers.[25] But the vast majority of modern emergencies are not of this nature. For example, industrial and natural disasters, however severe their consequences, are usually limited in time and space. Moreover, in most cases, even violent acts (eg, acts of terrorism) against the constitutional order do not constitute a threat to the existence of the state as a whole and do not justify the suspension or withdrawal of a whole range of fundamental rights. If, for example, there are absolute rights in a constitutional polity, as there usually are, they cannot be restricted even in times of war.

Then, the constitutional and/or legal regulation of emergencies is often merely reactive; it responds *ex-post* to unforeseen emergencies, which seems to reinforce the notion that it is precisely because of the unpredictability of risks that it is not possible to put in place a predefined framework of instruments to avert danger. However, unbridled exceptional powers may seem to be an excessive response to the unpredictability of the threat – particularly in light of the fact that, even if the occurrence of certain events cannot always be predicted, it is possible to model and prepare for possible threats. Many natural disasters (such as the Tōhoku earthquake and tsunami leading to the Fukushima nuclear accident in 2011 or the COVID-19 pandemic outbreak in early 2020) and even some man-made crises (such as the invasion of Ukraine in 2022 or Hamas' mass terror in Israel in 2023) are unpredictable, but this is not true of all emergencies, and the nature of theoretically possible emergencies and the means of their management are more or less known; further, while the future occurrence of global threats not yet known cannot be excluded, it does not seem plausible to give legal recognition to unlimited exceptional powers, for example, because of the possibility of an unexpected attack by Martians.

Another characteristic problem of emergency regulatory regimes, at least in many countries, is that constitutional or legal rules are unilaterally designed in response to certain acts of violence (such as war or coups) and thus may be ill-suited to deal with new generational crises (such as migration-related crises or climate change).[26]

Some argue that the very separation of normality and exceptionalism, ie, the assumption that the legal system is not *per se* appropriate for dealing with crisis situations, is problematic.[27] This could easily open the way to claims for non-legal or extra-legal remedies.[28] Another critique of the separation of normalcy and exceptionalism is that this dichotomy loses its meaning with the frequent recurrence of crises and, thus, of

[24] C Bjørnskov and S Voigt, "The Architecture of Emergency Constitutions" (2018) 16 International Journal of Constitutional Law 103.

[25] See, for example, M Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham & London, Duke University Press 2005); B Ackerman, *Before the Next Attack. Preserving Civil Liberties in An Age of Terrorism* (New Haven, Yale University Press 2007); EA Posner and AVermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York, Oxford University Press 2007); A Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency. Security and Human Rights in Countering Terrorism* (Dordrecht, Springer 2012).

[26] Lauta (n 22) 61–2.

[27] Lazar (n 17) 4.

[28] Lauta (n 22) 66.

exceptional power, ie, the perpetuation of the emergency.[29] Furthermore, it is also possible to take the view that if the cases and the framework for the granting of exceptional powers are regulated by law, then the exercise of such powers is no longer "exceptional." "The use of constitutional emergency powers may well become the rule and not the exception," and if the use of emergency powers is exercised to meet constitutional or legal requirements, even "constitutional dictatorship" may be considered legitimate.[30]

2. *Classifications and models of emergency regulatory regimes*

In legal theory, a variety of names are used for special legal situations in which exceptional powers are granted to a state body to avert threats to the state or other significant value, such as a state of emergency, state of exception, special legal order, or state of danger, while in the past, terms more suited to war-related conflicts were used, such as martial law, state of siege or state of war. Although these concepts are often not interchangeable (for example, some refer to situations of special danger, and others to the exceptional powers granted in such cases), they have in common that they serve to give constitutional expression to emergency situations (in other cases, however, similar types of situations are referred to by different names in the various legal systems).

Several models of regulating the state of emergency can be distinguished in the way that they may be grouped according to different criteria and in different ways. Common to the various classifications is that they all are based on a dichotomy that distinguishes between normalcy and emergency and between norm and exception in legal terms. The emergency regulatory regimes today are commonly grounded on the assumption that the general rules of the legal system are not sufficient to manage certain risks or to avert dangers, so it is necessary to provide exceptional powers to the government in order to safeguard the fundamental interests of the state or society in extraordinary situations.[31]

Two models of the constitutional treatment of the special legal order are generally distinguished, referring to the different traditions of common law and civil law legal systems, in that while the former often do not distinguish between ordinary and extraordinary law, and the executive enjoys general power to deal with crisis situations, the latter usually have specific rules for such situations in their constitutions.[32] This distinction is based on the scholarly debate presented above that states of emergency are considered to be situations outside the law or controllable by the legal system.[33] Accordingly, a number of constitutions do not contain provisions on emergency situations, and this may also be the case for those fundamental laws which do not contain explicit provisions on emergencies but which refer to them indirectly in certain jurisdictional or procedural rules (for example, the possibility of convening Parliament in

[29] A Jabauri, "State of Emergency: A Shortcut to Authoritarianism" (2020) 1 Journal of Constitutional Law 122; Lobel (n 5) 1412; Poole (n 13) 152.

[30] C Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Piscataway, Transaction 2002).

[31] Lauta (n 22) 41.

[32] See for instance, D Dyzenhaus, "States of Emergency" in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press 2013) 446–51; VV Ramraj and M Guruswamy, "Emergency Powers" in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (London and New York, Routledge 2015) 86–7; G Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit* (Edward Elgar, Cheltenham–Northampton 2018) 278–9. Others identify the two types of constitutional treatment as "Roman" or legislative models, referring to the role of the dictators in ancient Rome. J Ferejohn and P Pasquino, "The Law of the Exception: A Typology of Emergency Powers" (2004) 2 International Journal of Constitutional Law 210–39; O Gross and F Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge, Cambridge University Press 2006) 17–85.

[33] Cf. Lazar (n 17).

emergency circumstances), ie, where the regulation is essentially at the level of the law.[34]

On this basis, the first approach, mainly typical of Anglo-Saxon legal systems, is that there is no pre-defined legal framework or methodology for risk management. This is the so-called "derogation model," whereby, on occasion, ordinary laws specialised for the risk in question provide for exceptional powers and legal limitations for the public bodies responsible for managing threats. Therefore, this type of risk management, even if it does not presuppose a pre-determined constitutional approval or framework, is not at all similar to the Schmittian conception; it is simply that specialised emergency statutes determine the way in which exceptional powers are exercised, and fundamental rights are restricted. This regulatory regime, therefore, ensures the legitimacy of crisis management through an *ex-ante* legislative act rather than by an *ex-post* solution such as the extra-legal measures model. Moreover, this type of solution allows for both *ex-ante* and *ex-post* control, either through legislation (by legislating a sunset clause or through political responsibility) or through the courts (by judicial review).[35] Nevertheless, the risks of this regulatory model are, on the one hand, that the prior empowerment of the government may reduce the seriousness of its *ex-post* accountability (since the legislature itself has consented to the use of certain instruments) and, on the other hand, the judiciary's traditional deference towards the executive power concerning matters of emergency situations.

Another type of emergency accommodation is the "legal-executive discretion" or "martial law model," by which the constitution grants exceptional powers to the executive. This is traditionally implemented by martial law with the "suspension of ordinary law and the temporary government of a country."[36] This kind of constitutional risk management usually allows both political control and (*ex-post*) judicial review. Some authors characterise this as a "neo-Roman model,"[37] referring to the dictatorial type of solution used in ancient Rome, with the fundamental difference that the executive should be granted exceptional power in a democratic way by the legislature.[38] But from this point onwards, at least in principle, two separate paths are possible. One is that the constitution or the laws made under it predefine the means to be used and the fundamental rights that can be restricted in an emergency, and how – ie, they delimit the exceptional power granted to the executive. The alternative option is that the authorisation is not specific but general, and the legislature or the judiciary can subsequently verify the appropriateness or justification of the means used. The best-known version of this approach is the so-called "constitutional dictatorship" approach, the normative claim that even an authorisation for unlimited power can be justified in order to overcome a crisis.[39]

This type of classification is also often used by distinguishing between the French *état de siège* and the British "martial law models."

Another classification distinguishes three different regimes. In this scheme, the "absolutist" model (wherein the government has no special emergency power to respond to crises other than granted by the constitution) largely corresponds to the Anglo-Saxon derogation variant mentioned above. On the one hand, this is based on the consideration that the constitution provides the government with sufficient power to preserve the

[34] For example, the Japanese constitution only allows the government to call an extraordinary session of parliament in an emergency. Japanese Constitution, Article 54.

[35] K Roach, "Ordinary Laws for Emergencies and Democratic Derogations from Rights" in VV Ramjay (ed), *Emergencies and the Limits of Legality* (Cambridge, Cambridge University Press 2008) 230–1.

[36] Dicey (n 18) 283–4.

[37] In antiquity, in republican Rome, to avert threats to the empire, the Senate would give dictatorial power to a politician or a military leader, usually for a period of six months, but at the end of that period the Senate would hold him to account.

[38] Ferejohn and Pasquino (n 32) 213.

[39] See Rossiter (n 30).

constitutional order, and on the other hand, that even if there is a real threat, it should not be enough reason to sacrifice liberty.[40] In contrast to this "absolutist" approach, according to the "relativist" model, the constitution should empower the Executive to take whatever measures are necessary to overcome the crisis.[41] This is based on the well-known argument that since the variety and nature of future crises cannot be foreseen, the means necessary to prevent them cannot be determined in advance either. Finally, the "liberal" version of emergency regimes makes a sharp contrast between legal normalcy and emergency, recognising the necessity of extraordinary power. Nevertheless, it seeks to keep exceptional power within the framework of the rule of law, based on the assumption that unlimited or unchecked power poses too great a risk to the constitutional system and fundamental rights.[42]

Regardless of the basis on which the emergency regulatory regimes are classified, those legal systems that do not contain special rules for extraordinary circumstances, ie, do not recognise any kind of special legal order or exceptional power, are a separate type. This approach is based on the assumption that the constitution provides appropriate or sufficient powers and means for state bodies to perform any public task, while exceptional power poses too great a risk to democracy.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . . [U.S. Supreme Court, Ex Parte Milligan, 71 U.S. 2 (1866).]

Furthermore, emergency constitutions can be grouped based on a number of additional criteria, such as the scope of the regulation. It is worth pointing out that the traditional conception of public law recognised emergency rule as legitimate only in a state of war, or in other situations that threatened the way in which public power was exercised.[43] Most notably, constitutional developments in the twentieth century extended the possibility of emergency law to natural disasters (eg, earthquakes or floods) and industrial disasters. Natural or elemental disasters were understood as disasters caused by natural forces, unforeseeable and unpreventable by human intervention, as opposed to crises caused by human action or omission. Special legal situations have been regulated in most countries' legal systems in a kind of cascade; the most common object of protection in emergencies is still the state or the constitutional order, thus the respective rules most often apply to states of war or other situations threatening the exercise of power, but the law also applies special rules to many other disasters, specialised to the specificities of the crisis situation[44] – ie, the manner and extent of the departure from the normal legal order depends essentially on the nature of the threat.

[40] This kind of value judgment is also expressed in a saying (probably wrongly) attributed to Churchill according to which, when it was suggested to him during the Second World War that the funding of arts should be cut in order to support war efforts, he replied: "Then what would we be fighting for?"

[41] However, practice does not follow pure theoretical models. In the United States, for example, several presidents have held the view that the constitution gives the executive power an authority that inherently extends to all measures that the constitution does not explicitly prohibit. See Lobel (n 5) 1404–5.

[42] Ibid, 1386–90.

[43] See, eg, Agamben (n 14).

[44] Ferejohn and Pasquino (n 32) 229.

In general, it is worth mentioning that the newer a constitution, the more extensive the regulations it usually contains regarding emergency situations.[45]

IV. Assessment criteria: rule-of-law requirements of constitutional crisis management

The evaluation of emergency constitutions and the comparison of national regulatory regimes presupposes the existence of an assessment framework that is sufficiently abstract to be applicable to different legal systems and constitutional cultures yet concrete enough to serve as a more or less objective benchmark for the purpose of the analysis.

My understanding is based on the presumption that the state of emergency is dangerous to democracy and the rule of law. There are many historical examples of this, from the fall of the Weimar Republic and the establishment of the Nazi totalitarian dictatorship (an important tool of which was the abuse of the exceptional power guaranteed during the state of emergency provided by Article 48 of the Weimar Constitution)[46] and the exceptional power in fascist Italy in 1925 to the state of emergency in India in 1975 and Poland in 1981 (involving the use of emergency powers to oppress political opposition) – but more recent experiences also support this proposition, like the state of emergency in Turkey from July 2016 to July 2018, which was used by the authoritarian regime to suppress political opposition, and the current state of danger in Hungary, which has lasted for more than five years and in reality ensures the unlimited power of the government without the real possibility of overthrowing it.

> Once the necessity for derogation is conceded, it becomes difficult to control whether the suspension of rights amounts to an abuse of power.[47]

> Emergencies as such challenge the stability of the legal system, and, beyond this, the basic tenets and values of constitutional democracy.[48]

> If relevant constitutional provisions are not properly designed, a state of emergency gives leaders the possibility to take over the legislative power and transform democracies into authoritarian or semi-authoritarian states.[49]

The fundamental dilemma of any special legal status is the contradiction between the fact that while the authorisation of specific fundamental rights restrictions, powers and procedural exemptions may be necessary to avert public danger, the exceptional power, by its very nature, poses a serious risk to personal liberty and democracy, ie, the rule of law. The key issue in the constitutional or legal regulation of special legal order(s) is, therefore, always to strike a balance between the special power and the institutional guarantees that constrain it, ie, how to reconcile the interest in ensuring effective action through the special power with the interest in preventing abuse of that power. In emergency

[45] See the article by Attila Horváth in the same issue for details.

[46] Historical experience refutes the opinion that "[c]onstitutional emergency provisions arguably do not make sense under absolute monarchy or totalitarian regimes. If the head of the executive is unconstrained, why should there be special provisions giving him powers he already enjoys?" Bjørnskov and Voigt (n 24) 104. Even in the most recent times, autocracies have used the exceptional powers granted because of the COVID-19 pandemic to "enhance their power and crack down on opponents." Ginsburg & Versteeg (n 11) 1531.

[47] M Klamberg, "Reconstructing the Notion of State of Emergency" (2019) 52 The George Washington International Law Review 53–4.

[48] Gross and Ní Aoláin (n 32) 2.

[49] Jabauri (n 29) 122.

situations, the executive acquires exceptional powers that would be unacceptable under normal circumstances. Therefore, such a power can only ever be rule of law, if it is strictly limited to a specific purpose, temporary and exercised within a controlled framework. All these safeguards prevent the granting and exercise of exceptional power from becoming an irreversible process whereby it becomes permanent.

However, even if constitutional crisis management may necessitate a certain degree of derogation from democratic decision-making and the rule of law, in order to avoid the abuse of exceptional power, it is necessary to define the minimum criteria of the rule of law which values may not be abandoned even in special circumstances. These standards for emergency regulation may be identified mainly from the recommendations of certain international organisations,[50] the requirements of the constitutions of modern democracies[51] and the literature.[52]

Although these requirements can be normatively derived from the values of constitutional democracy, their content and extent cannot be determined precisely in advance but rather depend on the severity of the threats to be averted, the peculiarities of the legal system, and can only be determined by taking into account the specific circumstances. The elimination of different types of threats requires different tools, even if similar rights (eg, privacy rights or political freedoms) require restrictions. For example, anti-terrorist measures could include pre-trial detention, the suspension or limitation of habeas corpus, or secret surveillance, while the pandemic and related lockdowns, the closing of some public institutions, the right of assembly, the freedom of information, etc, are accompanied by restrictions.

It is also essential that the individual requirements are related to each other; if, for example, an aspect can only be partially enforced (eg, it is unpredictable what kind of economic intervention may be needed during the management of a special crisis), then it can be offset by meeting other requirements.

One such general rule of law requirement is that the exceptional power granted during a state of emergency cannot be based on the self-authorisation of certain state bodies. This means that the authority to declare a state of emergency must be constitutionally separated from the exceptional power.[53] There may be exceptions to this rule (many constitutions allow the government to declare a state of emergency due to the need for immediate action or obstruction of parliament), but the right of subsequent political and legal control must always be ensured.

Legality is a core value of the rule of law,[54] which in this respect means compliance with the norms of the state of emergency. In principle, legality can also be interpreted

[50] Such as the Siracusa Principles of the United Nations: *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex*, UN Doc E/ CN.4/1984/4 (1984). See also International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva 1983); European Commission for Democracy through Law (Venice Commission), *Emergency powers*, CDL-STD(1995)012, Strasbourg, 1995.

[51] For a European comparison of constitutional rules on the special legal order, see A Khakee, Securing Democracy? A Comparative Analysis of Emergency Powers in Europe (2009) *Policy Paper* No. 30 Geneva Centre for the Democratic Control of Armed Forces, and Attila Horváth's article in this issue.

[52] See, eg, R Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (Montreal, McGill-Queen's University Press 2017) 12–29.

[53] CJ Friedrich, *Constitutional Government and Politics* (New York, Harper & Brothers 1937) 210; Rossiter (n 30) 299; Jabauri (n 29)135; Bjørnskov and Voigt (n 24) 109.

[54] L Fuller, *The Morality of Law* (New Haven, Yale University Press 1964) ch 2; J Raz, *The Authority of Law: Essays on Law and Morality* (New York, Clarendon Press 1979) 210; S Shapiro, *Legality* (Cambridge and London, Harvard University Press 2011); TS Allan, "Constitutionalism at Common Law: The Rule of Law and Judicial Review" (2023) 82 Cambridge Law Journal 236–64.

as meaning only the legality of the authorisation, but this concept has no particular value from the point of view of the rule of law if the authorisation grants unlimited power to the government. Therefore, the emergency constitution must support a strong form of legality aimed at enforcing the legal rules for limiting exceptional powers.[55]

If a threat becomes persistent or regularly recurring, the extraordinary measures can become institutionalised, and thus permanent.[56] In order to avoid this, an additional rule-of-law requirement of emergency situations is their temporality, that is, their time limitation. This must also cover the temporary nature of the special legal order, as well as the limitation of the temporal effect of the legislation that was enacted in the course of government-by-decree solely to overcome the danger. The key principle is that the special legal order should only be maintained for as long as the reasons for its imposition or conditions exist that gave rise to its adoption because the prolongation of the state of emergency is inherently risky[57] – it makes the special legal order permanent, and thus, it equates exception with normalcy. Then, constitutional crisis management must ensure the avoidance of the risk that temporary legal norms be incorporated into the regular legal system and the rules made for special situations become permanent. This approach can resolve the so-called seepage problem: when emergency rules seep into the regular law.

Proportionality is also a crucial rule-of-law requirement. Adherence to this principle implies that all emergency measures must be taken to address the crisis and the consequences necessary to prevent the crisis. Although "during times of national emergency, judges tend to ascribe more weight to arguments favoring national security as opposed to those favoring individual rights,"[58] this principle can guarantee that even if a public body exercises exceptional powers, it can only do so within certain limits. These limits mean that the exercise of extraordinary powers of state bodies is justified only if it is suitable and absolutely necessary to avert the danger. As far as fundamental rights restrictions are concerned, the standards of necessity and proportionality applicable in emergency situations are similar to those of the normal legal order,[59] only their yardsticks are different, inasmuch as certain basic rights may be suspended or restricted beyond the extent that would otherwise be applied.[60]

Finally, all measures taken by using exceptional power should be subject to legislative deliberation and judicial review. Thus, it must be a requirement of the rule of law that the declaration of a state of emergency and the measures taken under the exceptional power can be monitored by other bodies, ie, bodies other than the one exercising the exceptional power. While legislative control is used to enforce political responsibility for the exercise of exceptional powers, the legality of emergency measures requires judicial r-

[55] Z Szente, "How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework" (2025) 17 Hague Journal on the Rule of Law 117–38.

[56] DL Robinson, "The Routinization of Crisis Government" (1973) 63 Yale Law Review 161; B Buzan et al, *Security: A New Framework for Analysis* (Boulder and London, Lynne Rienner Publishers Inc. 1998) 27.

[57] Jabauri (n 29) 134–8.

[58] A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press 2012) 524.

[59] For more details on these standards, see M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press 2012); Barak (n 58); G Huscroft, BW Miller and G Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, Cambridge University Press 2014); VC Jackson and MV Tushnet, *Proportionality: New Frontiers, New Challenges* (Cambridge, Cambridge University Press 2017).

[60] Szente (n 55).

eview. As far as the former is concerned, this requirement is not met by *ex-ante* authorisation, which presupposes broader authorisation, but only by the *ex-post* control of emergency decrees and other exceptional measures,[61] whereas the role of the courts in times of emergency is primarily to monitor compliance with procedural norms and to review substantive rights.[62] The legitimate function of courts in times of emergency can be justified on the basis that they are well-equipped to assess the regularity of decision-making procedures, identify the various interests at stake and protect fundamental rights at the institutional level.

[61] Ginsburg and Versteeg (n 11) 1526.

[62] However, as Ginsburg and Versteeg point out, in some cases the court may require the public authorities to take affirmative steps or to fulfill their constitutional obligations if they are necessary to overcome the crisis. Ibid.

Cite this article: Z Szente (2025). "Conceptualising State of Emergency, Constitutional Crisis Management and Their Rule-of-Law Requirements". *European Journal of Risk Regulation* **16**, 374–387. https://doi.org/10.1017/err.2024.101