Revista catalana de dret públic #66

www.rcdp.cat

THE RULE OF LAW IN RESPONSE TO THE COVID-19 EMERGENCY: A COMPARATIVE ANALYSIS

Carlos Garrido López*

Abstract

This work presents an analysis of the measures adopted by leading democratic countries in response to the COVID-19 emergency, and the compatibility issues that arose between these measures and the guarantees of the rule of law. The global and simultaneous scope of this serious emergency facilitates comparative analysis and reveals their advantages and their shortcomings. The aim of the article is to evaluate the various extra-constitutional methods employed in response to the exception as well as the state of exception model, based on the regulation of extraordinary situations and the measures to be adopted. Lastly, the analysis focuses on the contradictions that have arisen as a consequence of the use and non-use of the state of exception model in the response to COVID-19 in Europe.

Keywords: COVID-19 emergency; comparative law; rule of law; state of exception.

L'ESTAT DE DRET EN RESPOSTA A L'EMERGÈNCIA DE LA COVID: UNA ANÀLISI COMPARATIVA

Resum

Aquest treball presenta una anàlisi de les mesures que van adoptar els principals països democràtics en resposta a l'emergència de la covid i els problemes de compatibilitat que van sorgir entre aquestes mesures i les garanties de l'estat de dret. L'abast global i simultani d'aquesta emergència tan greu facilita l'anàlisi comparativa i en revela els avantatges i les mancances. L'objectiu d'aquest article és avaluar els diversos mètodes extraconstitucionals que es van emprar en resposta a l'estat d'excepció i també el model d'estat d'excepció, partint de la regulació de les situacions extraordinàries i de les mesures que calia adoptar. Finalment, l'anàlisi se centra en les contradiccions que han sorgit a conseqüència de l'aplicació i la no aplicació del model d'estat d'excepció en la resposta a la covid a Europa.

Paraules clau: emergència sanitària; COVID-19; covid; dret comparat; estat de dret; estat d'excepció.

* Carlos Garrido López, Professor of Constitutional Law at the University of Zaragoza. Faculty of Law, c. Pedro Cerbuna, 12, 50009 Zaragoza. cgarrido@unizar.es. 0000-0003-4741-7412.

Article received 28.09.2022. Blind review: 05.10.2022 and 02.11.2022. Final version accepted: 07.11.2022.

Recommended citation: Garrido López, Carlos. (2023). The rule of law in response to the COVID-19 emergency: a comparative analysis. *Revista Catalana de Dret Públic*, *66*, 188-203. https://doi.org/10.58992/rcdp.i66.2023.3877

Contents

1 Approach

The following pages present an analysis of the measures adopted by leading democratic countries in response to the COVID-19 emergency and the compatibility issues between these methods and the guarantees of the rule of law. The global and simultaneous scope of this serious emergency facilitates comparative analysis and reveals their advantages and their shortcomings. The objective of this article is to evaluate the various extra-constitutional methods activated in response to the exceptional circumstances and the state of exception model, based on the juridification of extraordinary circumstances and the measures to be adopted. The analysis will go on to focus on the contradictions that have arisen as a consequence of the use or non-use of the state of exception model in response to COVID-19 in Europe, and on the limitations of this model, which derive from the nature of the emergency but do not suppress the progress that its guarantees represent in the process of reducing immunities of the power of exception.

2 The non-use of models and the ad hoc response to COVID-19 in the UK and the United States

In the UK and the United States, laws granting extraordinary powers are the usual instruments through which the adoption of emergency measures is authorised. These laws are usually dependent upon the declaration of an emergency, but have also been passed ad hoc after the onset of a crisis. The Emergency Powers Act – passed by the UK Parliament on 29 October 1920 to ensure essential needs are met in case of an emergency – was an example of a prior delegation of powers. The police measures attributed to the UK Government were very broad, authorising "such powers and duties as His Majesty may deem necessary for the preservation of the peace", although said powers were limited in terms of time and under strict parliamentary control. The Civil Defence Act of 1948 was passed with the same purpose and similar content, and was used for decades, although its ineffectiveness in response to new emergencies, such as the floods of 2000 and the foot-and-mouth disease outbreak of 2001, led to the passing of the 2004 Civil Contingencies Act, which is still in force. Under this act, in response to situations that threaten to cause serious harm to human welfare, the environment or the security of the UK, an Order in Council entitles the government to pass regulations designed to protect human life, health or safety against threats that could occur over time in areas regulated by law and with limited parliamentary control (Walker & Broderich, 2006, pp. 153–180).

In contrast, the special powers conferred upon the governments of England, Scotland, Wales and Northern Ireland by the 2020 Coronavirus Act – passed in March of that year by both chambers of Parliament with the consent of the legislative assemblies of Scotland, Wales and Northern Ireland – were totally ad hoc, despite there already being a specific legislative framework in place for health emergencies. Paradoxically, said ad hoc granting of powers was also partially bypassed, since most of the right-restricting measures implemented to control the pandemic were adopted through simple regulations by the government, based on the 1984 Public Health (Control of Disease) Act and Schedule 19 of the 2020 Coronavirus Act (for England, Scotland and Wales), and the 1967 Public Health Act (for Northern Ireland). Most legal scholars have criticised this double sidestep or avoidance of the framework provided for in the Civil Contingencies Act and the Coronavirus Act and the subsequent reduction of parliamentary controls (Walker & Blick, 2020; Hickman et al., 2020, pp 237–245), although no significant legal reproach was produced, due to the traditional deference of UK courts to the power of exception. The "lockdown regulations" were challenged on the grounds that a lockdown was unnecessary, excessive and disproportionate, and that the Public Health (Control of Disease) Act did not authorise the broad restrictions on travel imposed by the government. However, the High Court rejected the claimants' application, ruling that the 1984 Act clearly referred to the authorisation of the enactment of general national measures, that it was applicable to a pandemic, and that decisions regarding the urgency and proportionality of the measures were the responsibility of the Minister for Her Majesty's Government and not of the courts.[1]

1 Read the full text of *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin), and the appeal, *R v Secretary of State for Health and Social Care and Secretary of State for Education ex parte Dolan and Others*. [2020] EWCA Civ 1605.

In the United States, only Article 1, section 9, cl. 2 of the Constitution refers to the exception, by providing for the suspension of habeas corpus in the event of serious danger. If this provision is read along with what is known as the Commander in Chief Clause in Article 2, section 2, it can be assumed that the US president can issue emergency orders and act with full powers in the event of armed conflicts. Even so, ad hoc laws granting full powers to the president in critical situations have also been passed in the United States, such as the 1941 First War Powers Act and the 1942 Second War Power Act. Since then, more than 100 laws concerning extraordinary powers (Statutory War Powers) have been approved, especially after the attacks of 11 September 2001. The strength of these powers and their extension over time has led to a kind of normalisation of the exception, to which some expert legal opinions have responded by proposing the creation of an "emergency constitution" that avoids the degradation of the rule of law (Ackerman, 2004, pp. 1029–1030). This proposal has been branded rigid, dogmatic and naive by other legal experts in favour of the extra-legal measures model (Gross, 2003, pp. 1011–1134); Tushnet, 2005, pp. 39–53).

The outbreak of COVID-19 reignited this debate although, due to President Trump's underestimation of the severity of the situation, the federal administration did not request special powers. Instead, it simply passed certain laws concerning aid, relief and economic security to tackle the crisis,[2] mobilised the Federal Emergency Management Agency (FEMA) to provide states with financial resources, and issued Proclamation 9994, which declared a national emergency under the 1976 National Emergencies Act (13 March 2020) and made it possible to exercise certain prerogatives through executive orders, proclamations and presidential memoranda. However, the president failed to make use of the potential powers of this declaration, the general lockdown power, or the direct governmental intervention related to significant state powers authorised by the 1988 Stafford Disaster Relief and Emergency Act.[3] The president suspended free entry to the country; signed agreements with pharmaceutical companies for the development, production and distribution of potential vaccines; and requested – not ordered, which he was permitted to do by applying the 1950 Defense Production Act – the cooperation of the private sector for the production of equipment and materials required to combat the pandemic, but left the imposition of restrictive measures concerning economic activity and rights of assembly, movement and freedom of worship to state authorities. Indeed, these authorities assumed the responsibility of containing the surge of cases through the exercise of their police powers and the powers delegated to them by their legislatures, thus facing the risk of being judicially disavowed, as occurred in Wisconsin regarding home lockdowns – which were approved by the health secretary but not by the governor (Wisconsin Legislature *v* Palm, 13 May 2020, WI 42) – and the obligation to wear masks (Fabrick *v* Evers, 31 March 2021, WI 13); and in California concerning a request for injunctive relief made to the Supreme Federal Court for violation of the First Amendment by restricting religious gatherings to study the Bible (Tandon *v* Newson, 9 April 2021 (No. 20A151 US)).

3 The state of necessity in several European countries, or how to deal with the pandemic without rules

The doctrine of *Staatsnotrecht*, or state of necessity, updated the Roman principle *necessitas non habet legem, sed ipsa sibi facit legem* in order to release the State from being subject to its rules and temporarily abolish constitutional guarantees. Law exists because of society, stated Ihering (1877) in *Der Zweck im Recht*, meaning that if, exceptionally, the State faces the dilemma of sacrificing law or sacrificing society, it is not only authorised, it is *obliged* to sacrifice law. In a constitutional monarchy, the monarch is responsible for deciding on the metalegal need to dispense with all legal formality, and the monarch's will transcends the separation of powers, acquiring the force of a law. The legal doctrine of the state of necessity was not limited to this form of government alone, but was also adopted by some European republics, such as the Swiss Confederation, where it became strongly established and has remained in force.

Despite its statute of neutrality, the Swiss Federal Assembly granted the Federal Council full powers during both World Wars, in a kind of practically unlimited delegation of legislative powers. Although abuses were committed, the Federal Court rejected controlling the regulations issued under its authority because they were

2 *Coronavirus Preparedness and Response Supplemental Appropriations Act*, *Families First Coronavirus Response Act* (FFCRA) and *Coronavirus Aid, Relief and Economic Security* (CARES) *Act*.

3 Arafa (2020, pp. 162–174) and Farinacci (2020, pp. 163–177) discuss the limited federal response.

"the exceptional measures required to protect the threatened public good", and it was "clearly impossible to order the Government to stop at a certain point if the welfare of the country required it to go further".[4] Since then, the Swiss Confederation has avoided the legal regulation of cases of exception, extraordinary measures and their possible limits. Instead, it has given carte blanche to the Federal Council to approve regulations of necessity in the event of a threat to public order or to national security, in accordance with Article 185.3 of the 1999 Swiss Constitution. Formally, all restrictions of fundamental rights require legal grounds, but Article 36.1 of the Constitution provides for the exclusion of said requirement "*en cas de danger sérieux, direct et imminent*," in a kind of general provision that makes it possible to limit rights through regulations and decrees of necessity (Hottelier, 2020, pp. 9–14). And hence the COVID-19 emergency was tackled first, under the protection of the *loi fédérale sur la lutte contre les maladies transmissibles de l'homme*; and later, when this proved to be inadequate, through regulations of necessity that banned public gatherings and protests without the express authorisation of the cantonal authorities, limited freedom of movement and the right to assembly, restricted border access, corporate and commercial activities, and suspended both the holding of referendums and popular initiatives in progress. These measures were adopted for six months without parliamentary intervention – although the Federal Assembly does have prerogatives that allow it to act in case of necessity [Art. 173.1c) of the Constitution] – and, when they were appealed on the grounds they had been applied through decisions with an individual scope, the Federal Court and the constitutional courts of the cantons exerted a very deferential control; for instance, the Court of Geneva confirmed the privation of the right to vote in person and its exercise solely by post.[5]

In Belgium, despite the Belgian Constitution's prohibition of suspension of constitutional guarantees (Art. 187 of the current Belgian Constitution, Art. 130 of the 1831 version), there was nothing to stop the king from exercising legislative power on critical occasions through *arrêtés* that, when challenged in court, were justified by the state of necessity, as in the case of the Swiss Federal Court. Parliamentary delegation of powers of necessity was permitted, based on a flexible interpretation of articles 26, 67 and 78 of the Constitution. In this regard, the Legislative Section of the Council of State, in its ruling issued on 31 May 1996, declared that laws on powers of necessity are compatible with Article 105 of the Constitution, provided that (i) exceptional circumstances exist, (ii) the special powers are granted for a limited period, (iii) their objectives and the measures to be adopted are precisely defined, and (iv) said powers respect both supranational laws and the constitutional system on the distribution of powers (Verdussen, 2020, pp. 2–10). In a very loose interpretation of these principles, the Belgian Federal Parliament passed two laws on 27 March 2020, that generically entitled the king "à prendre des mesures de lutte contre la propagation du coronavirus Covid-19".[6] Adopting an equally relaxed attitude, the parliaments of the regions and communities granted special powers to their governments. Despite having these acts and delegations, most of the measures restricting rights and freedoms were adopted through *arrêtés* by the Minister for Home Affairs, based on the dubious grounds of laws on civil protection, civil security and policing. These actions, therefore, were taken on a completely ad hoc basis, without parliamentary authorisation or ratification, and as such have been criticised by legal experts (Bouhon et al., 2020, pp. 5–56) and by the Court of Appeal of Brussels.[7]

In Italy, the Constitution (IC) regulates the scenario of a foreign war (Art. 78 IC), but not exceptions in times of peace. In the absence of provisions, the government adopts exceptional decisions under Article 77 of the IC, which allows it to issue *decreti-legge* in cases of urgent necessity until their ratification or rejection by Parliament within a period of 60 days. In addition, Law 225 of 24 February 1992, created the *stato di emergenza di rilievo nazionale* to deal with natural disasters or emergencies that, because of their severity or length, must be tackled using extraordinary measures. In these cases, the Italian Council of Ministers can declare such a state of emergency through a *delibera* (resolution) for a maximum of 12 months, which can be extended by a further 12 months. While in force, the president of the Council is authorised to issue regulations repealing current laws, observing the limits established in the declaration to enforce its provisions, unless

4 Ruling of the Federal Criminal Court of 14 December 1915 (*Millioud* case).

5 Arrêt de la Chambre constitutionnelle de la Cour de justice de la République et canton de Genève (ACST/12/2020) dans la cause A/1000/2020-ELEVOT, 1 April 2020.

6 *Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 (I)* and *Loi habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 (II)*, both of 27 March 2020.

7 *Arrêt* de 7 June 2021 (no. 2021/KR/17).

established otherwise through the actions of the head of the Civil Protection Department (arts. 5 and 25 of the Civil Protection Code). These instruments were used during the COVID-19 pandemic. In response to an upsurge in the number of cases, on 31 January 2020, the Council of Ministers declared a *stato di emergenza di rilievo nazionale* for six months. The spread of the disease made it necessary to increase extraordinary measures, which led to the approval of *decreto-legge* no. 6 on 23 February 2020, on "Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19", which permitted the suspension of the right to freedom of movement; the imposition of home lockdowns, and temporary closure of businesses, commercial services and activities; and, in a kind of blanket authorisation, the adoption of "all containment and management measures that are appropriate and proportionate in response to the progress of the epidemiological situation". Other *decreti-legge* were passed days later, such as *decreto-legge* no. 11 of 8 March 2020, which prohibited all gatherings of people in public spaces; and, particularly, *decreto-legge* no. 19 of 25 March 2020, which ordered all the measures provided for in previous *decreti-legge* and removed the aforementioned general provision.[8] The main sources of legislation during the emergency were, however, decrees made by the president of the Council of Ministers, which – though not provided for in either the IC or Law 400 of 23 February 1988 on the legislative power of the Government – was granted a broad power to repeal and affect the exercise of constitutional rights. The abuse of this unique source led to widespread criticism (Lucarelli, 2020, pp. 566–570), as did the legal uncertainty caused by the proliferation of urgent regulations from the Minister for Public Health, regional presidents and local mayors, issued under Law 833/1978 of 23 December. Said legal uncertainty was only palliated by the approval of the aforementioned *decreto-legge* no. 19. The Constitutional Court, however, reproached none of this. In fact, its Ruling 37/2021 of 24 February deemed constitutional the use of decrees by the president of the Council of Ministers and *Ordinanze* 66 and 67/2021 of 3 April, rejecting the conflicts of responsibilities between the powers of the State filed by several members of Parliament.[9]

4 The state of exception model and contradictions in its use and non-use in response to COVID-19 in European countries

Most European countries adopted the state of exception model, which approves the concentration of power without sacrificing the normalising force of law and, in order to distinguish between exception and normality, provides for an expeditious regulatory act that includes the transition to a state of exception, the limitation of its validity and the definition of the legal rules that can be excepted. The objective of this model is to resolve the critical situation as quickly as possible, but also to protect against itself. For this reason, the effectiveness of public powers is promoted, but without reaching the point of a concentration of power or of a suppression of rights that would make the transition back to normality difficult. Given the diversity of circumstances that may disrupt normality, the constitutional law does not usually provide for one state of exception, but rather for several, with different legal effects. In some cases, diversity is used to address the varying intensity or seriousness of the emergencies themselves; in others, it is the result of the differences between emergencies of varying nature for which specific exceptional measures are provided. Portugal opted for the first kind; in contrast, France, Germany and Spain chose the second, by regulating their states in order to respond to threats that were qualitatively different.

The Portuguese Constitution (PC) regulates two states of exception with a gradual scope: a state of emergency and a state of siege. A state of emergency can be declared "in cases of effective or imminent attack by foreign forces, of serious threat or disturbance to the democratic constitutional order or of public calamity" (Art. 19.2 PC). A state of siege is reserved for the most serious situations, involving actual or imminently threatened acts of force or insurrection that subvert sovereignty, independence, territorial integrity or the democratic constitutional order, which cannot be resolved by the ordinary measures provided for in the Constitution and in law (Art. 8.1 of *Lei nº 44/1986, de 30 de setembro, do Regime do estado de sítio e do estado de emergência*). In contrast, a state of emergency is declared in a less critical situation – particularly when public calamities occur or are likely to occur – and can only authorise the partial suspension of some rights

8 Luciani (2020, pp. 111–141) discusses these *decreti-legge* and the regulations referred to. A more general description of the extraordinary response to the pandemic can be found in Romboli (2020, pp. 289–299) and Marazzita (2021, pp. 181–191).

9 Read the *Sentenza* 37/2021 and the *Ordinanze* (1) and (2).

and guarantees and the strengthening of civil authorities (Suordem, 1995, pp. 245–261). This was the state used to respond to the COVID-19 pandemic, following the initial declaration of an administrative alert, and one which, together with the contingency and calamity situations provided for in Law no. 27/2006 of 3 June on the Bases of Civil Protection, proved insufficient. Declared through a decree made by the president of the Republic (no. 14-A/2020 of 18 March), the state of emergency was extended twice through presidential decrees nos. 17-A/2020 and 20-A/2020, partially suspending the exercise of the right of freedom of movement and the rights of freedom of assembly, protest, worship, property and private economic initiative. From 2 May, said state was replaced by a situation of administrative calamity, declared solely by the government; despite being intended as a regime for civil protection, it allows restriction of the exercise of a number of rights by establishing "limites ou condicionamentos à circulação ou permanência de pessoas, outros seres vivos ou veículos", and "cercas sanitárias e de segurança" (Art. 21 *Lei nº 44/1986, de 30 de setembro*). In practice, however, the measures adopted under the situation of calamity went beyond those stated above, and home lockdown, the closure of establishments, facilities and services, and the limiting of assembly, protest and other group activities continued. All this was done through simple resolutions by the Council of Ministers and by subverting the system of sources of law regarding rights, leading to criticism from legal experts (Santos, 2020, pp. 184–191; Reis, 2020, pp. 79–117).

France, in addition to the general provision for the granting of powers established in Article 16 of the French Constitution (FC), has two states of exception: a state of siege and a state of emergency. The state of siege is provided for in Article 36 of the FC and is regulated in articles L.2121-1 to L.2121-7 of the 2004 *Code de la défense*. It can be declared in the event of imminent danger of war or armed insurrection, and involves the transfer of powers for the maintenance of public order from the civil to the military authorities, and the extension of military jurisdiction to crimes against the security of the State, institutions and public order. The state of emergency was created by Law no. 55-585 of 3 April 1955 and, paradoxically, is not mentioned in the FC. It can be used in the event of public calamities and imminent risk of serious disturbances to public order, and involves the strengthening of the police powers of prefects and of the Minister for Home Affairs to include the implementation of various measures restricting rights, as demonstrated by its declaration in 2005 and 2015. However, the inadequacy of the measures regulated under both states to manage the COVID-19 pandemic convinced the legislator of the need to introduce a new ad hoc state of exception that would allow the adoption of the required restrictions, and this was done through Law no. 2020-290 of 23 March 2020, complemented by Organic Law no. 2020-365 of 30 March, under the name *état d'urgence sanitaire*. As an addition to the Public Health Code, said state of health emergency could be declared in all or part of the national territory for a maximum of one month through a decree approved by the Council of Ministers – although its first declaration was in force for two months under the provisions of Article 7 of Law no. 2020-290. While in force, the prime minister, health minister and prefects are authorised to order restrictions of freedoms. Specifically, the prime minister can, by decree, restrict freedom of movement and rights of assembly, free enterprise and trade; and ban travel, seize goods and suspend services as necessary. The government is also authorised to act through regulations in several fields established by law, under the conditions of Article 38 of the FC, and the government made ample use of this authority, passing dozens of regulations in the first weeks of the emergency (Beaud & Guerin-Bargues, 2020, pp. 891–897; Levade, 2020, pp. 613–616). When the state of health emergency was set to expire, it was extended by Law no. 2020-546 of 11 May, until 10 July 2020. On this occasion, the extension was preceded by the precautionary monitoring of the *Conseil constitutionnel* requested by the president of the Republic, the president of the Senate and several members of Parliament. Its *Décision* no. DC 2020-800 of 11 May declared two provisions unconstitutional and set out several reservations of interpretation, but ratified the constitutionality of the new state and its extension. Acts nos. 2020-856 of 9 July – organising the end of the state of health emergency – and 2020-1379 of 14 November – authorising the extension of a second state of emergency and the adoption of new measures to manage the health crisis – were also challenged before the *Conseil constitutionnel*, whose rulings no. DC 2020-203 of 9 July and DC 2020-808 of 13 November were highly deferential to the emergency legislator, permitting the suspension of rights and freedoms under an ordinary law and without any constitutional provision, in much the same way as the *Conseil d'État* had requested the executive to tighten health measures, in its *Ordonnances* of 22 March (no. 439674) and 8 April 2020 (no. 439827).[10]

10 The application of the state of health emergency and control by the *Conseil d'État* and the *Conseil constitutionnel* are discussed in Mathieu (2020, pp. 295–316) and Rousseau, Dadhoun, and Bonnet (2021, pp. 305–328).

In Germany, in the field of external threats or emergencies (*äusserer Notstand*), the Basic Law for the Federal Republic (BL) provides for the state of tension (Art. 80.a.1 of the BL) and the state of defence (Art. 115 of the BL), in response to imminent danger from armed aggression or attacks. In the field of domestic emergencies (*innerer Notstand*), it provides for a state of danger that threatens security and public order (Art. 35.2.1 of the BL), a state of danger caused by natural disasters and serious accidents (Art. 35.2.2 and 3 of the BL), and a state of internal crisis in the event of constitutional threats, in the strictest sense (arts. 91 and 87.a.4 of the BL).[11] The COVID-19 emergency could have been interpreted within a state of danger or a state of crisis scenario, but these states were not declared, because the measures they authorise go no further than inter-administrative cooperation, the intervention of national police forces, and the assistance of the armed forces. Although most of the federal state constitutions contain provisions for cases of emergency and several *Länder* have laws for protection against disasters, none of these were activated, except in Bavaria, which declared a state of disaster, concentrating powers in the hands of its Minister for Home Affairs.

Faced with the inadequacy of the states of exception and the laws on disasters to manage a crisis as serious as the COVID-19 pandemic, the *Länder* employed the Federal Law on Protection against Infections of 20 July 2020 (*Infektionsschutzgesetz* or IfSG), Article 28.1 of which made it possible to impose, in a general provision and through an administrative decision, "the necessary protective measures […] in the manner and for as long as is required to prevent the spreading of contagious diseases". The problem was that the IfSG was designed to be applied to people who were either sick or suspected of having a disease or being contagious, not for general application to entire populations. In addition, Article 28.1 of the IfSG did not constitute sufficient legal basis for the granting of decrees that limited rights, because it neither specified the fundamental right or rights to be restricted, nor defined the content, purpose or scope of the authorisation granted to officials as required under articles 19.1 and 80.1 of the BL, respectively. These circumstances, together with the lack of coordination and disparity of the measures adopted by the *Länder,* led the federal majority to modify the IfSG on 27 March 2020, in order to regulate the "significant national epidemic situation". By declaring this epidemic situation, the *Bundestag* allowed the Federal Minister for Health to issue legislative orders and decrees in the same parliamentary session regarding the powers of the *Länder* and without any need for authorisation from the *Bundesrat*, and explicitly authorised health authorities of the German Federation and the *Länder* to impose lockdowns and limit personal freedom (Art. 2.2 of the BL), the right of assembly (Art. 8 of the BL), freedom of movement (Art. 11.1 of the BL) and the inviolability of the home (Art. 13.1 of the BL). Legal experts have expressed many doubts about the constitutionality of the reform, which does not define the exceptional epidemic situation, weakens parliamentary controls and the *Bundesrat* in particular, changes the powers of the *Länder* by decree, and establishes no time periods for the exception.[12] However, the administrative courts were very deferential, ratifying the lockdown and social distancing measures adopted by executive decrees under Article 28 of the IfSG. So was the Federal Constitutional Court, except in certain cases regarding the prohibition of assembly and protest, which declared in its ruling of 19 November 2021 that the social contact and curfew restrictions adopted in the fourth Law on the Protection of the Population during a "national epidemic situation" had been necessary and proportionate interferences in fundamental rights that were compatible with the BL in an extremely dangerous pandemic situation.[13]

In Spain, the Spanish Constitution (SC) regulates the procedures for the declaration of states of alarm, exception and siege, but neither defines the exceptional circumstances nor specifies the measures to be adopted, referring this to the legislator (Art. 116 of the SC). Organic Law 4/1981 of 1 June, on states of alarm, exception and siege (LOAES) complied with this requirement by establishing the three states as different instruments for emergencies that are substantially different in nature. In accordance with this model, the COVID-19 health crisis was managed by declaring and extending the state of alarm, intended for the management of natural disasters or calamities, health emergencies, situations of shortages of supply of basic items, and concerning the suspension of essential public services in which minimum services could not be guaranteed and occur at the same time as another of the three defined emergencies (Art. 4 of the LOAES). The measures provided for in health legislation, and others that could be adopted by virtue of Article 3 of Organic Law 3/1986 of 14

11 The *Verfassungsnotstand* or constitutional state of emergency is discussed in Kaiser (2020).

12 A synthesis of the measures adopted under the reform of the *IfSG* and the criticism they raised can be found in Fuchs and Hein (2020, pp. 256–267).

13 BVerfG, Beschluss des Ersten Senats vom, 19 November 2021: read the decision of the First Senate.

April, on special measures in the field of public health (LOMESP), were insufficient to contain the spread of cases. The state of alarm and its extension could certainly not cover the adoption of general measures limiting fundamental rights with the necessary guarantees and formalities, such as the strict restriction on the freedom of movement, the prohibition of group activities, or the Spain-wide curfew adopted under the two national states of alarm declared in March and October 2020. Their effectiveness to deal with the emergency was acknowledged on both occasions, but their declaration and content led to widespread criticism and several appeals before the ordinary courts, appeals for legal protection before the Constitutional Court, and two appeals of unconstitutionality on the grounds that the appropriate instrument to deal with the emergency was not the state of alarm, but the state of exception, and that the restrictive measures adopted were an actual suspension of rights not permitted by the constitution under a state of alarm (Art. 55.1 of the SC). Although the ordinary courts tended to be deferential, the Constitutional Court disallowed the use of the state of alarm in response to the COVID-19 emergency by partially granting, in Ruling 148/2021 of 14 July, the appeal against the decrees of the declaration and extension of the first health-related state of alarm because, in its opinion, freedom of movement had been de facto suspended and, rather than the state of alarm, the instrument that should have been declared was the state of exception (Court Considerations 5 and 11). Months later, the same court once again ruled against the holder of the power of exception by declaring, in Ruling 183/2021 of 27 October, the unconstitutionality of both the extension of the second COVID-19 state of alarm and the delegation of authority to the presidents of autonomous communities (ACs) contained in the declaration and the extension.

The controversy that derived from these rulings and their legal consequences have shown – as occurred in France, which was forced to institutionalise an ad hoc state of exception, and in Germany, where the inadequacy of its states of exception led to the inclusion of the "significant national epidemic situation" in the IfSG – the limitations and shortcomings of the state of exception model in countries where it is established. The problem is not a lack of limits and guarantees, as is the case with extra-constitutional methods and the state of necessity, but rather the existence of these limits: when an emergency erupts in unknown and unpredictable ways, the response needed to bring it under control exceeds the regulation of the state of exception, and places the holder of the powers of exception in the dilemma of either respecting the limits and sacrificing the end to the means, or exceeding them and acting guided by necessity without sufficient regulatory support.

This was the dilemma faced by all the European countries that declared a state of exception in response to COVID-19, while others used ad hoc methods to avoid declaring a state of exception and subsequent extensions, either due to the inadequacy of their states of exception, or precisely to avoid their regulation and guarantees. The former group, including Finland, Hungary, Estonia, the Czech Republic, Slovakia, Bulgaria, Romania and Spain, declared the least serious state of exception, although the nature of the emergency forced them to adopt absolutely extraordinary measures such as home lockdowns and the banning of group activities. Other countries in the European Union whose constitutions included the state of exception model nevertheless decided to tackle the pandemic through reforms to their health legislation or improvised new emergency situations.[14] This was the case in Greece, Cyprus, Latvia and Ireland, where their established states of exception were only intended for armed conflicts, rebellions or internal insurrections and lacked specific instruments to respond to an emergency like the COVID-19 pandemic. In others, however, the activation of their respective model of exception was intentionally avoided, given that the constitutional limits and guarantees would have hindered the adoption of the measures that the situation required. This was the case in Poland, Lithuania, Slovenia, Croatia, the Netherlands and Malta, where emergency procedures were avoided and the exception was normalised ad hoc through control mechanisms that, by their ordinary nature, could be insufficient.[15] The constitutional courts of these countries have not rejected them, but necessity created its own rules in these cases.

5 Democratic guarantees and the reduction of immunities of power in the state of exception model: COVID-19 and the rule of law

In contrast to full power laws, ex post facto confirmations and provisions of necessity, the state of exception model introduces checks and balances and, despite its limitations, the legal rules regulating it continue to be

14 An analysis by country can be found in Diaz and Kotanidis (2020) and Díaz (2021, pp. 399–425).

15 Vedaschi (2020, pp. 1453–1489) studies the "escape" of exception models to tackle COVID-19.

law for the holder of the power of exception. In the state of exception model, the constitutional balance is maintained by parliament sitting and retaining parliamentary control, as well as by the jurisdictional controls required to reign in excesses, respect the principle of proportionality and determine possible responsibilities without violating rights of defence. There are no greater guarantees under the rule of law.

In the state of exception model, the constitution establishes the rights and freedoms that can be suspended, while other rights remain exempt from the exception. The Basic Law of Bonn makes it possible to limit freedom of movement, the inviolability of the home, compensation for expropriation and the extension of detentions. In the constitutions of Spain, the Netherlands, Greece, Finland, Cyprus and Malta, the list of rights that may be restricted is equally specific, although broader, including rights of association, assembly and protest, the inviolability of the home, freedom of movement and residence, secrecy of communications, the right to strike, rights of freedom of thought and expression, and certain detainee guarantees. Guided by an identical purpose of guaranteeing constitutional rights, the constitutions of Slovenia, Hungary, Poland and Portugal also establish the rights and guarantees that cannot be repealed, always including the right to life and the prohibition of torture, the non-retroactivity of criminal law, freedom of religion and beliefs, the right to a fair trial, and certain rights of the accused during a trial (Escobar, 2021, pp. 121–135; Escobar et al., 2021, pp. 64–81).[16] This legislative framework or self-limitation must be respected by the holders of the power of exception if they wish to not be deprived of authority.

The decision to declare a state of exception has wide-reaching political scope. As a consequence, most constitutions establish the intervention of parliament as a requirement for the decision, whether this be a simple one-off action or the result of a complex process involving several procedural steps, principal among which is parliamentary approval. These texts have therefore distinguished between the parliamentary body responsible for the decision to activate the state of exception and the executive body charged with implementing its measures. By attributing the declaration to the body representing the people's will, they give this decision maximum political legitimacy. Other legal systems allow the executive body to declare a state of exception, delaying parliamentary intervention to a later date when the declared state is either ratified or possibly continued or extended. The first option, under which the declaration is always reserved for the legislative branch, was adopted to declare states of siege and emergency in Portugal, states of emergency and preventive defence in Hungary, states of war and emergency in Slovenia, and a state of siege in Spain, despite the fact that the declaration and extension of a state of exception by the government requires the authorisation of the Congress of Deputies. The second option, aimed at effectiveness, was established in Greece, Poland and Slovakia; too in France, whose government could decree such states, but they could only be extended by law – as well as in Spain, where a state of alarm could be decreed by the government, but any extension required parliamentary authorisation.[17] In both systems, the sitting of parliament is guaranteed by operation of law and its dissolution is prohibited during the term of the states.

Jurisdictional control in this model is held by several judicial bodies whose powers depend on the legal nature of the decisions. The jurisdictional review of executive resolutions and acts adopted under the declaration of the states is a requirement based on the principles of legality and responsibility of public authorities and corresponds specifically to the administrative courts. Jurisdictional control over declarations and extensions of states of exception raises more problems. Some legal experts have argued that control over the state of exception should be limited to formal aspects (Greene, 2018, pp. 113–119), but this does not exclude its submission to law. Adoption of these decisions requires confirmation of the existence of any of the emergencies provided for to be formalised through the regulated procedure and their subjection to limits. In addition, in most constitutional systems, declarations and extensions contain or complement the legal system of the state of exception, meaning that control over these is essential to guarantee the supremacy of the constitution. In

16 In the state of exception model, "the Constitution – states the Venice Commission – must clearly specify which are the rights that can be suspended and which cannot be excepted, and these must be respected in any situation. The lists of these rights that cannot be repealed, present in human rights treaties (ECHR, ICCPR, ACHR), include four rights: the right to life, the right to be free from torture and other forms of punishment or inhumane or degrading treatment, the right to be free from slavery or servitude and the principle of non-retroactivity of criminal law. […] The inclusion of minimum guarantees against arbitrary detention and other guarantees to protect the right to a fair trial are also important" (European Commission for Democracy through Law (Venice Commission), 2020, p. 3).

17 A comparative analysis can be found in Faggiani (2012, pp. 8–10).

Slovakia, the Constitutional Court is granted explicit control over declarations and extensions. In Germany, the Federal Constitutional Court can control both federal laws that suspend rights and decisions declaring states of exception and other exceptional measures limiting rights. In France, extension laws can be subject to the preventive control of unconstitutionality, while government declarations can be subject to control by the *Conseil d'État* and, by ancillary proceedings, through the preliminary ruling regulated in 2008 before the *Conseil constitutionnel*. Croatia and Bosnia also provide for the constitutional review of these decisions on states of exception.

In several of these countries, and in others where it is not expressly provided for, said control was activated due to the COVID-19 health crisis. No state of exception was declared in Germany, although the constitutionality of the adopted measures was controlled under the "epidemiological situation of national importance". On 15 April 2020, the Federal Constitutional Court stated that the general bans on meetings and protests were unconstitutional and that the courts should have examined the circumstances of each specific case and confirmed their proportionality (BvQ 828/20 and BvQ 94/20). On 19 November 2021, it declared that the prohibition of face-to-face teaching, restriction of contact and curfews applied under what was called the "federal emergency brake" were compatible with the BL, necessary and proportionate to the seriousness of the emergency (BvR 781/21). On 26 March 2020, the French *Conseil constitutionnel* ratified the constitutionality of Organic Law 2020-365 on the urgent response to the COVID-19 epidemic "in view of the particular circumstances of the case", despite the fact that this approval violated the rules of accelerated legislative procedure provided for in Article 46 of the FC (*Decision* no. DC 2020-799). In contrast, on 11 May 2020, the *Conseil* declared that a number of the provisions of the law extending the *état d'urgence sanitaire* were unconstitutional, and expressed several reservations of interpretation in accordance with the FC (*Decision* no. DC 2020-800). On 14 November 2020, it reviewed and approved the constitutionality of the second state of health emergency (*Decision* no. DC 2020-808), and on 31 May 2021, it deemed the law regarding management of the exit from the health crisis constitutional.

In Romania, on 6 May 2020, the Constitutional Court repealed the 34/2020 emergency regulations issued by the executive as it considered that only the legislator, not the government, could change the sanctioning system of the state of emergency and validly restrict fundamental rights (*Decizia* no. 152/2020). The Croatian Constitutional Court was more deferential to the system chosen by the authorities to deal with the health crisis. Article 17 of the Croatian Constitution provides for a state of emergency due to natural disasters. However, since the declaration of a state of emergency and subsequent restriction of rights required a two-thirds parliamentary majority compared to the simple majority required in usual conditions, it was decided to reform the legislation on civil protection and infectious diseases to make it possible to adopt the necessary containment measures. Although the avoidance of the state of exception was achieved by allowing a simple majority to adopt measures for which a broad consensus was sought, the ruling of the Constitutional Court of 14 September 2020 nonetheless ratified the constitutionality of the parliamentary option (*Decision* no. U-I-1372/2020 et al.).

On 28 April 2020, the Constitutional Court of the Czech Republic rejected an appeal of unconstitutionality filed against the first declaration of a state of emergency on the grounds the decision was an act of governance that was exempt from jurisdictional review, and had not violated the fundamental principles of the democratic state or contravened international obligations (*Decision* Pl. ÚS 8/20). In contrast, a later appeal filed against the third declaration of a state of emergency was admitted because, in the opinion of the court, the essential guarantees of the model were affected by the declaration, which was overruled on the grounds the government had proceeded with it after the second state had expired without obtaining parliamentary approval for the extension, thereby avoiding the mandatory control of the legislative branch (*Decision* Pl. ÚS 21/21). In Slovakia, the Constitutional Court reviewed the constitutionality of the state of emergency declared in October 2020 because of an appeal filed by the Prosecutor's Office and a group of members of Parliament. However, although several formal shortcomings were found – lack of grounds and an inadequate definition of the territorial scope of application of the state – the Court ratified the declaration, deeming it to be covered by the scenarios for the state in question and not clearly disproportionate. The Court's ruling of 14 October 2020, issued two weeks after the declaration, was very deferential to the executive, which was granted a large degree of discretion in dealing with exceptional situations, and was to be controlled by Parliament except in the event of obvious unconstitutionality (PL: ÚS 22/2020-104) (Díaz, 2021, pp. 426–430).

In Spain, jurisdictional control of the declarations and extensions of the states of exception were not provided for, either constitutionally or legally, but the Constitutional Court did not hesitate to assume the power itself. Ruling 83/2016 of 16 May of the Constitutional Court – issued following an appeal for legal protection against the non-admission of demands by ordinary justice – defined the decisions of declaration and extension as acts with the force of law which could only be revised by constitutional justice (Court Consideration 10). In its Ruling 148/2021 of 14 July, the Constitutional Court ratified its doctrine and allowed the appeal of unconstitutionality filed by the members of the Vox party against Royal Decree 463/2020, of 14 March, on the declaration of a state of alarm due to COVID-19 and several of its extensions. The Court considered, by six votes to five, that the restriction of freedom of movement provided therein, derived from the restriction of other rights, although temporary and with the exceptions established in Article 27 of the Decree, represented "a particularly strong limitation" to the point of "effectively removing" or totally destroying said freedom for everyone and by any means in a kind of suspension that only the Constitution can order under a state of exception, but not under a state of alarm (Court Consideration 5). Months later, the Court once again disavowed the holder of the power of exception in its Ruling 183/2021 of 27 October on the appeal of unconstitutionality filed against the new state of alarm of 25 October 2020, and its extension, by declaring that both the extension and the delegation of authority for the application of measures to the presidents of the ACs were unconstitutional. In the case of the extension, the issue was not the term, but rather the fact that Parliament had granted it "without any certainty whatsoever about what measures were going to be applied [by the presidents of the ACs] when, and how long they would be in force in various parts of the country" (Court Consideration 8). In the case of the delegation, the Court determined that it contravened the provisions of article 7 of the LOAES; and that the delegating party, as holder and party responsible for the power, did not establish "the general criteria and instructions the delegated party should follow for the application of the measures, the control required during its application, and finally, the evaluation and final review of the measures" (Court Consideration 10).

This jurisdictional overruling of the two states of alarm declared in Spain is in contrast to the deference and self-restraint shown to the decisions on exceptions by other European constitutional courts. Spain did not avoid using its state of exception model by passing dubious ad hoc laws as other countries did, as described above. Instead, it activated the state reserved for this kind of emergency, with all its guarantees. The measures adopted undoubtedly exceeded those provided for; however, they were repeatedly supported by the legislative branch and were necessary to contain outbreaks of infection. The Spanish Constitutional Court could have rescued the constitutionality of these measures, which were neither disproportionate nor unreasonable, and its rulings have been criticised for their strictness.[18] Notwithstanding, criticism of the Spanish Constitutional Court should not tarnish the achievement that jurisdictional control over the declarations and extensions of states of exception *exists* and *can be effective*, both in Spain and in other countries that adopted this model. Control over the constitutionality of exceptional decisions aims to ensure that the restriction of rights and the concentration of powers are in accordance with the provided procedure and guarantees; hence, if the power of exception exceeds its limits, it can be rejected. This possibility is the most effective brake against the temptation to abuse powers and can only effectively be exercised in the state of exception model, wherein there are parameters to compare, as opposed to where necessity creates its own law.

6 Final considerations

The public health emergency produced by COVID-19 has demonstrated, on a global scale, the dilemmas posed by the constitutional law of exception. Jakab (2005) highlighted these dilemmas in relation to the German model, but they can be extrapolated to any rule of law: whether there are previous legitimate powers of emergency that are superior to positive law, whether only those that are explicitly regulated can be exercised, and whether the effectiveness in achieving the desired end and the re-establishment of normality is more important than the selection of means.

In the UK, the High Court of Justice did not hesitate to state the following:

18 Presno (2021, pp.161–179) and López (2022, pp. 237–282) were among those that criticised the judgment on the basis of legal doctrine, agreeing with the arguments of the judges that voted against.

> That freedom is an important one in a democratic society. The context in which the restrictions were imposed, however, was of a global pandemic where a novel, highly infectious disease capable of causing death was spreading and was transmissible between humans. There was no known cure and no vaccine. […] In those, possible [*sic*] unique, circumstances, there is no realistic prospect that a court would find that regulations adopted to reduce the opportunity for transmission by limiting contact between individuals was disproportionate.[19]

No criticism was made, therefore, of the avoidance of the standard regulatory framework provided for in the 2004 Civil Contingencies Act, nor even of the measures authorised ad hoc in the middle of the crisis under the 2020 Coronavirus Act. In addition, the Minister for Health and Social Security's enactment of general measures limiting rights through regulations based on the 1984 Public Health (Control of Disease) Act was ratified. Less self-restraint was shown in the United States, however, by some state courts as well as the US Supreme Court: although in most cases they supported the measures restricting economic activity and rights of assembly, freedom of movement and worship adopted by the states, in other cases they repealed these measures on the grounds of insufficient power to adopt them or violation of the First Amendment of the Federal Constitution.

In Switzerland, where the state of necessity prevails, the COVID-19 health crisis was tackled using regulations and decrees without authorisation or parliamentary ratification, and without judicial control, in accordance with its traditional model of exception. In other European countries that also lack emergency regulations, various extra-constitutional channels were used to adopt the necessary containment measures, which were unchallenged both politically and legally. In Belgium, most of the measures restricting rights were adopted through *arrêtés* issued on the dubious grounds of acts on civil protection, civil security and policing. In Italy, *decreti-legge* issued by the Government approved the regulatory framework that allowed the president of the Council of Ministers to adopt measures restricting fundamental rights through simple decrees during the term of the *stato di emergenza di rilievo nazionale*. These *decreti-legge,* in addition to regulations issued by the Minister for Health and regional presidents and mayors, changed the sources of law and imposed particularly harsh limitations under the protection of dubious legal authorisations.

Other European states did have constitutional emergency regulations, but either these were not applicable to an emergency such as the COVID-19 pandemic crisis, or the measures they approved were inadequate to deal with it. In Austria, where the general provision for granting powers to the president was not activated, an ad hoc law on COVID-19 measures authorised the Federal Minister for Labour, Social Affairs and Health to adopt decrees limiting rights, and the Constitutional Court did nothing to disavow this authority, apart from cancelling some decrees that violated the aforementioned ad hoc law or lacked sufficient justification. Ireland, Greece, Cyprus and Latvia had states of exception to deal with armed conflicts, rebellions or internal insurrections, but not for health emergencies or other natural disasters. Germany did have states of exception that could cover the pandemic, but the measures they provided for were insufficient to contain it. These five countries therefore managed the effects of COVID-19 through urgent reforms to their public health legislation and, in the case of Germany, by creating a new situation of emergency within the framework of said legislation that, once declared by the *Bundestag*, authorised the authorities of the Federation and the *Länder* to adopt restrictions of rights and enabled the Federal Minister for Health to issue legislative orders on state powers without the intervention of the *Bundesrat*.

The Netherlands, Poland, Croatia, Slovenia, Lithuania and Malta also used ad hoc methods, or they improvised reforms of their health legislation. This was not due to the inadequacy of their state of exception measures, but rather to avoid their use, their limits and their rigorous parliamentary controls in a clear attempt to escape the strictures of their state of exception model. In Croatia, restriction of rights under a state of emergency required a two-thirds parliamentary majority, compared to the simple majority required for such a restriction under ordinary conditions. Croatia decided to tackle COVID-19 using ordinary legislation, normalising the exception. In the Netherlands, the government used the law of extraordinary powers of civil authority to

19 Read the full text of *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin), 117.

restrict rights, but without the prior declaration of a state of emergency, which is its logical assumption, an excess that the Hague Court of Appeal did not overrule.[20]

By contrast, Portugal, Spain, Finland, Estonia, the Czech Republic, Slovakia, Bulgaria and Romania remained faithful to the state of exception model that was part of their respective constitutions and declared the least serious state, usually reserved for natural disasters and public calamities. France did not use the states available to it, as these were inadequate to deal with the pandemic, but instead created a new state of exception with similar guarantees to the existing ones and, like Portugal, Spain, etc., trusted in the strengths and guarantees of the law of exception. In this model, upheld by said countries, power is concentrated and rights are restricted, but emergencies are dealt with, actions are taken, and consequences are settled specifically and in accordance with this regulatory plan. The problem is that the gravity and the unique nature of COVID-19 required the adoption of several extraordinary measures that, as in the case of home lockdowns and the prohibition of group activities, were not definitively reflected in their states of emergency, which imposed a kind of "state of pandemic" that stretched the legal-constitutional framework of exception to the limit.

The pandemic has shown that the juridification of necessity in the state of exception model is limited, and that gaps are inevitable. But this does not support the theories of those such as Agamben (2005, pp. 72-73), who believe that this model is the legal form of what cannot adopt legal form. Despite its limitations, the state of exception model is part of law and fulfils the function of law, providing checks and balances against the holder of the power of exception. In those countries that dealt with the COVID-19 emergency using this model, constitutional balance was maintained by Parliament authorising its declaration or extensions. After the uncertainty and paralysis of the first weeks, both the parliamentary and jurisdictional controls designed to reign in excesses were maintained and the constitutional courts were able to review the main exceptional decisions. In most judgments, the correct interpretation and the application of proportionality ratified the constitutionality of the measures contained in the declarations and extensions. In others, as occurred in Romania, the Czech Republic and Spain, holders of the power of exception were disavowed, which shows that, in comparison to the other analysed models, the state of exception model does not in fact allow exceptions to be turned into legal rules. This model also provides instruments to deal with emergencies, such as the state of necessity and full powers, but while maintaining separation of powers and constitutional guarantees without significant alterations, subjecting the end to the means. That is its raison d'être, and that is what differentiates it from the rest. Hence, where the state of exception model is established and effectively guaranteed, the power of exception cannot create its own law, because it risks being overruled by the constitutional courts. There is no greater guarantee under the rule of law.

20 Rechtbank den haag, Vonnis in kort geding van, 16 February 2021: read the Court of the Hague Judgement.

References

Ackerman, Bruce. (2004). The emergency constitution. *Yale Law Journal*, *113*(5), 1029–1091.

Agamben, Giorgio. (2005). *Estado de excepción*. Adriana Hidalgo Editora.

Arafa, Mohamed. (2020). What really determined America's COVID-19 pandemic response? Who is overseeing the reaction to the coronavirus? *Revista Catalana de Dret Públic*, (special issue), 162–174. https://doi.org/10.2436/rcdp.i0.2020.3551

Beaud, Olivier, & Guérin-Bargues, Cécile. (2020). L'état d'urgence sanitaire : était-il judicieux de créer un nouveau régime d'exception ? *Recueil Dalloz*, *16*, 891–897.

Bouhon, Frédéric, Jousten, Andy, Miny, Xavier, & Slautsky, Emmanuel. (2020). L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception. *Courrier hebdomadaire du CRISP*, *2446*, 5–56.

European Commission for Democracy through Law (Venice Commission). (2020). Compilation of Venice Commission Opinions and Reports on States of Emergency. *Revista General de Derecho Constitucional*, *32*.

Díaz, María. (2021). Uso (y abuso?) del derecho de excepción en los estados miembros de la Unión Europea durante la pandemia. *Teoría y realidad constitucional*, *48*, 399–431.

Diaz, María, & Kotanidis, Silvia. (2020, December 4). *States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in the EU Member States during the first wave of the pandemic*. European Parliament Think Tank.

Escobar, Guillermo. (2021). Los derechos humanos en estados excepcionales y el concepto de suspension de derechos fundamentales. *Revista de Derecho Político*, *110*, 113–152.

Escobar, Guillermo, Rodríguez, Noemí, Davite, Claudia, Gonzales, Yamil Franz, Rodrigues de Freitas, Enrico, Sarmiento, Jaime Luis, Chaves, Wilmar David, Árguedas, Laura, Nasimba, Rocío del Carmen, Lara, Ana Ruth, Jiménez, Andrés, Mundo, Gabriela, Flores, Rurbell René, Castellanos, Juan Wilfredo, Corte, María de los Ángeles, Quintero, Anahi, Baca, Jean Pierre, Fernán-Zegarra, Eugenia, Castillo, Percy, Gil, Ana Rita, … Celi, Alejandra. (2021). *Estados excepcionales y COVID-19. XVIII Informe sobre derechos humanos*. Federación Iberoamericana de Ombudsman.

Faggiani, Valentina. (2012). Los estados de excepción. Perspectivas desde el derecho constitucional europeo. *Revista de Derecho Constitucional Europeo*, *17*, 181–232.

Farinacci, Jorge M. (2020). El sistema constitucional estadounidense en tiempos de COVID-19. In Enrique Arnaldo & Raúl Canosa (Eds.), *El Derecho constitucional ante el COVID-19: Las diferentes respuestas en el ámbito comparado* (pp. 163-177). Cardenal Cisneros and Wolters Kluwer.

Fuchs, Marie-Christine, & Hein, Jonas. (2020). La respuesta de Alemania frente a la pandemia de la COVID-19. In Enrique Arnaldo & Raúl Canosa (Eds.), *El Derecho constitucional ante el COVID-19. Las diferentes respuestas en el ámbito comparado* (pp. 256-267). Cardenal Cisneros and Wolters Kluwer.

Greene, Alan. (2018). *Permanent states of emergency and the rule of law: Constitutions in an age of crisis*. Hart Publishing.

Gross, Oren. (2003). Chaos and rules: Should responses to violent crises always be constitutional? *The Yale Law Journal*, *112*(5), 1011–1134.

Hickman KC, Tom, Dixon, Emma, & Jones, Rachel. (2020, April 6). *Coronavirus and civil liberties in the UK*. Blackstone Chambers.

Hottelier, Michel. (2020). Démocratie, État de droit et droits fondamentaux face à la pandémie de Covid-19 – La situation en Suisse. *Confluence des droits_La revue*, *7*.

Ihering, Rudolf von. (1877). *Der Zweck im Recht, Volume 1*. Breitkopf & Härtel.

Jakab, András. (2006). German constitutional law and doctrine on state of emergency. Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, *7*(5), 453–477.

Kaiser, Anna-Bettina. (2020). *Ausnahmeverfassungsrecht*. Mohr Siebeck.

King, Jeff, & Chauhan, Abe. (2020). The COVID-19 response in England: the intensification of executive supremacy. *Revista Catalana de Dret Públic*, (special issue), 234–245. https://doi.org/10.2436/rcdp.i0.2020.3556

Levade, Anne. (2020). Etat d'urgence sanitaire : à nouveau péril, nouveau régime d'exception. *La Semaine Juridique*, *13*, 613–616.

López, Alberto. (2022). El Tribunal Constitucional frente a la emergencia pandémica *(comentario a las SSTC 148, 163 y 183/2021)*. *Revista española de derecho constitucional*, *125*, 237–282.

Lucarelli, Alberto. (2020). Costituzione, fonti del diritto ed emergenza sanitaria. *Rivista dell'Associazione Italiana dei Costituzionalisti*, *2*, 558–583.

Luciani, Massimo. (2020). Il sistema delle fonti di diritto alla prova dell'emergenza. *Rivista dell'Associazione Italiana dei Costituzionalisti*, *2*, 109–141.

Marazzita, Giuseppe. (2021). Constitución italiana y estado de emergencia por Covid-19. *Teoría y realidad constitucional*, *48*, 153–191.

Mathieu, Bertrand. (2020). Los desafíos constitucionales ante la crisis de salud debido al coronavirus. Análisis de la situación en Francia. In Enrique Arnaldo Alcubilla & Raúl Canosa Usera (Eds.), *El Derecho constitucional ante el COVID-19. Las diferentes respuestas en el ámbito comparado* (pp. 295–316). Cardenal Cisneros and Wolters Kluwer.

Presno, Miguel Ángel. (2021). El estado de alarma en crisis. *Revista de las Cortes Generales*, *111*, *127–169*.

Reis, Jorge. (2020). Direitos fundamentais e inconstitucionalidade em situação de crise –a propósito da epidemia COVID-19. *e-Pública*, *Revista Eletrónica de Direito Público*, *7*(1), 79–117.

Romboli, Roberto. (2020). Le misure adottate per far fronte alla pandemia Covid-19 in Italia. *Revista Catalana de Dret Públic*, (special issue), 289–299. https://doi.org/10.2436/rcdp.i0.2020.3563

Rousseau, Dominique, Gahdoun, Pierre-Yves, & Bonnet, Julien. (2021). Chronique de jurisprudence constitutionnelle (2020). *Revue du droit public*, *1*, 305-340.

Santos Botelho, Catarina. (2020). Covid-19 and stress on fundamental rights in Portugal: An intermezzo between the state of exception and constitutional normality. *Revista Catalana de Dret Públic*, (special issue), 183-194. https://doi.org/10.2436/rcdp.i0.2020.3553

Tushnet, Mark. (2005). Emergencies and the idea of constitutionalism. In Mark Tushnet (Ed.), *The Constitution in Wartime*: *Beyond Alarmism and Complacency* (pp. 39–54). Duke University Press.

Vedaschi, Arianna. (2020). Il Covid-19, l'ultimo *stress test* per gli ordinamenti democratici: uno sguardo comparator. *DPCE On Line*, *43*(2), 1453–1489.

Verdussen, Marc. (2020). La Constitution belge face à la pandémie de Covid-19. In Laurence Gay & Caterina Severino (Eds.), *Démocratie, État de droit et droits fondamentaux face à la pandémie de Covid-19. La situation en Belgique* [Monograph]. *Confluence des droits_La revue*, *7*.

Walker, Clive, & Blick, Andrew. (2020, May 12). *Coronavirus legislative responses in the UK: Regression to panic and disdain of constitutionalism*. Just Security.

Walker, Clive, & Broderick, James. (2006). *The Civil Contingencies Act 2004: Risk, resilience and the law in the United Kingdom*. Oxford University Press.