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THE STATE OF EMERGENCY AS AN INSTRUMENT OF CRISIS MANAGEMENT²

ABSTRACT: At first glance, the state of emergency is an attractive instrument for dealing with different kind of crisis. It gives to the executive power extraordinary prerogatives in order to manage with and control a concrete extreme situation. It seems like emergency and crisis are used as synonyms, which makes the suspension of a state of emergency a difficult task. In this context, the text examines, from a comparative perspective, the very state of emergency, its practical implementation and the appearance of new notions related to the sanitary emergency. Is it possible to speak about it as an effective instrument of managing social crisis and public fear and what are its potential consequences?

KEYWORDS: *état d'urgence*, emergency powers, extraordinary regime, state of emergency, state of sanitary emergency

INTRODUCTION

Over the past three years the notion of a state of emergency has dominated the global political and public life. The coronavirus pandemic has revived the idea of exceptional circumstances when, at the beginning of 2020, many states were forced to activate emergency regimes of governance and decision-making of various duration and areas of application.

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Legal and operational frameworks describing the circumstances that can give rise to a state of emergency are characteristic of democratic countries; each state has its own procedures and requirements that have been shaped in the course of its historical and cultural development. By their nature, authoritarian regimes do not need special mechanisms to sanction the use of emergency or exceptional powers in times of crisis. Emergency regimes differ conceptually and in scope across countries; broadly speaking, they all refer to a state of war/martial law, a state of siege, a state of emergency or emergency powers. In most cases the reasons for declaring an emergency situation are war, terrorist threats, economic crises, natural disasters, epidemics, etc. In general terms, we are dealing with situations in which the public order is disrupted or is under immediate threat.

From a legal-political perspective, a state of emergency entails measures taken by the executive that go beyond the ordinary norms and principles guiding the daily workings of the state and that are justified and necessary in the concrete exceptional circumstances. It is believed that such measures enable governments to quickly and decisively deal with the crisis and maintain the public order. Many studies delve into the question why governments have used a state of emergency more often in recent decades. Those who take a more critical stance find an explanation in the exhaustion of modern democracies and the need to resort to authoritarian tactics in times of crisis. Carl Schmitt argues that this is a reaction to an underlying phenomenon of structural depoliticization, caused by liberalism and indicating the decline of the liberal state (Schmitt, 2005). Giorgio Agamben, on the other hand, claims that governments use the state of exception/emergency because of fear which signifies the transition from a state governed by the rule of law to a state governed by security (Agamben, 2019).

Looking at how different European countries have practiced this political-legal instrument in recent years, we can distinguish some general trends. On the one hand, we see the state of emergency being declared in different contexts and situations, for example, in cases of terrorism, major social conflicts or other forms of instability in the state. On the other hand, the concept itself is evolving; normative history now includes the notions of “emergency epidemic situation” and “state of health emergency”, both of which are recognized as grounds to introduce various restrictive and control mechanisms concerning civil rights and freedoms. From this perspective, it seems that the use of a state of emergency is gradually becoming banal/ordinary. The sense of exceptionality and urgency disappears, and slowly but steadily assumes a sense of normality for the sake of preserving global security. In other words, in the political practices and discourses the state of emergency becomes normalized. Why does this happen? One reason lies in the fact that the measures and norms declared as extraordinary and temporary are subsequently made permanent and are incorporated in ordinary laws. Examples include countries with both common law and continental law systems, e.g., Great Britain, France and others.

On the other hand, the concept’s own evolution and the appearance of new variants linked to the coronavirus pandemic reveal a unique overlap of emergency situations and

crisis management (for example in France, Bulgaria). In this paper, I critically examine these two lines of development, describing the normative aspects and practices in the above-mentioned countries and outlining the major implications and risks related to these practices.

a) Legal framework for emergency/exceptional powers in France

The current provisions in French primary laws and the Constitution foresee several emergency situations. Two of them are mentioned in the Constitution; Art. 16 reads: “Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.”³

Article 36 of the Constitution refers to the state of siege (*état de siège*), which can be invoked in case of an immediate and serious threat such as foreign war or a military conflict, following which there is a transfer of certain powers from the civilian to the military authority, to protect national security and the public order.⁴

The third provision concerns the state of emergency (*état d'urgence*) in French legislation. Unlike the state of siege and the presidential exceptional powers, the state of emergency is not dealt with in the Constitution, but is regulated in a special law.⁵ Such arrangement gives the government a different legal means to react in the event of an imminent threat to the public order or other public emergency.

b) Legal framework for emergency/exceptional powers in the UK

The lack of a written constitution in the UK has in a way shaped the regulations concerning the emergency regimes. The British law includes the notion of a *martial law*, which resembles the French state of siege (*état de siège*) and can be declared for a period of time in the event of an emergency, natural disaster or foreign invasion. In the state of siege, all powers are transferred from the executive to the military. Further legal provisions refer to *emergency powers*, on the basis of which the government can declare emergency measures. Historically, the statute of *emergency powers* relates to the exercise of royal prerogatives. Agamben writes that WWI played a major role in determining the scope of emergency powers given to the executive. Shortly after the outbreak of

³ Art. 16 was invoked only once, in April 1961, by General De Gaulle in reaction to the attempted military coup in Algeria. This provision was heavily criticized then and also more recently, but has not been revised or overturned.

⁴ Art. 36 of 4 October 1958, amending the Constitution; this provision is also included in the Defence Code (L2121-1 à L2121-8 du Code de la défense).

⁵ Law №55-385 of 3 April 1955 on state of emergency (*Loi No 55-385 du 3 avril 1955 relative à l'état d'urgence*)

the war, the government addressed the Parliament asking for the approval of a series of emergency measures which passed without much debate. The purpose of these acts was to give the executive control over the economy in war times, but they also imposed serious restrictions on basic civil rights and freedoms. Several years later, in 1920, the *Emergency Powers Act* was passed, which gave His Majesty the power to declare a state of emergency in the event of an act or an immediate threat of such nature and magnitude that could block the access to basic foods for some part of or for the entire population, and disrupt the supplies of water, fuel or electricity.⁶

The most recent change related to the state of emergency is the *Civil Contingencies Act*, adopted in 2004.⁷ According to some experts, the act was passed to replace previous legislation which had proven less effective over the years (Khakee, 2009). The Act proposes a new and broad definition of emergency, which now covers the following three circumstances: an event or situation seriously endangering the public security; an event or a situation endangering the (natural) environment; war or terrorist attacks posing a serious threat to national security.

c) How is the legislation put in practice?

In the last 20 years both France and the UK have adopted exceptional measures using different legal mechanisms, mainly because of their different constitutional regimes. As Agamben writes, in both countries the emergency measures have been invoked not only in response to a crisis caused by a war (Agamben, 2019; 47). But once instituted as such, these regimes inevitably begin to evolve into new forms. Over time, the likelihood of an emergency arising due to war or a similar danger diminishes while other types of conflict situations and crises appear which require a state of emergency to be declared.

In the 20th century, France had to resort twice to a state of emergency in situations posing a threat to the country's territory. First, in April 1961, when the military took over in Algeria as a measure to prevent a coup,⁸ and in 1985 in New Caledonia, once again in response to events related to France's colonial history.

The year 2005 marks a turning point in the evolution of the instrument of state of emergency. It was declared because of civil riots in the suburbs on several locations in France. The government was heavily criticized for this decision which was considered an overreaction to a situation that did not warrant such excessive measures. The state of emergency only helped the prefects impose a curfew, a prerogative that is already granted to them by primary law. The use of a state of emergency in that case was considered a

⁶ The Emergency Powers Act was amended in 1964, when supplementary sectoral legislation was passed, such as the Energy Act of 1976, the Electricity Act of 1989, the Radioactive Substances Act of 1993 and the Environment Act of 1995.

⁷ Civil Contingencies Act 2004 <http://www.opsi.gov.uk/acts/acts2004/20040036.htm>

⁸ It lasts more than 2 years, continuing even after Algeria declared independence in 1962.

strategic political move needed to appease the public opinion and the voters who were concerned about public security and safety in the country. Ten years later, immediately following the terrorist attacks in Paris in 2015, a state of emergency was declared and was prolonged several times until 2017.

The UK has also frequently resorted to emergency regimes. Between 1920 and 1974 the Emergency Power Act was used 12 times, mainly in cases of major strikes and civil riots. With the onset of the conflict in Northern Ireland, however, the key argument for activating emergency powers and extra security measures was the so-called war on terror. The UK announced a state of emergency immediately after the 11 September terrorist attacks in the USA, becoming the only country in Europe to do so, despite the physical distance from its territory. The government referred to Art. 15 of the European Convention of Human Rights, and requested a derogation of Art. 5, Right to Liberty and Security. This decision set in motion an intensive legislative process related to the fight against terrorism. Since the troubles at the end of 20th century, governments have been under pressure to revise the antiterrorist laws several times, but those changes did not come through until 2001 when the Terrorism Act 2000 was passed. The Act expanded the definition of terrorism and also fundamentally changed the way emergency situations are conceptualized. The notion of “emergency” is largely ‘normalized’ and urgency is no longer considered an important characteristic, which has led some experts to argue that this will enable the possibility of having a permanent state of emergency (Slater, 2016). Similar to France, public opinion played a key role in the process. The majority of the population supported the government’s decision in the hope that this would boost public safety and security.

No one can deny that acts of terrorism create extraordinary crises which call for extraordinary measures and powers. In recent years, the concept of terrorism is the subject of ongoing studies and debates; the concept continues to evolve since terrorism is a transnational threat that goes beyond national borders. Another, more difficult question arises here, namely, to what extent terrorism gives sufficient grounds for declaring a state of emergency, given that terrorism is a constant threat today? In the face of this persistent global threat, do we not also face the risk of living in a state of permanent emergency?

d) Towards the normalization of emergency measures

The emergency measures taken by the executive have one essential feature. i.e., they are temporary. Their exceptionality vis-à-vis the common norms is intended as a means to solve quickly the specific crisis. Therefore, the law provides for parliamentary oversight of the prolongation of the emergency powers, the measures taken, etc. However, the experience of both France and the UK illustrates that the issue of their temporary character can be critical. On the one hand, the two countries have a history of extending the measures beyond the originally set deadline. On the other hand, in both countries new legislation was passed or the existing legislation was revised to incorporate some of

the exceptional measures after the deadline expired. Thus, the measures have become permanent and their exceptionality is “normalized.” Sociologist Alan Greene writes that Great Britain prefers to adopt emergency legislation in exceptional circumstances because this grants the executive powers that they do not normally possess but that nevertheless enable them to tackle the crisis more efficiently and swiftly (Green, 2016). Special laws need to contain the so-called sunset clauses, that is, provisions concerning their temporal exercise and phasing out. As it turns out, the sunset clauses, limiting the temporal validity of some of these control mechanisms were revised and extended several times between 2005 and 2011.

As a result of the state of emergency declared in 2001 which lasted only a few months, subsequent legislation transformed some temporary control mechanisms into permanent, including some restrictions regarding suspected terrorists. In 2011, the *Terrorism Prevention and Investigation Measures Act* was passed which reconfirmed some of the restrictive measures; in 2015, the *Counter Terrorism and Security Act* was adopted. This ends the long process of gradual normalization of the measures initially declared exceptional and subsequently incorporated in the primary law.

We observe a similar development in France. Between November 2015 and July 2017, the government introduced six proposals for extending the state of emergency for various periods of time, which received full support of everyone involved in the process. This period of emergency measures has come under heavy criticism, attacking above all the length of its application: “*L’état d’urgence reste un état de crise qui est par nature temporaire... L’accoutumance à cette situation hors norme serait pour notre démocratie un risque: celui de la banalisation de l’exception...*” (Rousset, 2017).

The difficulty this situation presents is not so much legal as it is political; the decision to activate a state of emergency is made by the politicians. This explains why while the state of emergency was in force, new anti-terrorism legislation was passed. Shortly before the emergency state was lifted, the new Internal Security and Counter Terrorism Act was adopted⁹, as somewhat of a natural extension of the state of emergency; the Act made permanent some of the emergency measures, incorporating them in statutory provisions. Not surprisingly, the new act drew widespread criticism; critics warned that it posed a risk of establishing a permanent state of emergency.

NEW VARIANTS OF THE “STATE OF EMERGENCY” CONCEPT

The global health crisis produced a unique emergency situation. Many states were forced to enact emergency regimes and measures to contain the spread of the coronavirus, and this process brought forth new concepts such as “public health emergency”, “emergency epidemiological situation” etc.

⁹ Law № 2017-1510 of 30 October 2017 on internal security and anti-terrorism (Loi № 2017-1510 du 30 Octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme)

On 23 March 2020, France announced a public health emergency by special decree due to COVID-19.¹⁰ The notion of “public health emergency” is stipulated in the Public Health Code¹¹, and the new law was intended to reinforce the normative framework used as a basis for the measures adopted against the coronavirus. This new emergency regime gave exceptional powers to the prime minister and the prefects to limit some of the constitutionally guaranteed rights and freedoms. The concept of health emergency was not entirely unexpected or arbitrary; having lived until recently in a state of emergency, the French society was aware that once introduced, the new restrictions would not be easily cancelled and could have serious implications for human rights and the rule of law. And while the rest of the [European] countries did not hesitate to declare a general state of emergency, the French authorities were more cautious and were looking for a carefully planned and targeted response to the looming crisis.

In this context, the use of the term “emergency health situation” can be seen as a rather positive step forward on the part of the authorities. If we agree with the argument that an emergency regime predisposes governments to take excessive measures because of the exceptional powers granted to them, then an approach based on careful examination and precise definition of the nature of emergency would prevent governments from transgressing their realm of duties, taking only those measures that are necessary to deal with the health crisis.

Bulgaria is one of the countries with a practice similar to that of France; the country declared a state of emergency in March 2020. Several months later the National Assembly amended the Public Health Act and introduced a new statute, “emergency epidemiological situation”,¹² which was interpreted by some analysts as a first step towards normalizing (Slavov, 2021) the exceptionality of the circumstances.

The adoption of the act stirred heated debates and prompted the president to veto it and to refer the case to the Constitutional Court. The Court confirmed the constitutionality of the new provisions as well as the legality of the restrictions concerning some civil rights. In its ruling, the Court compares various emergency situations (natural disasters, military or other emergencies) and argues that the main distinction with regard to the emergency epidemiological situation is the intensity of measures that need to be taken by the competent authorities.¹³

¹⁰ Extraordinary law № 2020-290 of 23 March 2020 to tackle the COVID-19 pandemic (LOI n° 2020-290 du 23 mars 2020 d’urgence pour faire face à l’épidémie de covid-19).

¹¹ The emergency health state can be extended upon parts of or upon the entire territory of the country in the case of a health emergency, which poses an immediate threat to the public health.

¹² Amendments to the Public Health Act, (promulgated in State Gazette, No. 44/13.05.2020). “Emergency epidemic situation as stipulated in art. 63, para. arises in the case of a disaster due to a contagious disease which spreads at an epidemic level and presents an immediate threat to the life and health of citizens, and the prevention and containment of which requires going beyond the ordinary measures for the protection and preservation of the life and health of the citizens “

¹³ Decision № 10 of 23 July 2020, by the Constitutional Act № 7 of 2020.

RISKS AND IMPLICATIONS

The expectations related to a state of emergency are usually high. Governments seem to view it as an almost magical instrument to handle a crisis and often forget the risks and potential dangers that it carries. Regardless of the motivations and the concrete reasons for declaring a state of emergency, there is plenty we can learn from it about the functioning of the democratic government, its evolution, advantages and disadvantages.

First, the state of emergency is directly linked to national security. At first glance, it is an attractive instrument in the hands of the authorities allowing them to act quickly to restore and preserve the public order. Furthermore, in recent years new studies have expanded the concept of security, especially in the context of the fight against terrorism. Security is no longer solely and exclusively related to international relations and policies; today, multiple risks and threats of various nature are considered security issues (internal and external security, migration issues, extremist organizations, terrorism, etc.). Issues like these often raise questions whether the current legal frameworks can guarantee the desired level of security. A significant implication and a tendency that seems to apply to many countries is the way governments respond to crises today: they are much more inclined to look for new measures and to pass new legislation instead of using the tools they already have. The introduction of the special institutes of “emergency epidemiological situation” are good examples of this trend.

Second, current practice has shown that the state of emergency is becoming an “ordinary” instrument used to tackle situations of various scope and scale. Its use is becoming trivialized in political reactions and discourses. Agamben is right to say that the state of emergency will be henceforth perceived as the “rule” and is increasingly being regarded a management technique rather than an exceptional measure (Agamben, 2019; 24). In other words, it is no longer understood solely and only as a means to provide more security, but it is also an instrument of management and communication. This instrument is in possession of the destabilized political power which can resort to it at any time when it needs to demonstrate authority and legitimize itself in the eyes of the public. The reasons for political destabilization can vary – terrorist threats, economic and social crises. In this sense, we can argue that the state of emergency, which was initially conceived as a mechanism to provide general security and protection against (predominantly) military conflicts, is gradually gaining a new meaning. Current developments lead us to conclude that it is being increasingly used as an instrument with the main purpose and task to manage serious conflicts in society, and that means, conflicts of a different nature. In the presence of such conflict’s society is more likely to accept emergency measures. When people live in fear, it seems they more readily give up their rights.

Third, the prolonged use of the state of emergency generates the perception that in ordinary circumstances the state is actually weaker. There is a real risk of believing that

the government is only strong in a state of emergency and that ordinary legal statutes are not fit to cope with a crisis. In this way, the normal functioning of public institutions is undermined and the relevance of the primary legal provisions is questioned.

Fourth, exiting the emergency situation is a difficult choice to make. While at the onset of the crisis the real reason for the state of emergency is easily identifiable, its end is rather hard to predict. Declaring the end of the state of emergency should be an indication that the crisis situation is over. Therefore, the dilemma of when to put an end to it is primarily political in nature, since the termination of the state of emergency could also be seen as a resignation on the part of the authorities and institutions from their duties.

Fifth, risks are inherent in modern society and they cannot be eliminated. Risks can only be limited and reduced. Therefore, modern security policies concentrate on the assessment, analysis and reduction of different types of risks. If we followed the maxim that risks must be eliminated, then we would always live in a state of emergency and would need the imposition of emergency measures (Popov, 2021).

Two important conclusions can be derived in this regard from recent practice. On the one hand, there appears to be a kind of merging between an emergency and a crisis. On the other hand, the introduction of measures like “emergency health situation” and “extraordinary epidemiological situation” has led to new ways of conceptualizing emergency. Would it be possible, for example, to speak of a *refugee* emergency situation? In order to avoid such possibilities, it is necessary to expand the understanding of crisis culture, to think in the paradigm of risk, and to work on risk reduction. A crisis and an emergency should be theorized at two different levels. While an emergency implies a short duration, a crisis may protract in time. But even so we face a paradox; in cases where the danger is still present, the only possible solution is to reinforce the standing legal statutes. However, the adoption of provisions solidifying some of the emergency measures and emergency institutional powers is inevitable. From this point of view, we must say that promising a short duration of the state of emergency may be just an empty promise.

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