

Emergency and Risk in Comparative Public Law

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

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

Emergency in Comparative Public Law

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

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

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

sometimes not a smart strategy as it could end up in affecting the sustainability of a constitutional order. Another strategy is silence. Abeyances, as [Foley explained some years ago](#), “are important, therefore, because of their capacity to deter the formation of conflicting positions in just those areas where the potential for conflict is most acute”.

[Comparative law](#) confirms this variety of views. Among the legal systems equipped with explicit emergency clauses, there are examples which provide for a “gradual approach” depending on the type of emergency at stake. Spain is a very telling example. Article 116 of the [Spanish Constitution](#) identifies three kinds of emergency, which differ in the role of Parliament and in terms of impact on fundamental rights: state of alarm, state of exception (called state of emergency in the official translation, but the Spanish version refers to the “[Estado de excepción](#)”) and state of siege.

On the other side of the spectrum there are quasi-silent constitutions, like the Italian one, which never employs the term “emergency” and does not provide for special schemes applicable to exceptional situations other than war (Art. [78](#)). This does not exclude the existence of instruments applicable to cases of necessity and urgency which covers for instance the so-called decree-laws (“*decreti legge*”). The Italian case, as illustrated by some [colleagues](#) in this [blog](#), is an interesting example, as it had to adapt to the contingent circumstances of the pandemics. In the center of interest so far have been administrative measures, the so-called “decrees of the President of the Council of Ministers” (DPCM), depriving Parliament of its important function of scrutiny.

In any case the administrative branches of legal orders remain key actors in emergencies, as they provide immediate responses even in the absence of specific constitutional emergency powers. Generally speaking, emergency powers are exercised through atypical administrative acts, whose effects are not legally prescribed because of the objective to deal with exceptional facts that ordinary law cannot predict. [Giannini](#) effectively defined these powers as a safety “valve” protecting legal orders against the rigidity of legislation in legally unknown situations. In a democratic system, this means that derogation from law is admitted within the limits of general principles and their constitutional foundations. In other words, competent institutions can adopt any measures to tackle the imminent danger but the principle of proportionality shall guide the public intervention.

The temporary nature of emergency powers is thus implicit in their characterisation. Their use is legitimate insofar as the (legally) extraordinary situation lasts; but how can the end of the emergency be recognised? Facts (and not law) can indicate it. The lack of legal scrutiny on the end of the emergency brings the risk that the administrative use of emergency powers deviates from their original goals. Only check-and-balances of the wider legal system can prevent such a vitiated drift.

During the current pandemic the progressive relaxation of the restrictive measures aimed to contain the spread of the disease can still be placed in the context of the emergency intervention. This means effectively a progressive shift of approach towards risk regulation according to the reduction of the number of infected people. A research led by Alberto [Alemanno](#) effectively qualified “the regulatory action

undertaken in the immediacy of a disaster in order to mitigate its impact” as “emergency risk regulation”. These are critical moments for legal orders, from both a factual and legal point of view: the transition from an extraordinary situation to the normalisation of the contagion requires law to make a paradigm shift, for which it needs to be well-equipped to be successful.

Risk Regulation in Comparative Public Law

The attempts to introduce the concept of risk as a regulatory notion have started at the administrative level but scholars have been recently thinking of its application in a constitutional context, too, especially in the United States. For instance, Vermeule described constitutions as [risk management devices](#), distinguishing two competing paradigms of constitutionalism: precautionary constitutionalism and optimising constitutionalism. While the former implies that “[constitutional rulemakers and citizens design and manage political institutions with a view to warding off the worst case](#)”, the latter instead “[trades off all relevant political risks, giving them their due weight in the circumstances, without any systematic skew or bias against any particular type of political risk](#)”. This approach was actually part of a broader reflection in the US on the limits of the [precautionary principle](#). However, Vermeule has been [criticised](#) for his rigid differentiation of risks between administrative (first-order risks involving “substantive governmental policies”) and constitutional law (second-order risks involving the “design of institutions”) that does not necessarily correspond to our idea of public law in Europe. However, the concept of risk regulation could add value in comparative public law.

Risk regulation allows the monitoring and the management of risks that might have severe consequences for a community. The idea is that through the continuous assessment of such significant risks and the adoption of proportionate control measures, emergency scenarios can be limited and to some extent predicted.

The introduction of the risk paradigm in comparative public law can sensitively reduce the distortions in the use of [emergency powers](#). In addition, risk regulation gives voice to those rights competing with safety and security. Most frequently this are economic rights. In the current crisis, the introduction of measures of risk regulation would allow the protection of economic interests and, to some extent, would reduce the adverse economic externalities of the continued lockdown.

Yet, risk regulation requires the identification of an adequate safety level based on scientific assessment and the proportionate evaluation of the trade-off among competing rights. When disastrous risks are at stake, like in a pandemic, the high level of [uncertainty](#) regarding the probability of the risk challenges the application of the principles of risk regulation. [Yet, the elevated consequences in terms of casualties and losses require some regulation](#). The search for protection should engage in the [difficult task of assessing both probabilities and anticipating the severity of the possible impact](#). In a case-by-case analysis, risk regulation should therefore consider [the severity of the threat; the degree of reversibility of its effects; the possibility of delayed consequences; and the perception of the threat based on available scientific data](#).

Unlike emergency powers, risk regulation does not reflect the application of the principle of reasonableness in the fight or prevention of an immediate danger. Where the threat is not an emergency yet, law cannot be derogated, but precautionary action may be appropriate. In the domain of risk regulation, the application of the precautionary principle shall be justified by science as well as by the values that structure the legal order. To be sustainable, the precautionary approach requires scientific research and testing; that is, accurate risk assessment. If not, this approach based on the worst-case scenario generates exceptional costs.

This necessarily creates a burden of proof on the risk-taker. According to [Sunstein](#), strong applications of the precautionary principle can paralyse innovation. A weak approach, however, shows that science shall feed risk management and decision-making under uncertainty. Has this been done in the current pandemic? Probably not yet and not everywhere.

Only where decision-makers engage in a thorough risk assessment, restrictive measures can legitimately protect the relevant values and interests. The careful and accurate balance of scientific evidence, values and the possible effects of measures shall structure the proportionality test in the definition of the appropriate level of protection. Is comparative public law ready to engage in this task and to innovate its own tools to mitigate crises? This is the big challenge for the pandemic's aftermath.

