

AMERICA

WHEN THE CENTER LIES OUTSIDE THE FIGURE:
REPUBLIC, IMBALANCE OF POWERS
AND EMERGENCIES

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SUMMARY: I. *Foreword*. II. *Comparative Constitutional Law*. III. *Emergencies within the Argentine constitutional order*. IV. *Final Remarks: In case of emergency: break glass!*

“If one is frightened, everything makes a noise”

Sophocles, *Acrisius*, Chorus: 61

I. FOREWORD

No normative system is as capable of controlling human behavior as Law. In this context, transboundary law has become a necessary, rational, and sensible feature for civilized life. Here and now, we are immersed in complex settings where Law permeates and indeed attributes meaning to multiple relationships in civil societies. Law spreads to every corner of the world while vigilant States are overzealous and willing to regulate all aspects of human life. We live within Law-saturated societies.¹

A fundamental question in constitutional theory, then, is whether there are actual limits to Law.² In other words, does Law encompass everything? Can the rules of law foresee and regulate every extraordinary event?

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¹ See Rodotà, Stefano, *La Vida y las Reglas*, p.25, Editorial Trotta, Madrid, 2010.

² This is what English calls “*Die Rechtsfreie Raum*”. See English, Karl, *El Ambito de lo No Jurídico*, Ediciones de la Universidad Nacional de Córdoba, 1960.

1. *Basic statements*

A. My first insight is that the concept of emergency and all implied institutes, procedures, and rules –whether they are regulated by the Constitution or not- are normative in nature. This means that even if we refer to an extraordinary and global event –such as the COVID-19 pandemic-, an emergency should not be reported as a factual category. It has to be construed under a normative perspective. Although emergencies are related to extreme circumstances, we must not strait-forwardly infer that their recognition is not driven by an underlying constitutional source.

Accordingly, it is essential to appreciate the difference between ‘emergency’ and ‘exception’.³ Despite linguistic uses, while the former can only be understood in constitutional terms, the latter, instead, relies on ‘extra-constitutional’ circumstances upon which, the only certainty is the absence of authority or a legitimate norm that may solve a terminal conflict.

“*Sovereign is he who decides on the exception*” according to Schmitt.⁴ This statement, therefore, reveals that only in situations of extreme civic unrest is it possible to challenge or ratify the ultimate authority of a disputed political power.

B. In democratic-republican terms –particularly in countries like Argentina-, my second basic insight is that the study of emergency –such as the current pandemic- requires focusing on institutional aspects concerning the performance of the State’s branches of government.

Consequently, either by spelling out institutes, procedures and/or rules in terms of constitutional design or by exploring the actual behavior of political bodies created in the organic part of the Constitution, the justice and efficacy of said outcomes do not really depend on civic culture, Executive’s goodwill, judges’ boldness, or, let alone, on the sophisticated rhetoric of those rights enshrined in the dogmatic part of the Constitution. In line with Gargarella, my grasp is that we better go down into the dark basement and focus on the Constitution’s “engine room” rather than helplessly ramble on the shiny deck of rights.⁵

³ Riberi, Pablo, “*Assessing Republican Wariness in Time of Hazard and Turmoil*”, edited by Eberhard, Lachmayer, Ribarov, & Tallinger, *Constitutional Limits to Security*, Nomos-Facultas, 2009. Also, Riberi, Pablo, *La Emergencia como Remedio Constitucional, ¿o Viceversa?*, EL DERECHO (Jurisprudence and doctrine Law journal), Año XLIII, Nro. 11349, Buenos Aires, September 3, 2005.

⁴ See Schmitt, Carl, *Political Theology*, p. 5. M.I.T. Press.

⁵ See, Gargarella, Roberto, “*Latin American Constitutionalism and the Engine Room of the Constitution*”, in Riberi, Pablo & Lachmayer, Konrad, pp. 97-115, Nomos-Facultas, 2014.

2. *The last boundaries of normalcy*

Every Constitution provides a concrete power structure. As the Greeks rightly stated, a Constitution means “laying foundations *καταβολή*”.⁶ And on top of that, a legitimate Constitution, faithful to Enlightenment’s legacy, must promote human rights’ protections. If this is the case, hence, “emergency” can only be deemed as a normative concept.⁷ And incidentally, the extraordinary powers enabled by an emergency, performatively, must also be read within specific attributive mechanisms based upon constitutional constraints. The emergency can never be a lever that opens the gates for reckless human’s rights violations.

The Freedom/Power constitutional equation turns to be altered during constitutional emergencies. In the face of overwhelming global challenges concerning individuals’ inequality and vulnerability, it is however right to be reluctant toward subtle bio-political mechanisms of monitoring and surveillance of the people. Even in an emergency, from the republican point of view, it looks sensible that constitutional design foresees institutional mechanisms and incentives for swiftly normalizing full-enjoyment of individuals’ rights. My concern is that every emergency purports a limited range of possibilities. As Schauer claims, “*the existence of an interpreter holding restricted powers is a consequence arising from the very same idea of rule or a system of rules*”.⁸

II. COMPARATIVE CONSTITUTIONAL LAW

Since there are normative provisions and atavistic practices involved in different constitutional systems, it is enlightening to make a clear-cut distinction between “regulated emergencies” and “non-regulated emergencies”.⁹

Concerning constitutional design, for example, the Roman Republic created the ‘*senatus consultus ultimum*’ whose enactment brought about the exceptional institution of dictatorship. When a roman citizen was empowered

⁶ Emergency institutes, such as the state of siege, are entrenched within the constitution to avoid what the greeks called “*Stasis*” –civil war-.

⁷ Hobbes claimed: “(...)Where there is no common power, the law does not exist; where there is no law, there is no justice... See, Hobbes, Thomas, *Leviatán*, Volume I, Chapter. XIII, p. 138, Madrid, 1984.

⁸ Ver Schauer, Frederick, *Las Reglas en Juego*, p.293, Marcial Pons, Madrid, 2004.

⁹ See Gross, O., “*Constitutions and emergency regimes*”, pp. 334-339, -edited by Ginsburg, Tom & Dixon, Rosalind, *Comparative Constitutional law*, Edward Elgar, 2011.

as a dictator, the legal framework provided for broadest powers without any substantive limitation. The goal was to preserve the Republic's integrity. Once the dictator was holding office -none other magistracies being suspended-, he exercised wide-ranging discretionary competences for a fixed period unless one of the consul's term expired before.

1. *Regulated models*

There have been several attempts to entrench operative emergency provisions in the constitutional document. For example, like the Roman Republic, Machiavelli understood that, although restricted by proper incentives, new power allocation should be regulated *ex-ante*.¹⁰ The State of Siege, accordingly, was introduced in France on July 10, 1791. And many constitutions, such as Germany or Portugal's provide a gradual alternative pattern of potential emergency responses. This is the case of the Spanish Constitution which regulates three different kinds of emergency. Likewise, Brazil makes a difference between the traditional State of Siege and an intermediate "state of defense" which has to be declared by the president following the approval of a specific advisory council.

It is important to acknowledge a key historical experience. It is worth noting the devastating effects caused by the implementation of the famous section 48.2 of Weimar's Constitution. This provision prescribed that when the President saw fit, he was only required to give notice to the Bundestag of any declaration of an emergency.¹¹ Before the advent of National Socialism, a prequel of uncontrolled enforcement of emergency decisions -throughout 250 emergencies-, perhaps, may help to explain why the current German Constitutional Court's doctrine has made it clear that emergencies have to be declared with an unequivocal aim. And this goal is no other than *preserving or re-establishing the integrity of normalcy of the constitutional order*.¹²

¹⁰ Referring to the unity of action, Machiavelli shrewdly claims "...[habitual republican responses to emergencies move slowly... and since reaching timely agreements is difficult, medicine looks dangerous when it has to cure something that cannot wait. ... Thus, republics must have among their provisions swift and adequate means". See. Maquiavelo, N, *Discursos sobre la primera década de Tito Livio*, pp.138-139, Editorial Lozada, Buenos Aires, 2004.

¹¹ Riberi, Pablo, "*Jeinseits von Weimar (Más allá de Weimar): El constitucionalismo moderno asediado*", pp. 158-190, in -edited by Seleme, Hugo-, *Instituciones Públicas y Moralidad Política*, Ediciones de la Universidad Nacional de Córdoba, 2015.

¹² According to Böckenforde, the basic notes of such doctrine provide a. An emergency is a political-constitutional mechanism to preserve or restore, constitutional normalcy. b. Its validity cannot replace a Law, let alone the Constitution. c. During an emergency, special

Finally, it is worth highlighting the political-procedural proposal defended by Bruce Ackerman, which is based on section 37 (2) of the South African Constitution. According to this rule, the declaration and continuity of an emergency rely on increasing democratic support from the Legislative branch.¹³ The so-called *escalating cascade of supermajorities* requires more cumbersome agreements to keep emergency powers in place which, by the way, also means a more watchful commitment on the part of the opposition.¹⁴

2. *Non-regulated models of emergency*

Emergencies have not been regulated in ever country's Constitution. The United States, the UK, Switzerland, Japan, and Belgium, to mention just some, have not established provisions enabling extraordinary powers to the Executive nor have they enshrined specific restrictions to individuals' freedom in case of emergencies. The Swiss and the UK's constitutions deserve the utmost attention. In the former, said declaration has been associated with what is called "state of survival". And, naturally, all emergency decrees have been upheld by a long-lasting tradition of engaged political practices.¹⁵

Emergencies have barely been addressed in the USA's Constitution with laconism. The Constitution only provides the habeas corpus suspension. Be that as it may, the lack of such regulation has not prevented the USSC from resorting to a steep normative standard. As regards UK's emergency powers, the privileges of Government together with Common Law's principles have together been fit to Parliament's sovereignty.¹⁶

regulation labeled as "measures" can be enforced. d. Measures are valid for a limited period of time. See Böckernforde, E.W., *Constitutional and Political Theory –selected writings–*, pp. 117-118, Oxford University Press, 2017.

¹³ See Ackerman, Bruce, "The Emergency Constitution", 113 YLJ 1029, *Yale Law Journal*, March 2004.

¹⁴ There is some bold criticism against Ackerman's approach. For example, Dyzenhaus openly rejects Ackerman's take on this. See Dyzenhaus, David, *Schmitt v Dicey: Are states of emergency inside or outside the legal order?* Hernández, Antonio Ma., -Paper submitted by the author to the IACL-AIDC round table held in Córdoba On June 24/25 2005.

¹⁵ Böckernforde, E.W., *Constitutional and Political Theory –selected writings–*, pp. 124-125, Oxford University Press, 2017.

¹⁶ Böckernforde, E.W., *Constitutional and Political Theory –selected writings–*, pp. 121-123, Oxford University Press, 2017.

III. EMERGENCIES WITHIN THE ARGENTINE CONSTITUTIONAL ORDER

Argentina has undergone political turmoil throughout its history. In addition to many coup d'états, random cycles of economic crisis brought about disarray and dismay among the population. For example, the XXth century witnessed how emergency legislation passed by Congress thwarted the principle of contractual freedom or the principle of the non-retroactive nature of law. Accordingly, 'extraordinary police powers' ended up undermining property rights while case-law, for example, upheld mortgage deferments or rental contracts freezing. Backsliding this trend, there were even rulings endorsing the seizure of private deposits, interest rates haircuts, or deferment of maturities.¹⁷

The Argentine constitutional order has become a distorted model of separation of powers. Given the remarkable hyper-presidentialism ruling Argentina -and other countries in the region-, it is important to understand that even under normal circumstances, the Executive's powers look excessive and overwhelmingly plethoric.¹⁸

The emergency has thoroughly been regulated within the Argentine Constitution. Beyond the declaration of war -article 75, subsection 25-, the key provision dealing with emergencies is the *state of siege* -articles 23; 75 subsection 29; 99 subsection 16 and 61-. As regards to the Executive legislative competences during emergency times, the Constitution has exceptionally allowed the president to issue executive orders labeled as "necessary and urgent decrees" -DNU: article 99 subsection 3- and it also authorizes him to issue delegated decrees when Congress has specifically granted such delegation in the field of administration or as a result of a declared emergency (DD: article 76). In terms of legal argumentation, resorting to "*force majeure*", "*fait accompli*", "the normative strength of facts" have become commonplaces dogmatically avowed to remove any normative constraints to Executive's power expansion.¹⁹

¹⁷ Some case-law examples: "Ercolano v. Lantieri" (Fallos: 136:131); "Horta v. Harguindeguy" (Fallos: 137:47, 1922); "Cine Callao" (Fallos: 247:121, 1960); "Mango v. Traba" (Fallos: 144:219, 1925); "Avico v. De la Pesa" (Fallos: 172:21); "Prattico Carmelo v. Basso y Cia" (Fallos: 246:345); "Peralta, Luis v. Estado Nacional" (LL., 1991-C, p.140).

¹⁸ For instance, a large number of Executive Decrees (DNU) have been issued ever since Argentina's democratic off-spring. Eg: Alfonsín 10; Menem 545; De la Rúa 89; Duhalde 158; Nestor Kirchner 270 and Cristina Fernández de Kirchner 81; Macri 69. Alberto Fernández has issued more than 50 to date.

¹⁹ See Gargarella, R & Roa-Roa, J, *Diálogo Democrático y Emergencia en América Latina*, MPIL Research Paper No 2020-21.

Emergency in Argentina under COVID-19

Although in terms of health policies the government has been pretty successful, the current pandemic is yielding devastating consequences in economic and social terms. If one ever thinks about the “cost of rights” -as Holms did-, strictly speaking, it is not easy to assess how the bill will look like.²⁰

A wide array of Executive powers were granted by the 27.541 Act passed -before the pandemic-. Now the country has been witnessing an Olympic festival of Executive orders. This trend became more plausible after the “compulsive and preventive social isolation decree -297/20 (ASPO)-” was issued on March 19, 2020. On top of that, a cascade of more than 60 executive decrees (‘DNU’ and ‘DD’) had been issued until now. Despite the legitimacy and reasonableness of the early governmental measures, little by little, the president is somehow becoming a sort of croupier. The metaphor is intended to depict someone who is unilaterally allocating benefits and burdens among the population. Emergency legislation, in short, has hastened several Executive decrees whose ‘necessity’ and ‘urgency’ are unlikely to meet the required threshold of constitutionality stated by article 99 subsection 3 of the Constitution.²¹

IV. FINAL REMARKS: IN CASE OF EMERGENCY: BREAK GLASS!

Charles Tilly stresses republican state-building has always been devoted to a concrete history of violence controlling.²² Not even in this global pandemic or when national security is threatened can constitutional limitations and basic controlling institutions be foregone. A republican stance relies on government responsiveness and political accountability within a framework of constitutional rules and practices. Both, in normal and in emergency times, constitutional remedies must never be deployed to worsen individuals’ rights enjoyment.

²⁰ HOLMES, S & SUNSTEIN, C., *The Costs of Rights*, pp. 49-ss, W.W. Norton & Co, NY, 2009.

²¹ See Hernández, Antonio Ma., “*Las Emergencias por COVID-19 en Argentina*”, in -edited by González, Nuria & Valadés, Diego-, *Emergencia Sanitaria por COVID-19 –Derecho Comparado-*, pp. 23-39, Universidad Nacional Autónoma de México, 2020.

²² Tilly, Charles, *Las Revoluciones Europeas 1492-1992*, Editorial Crítica, Barcelona, 2000.

Whenever political, economic, or social disorders unleash State's emergency responses, ordinary people should never be considered as 'aliens' or 'guest participants' of a constitutional drama. It is plain to see that during emergency times, the strength of civil liberties could be somehow undermined and that new power limits could be set for the sake of people's future well-being.

Yet, emergency legislation deserves further reflection in countries like Argentina. Many of these measures often foster what might be called "self-inflicted emergencies". What does this mean? It means that the Executive's enlargement of powers as a response of a crisis –such as the pandemic-, is the efficient cause of wrong public policies which, in turn, trigger steeper emergencies for which the Executive demands new and broader powers to redress its own mistakes. In other words, the cure is worse than the disease.

To summarize, let me stress some final normative remarks.

- 1) Although most constitutions authorize the circumstantial delegation of powers to the Executive, it is nevertheless sensible to know in advance prior conditions and controlling mechanisms over such delegations.
- 2) It is also a fact that constitutional regulation of such delegations must never allow the very same power -whose competencies are being enlarged-, to unilaterally decide on the opportunity and the scope of such delegation.
- 3) Finally, even though it is true there might be special protections for office-holders this does not mean that emergencies may open the gates for the Executive to do as it wishes.

In short, the emergency may not be used to obliterate the very same Constitution which enables those exceptional powers. It is preposterous that the conclusion of a syllogism might become a means to finish off its supporting premises. Quoting Ernesto Garzón Valdés, it would be crucial for a catastrophe such as the present pandemic to not become a calamity.²³ Catastrophes are due to forces of nature, while calamities are caused by ill human agency.

²³ See Garzón Valdés, Ernesto, *Calamidades*, Gedisa, Barcelona, 2009.