

Final reflections: emergency and democracy*

Robert Schütze (Durham University and Luiss University)

Emergencies are “sudden and unexpected occurrences” that “urgently demand[] immediate action” (Oxford English Dictionary). Today, modern societies potentially face **three types of major crises**. They may be threatened by a **political crisis**, provoked by wars or rebellions; they may have to cope with **natural disasters**, such as floods or earthquakes; or, they might struggle with the effects of an **economic crisis**, and in the twentieth century, **this third type of emergency has become particularly prominent** (Rossiter 1963). How should a legal order deal with such emergencies? Constitutional orders are designed to offer permanent legal solutions to general social problems. **But what if this social order is itself challenged – internally or externally – to such an extent that its “ordinary” principles appear inadequate?**

Two constitutional options are here possible: a “relativist” and an “absolutist” approach.

The “relativist” approach accepts that the ordinary constitutional principles might not apply in emergency situations. Constitutional principles, like the separation of powers or human rights, can thus be “suspended” in times of crisis. **This approach has informed German constitutional thought.** The best-known expression of this idea was perhaps Article 48 of the 1919 Weimar Constitution. The latter **allowed the President to take all the necessary measures** – such as the suspension of fundamental rights – where “the public safety and order in the German Republic [were] seriously disturbed or endangered”. The abuse of emergency powers during the Weimar era originally led the Bonn Constitution to reject this “relativist” constitutional approach. This however changed in 1968, when a constitutional amendment returned to the “relativist” position (Schweitzer 1969). Today, the German Constitution provides an extensive “emergency constitution” that can abrogate the ordinary constitutional principles in times of crisis.⁵⁶

The “absolutist” approach, by contrast, considers the constitution as a “law for all seasons” (Lobel 1988-89). **This position has traditionally been the American constitutional solution.** In *Ex parte Milligan* (1866), the US Supreme Court thus held that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace” and therefore applied “at all times, and under all circumstances” (ibid. 120). Yet this does not prevent the legislator from adopting “emergency legislation” (Ferejohn and Pasquino 2004). However, and importantly, **this emergency legislation remains subject to the ordinary constitutional principles**, even if the concrete application of these principles during an emergency may produce different substantive results. In the words of the Supreme Court: “[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power” (*Home Building & Loan Association v Blaisdell* 1934: 426).

The European Union legal order is posited nearer the “absolutist” constitutional position. Yet since its early days, the EU legal order has also offered a variety of **flexible constitutional and legislative tools to deal with internal or external emergencies**. This adaptability to especially economic emergencies could already be seen in 1974, when the (then)

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⁵⁶ The “emergency constitution” is placed in a separate title within the German Constitution and was designed for the “state of defence”. It provides, inter alia, for special constitutional principles that allow an extension of the legislative powers of the federation (Article 115c GC) and a shortened legislative procedure for urgent bills (Article 115d GC).

European Economic Community faced a global economic emergency – the oil crisis (European Council 1974: 7):

“Recognizing the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation. The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political cooperation... These arrangements do not in any way affect the rules and procedures laid down in the Treaties ...

With a view to progress towards European unity, the Heads of Government reaffirm their determination gradually to adopt common positions and coordinate their diplomatic action in all areas of international affairs which affect the interests of the European Community ... The Heads of Government consider it necessary to increase the solidarity of the Nine both by improving Community procedures and by developing new common policies in areas to be decided on and granting the necessary powers to the Institutions.”

The birth of the European Council here represented an “institutional” emergency solution; yet the EU Treaties today also contain more concrete competence arrangements for emergency situations. Article 78 (3) TFEU for example offers a special legal basis for Council measures “[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries”. And a particularly famous example can be found in Article 122 TFEU, which simultaneously aims to offer a solution to, respectively, economic and natural crises affecting the Union and its Member States:

“1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.”

The European institutions here mainly charged to deal with a crisis resolution are the Council and the Commission. Where is the European Parliament in the decision-making in all this? And how, more generally, have democratic processes been affected by the various crises that have haunted the European Union and its Member States? This is the main question this collection of essays wished to answer. Part I began with an analysis of the ordinary constitutional principles of democratic government, such as the Union principle of representative democracy (Lupo). It was complemented by two contributions focusing specifically on the dissensus elements within the participatory (Golmohammadi) and non-parliamentary (Piccirilli) arenas within the Union.

Following on from these ex-ante constitutional benchmarks were two important contributions exploring the state of emergency rules within France (Hennette Vauchez) and the EU (de Witte). They formed the opening chapters to Part II on the democratic procedures (or absence thereof) during EU emergencies and crises. The thematic focus had here, rightly, been placed on the recent Covid-pandemic and the Union’s responses in the form of its Recovery and Resilience Facility (Capati and Fabbrini) and NextGenerationEU (Fasone), as well as on how NGOs have been affected (Dolghin). What has, or can, be learned

from these pandemic crisis experiences? The various chapters in **Part III** approached this question from a **variety of perspectives, including the war in Ukraine** (Dirri), the **Qatargate scandal** (Vauchez and Avril) and even **the rule-of-law crises within the Union** (Citino). **Two additional chapters** within this part, furthermore, analysed the **“Conference on the Future of Europe”** (Blokker) as well as the **2024 European Parliament elections** (Ceron et al.).

The history of the twentieth century has – sadly – shown the “weaknesses of democracy to meet crises” (Mauer 1935: 688); and the early twenty-first century does not seem all too different. The slowness and complexities of the parliamentary procedure continue to seem ill-equipped for emergencies with the latter often asking for quick and strong action. Indeed: when on 4 March 1933 **President Roosevelt** took office and the United States of America underwent the **biggest economic crisis of the century**, the new President had asked “for the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency” (Leuchtenburg 1963: 41). **This led to an explosion of regulatory executive activity – and the radical erosion of the “parliamentary” state. Has the same happened to the European Union? The Union has, to some extent, followed these steps in the past decade.** The rise of the Union executive, especially in the form of the European Council, has **marginalised the ordinary Union procedures and European Parliament in important decisions.**

What can here be done in the future? Perhaps the Union constitutional order would be better served by an express and formal “emergency constitution” that was to explicitly regulate the respective spheres of executive and parliamentary governance? Or should the Union follow the US American example and respond to crises mainly by (temporary) delegations of legislative power to its executive: the Commission? **The Union does enjoy extremely flexible delegation regimes under Articles 290 and 291 TFEU; and the parliamentary control methods especially under the former are well constructed** (Schütze 2021: 313-356). **This solution may however not please those Member States that feel that each European crisis has (almost) always represented a moment of European centralisation;** and it is, indeed, mainly for that reason that **the legal adhocery**, in respect of the various crises of the European Union in the past, has been **invented to please the Member States.** This flight into international law, through formal inter-se agreements or informal decisions, however, poses a serious **problem to democracy. For much of international affairs are non-parliamentary affairs.**

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