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EMERGENCY POWERS

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Emergency powers by Mr. Ergun ÖZBUDUN and Mr. Mehmet TURHAN

Preliminary Remark

This consolidated report is essentially based upon replies to the questionnaire on emergency powers formulated by the European Commission for Democracy through Law.

In all, the Commission received replies from 32 countries (Albania, Austria, Canada, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Kyrgyzstan, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, S.Marino, Spain, Sweden, Switzerland, Turkey, United States of America). The replies were given by members of the Commission.

The present report does not constitute an exhaustive study of comparative law in the matter of emergency powers. Its purpose is to demonstrate the diversity of legal models regulating emergency situations which have been established, a diversity which reflects the complexity of the situations in practice and, consequently, the variety of solutions adopted by different States to deal with the

problem. This report might thereby serve as a concise repertoire of constitutional and legislative practice in several European and other States.

Finally, the report contains a set of recommendations addressed to any country undergoing constitutional reform.

Concept of public emergency

Public emergency situations involve both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State. Derogations from fundamental human rights are an especially crucial problem since experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency. Nevertheless, the principal international human rights instruments of our time contain a derogation clause with regard to emergencies. The European Convention of Human Rights and Fundamental Freedoms (ECHR, Article 15) allows derogation in cases of "war or other public emergency threatening the life of the nation". The International Covenant on Civil and Political Rights (ICCPR, Article 4) refers to a "public emergency which threatens the life of the nation", while the American Convention on Human Rights (ACHR, Article 27) refers to a "war, public danger, or other public emergency that threatens the independence or security of a State party".

Most constitutions contain provisions on emergency situations. In a minority of countries there is no emergency rule as such, but there are provisions to be applied in the event of war, danger of war, or other emergency situations. In Norway, Denmark, Luxembourg, Sweden and Austria, no emergency rule exists in the ordinary sense of the word, but what is involved is an extended transfer of

legislative power if the Parliament is unable to meet and to perform its functions. In Norway, in 1950, the Parliament passed a statute which gives more competence to the executive branch during war time or war-like situations. However, this competence is exercised on behalf of the Parliament and only if the Parliament is unable to fulfil its functions. Similarly in Sweden, in case of war or imminent danger of war when it is impossible to keep the entire *Riksdag* (Parliament) assembled, the *Riksdag* may be replaced by a War Delegation appointed from among the members of the *Riksdag* if circumstances so require. The War Delegation consists of 51 members, including the Speaker of the *Riksdag*, and is thus a *Riksdag* in miniature. It enjoys all the powers otherwise vested in the *Riksdag*. If, in time of war, when even the War Delegation is unable to perform its functions, these functions devolve upon the Government in so far as it is necessary to defend the country and terminate hostilities. The Government may not, however, enact, amend or repeal any fundamental laws, the *Riksdag* Act, or the Parliamentary Elections Act.

In Denmark, the Government may issue temporary acts when the members of the Parliament cannot be gathered and the circumstances are extremely urgent. However, such acts must not be in conflict with the constitution and have to be submitted to the Parliament for approval or disapproval at the beginning of the first possible assembly of the Parliament.

In Luxembourg, although no emergency rule as such exists, in times of economic and social crises the legislature passed enabling acts (*habilitations législatives*) empowering the executive to regulate certain areas that are not considered the exclusive domain of laws. In such situations the executive itself may pass decree-laws invoking the state of necessity as a condition of validity of such decree-laws.

In Austria, if the Parliament is not assembled, or if it cannot meet in time, or is impeded from action by circumstances beyond its control, to prevent obvious and irreparable damage to the community, the Federal President can, at the recommendation of the Federal Government and on his and their responsibility, take necessary measures by way of provisional law-amending ordinances. The Federal Government must present its recommendation with the consent of the Standing Sub-Committee, to be appointed by the Main Committee of the *Nationalrat* (Parliament). Such an ordinance requires the countersignature of the Federal Government. Such ordinances must be submitted by the Federal Government to the *Nationalrat* without delay. Within four weeks of submission, the *Nationalrat* must either vote a corresponding Federal Law in place of the ordinance or pass a resolution demanding that the ordinance immediately be invalidated. In addition, certain ordinary laws in Austria give the executive the power to take measures in times of economic crisis or scarcity in order to provide necessary supplies.

In Switzerland, the federal constitution contains no explicit provisions on emergency rule in the ordinary sense of the word. Several possibilities, however, can be distinguished. One is the regime of full powers (*régime des pleins pouvoirs*). The Swiss doctrine recognises that in case the Federal Assembly is unable to meet or the normal legislative procedure can no longer be followed, the Federal Council is implicitly empowered by the Constitution to take all necessary measures, even if they are unconstitutional, to protect the security, independence and the neutrality of the country, its national economic interests, etc. When the Federal Assembly is able to meet, it has the power to confirm this "state of necessity" and to grant full powers to the Federal Council. This regime was implemented only during the two world wars. The second is the "regime of strict necessity", when the parliament can no longer function and therefore the Federal Council assumes the power to legislate by decrees of necessity even derogating

from the Constitution. There is no example of such a regime in the constitutional history of Switzerland. The third are the possibilities offered by Article 102 of the Constitution, which gives the Federal Council the duty to look after the internal and external security of the country and to maintain its independence and neutrality. Since 1914, the Swiss government has invoked this article to issue ordinances, in times of immediate danger, in areas that have not previously been regulated by laws. Thus, in a sense, the Federal Council functions like an ordinary legislature. However, such ordinances cannot contain provisions against the Constitution, laws, and resolutions of the Federal Assembly. Therefore, this does not involve an emergency rule in the commonly used meaning of the word.

The United States does not have a specific legal regime for emergency situations. At the Federal level, the U.S. Constitution and federal legislation authorise the President, in certain limited and clearly defined circumstances, to sanction the use of federal troops to control domestic violence, suppress insurrections and enforce federal law. These laws do not, however, authorise the Executive to suspend or interfere with the normal operations of the other branches of the Federal Government (the Congress and the Judiciary) or to permit derogations from fundamental rights. Indeed, with only one exception (the right of habeas corpus, which the Congress may temporarily suspend when public safety so requires), constitutional rights remain in effect at all times. At State and local levels, a wide variety of emergency enabling provisions exist that permit the State Executive (State Governors, City Mayors, County Executives) to take emergency actions. These provisions are based on the general police power that has been reserved to the States by the U.S. Constitution. If not unreasonable or arbitrary, a State may infringe upon what might otherwise be regarded as constitutionally protected rights if it is necessary to protect public health, safety and welfare in an emergency.

The Italian Constitution refers only to the state of war (Article 78). In case of war, the term of the Chambers can be extended by a statute until the end of war. The prohibition of the infliction of the death penalty is suspended in cases provided for by military war laws. The jurisdiction of army judges can be extended by law; exceptions to the rules concerning appeal against the decisions of army judges to the Cassation Court are permitted; and the Chambers are allowed to give the Cabinet the necessary powers in accordance with the exigencies of the situation. However, such a transfer cannot involve the total suspension of the powers of the Parliament or of those of the other constitutional bodies. A suspension of the democratic and representative government is not allowed, and the Parliament cannot give up its functions of political direction and control. Furthermore, in times of peace, the Cabinet is entrusted with the power of adopting, in special situations of necessity and urgency, provisional measures by decrees having the force of law, which are to be submitted to the Chambers to be converted to acts of parliament. The decrees lose their legal force *ex tunc*, if they are not converted into statutes within sixty days of their publication (Article 77). The ordinary fascist legislation concerning a declaration of the state of public danger and of internal war is formally still in effect. However, it is generally thought that those rules are in contradiction with the present Constitution. The Constitutional Court declared that the executive decrees without the force of law cannot bring about restrictions on fundamental freedoms and human rights.

Finally, the constitutions of Japan, Luxembourg and San Marino do not mention emergency rule at all. Although in Japan the Police Law allows the Prime Minister to declare a state of emergency, this does not constitute an emergency rule in the ordinary sense of the word since the Law grants no extraordinary powers.

The constitutions of all other Council of Europe member States contain specific provisions on emergency situations. Since constitutional regulation usually

involves guarantees for fundamental rights and liberties, it is recommended that such emergency regimes be explicitly regulated in the constitutions.

Types of emergency rule

In a minority of countries (Cyprus, Malta, Liechtenstein) there is only one type of emergency rule. In Cyprus, for example, a Proclamation of Emergency may be issued in case of war or other public danger threatening the life of the nation. Similarly, the Constitution of the Slovak Republic provides for emergency rule without specifying its causes. In the ordinary legislation there are references to different types of emergency rule, such as the state of military alert, natural disasters and catastrophes. In a majority of cases, however, there are different types of emergency rule to deal with different kinds of emergencies in proportion to the gravity of the situation.

In Germany, the 1968 amendments to the Basic Law provide for three distinct types of emergency situation. A "state of defence" exists when the republic is under attack or threat of imminent attack by an armed force. A "state of tension" covers the conditions that precede a state of defence, such as a "situation approaching civil war or preparation for international war". "Internal state of emergency" covers natural disasters, grave accidents, threats to the free democratic order in the federation or the *Länder*, or dangers to public security or order.

The Spanish Constitution likewise adopts a diversified or plural model for declaring emergency rule referring to three specific situations which it terms "state of alarm", "state of emergency", and "state of siege" (or martial law). However, the Constitution does not define the causes for which emergency rule may be

declared, leaving this task to organic legislation. Based on such constitutional empowerment, the Organic Law 4/1981 adopts a differentiated model in which the different types of emergency rule are based on different causes. Thus, the Organic Law defines the "state of alarm" as a response to natural emergency situations in order to deal with catastrophes, calamities or public disasters, health crises and periods of scarcity of basic commodities. A state of alarm may also be declared in cases of paralysis of basic public services. A "state of emergency" is prescribed "when the free exercise of the citizen's rights and liberties or the normal functions of democratic institutions, public services essential for the community or any other aspect of public order are altered to the extent that the ordinary powers prove insufficient to re-establish or maintain them". Finally, the "state of siege" is defined as a military emergency which may be declared "in the event of an insurrection or threat of insurrection or an act of force against the sovereignty or independence, territorial integrity and constitutional order of Spain which cannot otherwise be resolved".

The Hungarian Constitution also mentions three different types of emergency : state of siege, state of emergency, state of public danger. The state of siege is declared in case of war or an immediate danger of foreign armed attack. In this case, a Council of National Defence is established to exercise the powers of the government, the President of the Republic, and other powers delegated to it by the National Assembly. The President of the Council of National Defence is the President of the Republic. Its members consist of the President of the National Assembly, leaders of the parliamentary party groups represented in the National Assembly, the Prime Minister, Ministers, the Commander and the Chief of the General Staff of the Hungarian Army. The state of emergency is declared in case of serious and violent acts which threaten the constitutional order or in case of natural or industrial disasters. During the state of emergency, exceptional measures are taken by the President of the Republic by decrees. Finally, the state

of public danger is declared in cases of less serious threats to public order and public security, and it allows the government to issue decrees that may contradict existing laws.

Similarly, the Turkish Constitution specifies three types of emergency rule, in addition to the state of war during which time the Parliament may decide to postpone elections for one year (Article 78). Of the three types of emergency rule foreseen in the Constitution, one is designed to deal with natural disasters, dangerous epidemic diseases or serious economic crises (Article 119). Another type of emergency rule is foreseen in the event of "the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence" (Article 120). Finally, a "state of siege" (martial law) may be declared "in the event of widespread acts of violence which are more dangerous than the cases necessitating a state of emergency and which are aimed at the destruction of the free democratic order or the fundamental rights and freedoms embodied in the Constitution; or in the event of war, the emergence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of either internal or external origin threatening the indivisibility of the nation" (Article 121).

In the majority of our countries the Constitution foresees two types of emergency rule. In Portugal, Greece, Romania, Lithuania, Poland and Russia, these are emergency rule and the state of siege. In Slovenia and Albania, they are the state of emergency and the state of war. In Finland, the Constitution refers to a state of defence and, under the Constitution, legislation on a state of readiness has also been adopted. The State of Readiness Act (1991) includes provisions which are applicable also in emergencies short of war or rebellion. In Canada, emergency

powers are implicit in the Constitution. The Federal Parliament adopted two laws, one dealing with measures in time of war, and the other, less drastic, dealing with emergency measures in time of peace.

The Constitution of Ireland makes provision for two types of situation which could be regarded as an emergency situation, namely (a) war or armed rebellion (Article 28 of the Constitution), and (b) a situation where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order (Article 38 of the Constitution). The basic difference between the two types is that in the first type the Government is empowered to take any executive steps, of whatever kind, which it considers necessary for the protection of the state, including the establishment of military tribunals. Also, the Parliament is empowered to pass laws which in normal times would be declared unconstitutional by the Supreme Court. The second type of emergency situation is much more limited in scope. In such situations the Government may publish a proclamation bringing into operation Part V of the Offences Against the State Act, 1939. Special non-jury courts may then be set up to deal with cases which would ordinarily be tried by a jury. Part V of the Act has been in operation since 1972. The special court which was set up then and exists at present consists of three judges drawn from the permanent judiciary, although the Act also authorises the appointment of lawyers and army officers. This court is subject to the normal rights of appeal to the ordinary appellate courts.

Declaration of emergency rule

In most countries, the power to declare emergency rule is divided between the legislative and executive branches. Normally, the executive proposes and the legislature approves the declaration of emergency rule.

In Germany, the state of defence and the state of tension need to be declared by a two-thirds majority of both the *Bundestag* and the *Bundesrat*. The government may request the *Bundestag* to initiate the state of defence. The decision must then be promulgated by the Federal President. The state of tension may also be initiated by a two-thirds majority of the *Bundestag* without the concurrence of the *Bundesrat* being necessary. The internal state of emergency may be initiated without a formal resolution of the *Bundestag*.

In Spain, the state of alarm may be declared by the Council of Ministers and the decree is communicated to the Congress of Deputies. The state of emergency may be declared by the Council of Ministers with the prior authorisation of the Congress of Deputies. The State of siege may be declared by an absolute majority vote of the Congress of Deputies at the exclusive request of the Council of Ministers.

In Turkey, all three types of emergency rule are declared by the Council of Ministers, presided over by the President of the Republic, and are immediately submitted to Parliament for approval.

In Greece, a state of siege may be declared by the Chamber of Deputies at the request of the Government. In case the Chamber of Deputies is unable to meet, it may be declared by the President of the Republic upon proposal of the Council of Ministers. In the case of emergency rule referred to by Article 44 of the Greek Constitution which covers natural catastrophes and economic crises, acts of a legislative nature may be issued by the President of the Republic upon proposal of

the Council of Ministers. However, these acts have to be submitted to the Chamber of Deputies for approval within forty days.

In Portugal, the state of siege and emergency rule may be declared by the President of the Republic upon proposal of the Government and prior authorisation by the Assembly of the Republic.

In Finland, both the state of defence and the state of readiness are adopted by a decree of the President of the Republic in session with the Council of Ministers, and are then submitted to the Parliament. While the decree proclaiming a state of defence is effective immediately, the decree proclaiming a state of readiness may become effective, as a rule, only after it has been approved by the Parliament.

In Russia, Lithuania, Slovakia and Romania, it is for the President of the Republic to declare emergency rule and for the Parliament to approve it. In Slovenia and Albania, the power to declare emergency rule belongs, in principle, to the legislature, but if the legislature is unable to meet, the President of the Republic may also declare emergency rule to be submitted to the legislature when it convenes. In Malta, emergency rule may be declared either by the President or by a resolution of the House of Representatives. In Liechtenstein, the Prince declares emergency rule with the countersignature of the Prime Minister.

In Canada, the federal executive declares emergency rule and the federal legislature ratifies it by simple majority. Similarly, in Cyprus, Parliament must ratify the government's Proclamation of Emergency by a simple majority only, and convenes automatically for such purpose. The decision of the government is also subject, however, to a right of veto by the President and the Vice President, exercised separately or jointly within 48 hours of the Proclamation.

In Kyrgyzstan, emergency rule on the whole territory of the Republic may only be declared by the Parliament. Although the President of the Republic may also declare emergency rule in certain parts of the country, this should be submitted for the approval of the Parliament on the same day. If it is not approved by the Parliament within three days by a two-thirds majority, the declaration of emergency rule becomes null and void.

In Latvia, a state of emergency may be declared by the Cabinet of Ministers. But if the Parliament does not affirm such resolution within 48 hours, the resolution shall be considered null and void from the moment it was declared.

In Ireland, in the event of war or armed rebellion, emergency rule is declared by the Parliament. In the event of an armed conflict in which the state is not a participant, each House may pass a resolution stating that arising out of the armed conflict a national emergency exists affecting the vital interests of the state, and may then enact laws on the basis of those resolutions. In either case, such laws are protected from a legal challenge as to their constitutionality. In the second type of emergency situation referred to above (a situation where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order) it is the Government which decides whether to bring Part V of the 1939 Act into operation. However, Dail Eireann has the right to annul that decision.

In Croatia emergency rule may be declared by the Parliament by a two-thirds majority of all representatives. If the Parliament is unable to convene, emergency rule is declared by the President of the Republic.

In Romania, a failure to publish the decree instituting emergency rule, duly signed by the President and countersigned by the Prime Minister, results in the nullity of

the decree. The President must also simultaneously request Parliament to approve the decree within 5 days of its promulgation, and Parliament convenes automatically for such purpose within 48 hours when it is not already sitting.

In the Slovak Republic, emergency rule is declared by the President of the Republic. However, this is contingent upon the passage of a special constitutional law by the National Council (Parliament) which requires a three-fifths majority of all deputies.

In Hungary, the power to declare a state of siege, to establish the Council of National Defence and to declare emergency rule belongs to the National Assembly. If the Assembly is unable to meet, these powers are exercised by the President of the Republic.

In Poland, martial law and the state of emergency are declared by the President of the Republic. There is no time-limit concerning martial law. On the other hand, the state of emergency may be introduced for a definite maximum period of three months and extended only once.

Some constitutions require a qualified parliamentary majority for the declaration of emergency rule. In Germany, this is a two-thirds majority of both the Bundestag and the Bundesrat for the declaration of the state of defence and the state of tension. In Spain, for the declaration of a state of siege, an absolute majority of the Congress of Deputies is required. In Hungary, the required majority for the declaration of the state of siege or emergency rule is a two-thirds majority of deputies. In Greece, if the Chamber of Deputies itself declares the state of siege, this requires a majority of three-fifths of the total number of deputies. If the Chamber of Deputies approves the state of siege declared by the executive, an absolute majority of the total number of deputies is required. In

Latvia, the absolute majority vote of the members present is required. In Malta, if emergency rule is declared by the House of Representatives, the required majority is two-thirds of all members. In Kyrgyzstan, too, the required majority is two-thirds of the total number of deputies.

Many constitutions provide a time-limit for emergency rule. This period is 14 days in Malta, 15 days in Greece and Portugal, 30 to 60 days in Russia, 2 months in Cyprus, 3 months for the state of defence and one year for the state of readiness in Finland, and 6 months in Latvia, Lithuania and Turkey. These periods are normally renewable.

Emergency rule: competencies

Emergency rule may or may not involve changes in the distribution of powers among organs of the State or shifts in the competences of such organs. In some cases (eg in Spain and Portugal) the normal functioning of the constitutional organs is not affected by the emergency rule.

In some federal States, the declaration of emergency rule may involve the shift of competences from the State and local authorities to the central government. For example, in Germany in a state of defence the Federal Government may send the Federal Border Guard throughout federal territory and may issue instructions directly to the Länder in matters of administration and State finances. Again, during a state of defence the legislative powers of the Federation are extended to matters within the legislative competence of the Länder. Similarly in Canada, the federal dimension of the constitution temporarily goes into eclipse and federal authorities (the legislature and the executive) may take measures that normally fall within the competence of State governments. The powers transferred to the federal

executive are vast, and its decrees have the force of law throughout the country. In Russia, emergency decrees issued by the President may introduce special forms of government over the territories where the state of emergency is proclaimed. In this case, the power of the local authorities may be temporarily restricted or suspended.

Another typical example is Hungary. Together with the declaration of a state of siege, a Council of National Defence is established to exercise the powers of the government, the President of the Republic, and other powers delegated to it by the National Assembly.

Normally, the declaration of a state of emergency involves the transfer of additional powers to the executive. Thus in Turkey, the Council of Ministers presided over by the President of the Republic may issue martial law or emergency rule law-amending ordinances which are different from ordinary delegated legislation, in that they do not require a prior enabling act of parliament and they can regulate the area of civil and political rights. In Croatia, the Chamber of Representatives may, for a maximum period of one year, authorise the Government to regulate issues falling within the competence of the Chamber of Representatives by decree-laws, except those relating to the elaboration of constitutionally guaranteed freedoms and human rights, the rights of minorities, the election system, the organisation, functioning and responsibilities of government bodies and local self-government. In Germany, the Basic Law does not grant the executive the competence to issue special emergency decree-laws. Nonetheless, during a state of defence legislative procedure can be simplified, in that urgent government bills may be presented to both Houses simultaneously to be considered immediately.

In Cyprus, in circumstances requiring immediate action the government can adopt ordinances strictly connected with the state of emergency, subject to a right of veto, separately or jointly, by the President and Vice President.

In some countries, the term of the legislative assemblies is extended during the emergency period: Italy (in a state of war), Germany (in a state of defence), Turkey (in a state of war), Poland, Lithuania (in a state of war), Slovenia, Hungary and Canada (if more than one-third of deputies do not oppose it). In many countries (Germany, Spain, Portugal, Greece, Poland, Hungary, Russia and Croatia) the dissolution of parliament during the period of emergency is prohibited.

In some cases, the establishment of military tribunals is specifically prohibited by the constitution (Russia). In others, military tribunals may be established, particularly in times of war. In Italy, in war-time the army judges have the jurisdiction provided for by special statutes to deal with military crimes committed by members of the army, but also with other crimes. Only the military war laws can provide for the death penalty. The right of appeal against the decisions of army judges to the Cassation Court may be suspended during the state of war. In Spain, the resolution of the Congress of Deputies declaring a state of siege also determines which crimes fall under military jurisdiction. However, this does not imply a broad assumption of judicial power on the part of military courts, nor the possibility of establishing courts martial, courts of exception being specifically prohibited by the Constitution. In Romania, the creation of special courts is forbidden under the Constitution. In Greece, in a state of siege the military tribunals become competent to try cases involving a number of crimes, particularly insubordination to the orders of military authorities, as well as crimes committed against the security of the State, the democratic regime and public order.

In Portugal, the declaration of the state of siege also specifies the crimes transferred to the competence of military tribunals. According to the law 44/86, it is for the military tribunals to try cases involving insubordination to the orders of martial law authorities, as well as crimes connected with the declaration of the state of siege, or crimes committed against the life, physical integrity and personal liberties of persons while the state of siege is in effect, the right of information, the safety of communications, property rights, and public order. In Hungary, in times of the state of siege the Council of National Defence, and in times of the state of emergency the President of the Republic has the power to create military tribunals, or to declare martial law in the entire country or in certain regions. The applicability of martial law may cover violent crimes against the security of the nation, crimes of insubordination, serious crimes committed against the lives of citizens, and war crimes. In Turkey, of the three types of emergency rule only the state of siege involves the establishing of martial law tribunals to try cases specified in the Act on the State of Siege. Crimes committed at most three months before the declaration of the state of siege and connected with the causes of the state of siege also fall within the competence of the military tribunals. Finally, in Finland (in a state of defence) and in Slovenia military courts may be established but mainly to try crimes committed by military personnel.

In some countries (Portugal, Greece, and Turkey) the state of siege also involves the transfer of certain police powers to the military authorities. In others (Germany, Finland, Russia, Poland, Hungary, Latvia and Malta) this is not possible.

In Ireland, police powers may be transferred to military authorities if legislation enacted on the basis of the parliamentary resolutions declaring a state of emergency so provided. Furthermore, military tribunals may be established in the

event of war or armed rebellion. The Constitution does not impose any restrictions on the scope of such tribunals and it does not require any separate legislation or parliamentary resolution to establish them; they derive their legitimacy from the mere fact of war or armed rebellion.

Finally, in some countries the constitution may not be amended during the time of emergency: Romania, Poland, Lithuania, Kyrgyzstan. In Hungary, the Council of National Defence has no power to suspend the application of the constitution. Likewise, the activities of the Constitutional Court may not be limited during a state of siege.

Emergency measures

In Carl J Friedrich's words "a government which cannot meet emergencies is bound to fall sooner or later. There is no object in arguing against such emergency powers on the ground that they endanger the constitutional morale, and hence the maintenance of the constitutional order". Normally emergency rule involves the restriction or suspension of fundamental rights and liberties. National legislations on this point vary a great deal. However, all Council of Europe member States are under the obligation to respect Article 15 of the European Convention of Human Rights. Under this article,

- "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

Thus, paragraph 1 of Article 15 of the Convention establishes the principle of proportionality, while paragraph 2 establishes a "hard core" of human rights that are not to be violated or derogated from even in times of emergency. Finally, paragraph 3 introduces the principle of notification which in itself can be considered a procedural guarantee since it prevents de facto emergency regimes. Some constitutions (eg Turkish Constitution, Article 15) repeat Article 15 of the Convention.

Similarly, Article 16 of the Latvian law on a State of Emergency states that "measures for a state of emergency shall conform to those international agreements and acts of international rights in the sphere of human rights which the Republic of Latvia has signed or acceded to". In Albania, the Law on Human Rights and Freedoms recognises a core area of human rights that cannot be restricted even under emergency rule : the right to life, freedom of expression, prohibition of torture, fair trial, due process of law, presumption of innocence, and equal protection by the laws.

In Romania, under the Constitution, the exercise of certain rights and freedoms can only be restricted by law and then only in defined circumstances. The Constitution further provides that any such restriction must be proportionate to the situation which gave rise to it, and must not attack the very existence of the right or freedom in question. Again, under the Constitution, certain rights and freedoms cannot be subject to any restrictions: the rights to life, to physical integrity, of access to courts to defend one's rights, freedom of thought and opinion, as well as freedom of religion.

In Croatia, under the emergency rule (Article 17 of the Constitution) the fundamental freedoms and human rights can be restricted to the extent strictly required by the exigencies of the situation and cannot result in the inequality of persons due to race, colour, sex, language, religion, national or social origin. Furthermore, even in the case of immediate danger to the existence of the state, the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to freedom of thought, conscience and religion and the right to freedom from retroactive criminal legislation cannot be restricted or derogated from.

In the Slovak Republic, despite the absence of constitutional provisions guaranteeing certain fundamental human rights and freedoms under emergency rule, Article 15 of the European Convention on Human Rights would fully apply in such a situation, since Article 11 of the Slovak Constitution states that "international instruments on human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements shall take precedence over national laws provided that international treaties and agreements guarantee greater constitutional rights and freedoms". Finally, the Hungarian Constitution contains a long list of fundamental rights and liberties that cannot be restricted or

suspended during times of state of siege, state of emergency or state of public danger.

In the Constitution of the Federal Republic of Germany there is a very important principle which is the philosophical foundation of the rule of law - the principle of human dignity. In Germany even in a state of emergency the principle laid down in Article 1 of the Basic Law protecting human dignity is untouchable. In addition, the Basic Law also prohibits any State action that would directly affect the "substance" or "core" area of any fundamental right. There are also some precise and particular restrictions resulting from a state of emergency.

Constitutions can also provide for safeguards peculiar to certain rights, as for example in Cyprus, where the Constitution establishes particular safeguards in respect of preventive detention in times of emergency.

In most cases the exercise of emergency powers further authorises governmental restriction, even suspension of rights and liberties beyond what is acceptable in normal times. However, there are also some constitutions in which governmental restriction of rights is not very different in emergency situations. For example, in the United States, a state of emergency is not considered to change the executive's powers, but rather to allow the exercise of pre-existing powers that may be implemented in emergencies.

Legislative control

Legislative control over the acts and actions of emergency rule authorities and special procedures for such control are important for the realisation of the rule of law and democracy. In most of the democratic constitutions the executive has the

right to declare emergency rule, subject to parliamentary approval. The question of by whom, how and when an emergency rule is to be terminated cannot also be left to executive enjoying its increased power. It must be the function of the Parliament. This implies a continuity of parliamentary life during the period of emergency. For that reason, some constitutions explicitly state that the legislature cannot be dissolved during the exercise of emergency powers.

In Germany one of the main intentions of the drafters of the emergency provisions in 1968 was to have Parliament participate in the decision-making process under all possible and foreseeable conditions. The state of defence and the state of tension exist only if they are initiated by a two-thirds majority of the Bundestag, and with regard to the state of defence the concurrence of the Bundesrat is necessary. If the Bundestag is unable to meet, legislative duties are assumed by the previously nominated Joint Committee. The Joint Committee (Parliament in miniature) has the power to control the government in times of emergency. However, the power to amend the Basic Law or the sovereign authority of the Federal Republic is not granted to the Joint Committee.

In some countries it is possible to issue decrees having the force of law during states of emergency. Such decrees present the problem of legislative control. As mentioned before, in Turkey during states of emergency the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue law-amending ordinances on matters necessitated by the emergency situation. Law-amending ordinances should be submitted to the Turkish Grand National Assembly on the same day for approval. According to the Constitution, the time limit and procedure for the approval of the emergency law-amending ordinances should be indicated in the Standing Orders of the Assembly. This means that there should be a special procedure for legislative control. However, the Parliament has

not yet adopted the new Standing Orders, and in the old one there is no special procedure for legislative control.

In Italy the decrees adopted by the Cabinet on the basis of the delegation of the necessary powers do not have to be submitted to Chambers. In spite of this, the Parliament may establish rules concerning the exercise of the necessary powers and the inspection of the activities of the Cabinet.

It may be recommended that the emergency situations capable of giving rise to the declaration of states of emergency should be clearly defined and delimited by the constitution and in all cases there should be a parliamentary monitoring mechanism on the declaration and extension (and termination) of states of emergency. Almost all constitutions contain provisions on a parliamentary control mechanism, and in some constitutions there are also special procedures for legislative control.

Judicial review

The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive (including military power in a martial law). However, emergency rule is a legal regime governed by the principles of legality of administration, based on the rule of law. The rule of law means a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent courts. In other words, the legal security of individuals should be guaranteed.

First of all, consideration may be given to whether there is any judicial review of the executive act declaring emergency rule or the legislative resolution approving it. There is no general agreement about the appropriateness of judicial review concerning the declaration of emergency rule. Because of its political nature the justiciability of a declaration of emergency presents special and difficult questions and problems. There are those who say that there should be no control at all by the judiciary and others who claim that a certain control would be appropriate.

In international law the above question is answered somewhat differently. Especially under the European Convention, the European Commission and Court have consistently declared themselves competent to examine emergency situations according to Article 15 of the ECHR. The right of States to declare a public emergency and to take measures derogating from their obligations under the Convention is recognised but also supervised by them. In international law, in evaluating the existence of a public emergency and the need for derogating measures, States enjoy a margin of discretion.

In many countries there is no judicial review of the executive act declaring emergency rule or the legislative resolution approving it. Normally, only the acts of the emergency rule authorities fall under the jurisdiction of the courts.

In spite of the fact that there is no unambiguous and clear-cut provision in the Constitution of the Republic of Turkey, the Constitutional Court and the Council of State have ruled that the decision of the Council of Ministers declaring states of siege or states of emergency is beyond their jurisdiction and have refused to examine the validity of such a declaration. In Hungary, Albania, Canada and Switzerland, the executive act or the legislative resolution approving the emergency cannot be reviewed by the courts. In Finland there is no judicial review of the executive act declaring emergency rule except in so far as any powers are

used by the executive before the decree in question has been approved by the Parliament.

In Ireland while the Supreme Court ruled that it had jurisdiction to review the procedural arrangements for the enactment of emergency legislation, it left open the question whether it has jurisdiction to review the contents of the resolutions of the Houses of Parliament. The Court ruled that there was a presumption (which could be displaced) that the contents of the resolutions stating that a national emergency existed was correct. While the constitutionality of the emergency legislation is protected from judicial review, this does not deprive a person who has been subjected to procedures authorised by the legislation of his right of recourse to the ordinary courts seeking judicial review of whether the authorities have complied with the requirements of the legislation.

In some countries the constitutional courts may control whether the declaration of emergency rule is compatible with international commitments. For example, in the Slovak Republic neither the Constitution nor other legal instrument provide for judicial review of the declaration of emergency, but if the constitutional law which empowers the President of the Republic to declare emergency rule, and legal regime of this rule, is found to be in conflict with international commitments, the Constitutional Court can be induced to determine whether the adopted instrument on emergency is in conflict with the international commitments of the Slovak Republic. The Constitutional Court of Slovenia also decides on whether a decision to introduce the emergency rule conforms with ratified international agreements and the general principles of international law. In addition to this, the Constitutional Court examines the constitutionality in respect of both form and substance of a decision to introduce emergency rule.

In other countries judicial review is limited. In Russia the courts have no right to assess the conditions that caused the declaration of emergency rule. However, the Constitutional Court of the Russian Federation decides on the compatibility of acts introducing emergency rule with the Constitution. In Malta the executive act declaring emergency is subject to judicial review. Yet, there is no specific provision which envisages judicial review of the legislative resolution approving the emergency rule. The review of the executive act would be of a procedural nature. Similarly, in Cyprus, such review is limited to the question of whether there has been compliance with the relevant constitutional provisions.

In a further group of countries judicial review of the executive act declaring emergency rule or the legislative resolution approving it is only a theoretical possibility. In Liechtenstein the question of judicial review is not settled, but according to the doctrine it is a possibility. In Spain according to the widely shared opinion judicial control over the declaration would be possible if the Constitutional Court equated the parliamentary authorisation or declaration of emergency powers to a norm having the force of law. In Italy the jurisdiction of the Constitutional Court is not suspended during the state of war; therefore there is always the possibility of judicial review of the statutes approved by the Parliament. This rule applies to the statute for the delegation of the necessary powers as well as the declaration of the state of war when it is approved by an ordinary statute.

An example of extensive judicial review can be found in Germany. In the Federal Republic of Germany, federal legislation approving emergency rule or executive acts declaring emergency can be reviewed by the Federal Constitutional Court. The Federal Constitutional Court has the right to review the material circumstances that led to the declaration of the emergency state of defence. Not only the declaration but also the determination of a state of defence can be

reviewed by the Federal Constitutional Court. In Portugal, Lithuania and Kyrgyzstan the Constitutional Court can also review the declaration of emergency rule.

On the other hand, judicial review over the acts of the emergency rule authorities, as opposed to the declaration itself, requires separate consideration. Decisions taken by the emergency rule authorities are typical unilateral administrative acts and actions and for this reason they should be reviewed by courts.

In Finland, the decisions of military authorities under the State of Defence Act cannot be challenged except as far as civilian property is used, moved or destroyed or labour or goods requisitioned, and the decisions of the Council of Ministers which must be submitted to the Parliament cannot be reviewed by a court.

As mentioned before, in Turkey it is possible to issue law-amending ordinances in emergency situations which according to the Constitution, are not subject to review of constitutionality by the Constitutional Court. Yet such ordinances should be submitted to the Parliament and after approval they will become ordinary acts of parliament subject to judicial review. In addition to this, according to the case law of the Constitutional Court, emergency ordinances can only be issued on matters necessitated by emergency situations. Therefore, the Constitutional Court has ruled that emergency measures and derogations in emergency ordinances should be applied only during the time of emergency and in the regions for which emergency rule is declared; furthermore, such ordinances cannot alter or repeal the ordinary laws of Turkey.

Recommendations

Admittedly, a variety of internal and external situations may arise in which the executive organ of the state must act quickly and decisively to protect the fundamental interests of the state and society. For that reason, public emergency conditions may involve both derogations from normal human rights standards and alterations in the arrangement of functions and powers among the branches of the state. However, there is always a potential for the abuse of state power, and experience has shown that the most serious violations of human rights tend to occur in emergency situations. The constitutional order should find appropriate legal principles and provisions to cope with problems created by emergency conditions. Here, our recommendations will be confined to matters touching upon human rights, because national legislation and regulations differ greatly on the institutional aspects of the problem. The following points can be made in order to suggest certain legal standards for public emergencies :

- a. The emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution. In other words, the existence of a real and imminent danger should be clearly specified. The above condition is expressed in the three main human rights treaties (ECHR, ICCPR, ACHR) as an "exceptional threat". According to the principle of exceptional threat, the derogation from human rights standards in emergencies is legitimate only in case of "war or public emergency threatening the life of the nation".
- b. De facto state of emergency should be avoided, and emergency rule should be officially declared. The corresponding condition in the three main human rights treaties is the requirement of notification, whereby the other

states party shall be informed of the provisions derogated from and the reasons therefor.

- c. The constitution should clearly specify which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances. The lists of non-derogable rights in the three main human rights treaties (ECHR, ICCPR, ACHR) contain four such rights: the right of life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle of non-retroactivity of penal laws. These four non-derogable rights which constitute the "irreducible core" of human rights should be explicitly phrased and sanctioned in the constitution. The inclusion of minimum guarantees against arbitrary detention and other guarantees protecting the right to a fair trial would also be important; furthermore, recourse to courts against acts and actions of the emergency rule authorities should be permitted. The foregoing rights and guarantees should be enjoyed by all without discrimination.
- d. The emergency measures and derogations from fundamental rights and liberties should be proportionate to the danger. In other words, derogations, restrictions and suspensions are acceptable only in case of war or a public emergency threatening the life of the nation; furthermore, such measures should be proportionate to the emergency. The principle of proportionality also includes what ACHR has called "the principle of temporariness" which means that emergency measures cannot last longer than the emergency itself, and the limitations that they bring about should be applied only in those geographical areas affected by the emergency. On the other hand, many of the measures taken under emergency rule do not imply any derogation from human rights standards. This is especially

true of measures at the lower level of emergency. Quite often, such measures only regulate the behaviour of people or the use of their property, or the executive may be authorised to take measures which otherwise would require legislative action.

- e. Even in a state of public emergency the fundamental principle of the rule of law should prevail. In other words, no-one should be put to trial before a court other than one previously determined by law.

Summary Table of Replies

This consolidated report is based upon replies to a questionnaire on emergency powers formulated by the European Commission for Democracy through Law.

Drawing upon summaries of the relevant law and practice in 32 countries, the report contains a concise repertoire of the constitutional and legislative regulation of emergency powers in several European and other States.

Although not an exhaustive study of comparative law, the diversity of legal models regulating emergency situations is illustrated by the variety of solutions adopted by different States to deal with such questions as what constitutes a public emergency, the types of emergency rule which can result, and in what circumstances. Particular attention is given to procedural and substantive safeguards for the exercise of emergency powers, including legislative control and judicial review of decisions and measures taken.

The report concludes with a set of recommendations addressed to any country undergoing constitutional reform.

The European Commission for Democracy through Law (Venice Commission) is a consultative body on questions of constitutional law, created within the Council of Europe.

It is made up of independent lawyers from member States of the Council of Europe, as well as from non-member States. Almost fifty States participate in the work of the Commission.

The Commission gives priority to its work on the strengthening of democratic institutions, on public rights and freedoms, and on the contribution of local and regional self-government to the development of democracy, in particular within the overall framework of constitutional reforms.

In addition to its consultative role, from time to time the Commission selects questions of particular constitutional significance or interest for comparative study and discussion within its UniDem (University for Democracy) programme.