



Geneva Centre for the Democratic Control of
Armed Forces (DCAF)

Policy Paper - №30

**Securing Democracy?
A Comparative Analysis of Emergency Powers
in Europe**

Anna Khakee

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ARMED FORCES (DCAF)

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List of Abbreviations

AT Const.	Austrian Constitution
BE Const.	Belgian Constitution
BG Const.	Bulgarian Constitution
CH Const.	Swiss Constitution
CoE	Council of Europe
CY Const.	Greek Cypriot Constitution
CZ Const.	Constitution of the Czech Republic
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DE Const.	German Constitution
DK Const.	Danish Constitution
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EE Const.	Estonian Constitution
EHRR	European Human Rights Report
EU	European Union
ES Const.	Spanish Constitution
FI Const.	Finnish Constitution
FR Const.	French Constitution
GC	General Comment
GR Const.	Greek Constitution
HU Const.	Hungarian Constitution
ICCPR	International Covenant on Civil and Political Rights
IE Const.	Irish Constitution
IT Const.	Italian Constitution
LT Const.	Lithuanian Constitution
LU Const.	Constitution of Luxembourg
LV Const.	Latvian Constitution
MT Const.	Maltese Constitution
NL Const.	Dutch Constitution
NO Const.	Norwegian Constitution
PL Const.	Polish Constitution
PT Const.	Portuguese Constitution
RO Const.	Romanian Constitution
SE Const.	Swedish Constitution
SI Const.	Slovenian Constitution
SK Const.	Constitution of the Slovak Republic

Securing Democracy? A Comparative Analysis of Emergency Powers in Europe

Anna Khakee

1. Introduction

It is widely agreed that, at present, states and societies face a number of complex (and partly new) threats and challenges, including pandemics, terrorist attacks, transnational organised crime, sudden and large scale population flows, as well as natural catastrophes resulting from global warming.¹ Political leaders often do not know how to tackle such multi-faceted and unfamiliar challenges, in particular if they emerge suddenly and take on large proportions. As a consequence, the reflex of resorting to emergency powers – i.e. to grant the government extraordinary powers beyond its normal constitutional role – can be strong in such situations. Declaring a state of exception does, however, come at a cost. In the past, emergency powers have virtually always implied limits on individual human rights and, while intended to secure the survival of the state, such extensive executive powers have not always secured the survival of democracy.² In other words, the risk of an undermining of the state's constitutional order, and in particular the role of parliament, the judiciary and other oversight bodies, always looms.

Not surprisingly, therefore, there is an ongoing debate in the United States on how to safeguard civil liberties and the system of checks and balances, given what has been called the “creeping imposition of emergency rule” after the events of 11 September 2001.³ Similarly, in France, there has been a heated discussion about the government's decision to impose a state of emergency (*état d'urgence*) in response to the unrest in the suburbs of Paris and other French cities in late 2005. Lately, Germans have been debating whether their constitution gives sufficient guidance and coverage in the case of another event similar to 11 September on the German territory, and in Italy in recent years, states of emergency have been used on occasions when there has been an unusually large influx of migrants – a hot topic in current Italian politics.

¹ The author wishes to thank Anders Eka from the Working Committee on Constitutional Reform at the Swedish Ministry of Justice for entrusting her with the task of comparing the European regulations on states of exception in view of possible changes to the Swedish constitution. Many thanks also go to Hans Born, Derek Lutterbeck and an anonymous reviewer for their valuable comments on earlier versions of this manuscript. The author is grateful to Oliver Diggelmann and Daniela Thurnherr for kindly pointing her to Swiss sources of information. She also wishes to thank Wendy Robinson at DCAF for a very thorough editing of the report. Any errors of fact or interpretation are solely the responsibility of the author.

² For a good introduction to the problems and issues surrounding emergency rule, see DCAF (2005). “States of Emergency” Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Centre for the Democratic Control of the Armed Forces), October.

³ For a good overview of the American literature on the topic, see Scheuerman, William E. (2006). “Emergency Powers and the Rule of Law After 9/11” *Journal of Political Philosophy*, 14:1, pp 61-84.

As these few examples indicate, emergency powers are being used in Europe today, and their use is often contested. In theory, emergency powers⁴ are those special prerogatives that a government or a president can resort to in extraordinary situations such as war, insurgency, terrorist attacks, or other severe threats to the state, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives. It is commonly agreed that these powers should only be used in such extraordinary circumstances, and even then only to the extent that the situation requires. Reality is more complex, however, and as already mentioned, two aspects of emergency rule in particular are often problematic: (1) safeguarding the balance of powers, i.e. the powers of parliament and the judiciary *vis-à-vis* the executive, and (2) protecting human rights and the rule of law.

This policy paper examines the regulation of the use of emergency powers in European states (encompassing EU member states, Norway and Switzerland), and attempts to assess to what extent and in what ways existing rules protect the democratic order. This is done by focusing on two interrelated sets of questions: Firstly, how has the tension between emergency powers on the one hand and the principles of democracy and human rights on the other, been resolved in European constitutions and other relevant legislation? Or, more concretely, what is the role of parliament – as the state institution at the heart of the democratic system – in declaring, supervising, and ending emergency powers? What rights and freedoms cannot be suspended even during a state of exception? To what extent and how is the survival of the democratic order ensured? The second question concerns the present-day security threats: to what extent are current emergency regulations adapted to today's security challenges? Do European constitutions provide for a differentiated response to emergencies? These questions are important because if, in an emergency, a government is left without well-adapted constitutional tools, *ad hoc* or less suitable solutions may hastily be sought and those proposed may not offer enough safeguards for parliamentary and judicial oversight, as well as for the protection of human rights and the rule of law.

The current debate on emergency rule – be it theoretical or policy oriented – is heavily influenced by a “classical” theoretician: the German pre-war philosopher Carl Schmitt, whose main assertion, crudely put, is that liberalism and exception cannot be reconciled. In Schmitt's view, emergencies (which are ubiquitous) cannot be foreseen and constrained by law and will therefore require the exercise of absolute power: liberalism will always have to yield to authoritarian rule. Giorgio Agamben is perhaps the most widely cited theoretician on emergency powers post-9/11, and he follows Schmitt's argument (without, however, adopting Schmitt's pro-authoritarian prescriptive stances). In his *State of Exception*, Agamben claims that the state of emergency has become “the dominant paradigm

⁴ A number of terms are used to cover the various forms of extraordinary powers granted to governments in periods of crisis, such as “state of emergency”, “state of exception”, “state of alarm”, “state of siege”, “martial law” or even “times of war”. The author has tried to closely follow each state's terminology.

of government in contemporary politics”, and, echoing Schmitt, that the state of exception necessarily implies operating outside of the laws and the legal order.⁵

Schmitt has also coloured the more policy-oriented discussions on states of emergency after 9/11. While the “Schmitteans” argue that emergency powers necessarily fall outside the constitutional order, “anti-Schmitteans” maintain that emergency powers can, and should, be integrated into the state’s legal order.⁶ One example of a counter-Schmittean argument is that made by Bruce Ackermann. He suggests that post 9/11, the United States, which so far has not had any coherent body of rules regarding states of emergency, should consider creating what he calls an “emergency constitution”. An emergency constitution, in his view, is the best way to minimise the risk of a creeping, gradual, and permanent undermining of basic civil liberties in a society threatened by terrorism.⁷ In other words, Ackermann proposes creating legal boundaries and regulations circumscribing emergency rule, and offers his own, in many ways ingenious approach to do so. Oren Gross, also focusing on terrorism, argues against this, taking a more Schmittean position. He puts forward a solution that allows for emergency measures, but construes them as external to the law: decision-makers should publicly acknowledge that any emergency measures they adopt are extra-legal.⁸ In an even clearer reference to Schmitt, Mark Tushnet basically agrees: emergency powers, which are – in his view – by their very nature extra-constitutional, cannot be controlled by the democratic institutions, but only by a mobilised citizenry, standing up for democracy.⁹ To conclude, then, the more policy-oriented literature not only has Schmitt as a common reference point – either in a positive or negative sense – , but also shares some additional commonalities: a clear focus on terrorism; and a search for models appropriate in the US post-9/11 context in particular. If comparisons are drawn, they are mostly confined to Canada, Israel and the United Kingdom, and are brief.¹⁰ A European perspective and a more thorough comparison of current regulations in various European states have so far been lacking.

⁵ Cited in Scheuerman (2006), *op cit*. See also Johns, Fleur (2005). “Guantánamo Bay and the Annihilation of the Exception” *The European Journal of International Law* 16:4; Neal Andrew W. (2006). “Foucault in Guantánamo: Towards an Archaeology of the Exception” *Security Dialogue*, 37:1, pp.31-46; Prozorov, Sergei (2005). “X/Xs: Toward a General Theory of the Exception” *Alternatives: Global, Local, Political*, pp. 81-112.

⁶ In so doing, they come closer to another classical thinker on the subject, Clinton Rossiter (Rossiter, Clinton (1948 [2002]) *Constitutional Dictatorship: Crisis Government in Modern Democracies* Princeton University Press

⁷ Ackerman, Bruce (2004). “The Emergency Constitution” *Yale Law Journal* Vol. 113 Vol. 113:1029 pp.1029-1091.

⁸ Gross, Oren (2003). “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?” *Yale Law Journal*, No. 112, pp. 1011-1134.

⁹ Mark Tushnet (2005). “Emergencies and the Idea of Constitutionalism” in: *The Constitution in Wartime: Beyond Alarmism and Complacency* Durham: Duke University Press.

¹⁰ This is also valid for someone like Kim Lane Scheppele, whose basic argument is comparative: she stresses that the reason why the international and national state of emergency imposed by the US after 9/11 was so forcefully rejected internationally is that “the international community has moved on from the Schmittean framework”. European states, learning the lessons from the horrors of Nazism, fascism, and communism, have carefully regulated emergency rule in their constitutions. However, as we shall see, she is able to justify her argument regarding European states of emergency being “filled up with more legal content” and legal guarantees because of her limited use of mainly the German constitution, omitting European states that do not carefully regulate states of emergency (Scheppele, Kim (2004). “Law in a Time of Emergency: States of Exception and the Temptations of 9/11” *University of Pennsylvania Journal of Constitutional Law*, No. 6, pp. 1008, 1069, 1079).

This study seeks to fill this gap by providing an overview of the regulation of emergency rule in European constitutions, with a focus on how the tension between emergency powers on the one hand and the principles of democracy and human rights on the other has been resolved. It shows that European countries differ considerably as to their constitutional regulation of emergency powers. Some states – often those with an unhappy experience of emergency rule or authoritarian government in recent history, such as Germany, Greece, Portugal, Spain and some of the newer democracies of Central and Eastern Europe – have detailed constitutional rules to be applied in emergencies. Other constitutions, many of them Western European, contain very little on emergency powers. There are several reasons for this absence of constitutional regulations of emergency powers. Some European countries do not provide for states of exception *per se* in their legal systems. Instead, they have certain rules enabling speedier parliamentary decision-making or the delegation of some legislative powers etc., which can in principle be used in all kinds of circumstances when speed is of essence (say for example to respond to a sudden influx of illegal drugs or a surge in some other form of crime, in an economic crisis, or when a budget reallocation needs to be made quickly) and not only in serious emergencies, which is the focus of this study.¹¹ Another reason for the absence of constitutional norms on emergency powers is that these are regulated elsewhere, by ordinary law or so-called organic law.¹² A third reason is that emergency powers are guided not by law, but by unwritten rules (often labelled “doctrine of necessity”).

European constitutions differ not only in terms of *existence* and *scope* of emergency regulations but also with regard to their *contents*: the role they give to parliament and other state bodies responsible for oversight during an emergency, the protection of fundamental freedoms, and safeguards for the survival of the democratic political order. The definition of threats also varies significantly, with some countries solely focused on more “classical” threats to the state such as foreign invasion and conventional warfare, while others include industrial accidents, natural calamities, or serious threats to the “constitutional order”. This study also highlights that the Schmittean debate on whether emergency powers are to be conceived of as extra-constitutional or as rule-bound is also reflected in European constitutions: some countries, such as Switzerland, Norway, and (arguably) France have adopted a conception of emergency powers as largely external to the law, while others, such as Germany and Spain, carefully regulate and circumscribe emergency powers in their constitutions and other legislation.

The policy paper is divided into two parts: Section 2 provides an examination of the constitutional regulation of emergency powers across 28 European countries: here, the geographical focus is broad – including the EU states, Norway and Switzerland – but the analysis is confined to the texts of the respective constitutions. Section 3 digs deeper into the national systems. It comprises seven case studies (on Finland, France, Germany, Norway, Spain, Switzerland, and the United Kingdom), which go beyond the constitutions and take into account other

¹¹ Such constitutional rules regarding speedy decision-making hence fall outside the scope of this analysis.

¹² Organic laws have a special status in between the constitution and ordinary laws.

types of legislation as well as actual practice. The paper concludes with a series of policy recommendations.

2. Constitutional Protection of the Democratic Order During States of Exception: No European Consensus

2.1 Introduction

What does the regulation of emergency powers in European constitutions look like? How are potential emergencies defined? Do the constitutions contain different levels or forms of emergency powers? Who decides on the declaration of emergency powers, its duration, prolongation and end? Do the constitutions provide for parliamentary and/or judicial oversight and control of emergency rule? What basic constitutional guarantees are made for the preservation and the survival of the democratic order? Which human rights and fundamental freedoms are protected at all times (so-called non-derogable rights)? This section attempts to answer these questions as concerns the constitutions of the EU member states, Norway and Switzerland.¹³ It offers an analytical overview of how European constitutions regulate emergency rule, with more details regarding each individual constitution contained in a set of tables which feature in the annexe to this report.¹⁴

It must be noted that, from an international law perspective, states are not free to shape their emergency legislation entirely as they wish. Many of the most important international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and (in the pan-American context) the American Convention on Human Rights, enumerate a number of so-called non-derogable human rights, which cannot be suspended in any circumstances, including during a state of emergency or in wartime. In the wake of the democratisation of large parts of Central and Eastern Europe after 1989, recommendations regarding the constitutional regulation of emergency powers were also made by the Venice Commission within the Council of Europe.

The list of non-derogable rights in the international instruments vary somewhat, but generally encompass the right to life, the prohibition of slavery and of torture or cruel, inhuman or degrading treatment or punishment, as well as the principle of non-retroactivity of penal law (no crime without law). According to the Venice Commission, it is also crucial to maintain certain other rights during a state of emergency, in particular minimum guarantees against arbitrary detention, the right

¹³ The United Kingdom, lacking a written constitution, is not part of the analysis in this section: it is however treated in a case study in section 3.

¹⁴ Surprisingly perhaps given the centrality of the document to a state's constitutional order, official translations of European constitutions are of very varying quality, which has in certain instances made the analysis more difficult.

to a fair trial and to recourse to courts against acts and actions of the authorities wielding emergency powers. Moreover, rights should be enjoyed by everyone without discrimination.¹⁵

The instruments also provide rules for how and in what circumstances emergency regulations which derogates from certain (derogable) rights can be established. According to the ECHR Art 15, derogations can only be made in times of “war or other public emergency threatening the life of the nation”, and the Secretary General of the Council of Europe shall be kept fully informed (i.e. the convention establishes a system of notification). A number of qualifying criteria, developed in European Court of Human Rights case law, further restrain the usage of emergency rule.¹⁶ The same is true for the ICCPR Art 4.¹⁷

On the question of the division of powers between branches of government and the preservation of the democratic order during states of emergency, however, the human rights instruments remain silent. The Venice Commission also avoids making recommendations in this area, confining itself to “matters touching upon human rights, because national legislation and regulations differ greatly on the institutional aspects of the problem”.¹⁸ Only limited guidance is given to national constitutional drafters and lawmakers regarding this important issue. This has also arguably contributed to the significant differences in constitutional models of emergency rule surveyed in this section.

2.2 Types of States of Exception

Emergency situations differ greatly: pandemics and natural catastrophes tend to have different effects and require different responses than insurgencies or attempted *coups d'état*. Terrorist attacks, again, will be different from severe economic crises or an armed aggression of a foreign state. This diversity of possible emergencies is one of the thorniest issues that constitutional drafters and scholars have had to grapple with. It is also one of the reasons why the debate (reviewed in the introduction to this report) on whether responses to emergencies can indeed be regulated by law is so fierce. Arguably, however, a system that allows for a differentiated approach (i.e. a more limited form of emergency powers in the case of, for example, a large scale industrial accident and more comprehensive forms of emergency rules for wartime etc.) is less prone to

¹⁵ Venice Commission - European Commission for Democracy through Law (1995). “Emergency powers” by Ergun Özbudun and Mehmet Turhan, in the series Science and technique of democracy No. 12 CDL-STD(1995) 012, Strasburg. [http://www.venice.coe.int/docs/1995/CDL-STD\(1995\)012-e.asp](http://www.venice.coe.int/docs/1995/CDL-STD(1995)012-e.asp), “Recommendations”.

¹⁶ As developed in the following leading cases: *Lawless v Ireland* (No 3) (1961) 1 EHRR 15; *Askoy v. Turkey*, Judgment of 18 December 1996, 23 EHRR 553; *Brogan v. UK* A 145 (1988) 11 EHRR 117; *Brannigan and McBride* A 258-B (1993) 17 EHRR 539. (The author is grateful to an anonymous reviewer for making this addition)

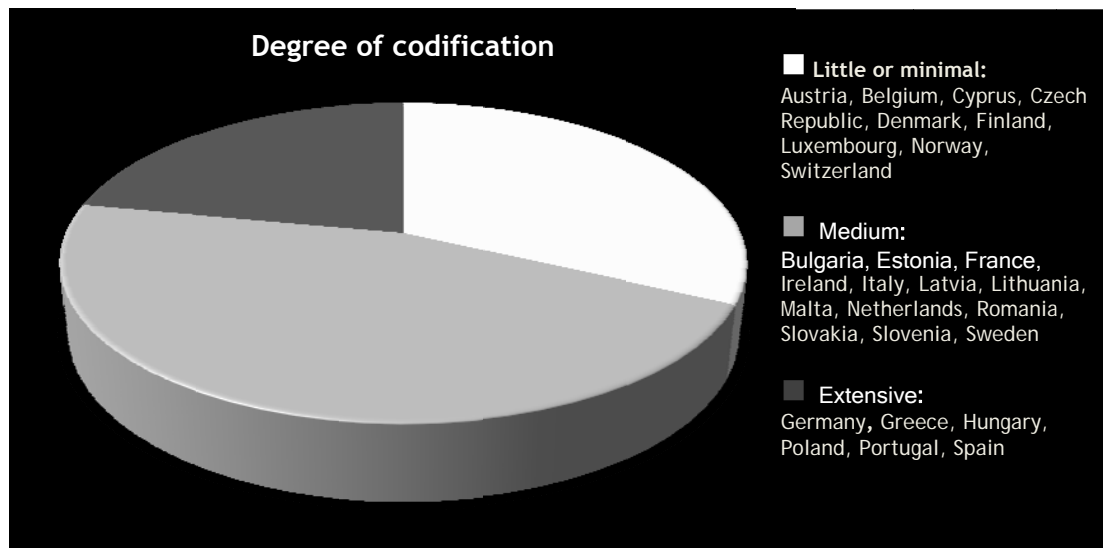
¹⁷ See General Comment No. 29 of the Human Rights Committee on derogations during a state of emergency (article 4) [2001]. For a thorough discussion of the issues of non-derogable rights and the proclamation of a state of exception, see Chowdhury, Subrata Roy (1989). *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. London: Pinter Publishers and Fitzpatrick, Joan (1994). *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* University of Pennsylvania Press.

¹⁸ Venice Commission 1995, *opt cit.* “Recommendations”.

political over-reaction than one that comprises only one single form of emergency powers.

To what extent, then, do the current constitutions of European states contain definitions of states of emergency? Which European constitutions have adopted a differentiated approach to emergency powers? As Table A2.1 indicates, many Western European constitutions do not explicitly provide for any state of emergency at all, but rather contain references – often only *en passant* – to “extraordinary circumstances”, “international crisis”, “particularly urgent situations”, or “times of war”. The Norwegian constitution, for example, makes only one mention of “extraordinary circumstances, such as hostile invasion or infectious disease”, to stipulate that in such cases the parliament may meet outside the capital: no other implications of extraordinary circumstances are provided for. Similarly, the Austrian constitution regulates the role of the federal armed forces in protecting the constitutional order and public security and in assisting in cases of natural disasters or other serious calamities (including the right of the armed forces to intervene on their own initiative in certain cases when the civilian authorities are incapacitated). The constitution also entitles the federal authorities to take special measures to ensure basic supplies in times of war. Yet, few other implications of war, threats to the constitutional order and public security, natural disasters or other serious calamities are provided for.

Figure 2.1 Degree of codification of emergency rule in European constitutions: a rough classification



That said, more than half of the 28 European constitutions surveyed regulate in one way or another at least two forms of states of exception. In many cases, the distinction is made between situations of war (normally regulated by martial law or under the heading “state of war”) on the one hand, and other types of emergencies, on the other hand. Countries with a recent experience of authoritarian rule tend to have more fine-grained distinctions in their constitutions. Estonia, Poland, and Spain thus have a similar three-level system,

with a state of alarm dealing with natural disasters and the like, a state of emergency, and a state of siege/war.¹⁹ Uniquely, the Hungarian constitution mentions as many as five different states of exception, although the difference between them is not always clear.

Given that the shape and form of future emergencies are difficult to predict, European constitutions generally do not provide detailed descriptions of the types of threats covered by the state (or states) of exception. Generally, formulas such as “threats to the constitutional order”, “serious and immediate threats to public order” or “threats to territorial integrity and independence” are preferred. If the enumerations are more specific, they tend to remain open-ended. Thus, in the Estonian definition of an “emergency” (the lowest level of the three states of exception in the Estonian system) – “a natural disaster or a catastrophe” – catastrophe is not further defined. At times, fairly specific threats (such as a *coup d'état*) are combined with more general wordings (“imminent threat against national security”) such as is the case in the Greek constitution where a state of siege can be declared “[i]n case of war or mobilisation owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime”. Interestingly, no European constitution makes specific mention of terrorism as a basis for proclaiming a state of emergency.

2.3 Declaration, Prolongation and Termination of Emergency Rule

Only a handful of European constitutions remain silent on how emergency rule is declared. In fact, declaration is one of the few aspects of emergency rule that is covered in the great majority of European constitutions (see Table A2.2). According to most European basic laws that regulate the issue, parliaments must be involved in the decision to impose emergency rule. Most of the time, they act on a proposal or a declaration of the government or the president (however, in two cases, the Czech and the Irish constitutions, the parliament can act alone). Often, more stringent conditions apply to such a parliamentary decision or approval than to regular legislative acts: requirements of a larger majority and/or a majority of all MPs (not only those present) are common. An interesting exception can be found in the Polish constitution, whereby an absolute majority of votes (in the presence of at least half the statutory number of MPs) is required to *annul* the president’s decision on a state of emergency or martial law.

Given that emergency rule must often be imposed without delay, supplementary rules exist in many European constitutions for the case that parliament cannot be rapidly convened. In such cases, it is often up to the government or the president to declare emergency rule, with parliamentary deliberation over the decision taking place at its next session. To avoid leaving the decision solely to the executive

¹⁹ Romania and Slovakia have also adopted a three-level system, but the types of threats that each of the levels are supposed to deal with have not been defined in the constitution. Other countries, such as France, also have a three-tier system although with differences in gradation and with one or two of the states of exception regulated only outside the constitution.

should the parliament be incapacitated, a few European states have sought alternative solutions. Thus, in the German case, it is up to the so-called Joint Committee (a kind of mini-parliament replacing the Bundestag and the Bundesrat whenever necessary during a state of defence, see below section 2.4) to take the decision, and according to the Portuguese constitution, granting permission is conferred to the Standing Committee of parliament. The Hungarian constitution has adopted a slightly different model, with the speaker of parliament, the chairperson of the constitutional court and the prime minister jointly deciding whether the president should be entitled to introduce a state of emergency, a state of national crisis or a state of war in the parliament's place. The parliament, in its first session, decides by a two thirds majority of all MPs upon the legality and necessity of the decision.

In certain European constitutions, parliamentary involvement is weaker. In France, the president alone (after consultation with the prime minister, the presidents of the assemblies and the Constitutional Council) can impose the most far-reaching type of state of exception in the French system, the so-called exceptional powers. Similarly, in Slovakia, the president declares a state of emergency or a state of war on the proposal of the government, which should take its decision collectively. This solution is quite unusual, however. Often, pure executive decision-making is confined to the *least* serious forms of state of exception (used in case of a large-scale accident, pandemic, natural calamity, or the like), and in such cases, there is usually a constitutionally regulated time limit for its duration.

Comparatively few European constitutions have explicit rules regarding the prolongation and termination of states of exception: almost half have no regulations at all; others have regulations that are much less detailed than those on the imposition of emergency rule (Table A2.3). Surprisingly, even certain constitutions such as the Hungarian one, that have detailed and even ingenious rules regarding the declaration of a state of exception, have left the issue of its prolongation and termination unregulated. In the cases where explicit constitutional rules exist, they often mirror regulations regarding the imposition of emergency rule: for example, in Ireland, it is the parliament that decides when a public emergency or a time of war or armed rebellion shall cease and in Slovakia, it is again the president, on the proposal of the government, who terminates a state of emergency or a state of war. It is also relatively common to set a time limit for a state of exception, without any further regulation. This begs the question of how to proceed if the emergency situation drags on beyond the constitutional time limit for emergency rule.

As in many other areas of emergency regulation, the most stringent constitutional rules are found in countries with a relatively recent experience of authoritarian rule, such as Germany, Greece, Spain, and a handful of other countries. According to the German constitution, a *Spannungsfall* (the less serious of the two constitutionally regulated states of exception) is terminated whenever the Bundestag so decides. A *Verteidigungsfall* (state of defence) is terminated whenever

the Bundestag, with the approval of the Bundesrat, so decides. The Bundesrat can demand that the Bundestag deliberate the issue of termination. The Greek constitution stipulates a time limit of 15 days for a state of siege. It can be prolonged for 15-day periods by parliamentary decision, taken by absolute majority. According to the Spanish constitution, the time limit for a state of alarm is 15 days, whereas it is 30 days for a state of emergency. Congress decides on time limits for a state of siege. A state of alarm can be prolonged by Congress. A state of emergency can be prolonged for another 30 days, following the same procedure as for the proclamation of a state of emergency.

2.4 Oversight and Maintenance of Democratic Institutions During a State of Exception

It is perhaps in the area of oversight and regarding the workings of the democratic institutions during a state of emergency that European constitutions diverge the most. First, there are considerable differences regarding the extent of regulations: some constitutions are entirely silent on the effects of emergency powers on the role of the courts and on the balance between parliament, government and head of state, while others include very detailed systems of decision-making and transfer of powers (see Table A2.4). Second, there are big differences as to how emergency powers affect the balance of power and possibilities for oversight: In Bulgaria, for example, a Grand National Assembly takes on the functions of the parliament in an emergency. The Grand National Assembly has 400 deputies, while parliament has 240. An emergency thus perhaps paradoxically entails a parliamentary procedure that is potentially more cumbersome than in a normal state of affairs. The Portuguese constitution stipulates that a declaration of a state of siege or a state of emergency must not affect the constitutional responsibilities and functions of the main governing institutions, including the self-government bodies of the autonomous regions. In Slovakia, in contrast, the president shall dissolve parliament during war, or during a so-called “war state”²⁰ or an exceptional state: the parliament hence ceases to function entirely. Oversight is instead confined to the Constitutional Court.

Bulgaria and Slovakia are extremes, however. More common is the transfer of some powers by parliament to the government or the president, who has the right to issue regulations that go against existing laws. Also relatively common is speedier parliamentary decision-making and joint decision-making of both chambers of parliament. As a counter-balance, such laws and regulations are often temporary, and/or must be approved by parliament within a set period of time failing which they automatically lapse.

²⁰ The official translation of the Slovak constitution is opaque and its terminology somewhat unusual. Moreover, the version of the Constitutional Court (http://www.concourt.sk/en/A_ustava/ustava_a.pdf), used here, differs in important respects from that of the government office (<http://www.government.gov.sk/9714/the-constitution-of-the-slovak-republic.php?menu=1297>). The information on Slovakia must hence be treated with utmost caution.

A couple of constitutions stipulate that “mini-parliaments” replace the legislature during war or similar situations. This is the case in Sweden as well as in Germany, where, during a state of defence, the so-called Joint Committee can determine that the Bundestag cannot be convened or cannot reach *quorum* and that, as a consequence, the Joint Committee replaces both the Bundestag and the Bundesrat and exercises their rights as one body. The Swedish constitution provides for a similar so-called War Delegation. The Hungarian constitution contains provisions regarding crisis decision-making: it provides for a National Defence Council composed of the president, the speaker of parliament, the floor leaders of the political parties represented in parliament, the prime minister, the ministers, and the chief of staff of the armed forces with the right of consultation. In severe emergencies, the National Defence Council exercises the powers of the president and the government, as well as the powers transferred to it by the parliament.

Approximately one third of European constitutions contain no provisions specifically designed to ensure the survival of the democratic order during states of exception, but the majority do (see Table A2.5). Some of the most common protective mechanisms concern the parliament as a key democratic institution. Given that elections and campaigning can seldom be conducted without severe disturbances in a serious emergency, many constitutions provide for the postponement of elections and the prolongation of parliamentary terms. Equally common is the compulsory convening of parliament rapidly after a state of exception has been proclaimed and the prohibition to dissolve the parliament.

Another common safeguard is the prohibition to alter the constitution – and, in certain cases, other pieces of important legislation such as the election laws and the laws governing the state of emergency – during the state of exception. This is a way of trying to make sure that leaders who have become too fond of wielding extensive powers cannot alter the rules of the game to perpetuate their rule. Ireland is an outlier in this respect: In the case of war or armed rebellion, the constitution is practically suspended: “Nothing in this Constitution other than Article 15.5.2° [which forbids parliament to introduce the death penalty] shall be invoked to invalidate any law enacted by [the parliament] which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law”.

2.5 Judicial Control and Oversight

Relatively few European constitutions emphasise judicial control of the authorities wielding emergency powers: many are entirely silent on the issue. Two exceptions are the German and the Hungarian constitutions, which stipulate that the Constitutional Court must continue to function normally, even during emergency rule. In the German case, the only exception that can be made is where the Court itself decides that its working methods must be adjusted to the new situation. Only in one case (Slovakia) does the constitution explicitly provide for judicial controls: there, the Constitutional Court examines the constitutionality of the proclamation of a state of emergency or a state of exception, as well as of measures subsequently taken by the emergency government. Given that the parliament is dissolved during states of exception in Slovakia (see above), the judicial control mechanism takes on even greater significance.

Likewise, other alterations in the judicial system during emergency rule are not treated in detail in any European constitution. A number of basic laws mention the establishment of extraordinary courts or the extension of the jurisdiction of military tribunals (see Table A2.4). The right to appeal may also be restricted, such as in Italy as concerns sentences of the military tribunals. The Swiss constitution explicitly rules out creating *ad-hoc* tribunals, but many others remain silent on the issue.

2.6 The Protection of Human Rights During States of Exception

European constitutions as a rule fall into one of three categories as far as the protection of human rights during emergency rule are concerned.²¹ Some constitutions do not mention the issue at all, or stipulate that it should be settled in other types of legislation. The majority of states that fall into this category are Western European ones, including Belgium, Denmark, France, Italy, and Norway, but a few of the newer Central European democracies (Czech Republic, Latvia and Slovakia) also feature.²²

Other constitutions, such as those of Austria, Greece, Lithuania, Malta, Netherlands, and Spain, list the rights that *may* be curtailed during emergency rule. The list of derogable rights vary somewhat from one country to the next, but often include the freedom of movement, the freedom of assembly, the freedom of association, free speech, secrecy of correspondence/ right to privacy, the sanctity of the home, and certain rights during arrest and/or trial. Uniquely, the Maltese

²¹ Due to space constraints, no table on the protection of human rights during states of exception is provided. The following constitutional articles were consulted for the analysis in this sub-section: AT Basic Law on the General Rights of Nationals art. 10; BG Const. art. 57.3; CH Const. art. 36.1, 3-4; DE Const. arts. 17a.2; 115c.2; EE Const. art. 130; ES Const. art. 55.1; FI Const. art. 23; GR Const. art. 48.1; HU Const. art. 8.4; IE Const. art. 40.4.5; LT Const. art. 145; LU Const. art. 113; MT Const. arts. 34.5, 45.4.e; NL Const. art. 103.2; PL Const. art. 233.1; PT Const. art. 19.6; RO Const. art. 53; SE Const. Chapter 2 arts. 12-16, 23; SI Const. art. 16; SK Const. art. 51.2.

²² The constitution of Cyprus (art. 33.1) stipulates that “[s]ubject to the provisions of this Constitution relating to a state of emergency” fundamental rights and liberties cannot be further limited or restricted. As no such provisions as regards basic rights during a state of emergency are to be found in the constitution, it can be assumed that no restrictions can be made.

list of derogable rights includes the principle of non-discrimination. According to the German constitution, only four rights, namely freedom of movement, the sanctity of the home, compensation for expropriation, and certain rules regarding arrest (allowed for up to four days during a state of defence), are derogable. According to the Irish constitution, the protection against unlawful detention is curtailed during a state of war or armed rebellion; the constitution contains no further rules regarding restrictions of human rights during states of exception. The Romanian constitution admits that restrictions in certain rights are made, but the measure “shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.”

Following the model employed in the international conventions, a third set of constitutions, including those of Bulgaria, Estonia, Hungary, Poland, Portugal, and Slovenia, list rights which are *non-derogable*. Again, national variations as to the list of non-derogable rights are legion, but a common core can be discerned. It is virtually always the case that the right to life, the prohibition of torture and other inhuman or degrading treatment or punishment, and the non-retroactivity of penal law, are included. Other common non-derogable rights include the inalienable dignity of the person, right to citizenship, right to a fair trial or certain rights during trial, freedom of religion and belief, rights when under arrest, and, in the Estonian and Polish constitution, non-discrimination. Surprisingly, the prohibition of slavery and servitude (one of the non-derogable rights in the international human rights conventions) is remarkable by its absence.

The Swiss constitution adopts a solution which is somewhat different from the others: it states that severe restrictions may only occur in the case of a serious, direct and imminent danger and must be proportional to the purpose. The “essence of basic rights” remains inviolable. The constitution of Luxemburg is in principle silent on the issue of non-derogable rights, but the general rule that none of the paragraphs of the constitution may be temporarily suspended should presumably apply to situations of emergency as well.

3. Legislation and Practice in Selected European States

3.1 Introduction

Section 2 showed that there are big differences between European states as to both the *extent* and *content* of constitutional regulation of emergency situations. We saw that countries such as Germany, Greece, Hungary, Poland, Portugal, and Spain have constitutional regulations on most of the main aspects of emergency rule, while the constitutions of – primarily Western European – states such as Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Luxemburg, Norway, and Switzerland are practically silent on the topic. Content-wise, differences are also important: according to some constitutions, proclamation, prolongation and termination of emergency rule are an executive prerogative, while in others, the role of the parliament is important. Similarly, some constitutions allow for increased executive prerogatives during a state of emergency, while others stipulate practically no changes in the balance of powers between the executive, the judiciary, and the legislature. Variations are also considerable as regards the extent to which restrictions can be made in human rights and civil liberties during states of exception.

This section explores these differences further through a series of brief case studies of legal regulations and practices in Finland, France, Germany, Norway, Spain, Switzerland, and the United Kingdom. It shows that the theoretical debate referred to in the introduction of this report – between those who, following Carl Schmitt, believe that emergencies can only be dealt with outside the constitution, and those who think that emergencies should be restrained and circumscribed as much as possible by law – is in fact not merely theoretical. As the case studies make clear, European states come down on opposite sides of this debate. Two cases, in particular, are almost ideal-typical. Switzerland, on the one hand, has deliberately, by government decision, chosen not to adopt any written rules, constitutional or otherwise, for emergencies so as not to hamper the executive in its handling of a crisis. Rather, it relies on an extra-constitutional and un-codified “doctrine of necessity”, which stipulates that, in a severe emergency, the government may seize almost total power, leaving the parliament toothless. As shown in the previous section, the basic law of neighbouring Germany, on the other hand, sets forth detailed constitutional regulations of emergency powers that allow parliamentary involvement in the introduction and removal of emergency rule, both legislative and judicial oversight during a state of exception, and a virtually unaltered guarantee of human rights.

Other states fall somewhere in between these two models of constitutionality *vs.* extra-constitutionality, and of checks and balances *vs.* unrestrained executive power. France and Norway come closer to the Swiss model as regards extra-constitutionality and, in particular, when it comes to the vast powers transferred to the executive. Spain, in contrast, shares some basic similarities with the tight regulatory reins found in Germany, although they are partly provided for in the

constitution and partly in organic law. The UK system is subject to much controversy and interpretation but, like Finland, most likely falls somewhere in the middle of the spectrum, as they offer a rules-based approach, but with weaker checks on executive power than in Germany or in Spain.²³

3.2 Switzerland and Germany: Extra-constitutional Carte Blanche vs. Tight Constitutional Limits

As noted in section 2, the Swiss constitution does not provide for any state of exception *per se*. In the past, Switzerland has had written rules on the doctrine of necessity (*droit de nécessité*). However, in 2003, the Swiss government repealed 23 legal acts that in one way or the other regulated this doctrine, on the grounds that they were old and had become purposeless (“*sans objet*”).²⁴ Three years later, after an examination by the Federal Department of Justice and Police, the government concluded that a new, constitutionally grounded doctrine of necessity would be “laborious, pointless and not risk free”.²⁵ Given that such legislation must be detailed, the government pointed out that it risked slowing down decision-making in situations when measures would have to be taken swiftly. It also believed that the Swiss federal structure would make it relatively easy to transfer competencies to the cantonal level were the federal institutions to become incapacitated, and *vice versa*. Moreover, the government feared that constitutional regulation of the doctrine of necessity would increase rather than decrease the risk of abuse of power: “it can be feared that written rules regarding the doctrine of necessity has the psychological effect that the authorities hesitate less to use such norms in exceptional situations”.²⁶

What remains in the case of Switzerland, then, is the extra-constitutional doctrine of necessity, based on the experience of the two World Wars. This doctrine may be relied on in severe crisis situations such as war or widespread natural disasters that make it impossible for the highest organs, and in particular the parliament, to function normally.²⁷ According to the doctrine, the parliament, if it can be convened, will decide on a state of exception and on the transfer of absolute powers to the executive. If parliament cannot be convened, the government can itself declare a state of exception and take all necessary decisions, even including decisions that are unconstitutional.²⁸

During the two World Wars, the Swiss government relied extensively on the doctrine of necessity. In August 1914, the Swiss parliament decided to give the

²³ Due to space constraints, this section does not include any in-depth analysis of how constitutional or other courts in the seven countries have ruled on the legality and scope of emergency powers.

²⁴ “Une nouvelle réglementation du droit de nécessité ne s’impose pas” Communiqués, Federal Department of Justice and Police, 16 June 2006 <http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2006/2006-06-160.html>

²⁵ *Ibid*, translation by the author.

²⁶ *Ibid*, translation by the author.

²⁷ Bellanger, François (2001). “Droit de nécessité et état d’exception” in Daniel Thürer, Jean F. Aubert Jörg P. Müller och Oliver Diggelmann (Eds.), *Verfassungsrecht der Schweiz*, pp.1268-9; “Une nouvelle réglementation...” *opt cit*.

²⁸ Venice Commission *opt cit* “Concept of public emergency”, Bellanger, François *opt cit* p.1269.

government absolute powers to undertake those measures that were considered necessary to guarantee the unity, security and neutrality of the country. Based on this decision and until 1921 when the state of exception was lifted, the government and the ministries (federal departments) issued almost 1,400 regulations, many of which were “illegal or unconstitutional”.²⁹ During that time period, the supervisory role of the Swiss parliament was reduced.³⁰ The situation was similar during the Second World War; with the difference that the government was unwilling to relinquish its extraordinary powers when the war had ended in what François Bellanger called an “abuse of the doctrine of necessity”.³¹ It was only in December 1950, after a popular initiative won the support of the majority of the population and of the cantons in a referendum, that the government was forced to do so. To summarise, then, the Swiss system for emergency rule is primarily extra-constitutional, and the non-codified doctrine of necessity allows for practically unrestrained executive rule.

If the Swiss experiences of the use of emergency powers during the Second World War were somewhat unpleasant, those of Germany were disastrous. Paragraph 48 in the Weimar Constitution famously made it easy to proclaim a state of emergency, and gave the president almost absolute powers—to restrict or abolish certain basic rights and to use the armed forces, for example—in such situations. During the turbulent inter-war years, Article 48 was invoked more than 250 times,³² and in 1933 Hitler proclaimed a state of emergency which lasted until the end of the war in 1945.³³ As a consequence, German post-war politicians (and Germans in general) were very reluctant to provide any constitutional basis for a state of emergency. In fact, they only did so as this was an allied precondition for granting Germany full sovereignty, and only in 1968 after ten years of discussions.³⁴

The amendments to the German basic law, entitled *Notstandsgesetze*, are very detailed. They encompass aspects of emergency rule that few other constitutions (or even ordinary laws) touch upon, such as the exact tasks that can be transferred to the armed forces during a state of defence or a *Spannungsfall* (i.e. the protection of civilian property and, in certain well-defined cases, fighting organised and armed insurgents), the transfer of certain legislative powers and powers over the police from state to federal authorities, rules regarding finances during a state of defence, the promulgation of a proclamation of a state of defence, and rules regarding specific constitutional amendments authorised in the case of an international peace or defence agreement, or the gradual withdrawal of occupying

²⁹ Bellanger, François *opt cit* p.1269.

³⁰ *Ibid.*

³¹ *Ibid* p.1270.

³² Scheppele, Kim *opt cit.*, p. 1008.

³³ Schweiger, Gaëlle (2005). “Die Notstandsverfassung” Studienarbeit GRIN Verlag für akademische Texte, Dokument Nr. V56999, Chapter. 1; Benda, Ernst “Notstandsverfassung” Bundeszentrale für politische Bildung <http://www.bpb.de/wissen/01800835942875274916993427085023,0,0,Notstandsverfassung.html>; Jakab, András (2006). “German Constitutional Law and Doctrine on State of Emergency - Paradigms and Dilemmas of a Traditional (Continental) Discourse” *German Law Journal* Nr. 5, 1 May.

³⁴ Schweiger *opt cit.* p.2.

powers. In the European context, Germany is unique in that this very detailed constitutional regulation makes additional federal laws virtually superfluous.³⁵ These regulations also provide for far-reaching safeguards aimed at ensuring the continuity of the democratic system, with a crucial role for parliament in the declaration and termination of a state of defence, rules regarding the continued activities of the Constitutional Court, the Bundestag and the Bundesrat, the replacement of the two houses of parliament by a Joint Committee – to ensure at least some parliamentary oversight in times of severe crisis when it proves impossible to convene both houses of parliament, the maintenance of the Federal Court of Justice as the highest court for appeals, etc. (these and other aspects are all further elaborated on in the previous section and in Annex 1). The fears of the post-war politicians and the German public have so far not materialised, as the *Notstandsgesetze* have not been used in Germany to date.³⁶ Today, the laws are also fairly uncontroversial. To summarise, then, the German system offers very detailed constitutional regulations of emergency rule that allow for the continued functioning of the country's main democratic institutions even during situations of emergency.

3.3 Varieties of the Doctrine of Necessity: Norway and France

While Switzerland and Germany can be characterised as almost ideal typical cases occupying two ends of a spectrum, other European countries have adopted more mixed models. Relatively close to the Swiss system are the French and Norwegian arrangements, although neither is as clear-cut. Contrary to the Swiss model, they have – in certain respects quite detailed – emergency regulations applicable in less serious emergency situations. However, similarly to the Swiss, both the French and the Norwegian system provide for a type of emergency rule that is virtually unlimited and (in the case of Norway) extra-constitutional as a last resort in serious emergencies.

The Norwegian constitution, like the Swiss one, makes little mention of emergencies (see previous section and Annex 1). In contrast to the Swiss case, however, Norway has a Contingency Law which contains rules regarding decision-making and the division of power in the case of a severe crisis such as war or the threat of war.³⁷ The Contingency Law stipulates that if the Storting (parliament) cannot operate normally due to war, the King (in practice the government) is entitled to take all decisions deemed necessary to protect the country's interests. The Storting shall be informed of such decisions as soon as possible, and immediately after its next session, the decisions will be automatically repealed. In war or when confronted by an immediate threat of war or a threat to the country's

³⁵ Thus, there are only a series of purely technical laws regarding energy and electricity supplies, air, rail, and sea traffic, postal services etc., (*Notstandsgesetze* http://www.rechtliches.de/Gesetze_17.html) as well as regulations for the rules of procedure of parliament and of the Joint Committee in the case of emergency rule (*Geschäftsordnung für das Verfahren nach Artikel 115 d des Grundgesetzes, Geschäftsordnung für den Gemeinsamen Ausschuss*).

³⁶ Benda, Ernst *op. cit.*

³⁷ Lov 1950-12-15 nr 07: Lov om særlige rådgerder under krig, krigsfare og liknende forhold <http://www.lovdato.no/all/hl-19501215-007.html>

security or sovereignty, the King has the right to issue regulations with the force of law to ensure the country's security, public order and health, supplies of vital goods, and military and civil defence. Such regulations may be contrary to existing laws, but the Storting should be notified about them as soon as possible and it will then immediately be convened. The Storting can repeal the regulations, but if it chooses not to, they should be turned into law through the proper parliamentary procedure. The law also contains specific rules applicable to areas of the country which have been cut off from government control due to war or other severe crises, and for the actual theatre of war. Penal laws can also change in situations of war, threat of war, or when the security or sovereignty of the country is threatened; however, the law does not mention which rights and freedoms are protected in such situations, nor does it encompass specific provisions aimed at protecting the survival of the democratic order.

Although the Contingency Law gives the government extensive powers during a serious crisis, there is also an extra-constitutional doctrine of necessity, which potentially concentrates even more powers in government hands. According to this doctrine, based on practical historical experiences (mainly from the Second World War when Norway was occupied by the Nazis), “emergencies legitimise an action which under normal circumstances would imply a breach of the constitution”.³⁸ The doctrine of necessity can only be used in a severe emergency, when crucial national interests would be jeopardised if the normal rules were adhered to. It generally implies that the government's powers are extended, while those of the Storting are reduced or even eliminated, and that the normal rules for governmental decision-making need not be followed. Breaches of the constitution and of the Contingency Law are, as already noted, allowed.³⁹ To summarise, then, the Norwegian system for emergency rule is a hybrid, with two sides: a legally regulated system giving parliament an important role in checking the emergency rule government on the one hand and, in a very severe crisis, the extra-constitutional doctrine of necessity concentrating virtually all powers in the hands of the government, on the other hand.

In contrast to Norway and Switzerland, France does not, strictly speaking, have a doctrine of necessity, but its presidential *pouvoirs exceptionnels* (exceptional powers) are, as we shall see, so wide-ranging and little regulated that, in practice, they bear great similarities to the necessity approach – with the important difference, however, that these sweeping powers are not extra-constitutional, but instituted through Article 16 of the French constitution.⁴⁰

France has three levels of emergency powers. Apart from the *pouvoirs exceptionnels*, there is the state of siege, regulated in paragraph 36 of the French constitution and in the Defence Law,⁴¹ and the state of emergency, regulated in the *Loi instituant un*

³⁸ Andenæs, Johs. och Arne Fliflet (2006). *Statsforfatningen i Norge*, 10. utg. Oslo: Universitetsforlaget, p. 502, author's translation.

³⁹ Andenæs och Fliflet, *opt cit.*, pp.503-6.

⁴⁰ For a thorough discussion on how to categorize the French system of emergency powers, see Saint-Bonnet, François (2001). *L'Etat d'exception* Paris: Presses Universitaires de France, pp. 5-28.

⁴¹ Code de la défense, parti 2, livre I titre II http://www.defense.gouv.fr/defense/content/download/86693/779255/file/code_defense_legislatif_2007.pdf

état d'urgence of 1955 (this law hence predates the constitution).⁴² A state of siege can be proclaimed when there is an immediate threat due to a foreign war (*guerre étrangère*) or an armed uprising. The decision is taken by the government, but any prolongation beyond the initial 12 days must be authorised by parliament. The main effect of a state of siege is to transfer certain powers from civilian to military authorities. These include: the authority over the police and the responsibility for public order (including decisions on restricting freedom of assembly and introducing censorship); judicial powers in criminal law cases and in cases where the military authorities are being undermined; and increased policing powers, such as the right to search inhabitants' dwellings at any time of the day or night). All other powers remain vested with the civilian authorities, and other constitutional rights and freedoms remain in force.

The law instituting a state of emergency stipulates that a state of emergency can be proclaimed by the government in the whole or parts of the country (including the non-metropolitan *départements d'outre-mer*) in cases of immediate danger due to serious assaults on the public order or in situations that can be likened to a public calamity. As in the case of the proclamation of a state of siege, any prolongation beyond the initial 12 days must be authorised by parliament, which at the same time decides on the exact length of the state of emergency. During a state of emergency, the prefect (i.e. the state representative at the local, *département*, level) has the right to impose a curfew and certain other types of restrictions on the freedom of movement. The Minister of the Interior is entitled to take decisions regarding house arrests and order the seizure of certain types of weapons. In addition, the Minister of the Interior or the prefects can provisionally close all types of meeting places and prohibit gatherings that may disturb the public order. The decree proclaiming a state of emergency can also introduce censorship and allow night-time searches.

The state of emergency bears a number of resemblances to the state of siege (as far as proclamation, prolongation, and restrictions in certain freedoms are concerned); the main difference is that, during a state of emergency, no powers are automatically transferred to the military authorities.⁴³ Another difference is that, to date, the state of siege has never been used in France, while the state of emergency has been used on several occasions, both in the colonies (Algeria in 1955 and New Caledonia in 1985) and in metropolitan France (most recently between 8 November 2005 and 4 January 2006, both during and after the civil unrest).⁴⁴

The state of siege and the state of emergency grant important, but circumscribed, powers to the government (or the military authorities in the case of the former). In contrast, the *pouvoirs exceptionnels*, regulated in paragraph 16 of the French

⁴² Loi numéro 55-385 du 3 avril 1955 instituant un état d'urgence <http://www.libertysecurity.org/IMG/pdf/loidu3avril1955EtatDUrgence.pdf>

⁴³ Thénault, Sylvie (2007). "L'état d'urgence (1955-2005): de l'Algérie coloniale à la France contemporaine" *Mouvement social* P 8° 1233 n°218, pp.63-78.

⁴⁴ Thénault, Sylvie *opt cit.*, Ministère de l'intérieur et de l'aménagement du territoire Décret n°2005-1387 du 8 novembre 2005 relatif à l'application de la loi n°55-385 du 3 avril 1955.

constitution, essentially gives the president a *carte blanche* of legislative and executive power.⁴⁵ If there is an immediate and serious threat to the French institutions, independence, territorial integrity or the fulfilment of France's international commitments, and its constitutional governmental authorities are no longer able to function normally, the president can decide to take on exceptional powers. Before taking such a decision s/he must consult the prime minister as well as the presidents of both chambers, and the Constitutional Council. The president also decides how long the exceptional powers should be in force. Paragraph 16 does not require a total collapse of the normal structure of government: the president can seize exceptional powers even if parliament, for example, is functional. Given these elements, paragraph 16 has long been controversial in France. A constitutional review committee of the early 1990s did not, however, believe that any alterations to the system were necessary; neither did the *Conseil d'Etat* a few years later.⁴⁶ In sum, then, the French system combines two very different models of emergency power: the relatively well-regulated states of emergency and siege providing for certain checks and balances and for the protection of human rights, on the one hand, and, for very serious crises, the formidable and – à la Schmitt – hardly-regulated exceptional powers that the president can take on without any serious counter-balance, on the other hand.

3.4 Spain: Closer to the German Model

Not unlike Germany, 20th century Spain knew fascism, war, and dictatorship. Also like Germany, it has felt the need to carefully craft a series of regulations to circumscribe emergency rule. As was shown in the previous section as well as in Annex 1, the Spanish constitution contains relatively detailed regulations regarding the proclamation and prolongation of the three types of emergency rule that exist in the Spanish system: state of alarm, state of emergency, and state of siege (*estado de alarma*, *estado de excepción* and *estado de sitio*). It also establishes a relatively detailed set of safeguards to ensure the survival of the democratic order during emergency rule, and sets out limits for restrictions of basic rights and freedoms in such circumstances. In contrast to Germany, the Spanish constitutional regulations are not exhaustive, however, and the three exceptional states are further regulated in an organic law, the Ley Orgánica 4/1981.

The Ley Orgánica 4/1981 spells out in detail the circumstances for which the three different types of emergency rule are designed. A state of alarm is proclaimed in parts or the whole of the country in cases of calamities or accidents such as earthquakes, flooding, or widespread fires; epidemics; disruptions in crucial public services (as long as such disruptions are not covered by the right to industrial action); and shortages in the supply of basic necessities. A state of emergency is proclaimed when the political system or public order is severely disrupted, and a state of siege in the actual case of or threat of insurgency or

⁴⁵ Ackerman *opt cit.*, pp.1038-9; footnote 19.

⁴⁶ Cited in Saint-Bonnet, François *opt cit.*, pp. 374-5.

armed action directed against the country's sovereignty, independence, integrity, or constitutional order.

The three types of emergency rule are proclaimed following different modalities, where the stronger role of parliament in the case of a state of exception and a state of siege reflects the more serious implications that these two have on the life of the country and its institutions. The main implication of a state of alarm is, in fact, that the public authorities in the emergency area are put under government command (or, if the government so decides, under the command of the president of the autonomous region). During a state of alarm, circulation can be restricted in certain areas and during certain times, an obligation to work can be introduced, as can rationings and other means of ensuring the supply of basic necessities. Requisitions of property and industries of various kinds may also be made.

A state of emergency touches individual rights and freedoms to a greater degree. For example, a person who on good grounds may be suspected of disturbing the public order can be incarcerated for a maximum of ten days. However, the right to a lawyer and to be informed of the reasons for the arrest must be upheld, and a competent judge must be notified within 24 hours. In similar fashion, the *Ley Orgánica* regulates the extent to which other rights and freedoms may be curtailed, if the Chamber of Deputies so admits: searches without a court order may be conducted, but only if certain rules regarding note-taking and the presence of parties are respected; censorship is allowed, but not prior censoring; the right of assembly may be restricted, but regular meetings of political parties, trade unions, and employers' organisations cannot be forbidden, etc. When the disruption of the political order leads to, or occurs in conjunction with a calamity or an epidemic, etc., the government may also use the additional powers vested in it under a state of alarm. No other changes in the balance of powers are stipulated.

The state of siege implies some possible further restrictions – again dependent on the prior authorisation of the chamber of deputies – of individual rights and freedoms (the right to a lawyer, right to know the reasons for arrest). The chamber of deputies may also decide that certain crimes are to be tried in military courts. However, the most important implication of a state of siege lies in the transfer of extensive powers to the military authorities. Again, this transfer is circumscribed in that the government shall appoint the executive military authorities, lead their activities, and continue exercising powers that have not been handed over. The *Ley Orgánica* 4/1981 has so far never been used.

Thus, the relatively strongly regulated Spanish system focuses on protecting human rights and the role of parliament even during emergency rule. The two less intrusive levels of emergency rule, the state of alarm and state of emergency, also imply a relatively limited change in the balance of powers. The transfer of powers to military authorities during a state of siege, however, implies an important, although to some extent circumscribed, shift. The Spanish system is nevertheless neither as detailed nor as stringent when it comes to protecting the democratic institutions as its German equivalent.

3.5 The Middle Ground: Finland and United Kingdom

Finland and the United Kingdom share one basic commonality: they provide little or no constitutional regulation of emergency powers, the UK for the simple reason that it has no written constitution. The Finnish constitution is also silent on the issue (as noted in section 2 and in Annex 1), with the important exception of guaranteeing certain key rights and freedoms in emergency situations. Both states instead have detailed and relatively recent laws on the issue. As we shall see, these laws also share some basic features such as detailed definitions of situations that can lead to emergency rule, rather sweeping emergency powers, and a relatively limited role for parliamentary oversight. They thus fall somewhere in the middle of the spectrum regarding circumscription of emergency rule.

Two Finnish laws, the Contingency Law and the Law on the State of Defence,⁴⁷ provide very detailed regulations to be employed in emergency situations. Loosely following the German and the Spanish logic, the two laws provide for two types, or degrees, of emergency rule, whereby “exceptional circumstances” is the first, and a state of defence the second. This means that during a state of defence, the Contingency Law (regulating exceptional circumstances) will also be applicable, unless the Law on the State of Defence prescribes otherwise. “Exceptional circumstances” are defined in considerable detail. They include war and post-conflict situations, threat of war (directed at Finland or internationally), serious threats to livelihoods or the national economy, and serious accidents. A state of defence can be introduced in case of insurgency or war directed at Finland.

In exceptional circumstances as defined by the Contingency Law, the parliament can decide to give the government extended powers. If parliament cannot be heard without causing serious danger, the president can decide that the government be given extended powers, but such a decision must be put to parliament within a week, otherwise it lapses. A state of defence is proclaimed by the president, a decision which must also be put to parliament within a week. Exceptional circumstances and a state of defence can be prolonged by the president for a period of one year at a time, but any prolongation must immediately be put to parliament. These legislative checks on the proclamation and prolongation of emergency rule can be circumvented, however: in both types of state of exception, the president can authorise the government to continue exercising emergency powers if the situation so requires and parliament has not taken a decision within two weeks.

The scope of decision-making powers during exceptional circumstances is wide, encompassing large parts of the economy (including for example price controls and the distribution of goods), the organisation of public administration, the postponement of local elections and the transfer of municipal powers, compulsory labour, the confiscation of goods, a duty to submit information to the government, etc. Nevertheless, government decisions on such issues must be put

⁴⁷ Beredskapslagen <http://www.finlex.fi/sv/laki/ajantasa/1991/19911080>, Lagen om försvarstillstånd <http://www.finlex.fi/sv/laki/ajantasa/1991/19911083>

to parliament. During a state of defence government decision-making powers are further widened, to include measures aimed at ensuring vital supplies in times of war (control over production, strengthened obligation to work, confiscation of means of transportation, machinery etc.) and restrictions regarding the freedom of expression, assembly and organisation. The laws have so far never been used.

In sum, the Finnish regulations are very detailed, comprising long lists of specific measures that the government can take in case of emergency. There are also provisions regarding non-derogable human rights. In contrast, parliamentary decision-making and oversight can, in certain situations, be circumvented. Finland therefore falls somewhere in the middle of the spectrum regarding the scope of emergency rule.

The United Kingdom has one of the most recent laws on emergencies, the so-called Civil Contingencies Act of 2004.⁴⁸ It replaced the emergency laws which dated back more than 50 years and that had proved inadequate during the outbreak of foot and mouth disease in 2001, the severe flooding in 2000 and the fuel protests during the same year.⁴⁹ The definition of emergency contained in the Act is very detailed. It refers to events or situations which threaten to seriously damage human welfare or the environment in the whole or parts of the country, or war or terrorism that is seriously threatening the country. Damage to human welfare and to the environment is further defined to include actual or potential loss of human life, human illness or injury, homelessness, damage to property, disruption in the supply of basic goods or health services, disruption in communication or transport systems, or, in the case of the environment, contamination of land, water or air with biological, chemical or radio-active substances or disruption or destruction of plant animal life. This is a very broad definition of an emergency. Thus, preparatory works and comments stress the “Triple Lock” contained in the law: i.e. necessity, proportionality, and seriousness must be taken into account when considering emergency powers.⁵⁰

According to the Civil Contingencies Act, emergency regulations are made by “Her Majesty by Order in Council”, i.e. on decision by the government proclaimed by the Queen. If such a procedure cannot be followed without serious delay, the prime minister or any of the principal secretaries of state or the commissioners of the treasury can decide on emergency regulations. These should be presented to parliament “as soon as is reasonably practicable”. The regulations lapse after seven days unless approved by both Houses of Parliament. The two Houses of Parliament can jointly decide to amend or repeal the emergency regulations. However, there is an important restriction on legislative oversight: nothing in the section of the Act pertaining to parliamentary scrutiny “shall

⁴⁸ Civil Contingencies Act 2004 <http://www.opsi.gov.uk/acts/acts2004/20040036.htm> Relevant in this context is mainly Part 2 of that Act, entitled “Emergency Powers”.

⁴⁹ Explanatory Notes to Civil Contingencies Act 2004 <http://www.opsi.gov.uk/acts/en2004/2004en36.htm>.

⁵⁰ Analysts have criticised the “Triple Lock”, however, stressing that it does not emerge clearly from the Act, and that none of the three conditions have to be objectively determined (Walker, Clive and James Broderick (2006). *The Civil Contingencies Act 2004 Risk, Resilience and the Law in the United Kingdom* Oxford University Press. pp.154, 158 and 160.

prevent the making of new regulations”. The time limit for emergency regulations is 30 days, but, again, this “shall not prevent the making of new regulations”.

According to two analysts of the Civil Contingencies Act, “[t]he regulation-making powers are of awesome scope”.⁵¹ Emergency regulations can include any provision (also in areas normally regulated by law) to prevent, control or mitigate an aspect or effect of the emergency. Thus, they can imply confiscation or destruction of property, restrictions in the right to free movement and to the freedom of assembly, evacuation, and transfer of judicial authorities, including to courts set up by the emergency regulations. However, the Human Rights Act 1998, Part 2 of Civil Contingencies Act, and, to a certain extent, penal law, cannot be altered. It is also unlawful to require a person to do military service or prohibit participation in industrial action. Moreover, the parliament, the High Court and the Court of Session must be able to conduct proceedings in connection with the regulations or action taken under the regulations. While the previous legislation (the Emergency Powers Act 1920) was used twelve times (with the last time being in 1974), Part 2 of the current law has so far never been employed.⁵² The British system is not unlike the Finnish one: detailed on many aspects of decision-making powers, but at the same time offering relatively limited parliamentary decision-making and oversight.

⁵¹ Walker and Broderick *opt cit.*, pp. 153, 161-8.

⁵² Walker and Broderick *opt cit.*, p. 188.

4. Conclusions

This study shows that there are great differences between European states in terms of both the *extent* and *content* of constitutional regulation of emergency situations. Countries with relatively recent experiences of authoritarian rule, such as Germany, Greece, Hungary, Poland, Portugal, and Spain, have constitutional regulations on most of the main aspects of emergency rule, while the constitutions of – primarily Western European – states such as Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, Luxemburg, Norway, and Switzerland are almost silent on the topic. Content-wise, differences are also important: according to some constitutions, the proclamation, prolongation and termination of emergency rule are an executive prerogative, while in others, the role of the parliament is important. Similarly, some constitutions allow for considerably increased executive prerogatives during a state of emergency, while in others hardly any changes in the balance of powers between the executive, the judiciary, and the legislature are stipulated. Variations are also considerable as regards the extent to which restrictions can be made during states of exception concerning human rights and civil liberties. Moreover, the definition of threats varies significantly, with some countries solely focused on more “classical” threats to the state such as foreign invasions and conventional warfare, while others include industrial accidents, natural calamities, or serious threats to the “constitutional order”. In contrast, when provided for in national constitutions, safeguards for conserving the democratic systems are relatively similar, including the compulsory convening of parliament rapidly after a state of exception has been proclaimed, the prohibition to dissolve the parliament, the postponement of elections and a concomitant prolongation of parliamentary terms.

The case studies presented in this paper show that the constitutions almost never – with the notable exception of Germany – contain the complete set of regulations applicable during states of exception: as a rule, other pieces of legislation as well as non-written practice complement the constitutional regulation. The case studies also attest to the fact that in some European countries, following thinkers such as Carl Schmitt, emergencies are construed as extra-constitutional and unrestrained by law. Thus, the Swiss Government has deliberately chosen not to adopt any written rules, constitutional or otherwise, for emergencies so as not to hamper the executive in its handling of the crisis. Rather, it relies on an extra-constitutional and un-codified “doctrine of necessity”, which stipulates that, in a severe emergency, the government may seize almost total power, leaving the parliament virtually toothless.

This study, essentially construed as a mapping exercise, leaves many questions unanswered. For example, is the type of constitutional government (presidential, parliamentary executive, dual executive) in any way related to the way emergency rule is regulated? What determines whether emergency regulations are used or not in specific emergency situations (e.g. the British anti-terrorist response has not so far relied on the Civil Contingencies Act but instead on specific anti-terrorist laws)? To what extent do international norms regarding emergency rule have a real

impact on national constitution drafting? These and similar questions would require further analysis.

5. Policy Recommendations

Severe crises and emergencies are dangerous periods in the life of a democracy. As we have seen, not even a democracy as stable as the Swiss one is shielded from danger during a prolonged period of exceptional powers wielded by the government. Many analysts agree – and, again, the Swiss case also shows – that the most important factor in ensuring the survival of democracy during emergency rule is an active, pro-democracy citizenry. This, of course, is not a factor that can be created through legislation or constitutional arrangements.

In the absence of being able to affect the citizenry, some rules nevertheless seem more suitable than others to protect democracy in severe crisis situations.⁵³ These are:

- A system of differentiated emergency powers – i.e. a limited form of emergency powers for use, for example, in the event of a large scale industrial accident or a natural catastrophe; an in-between-version for more serious threats to the constitutional order such as a serious terrorist attack or an attack on the democratic institutions; and a set of comprehensive forms of emergency rules for wartime and similar situations – is arguably less prone to political over-reaction than an all-or-nothing system;
- Stringent rules for the proclamation, prolongation and termination of emergency rule, in each case involving the parliament, and indeed larger-than-normal parliamentary majorities. If it is not possible to convene parliament to discuss the proclamation of emergency rule, another formula involving several institutions (such as for example the standing committee of parliament, the government, the president, and the president of the constitutional council) is arguably preferable to a purely executive decision (the desirability of avoiding a purely executive decision must however be weighed against the necessity to maintain checks and balances);
- A requirement of periodic prolongations of emergency rule by parliament, which gives parliament the chance to regularly and publicly deliberate on the necessity to maintain a state of emergency;
- Provisions for swifter emergency-time legislative processes, rather than bypassing parliamentary decision-making entirely;

⁵³ These recommendations focus on those aspects of emergency rules that are not regulated by the ECHR, the ICCPR, and other relevant instruments, and that are not treated in The Paris Minimum Standards of Human Rights Norms in a State of Emergency of the International Law Association or by the Venice Commission.

- A prohibition to dissolve the parliament, a compulsory convening of parliament directly after a state of exception has been proclaimed, and the prolongation of parliamentary terms until the emergency is over;
- A strong constitutional protection of the national basic law and other fundamental pieces of legislation by prohibiting changes to such documents during, as well as just before and just after, a state of exception;
- The constitutional court and other courts should continue operating under their normal rules, and they should be entitled to review regulations, acts, and actions of the institutions wielding emergency powers;
- A strong guarantee of human rights, following the provisions in International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and other relevant mechanisms.

These recommendations have nothing utopian. As this study shows, each recommendation is in fact currently adhered to in at least one European constitution. Currently, however, no constitution in Europe follows all of them, although the German one comes close.

How important is it then to provide *constitutional* regulation on these issues? As we saw in this study, the Norwegian and Finnish constitutions make virtually no reference to emergencies, but in other pieces of legislation, quite detailed regulations are provided: they are not alone in this in Europe. However, given the importance of the changes made to political decision-making, the balance of powers and to human rights, it seems important that a strong constitutional anchorage is given to the norms regarding emergency rule.

Annex 1. The constitutional regulations of emergencies in EU member states, Norway and Switzerland

N.B. The following tables are designed to summarise the main aspects of the relevant constitutional provisions: for detailed and exact wordings, please refer to the constitutional articles cited at the bottom of each table.

Table A2.1 Types of states of exception regulated in European constitutions

Country	Does the constitution contain provisions regarding different types of states of exception?
Austria	Only the role of the federal armed forces in protecting the constitutional order and public security and in assisting in cases of natural disasters or other serious calamities is mentioned, as are the special measures that the federal authorities are entitled to take to ensure basic supplies in times of war.
Belgium	Only state of war is mentioned.
Bulgaria	Yes, state of emergency and martial law.
Cyprus	Yes, emergency measures and martial law.
Czech Republic	Only state of war is mentioned.
Denmark	Only a "particularly urgent situation" is mentioned.
Estonia	Yes, emergency, state of emergency and state of war.
Finland	Armed aggression and exceptional circumstances are mentioned in relation to the non-derogability of certain rights and freedoms.
France	Yes, <i>pouvoirs exceptionnels</i> and state of siege.
Germany	Yes, <i>Spannungsfall</i> and <i>Verteidigungsfall</i> .
Greece	Only state of siege is mentioned.
Hungary	Yes, state of danger, state of emergency, state of national crisis, preventive defence emergency and state of war.
Ireland	Yes, public/national emergency and times of war or armed rebellion.
Italy	Only wartime is mentioned.
Latvia	Yes, state of emergency and times of war.
Lithuania	Yes, state of emergency and martial law.
Luxemburg	Only international crisis is mentioned.
Malta	Only "state of public emergency" is mentioned.
Netherlands	Yes, state of emergency and martial law (the latter in the context of trial for offences).
Norway	Only "extraordinary circumstances" are mentioned, and only to allow the parliament to meet elsewhere than in the capital in such circumstances.
Poland	Yes, state of natural disaster, state of emergency, and war laws.
Portugal	Yes, state of emergency and state of siege.
Romania	Yes, state of emergency, state of siege, war and mobilisation.
Slovakia	Yes, "state of emergency", "exceptional state" and state of war.
Slovenia	Yes, state of emergency and war.
Spain	Yes, state of alarm, state of exception and state of siege (also called martial law).
Sweden	Only war and danger of war are mentioned.
Switzerland	The constitution uses terms such as "serious threats to internal security", "exceptional situations", "emergency situations", "catastrophes", and "disturbances which seriously threaten the public order, the external or internal security" without defining any state of exception.

Sources: AT Const. arts. 10.1.15, 55.5; BE Const. arts. 157, 167, 196; BG Const. arts 57.3, 64.2, 84.12, 100.5, 162.2; CH Const. arts. 58.2, 61.2, 185.3; CY Const. art. 50 (c); CZ Const. art. 43.1; DE Const. art. 80a, and section Xa; DK Const. arts. 23, 42.7; EE Const. arts. 65.14-15, 87.8, 104, 128-131; ES Const. arts. 15, 30.4, 55, 116-117; FI Const. art. 23; FR Const. arts 16, 36; GR Const. art. 48; HU Const. arts 8.4, 19, 19/A-E, 28/A, 28/C.5, 35.1-3, 40/B.2; IE Const. arts 15, 24, 28, 38.4.1; IT Const. arts. 27.4, 60, 78, 87.9, 103.3, 111.7; LT Const. 67.20, 84.17, 140, 142-145, 147; LU Const. art. 32.4; LV Const. arts 62, 73, 82; MT Const. art. 47; NL Const. art. 103, 113.4; NO Const. art. 68; PL Const. arts. 228-234; PT Const. art. 19, 134, 138, 140, 161, 164, 172, 179, 197.1; RO Const. art. 53, 63.1, 73.3, 83.3, 89.3, 92.1, 93, 115, 152.3; SE Const. chapter 13; SI Const. 16, 81, 92, 103, 108, 116, 126; SK Const. 51.2, 102, 119, 129.

Table A2.2 Constitutional provisions regarding parliamentary involvement the decision to impose emergency rule

Country	According to the constitution, which institution decides on the imposition of emergency rule and how?
Austria	Not regulated in the constitution.
Belgium	The king decides on a state of war.
Bulgaria	On the request of the president or the government, parliament decides on martial law or state of emergency. If parliament is not in session and cannot be convened, the president will impose martial law or a state of emergency. Parliament shall immediately be convened to approve the decision.
Cyprus	The House of Representatives decides on emergency measures and martial law. However, the president and the vice-president, jointly or separately, have a right of veto regarding decisions on emergency measures.
Czech Republic	The Parliament can declare a state of war if the Czech Republic is attacked or in order to meet international contractual obligations concerning common defence.
Denmark	Not regulated in the constitution.
Estonia	The government declares an emergency. Parliament, on the President's or the government's proposal, decides on a state of emergency. Such a decision must be taken by a majority of all MPs. Parliament, on the President's proposal, decides on a state of war, except in the case of armed aggression, in which case the president shall immediately make such a declaration.
Finland	Not regulated in the constitution.
France	A state of siege is declared by the government. The president decides on extraordinary powers, after consultation with the prime minister, the president of the assemblies and the Constitutional Council.
Germany	The Bundestag decides on a <i>Spannungsfall</i> by a two-thirds majority. The federal government can also agree to apply the rules regarding <i>Spannungsfall</i> in the case of international contractual obligations. The Bundestag decides, by a two-thirds majority (which should include at least a majority of all MPs), to impose a state of defence, on the proposal of the federal government. Such a decision requires the approval of the Bundesrat. If immediate action is needed and the Bundestag cannot be convened or if <i>quorum</i> cannot be attained, the Joint Committee can decide by a two-thirds majority (which should include at least a majority of all its members), to impose a state of defence. If, during an armed aggression, the above state institutions cannot immediately declare a state of defence, it shall be considered as having been proclaimed at the point when the aggression started.
Greece	Parliament decides, by a three-fifths majority of all MPs, to impose a state of siege, on proposal of the government. If parliament is not in session and it is objectively impossible to convene it in time, the president, on proposal of the government, can decide on a state of siege. In the latter case, such a decree must in all circumstances, even if parliament has been dissolved, be approved by it within 15 days: such a decision is taken by absolute majority.
Hungary	Parliament decides on a state of emergency, state of national crisis, preventive defence emergency, or state of war by two-thirds majority of all MPs (in the case of preventive defence emergency, two-thirds of MPs present). If parliament is prevented from taking such a decision (because it cannot be convened due to a lack of time or due to the emergency itself), the president can introduce a state of emergency, state of national crisis or state of war. The speaker of parliament, the chairperson of the constitutional court and the prime minister decide together whether the president should be entitled to take such a decision. In its first session, parliament shall decide, by two thirds majority of all MPs, upon the legality and necessity of the decision.
Ireland	Both chambers of parliament decide whether there is a "national emergency"; not further regulated in the constitution.
Italy	Not regulated in the constitution.
Latvia	The government proclaims a state of emergency. Such a decision shall immediately be put to the parliament.
Lithuania	Parliament can itself decide on a state of emergency and on martial law. The president can also, in accordance with law, proclaim a state of emergency and put it before parliament at its next session. In the case of armed aggression, the president shall establish martial law in the whole or parts of the country. The decision shall be put before parliament, which, if not in session, shall immediately be convened.

Luxemburg	Not regulated in the constitution.
Malta	The president can declare a state of public emergency. The parliament can also declare a state of public emergency by a two-thirds majority of all MPs, by stating that the democratic institutions are threatened by subversion.
Netherlands	A state of emergency is declared by royal decree. Immediately after the declaration both chambers of parliament, in joint session, shall determine the duration of the state of emergency.
Norway	Not regulated in the constitution.
Poland	The president imposes martial law or a state of emergency at the request of the government. This decision has to be presented to the Sejm within 48 hours. An absolute majority of votes taken in the presence of at least half the statutory number of MPs, may annul the President's decision. The government decides whether to declare a state of natural disaster.
Portugal	The president imposes a state of emergency or a state of siege after conferring with the government and gaining the permission of parliament. If parliament is not in session and cannot be immediately convened, its Standing Committee decides in its place. In such a case, parliament shall approve the decision as soon as it can be convened. The proclamation of a state of emergency or a state of siege must be counter-signed by the government.
Romania	The president declares a state of emergency or a state of siege in accordance with the law, and must seek the parliament's approval of the measures within five days.
Slovakia	The president declares a state of emergency or a state of war on proposal of the government, which should take its decision collectively.
Slovenia	Parliament declares a state of emergency on proposal of the government. If parliament cannot be convened, the president will decide on the proclamation of a state of emergency. When parliament is next in session the proclamation shall immediately be put before it for approval.
Spain	The government decides on a state of alarm by decree. The lower house of parliament shall be immediately notified and shall convene without delay. The government declares a state of emergency by decree, after approval by the lower house of parliament. The authorisation shall include provisions regarding effects, time-limits, and the geographical scope of the state of emergency. At the proposal of the government, the lower house of parliament declares a state of siege by absolute majority.
Sweden	A state of war can only be declared with the consent of the Riksdag, except if there is an armed attack on the country.
Switzerland	The government takes decisions regarding the internal security.

Sources: BE Const. art. 167.1; BG Const. arts. 84.12 and 100.5; CH Const. art. 185.2; CY Const. art. 50 (c); CZ Const. art. 43.1; DE Const. arts. 80a.1-3; 115a.1-4; EE Const. arts. 65.14-15, 87.8, 128, 129; ES Const. art. 116.2-4; FR Const. arts. 16, 36; GR Const. art. 48.1-2, 6; HU Const. arts. 19.3, 19/A.1-4; IE Const. 28.3; LT Const. arts. 67.20, 84, 142, 144; LV Const. art. 62; MT Const. art. 47.2; NL Const. art. 103; PL Const. arts. 229, 230.1, 231 and 232; PT Const. arts. 134 d, 138.1-2, 140, 161, 179.3-4, 197.1f; RO Const. art. 93.1; SE Const. chapter 10 art. 9; SI Const. art. 92; SK Const. arts. 102.1m, 119n

Table A2.3 Constitutional provisions regarding parliamentary involvement in decisions to prolong and terminate emergency rule

Country	According to the constitution, which institution decides on the prolongation and termination of emergency rule, and how?
Austria	Not regulated in the constitution.
Belgium	The king states that hostilities are ended. Not further regulated in the constitution.
Bulgaria	Not regulated in the constitution.
Cyprus	Not regulated in the constitution.
Czech Republic	Not regulated in the constitution.
Denmark	Not regulated in the constitution.
Estonia	There is a maximum time limit of three months for a state of emergency. Not further regulated in the constitution.
Finland	Not regulated in the constitution.
France	There is a time limit of 12 days for a state of siege; it can be prolonged by parliament. Not further regulated in the constitution.
Germany	A <i>Spannungsfall</i> is terminated whenever the Bundestag so decides. A <i>Verteidigungsfall</i> is terminated whenever the Bundestag, with the approval of the Bundesrat, so decides. The Bundesrat can demand that the Bundestag deliberate on the issue of termination.
Greece	There is a maximum time limit of 15 days for a state of siege. It can be prolonged for 15-day periods by parliamentary decision, taken by absolute majority.
Hungary	Not regulated in the constitution.
Ireland	The parliament decides when a public emergency or a time of war or armed rebellion shall cease.
Italy	Not regulated in the constitution.
Latvia	Not regulated in the constitution.
Lithuania	There is a time limit of six months for a state of emergency. Not further regulated in the constitution.
Luxemburg	Not regulated in the constitution.
Malta	There is a time limit of 14 days for a state of public emergency, which can be prolonged by the parliament for up to three months at a time. If parliament has, through a resolution, concluded that the democratic institutions are threatened by subversion, the time limit is 12 months.
Netherlands	In a joint session, the chambers decide on the time limit for a state of emergency. Such a decision is taken immediately after a state of emergency has been declared by royal decree and whenever the chambers find it necessary. A state of emergency can also be terminated by royal decree.
Norway	Not regulated in the constitution.
Poland	The time limit for a state of natural disaster is 30 days; for a state of emergency, it is 90 days. A state of emergency can be prolonged only once for a maximum of 60 days with the permission of the Sejm. A state of natural disaster can also be prolonged with the permission of the Sejm.
Portugal	The time limit for both a state of emergency and a state of siege is 15 days, except in war when the time limit is determined by law. Both types of states of exception can be prolonged.
Romania	Not regulated in the constitution.
Slovakia	The president, on proposal of the government, decides when a state of emergency or a state of war shall come to an end.
Slovenia	Not regulated in the constitution.
Spain	The time limit for a state of alarm is 15 days; for a state of emergency, it is 30 days. Congress decides on time limits for a state of siege. A state of alarm can be prolonged by Congress. A state of emergency can be prolonged for another 30 days, following the same procedure as for the proclamation of a state of emergency.
Sweden	Not regulated in the constitution.
Switzerland	Not regulated in the constitution.

Sources: BE Const. art. 167.1; DE Const. arts. 80 a.2, 115 I.2; EE Const. art. 129; ES Const. art. 116.2-4; FR Const. art. 36; GR Const. art. 48.1, 3-6; HU Const. art. 28.3.3; LT Const. art. 144; MT Const. art. 47.3-4; NL Const. art. 103.3; PL Const. arts. 230.1-2, 232; PT Const. art. 19.5; SK Const. art. 102.1m

Table A2.4 Effects of state of exception on the role of parliament and of courts

Country	How, according to the constitution, do emergency powers affect the balance between parliament, government and head of state? How is the role of the courts affected?
Austria	Military jurisdiction can be established in times of war.
Belgium	Military tribunals are set up in times of war. Their organisation, jurisdiction, duration, and the rights and duties of the members of the court are established by law.
Bulgaria	In an emergency, a Grand National Assembly shall take on the functions of the parliament. The Grand National Assembly has 400 deputies, while parliament has 240.
Cyprus	Not regulated in the constitution.
Czech Republic	Not regulated in the constitution.
Denmark	If parliament cannot be convened, the King (in practice the government) can issue provisional laws. These must be in conformity with the constitution, and shall be put before the parliament as soon as it is in session again.
Estonia	Not regulated in the constitution.
Finland	Not regulated in the constitution.
France	“Extraordinary powers” presume that the democratic institutions are at least partially disrupted. Not further regulated in the constitution.
Germany	<p>When a state of defence is promulgated, the power of command over the armed forces passes to the Federal Chancellor.</p> <p>Bills submitted as urgent by the federal government shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills together without delay.</p> <p>During a state of defence, the Joint Committee (<i>Gemeinsame Ausschuss</i>) can determine with a two-thirds majority of the votes cast (including at least the majority of its members), that insurmountable obstacles prevent the timely assembly of the Bundestag or that there is no <i>quorum</i> in the Bundestag. As a consequence, the Joint Committee shall have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one body. Statutes adopted by the Joint Committee lapse not later than six months after the termination of a state of defence.</p> <p>During a state of defence, the federation has the right to legislate concurrently even on matters that normally come within the legislative powers of the Länder. Such statutes require the consent of the Bundesrat.</p> <p>During a state of defence, the federal government can also issue instructions to Land governments and to Land authorities. In extreme and clearly delimited cases, the Land governments are authorised to issue instructions in the place of the federal government.</p> <p>The Federation is entitled to establish federal military criminal courts for the armed forces. These can exercise criminal jurisdiction during a state of defence. The highest court of justice for appeals is nevertheless the Federal Court of Justice.</p>
Greece	On proposal of the government, the president may issue acts of legislative content to deal with the emergency. Such acts shall be submitted to parliament within 15 days after issuance/after the convening of parliament. If they are not submitted to parliament within the time limit, or if parliament does not ratify them within 15 days, they lapse. Extraordinary courts are established during a state of siege.
Hungary	<p>During a state of preventive defence emergency, the government can introduce measures that derogate from the acts governing the administrative system and the operation of the Hungarian armed forces and the law enforcement agencies; such measures cannot last for more than 60 days, and the government shall continuously inform the president and the competent parliamentary committees concerning the measures.</p> <p>During a state of danger and a state of preventive defence emergency, the government, if authorised to do so by parliament, may issue decrees and pass resolutions that derogate from existing law.</p> <p>During a state of emergency, the president introduces emergency measures, which are defined in a separate law, by decree. S/he shall immediately inform the speaker of parliament of any such emergency measures. The parliament, or the parliamentary defence committee, has the right to suspend emergency measures introduced by the president. They remain in force for a period of 30 days, unless the parliament or, should the parliament be obstructed, the parliamentary defence committee, extends their validity.</p> <p>In severe emergencies, a National Defence Council is established. It is chaired by the president, and is composed of: the speaker of parliament, the floor leaders of the political parties represented in parliament, the prime minister, the ministers, and the chief of staff of the armed forces with the right of consultation. During a state of martial law, the National Defence Council decides on the use of the armed forces and on the deployment of foreign armed forces in Hungary. It also decides on the introduction of emergency measures as defined in a separate law.</p>

	<p>The National Defence Council exercises the powers of the president and the government, as well as the powers transferred to it by the Parliament.</p> <p>The National Defence Council may pass decrees, which may suspend the application of certain laws or which may deviate from the provisions of certain laws. Furthermore, it may take other extraordinary measures, but may not, however, suspend the application of the Constitution.</p> <p>Decrees passed by the National Defence Council shall lose validity upon cessation of the state of national crisis, unless the Parliament extends their validity</p>
Ireland	<p>In a public emergency, the time of deliberation of the Senate can be shortened (except for proposals regarding changes in the constitution). If its decisions oppose those of the House of Representatives, they can, in certain circumstances, be overruled. Such laws have a validity of 90 days, unless both chambers agree on a longer period of validity.</p> <p>Military tribunals may be established to deal with a state of war or armed rebellion.</p>
Italy	<p>In times of war, the parliament assigns the necessary powers to the government.</p> <p>The scope of jurisdiction of military tribunals in times of war is decided by law. The right to appeal sentences of the military tribunals can be restricted.</p>
Latvia	<p>The jurisdiction of military tribunals is extended in times of war and during a state of emergency.</p>
Lithuania	<p>Not regulated in the constitution.</p>
Luxemburg	<p>During an international crisis, the Grand Duke may, in urgent cases, issue regulations, including such regulations that diverge from existing law.</p>
Malta	<p>Not regulated in the constitution.</p>
Netherlands	<p>According to the constitution, the consequences of a state of emergency shall be determined by law. In addition, the constitution stipulates that a declaration of a state of emergency may depart from the provisions of the Constitution relating to the powers of the executive bodies of the provinces, municipalities and water boards (waterschappen).</p>
Norway	<p>Not regulated in the constitution.</p>
Poland	<p>The principles regulating the activity of organs of public authority during all three states of exception shall be established by statute. Whenever, under martial law, the parliament cannot be convened, if the government submits an application, the president can issue regulations with the force of law. Such regulations must be approved by parliament at its next session.</p> <p>Extraordinary courts or summary procedures may only be established during times of war.</p>
Portugal	<p>Declarations of a state of siege or a state of emergency must not affect the application of the constitutional rules concerning the responsibilities and functioning of the bodies that exercise sovereign power or of the self-government bodies of the autonomous regions.</p> <p>During states of war, court martials with jurisdiction over crimes of a strictly military nature shall be established.</p>
Romania	<p>Parliament may pass a special law enabling the Government to issue ordinances in particular fields during a set period of time, outside the scope of organic laws. If the enabling law so stipulates, ordinances shall be submitted to Parliament for approval. The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status. An emergency ordinance only comes into force after it has been submitted for debate in an emergency procedure to the Chamber, and after it has been published in due order. If, within 30 days, the notified Chamber does not pronounce itself on the ordinance, it is deemed to have been adopted and is sent to the other Chamber, for a similar emergency procedure.</p> <p>Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly.</p>
Slovakia	<p>The president shall dissolve parliament during war, a war state or exceptional state.</p> <p>The manner of exercising public authority during war, a state of war, and an exceptional state, shall be laid down by a constitutional law.</p>
Slovenia	<p>If parliament cannot be convened due to a state of emergency or war, the president may, on proposal of the government, issue decrees with the force of law. Such decrees may, in exceptional circumstances and in accordance with the constitution, restrict certain rights and freedoms. When parliament is next in session such decrees shall immediately be put before it for approval.</p> <p>Military tribunals cannot be established in peacetime.</p>
Spain	<p>The law shall make provisions for the exercise of military jurisdiction strictly within the military framework and in cases of a state of siege (martial law), in accordance with the principles of the Constitution. Courts of exception are prohibited.</p> <p>See also Table A2.5.</p>

Sweden

During war or the threat of war, a War Delegation appointed from among the members of the Riksdag replaces the Riksdag if necessary. The order instructing the War Delegation to replace the Riksdag is issued by the members of the Advisory Council on Foreign Affairs after consultation with the prime minister, if possible. If war conditions prevent the Council from convening, the order is issued by the Government. In case of a threat of war, the order is issued jointly by the members of the Advisory Council on Foreign Affairs and the prime minister.

If neither the Riksdag nor the War Delegation is in a position to carry out its duties, the Government shall assume its powers to protect the country and bring hostilities to an end.

If the government cannot carry out its duties due to war, the Riksdag can decide on the formation of a new government and determine its working procedures.

During war or the threat of war, the Government can, with authority in law, issue regulations on matters which otherwise, according to the constitution, should be laid down in an act of law.

Switzerland

The government may, during disturbances that seriously threaten public order or the external or internal security, take decisions or issue regulations to come to terms with the situation. Such regulations must be temporary.

Exceptional tribunals are forbidden.

Sources: AT Const. art 84; BE Const. art. 157; BG Const. arts. 63, 157; CH Const. arts. 30.1, 185.3; DE Const. arts. 115b, c.1, d.2, e.1, f.1, k.2, i, 96.2-3; DK Const. art.23; EE Const. ES Const. art. 117.5; FR Const. GR Const. art 48.1, 5; HU Const. arts. 19/B.1-5, 19/C.2-4, 35.1.m, 3; IE Const. arts. 24.1-3, 38.4.1; IT Const. arts. 78, 103.3, 111.7; LT Const. LU Const. art. 32.4; LV Const. NL Const. art. 103.1-2; PL Const. arts. 175.2, 228.3, 234; PT Const. arts. 19.7, 213; RO Const. SE Const. chapter 13, arts. 2-6; SI Const. arts. 108, 126; SK Const. art. 102.1e, 3

Table A2.5 Constitutional safeguards for the survival of the democratic system

Country	What constitutional mechanisms exist to ensure the survival of the democratic order?
Austria	Not regulated in the constitution.
Belgium	The constitution cannot be altered in times of war or when the two parliamentary chambers are incapable of convening freely on federal territory.
Bulgaria	If there is war or another emergency situation when the term of the parliament has ended or is about to end, it will be prolonged until the situation improves.
Cyprus	Not regulated in the constitution.
Czech Republic	Not regulated in the constitution.
Denmark	Not regulated in the constitution.
Estonia	During times of war or a state of emergency, no parliamentary, presidential or local elections may be held. The powers of these institutions cannot be curtailed, and their terms are automatically prolonged until three months after the end of the state of emergency or the war.
Finland	Not regulated in the constitution.
France	The parliament sits "as of right". The National Assembly cannot be dissolved while the president is exercising his/her extraordinary powers.
Germany	The Joint Committee (i.e. the "mini-parliament" that can replace the <i>Bundestag</i> and the <i>Bundesrat</i> during a state of defence) cannot change the constitution and is not entitled to transfer powers to an international organisation. The <i>Bundestag</i> , with the approval of the <i>Bundesrat</i> , can at any point in time repeal laws issued by the Joint Committee. Measures by the Joint Committee or the federal government to avoid danger can be repealed by the decision of the <i>Bundestag</i> and the <i>Bundesrat</i> . The Constitutional Court shall continue to function normally, except in cases where the Court itself decides that its working methods must be adjusted to the situation. Terms of the <i>Bundestag</i> , the president, the parliaments of the <i>Länder</i> , and the judges of the Constitutional Court shall be prolonged until six months (nine months for the president) after the end of the state of defence. The <i>Bundestag</i> cannot be dissolved during a state of defence.
Greece	During a war, the terms of the president and parliament are prolonged until the end of the conflict. If parliament has been dissolved, new elections shall be postponed until the end of the war, and, in the meantime, parliament is re-convened.
Hungary	During a state of emergency or a state of national crisis, parliament cannot be dissolved, and its term shall be prolonged until the end of the emergency situation. The parliament or, should the parliament be obstructed, the parliamentary defence committee shall remain in session during a state of emergency. In case of war, the risk of war or in an emergency situation, the president can reconvene the parliament if it has been dissolved. The parliament itself shall decide on the prolongation of its term. In a national crisis, the activities of the Constitutional Court may not be restricted.
Ireland	In the case of invasion, the House of Representatives (Dáil Éireann) shall be convened as soon as it is possible to do so in practical terms, if it is not already in session. However, the constitution is practically suspended in the case of war or armed rebellion: "Nothing in this Constitution other than Article 15.5.2° [which forbids parliament to introduce the death penalty] shall be invoked to invalidate any law enacted by [the parliament] which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law".
Italy	In wartime, the terms of both chambers can be extended by law.
Latvia	Not regulated in the constitution.
Lithuania	If general elections fall during a war, the Seimas or the president shall decide that the Seimas', the president's, or the local governments' terms shall be prolonged. In such cases, elections must be called within three months after the end of the war. During a state of emergency or martial law, the constitution cannot be altered.
Luxemburg	No paragraph of the constitution can be temporarily suspended.
Malta	If parliament is not in session, it shall be convened within five days after a state of public emergency has been proclaimed, and thereafter remain in session. If Malta is at war, the parliamentary term can be prolonged by 12-month periods, not exceeding a total of five years.
Netherlands	Not regulated in the constitution.

Norway	Not regulated in the constitution.
Poland	When extraordinary measures are in place, the constitution, the election laws, and the laws regulating the extraordinary measures cannot be changed. During and for 90 days after such a period, the term of the Sejm cannot be abrogated, and no elections or referenda may be held: terms are thus prolonged if necessary.
Portugal	Parliament cannot be dissolved during a state of emergency or a state of siege, and the constitution may not be changed. Only parliament can legislate regarding a state of emergency and state of siege.
Romania	Parliament cannot be dissolved during a state of emergency, a state of siege, war or mobilisation. Its term is prolonged <i>de jure</i> until the crisis (of whatever type) is over. If parliament is not in session, it shall be convened <i>de jure</i> within 48 hours after a state of emergency or a state of siege has been introduced, and within 24 hours in case of mobilisation or war. Parliament shall remain in session during the whole period of crisis (of whatever type). The presidential term can be prolonged by organic law in case of war or catastrophe. The constitution cannot be altered during a state of emergency, a state of siege or war.
Slovakia	The Constitutional Court shall examine whether the proclamation of a state of emergency or an exceptional state as well as decisions taken in conjunction therewith are in accordance with the constitution and constitutional law.
Slovenia	If the parliamentary or presidential term comes to an end during a war or a state of exception, its term shall be prolonged until six months after the end of the war/state of emergency, or, as concerns the parliament, earlier if parliament so decides.
Spain	Parliament cannot be dissolved during a state of alarm, a state of emergency or a state of siege. If parliament is not in session, it shall be convened. Its functioning, as well as that of the other constitutional state authorities, may not be interrupted. If parliament has been dissolved or its term has expired before the emergency occurred, its powers are assumed by its Permanent Deputation. None of the exceptional states will affect the principle of liability of the Government or government agents. The constitution cannot be altered during a state of alarm, a state of emergency, or a state of siege.
Sweden	In case of war or danger of war, the Riksdag shall be convened. If neither the Riksdag nor the War Delegation is able to carry out its duties, the government assumes its powers to the extent necessary to protect the country. In such a case, the government may not enact, amend, or abrogate a fundamental law, the Riksdag Act, or a law on elections for the Riksdag. If the case of war, elections for the Riksdag are held only if the Riksdag so determines. In the case of danger of war, the Riksdag may decide to defer elections. Such a decision must be reviewed at intervals of no more than one year. Decisions regarding postponement of elections are valid only if supported by at least three fourths of the members of the Riksdag. Elections for the Riksdag or local government assemblies cannot be held in occupied territory.
Switzerland	Not regulated in the constitution.

Sources: BE Const. art. 196; BG Const. art. 64; DE Const. arts. 115 e.2, 115 g, 115 h.1-3, 115 l.1; EE Const. art. 131.1-2; ES Const. arts. 116.5-6, 169; FR Const. art. 16; GR Const. arts. 30.4, 53.3; HU Const. arts. 19/B.6, 28/A.1-3; IE Const. art. 28.3.2-3; IT Const. art. 60; LT Const. arts. 143, 147; LU Const. art. 113; MT Const. arts. 47.3.a, 76.3; PL Const. art. 228.6-7; PT Const. arts. 164 e, 172.1, 289; RO Const. 63.1, 83.3, 89.3, 92.1, 93.2, 152.3; SE Const. chapter 13, arts. 1, 5, 10, 12; SI Const. arts. 81, 103; SK Const. 129.6.



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DCAF Geneva
P.O. Box 1360
1211 Geneva 1
Switzerland
Tel: +41 (22) 741 77 00
Fax: +41 (22) 741 77 05

DCAF Brussels
Place du Congrès 1
1000 Brussels
Belgium
Tel: +32 (2) 229 39 66
Fax: +32 (2) 229 00 35

DCAF Ljubljana
Kotnikova 8
1000 Ljubljana
Slovenia
Tel: + 386 (3) 896 5 330
Fax: + 386 (3) 896 5 333

DCAF Ramallah
Al-Maaref Street 34
Ramallah / Al-Bireh
West Bank, Palestine
Tel: +972 (2) 295 6297
Fax: +972(2)295 6295

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