Introduction: Public Health, Financial and Economic Crises

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Abstract Starting from the basics, all authors of this Chapter provide a definition of what “extreme conditions” or “emergencies”, as more traditionally referred to, constitute. Basic constitutional models of emergency powers undertaken by the executive under extreme conditions are, moreover, identified by the authors, who, in addition, map the concerns over the restriction of fundamental rights under such extreme conditions. Public health emergencies, although among the most traditional forms of emergencies, pose challenges which demand responses distant from “business as usual”. Even more distant from “business as usual” are the responses required to the new-born European economic and financial emergencies, which generate doubts as to whether the European Union and its Member States will ever be the same again. As national fundamentals are overturned, the European Union and its Member States struggle to remain beacons of human rights protection.

1 Starting from the Basics

All authors of this part are commencing their contributions by attempting to provide a definition of what “extreme conditions” or “emergencies”, as more traditionally referred to, constitute.

Dr. Villarreal1 explicitly, at the outset, states that there is no unitary agreement on the legal field of what exactly an emergency constitutes and that the current lack of a precisely calibrated blueprint for emergencies entails a continuous process of assessing facts for determining how to respond to a situation. He submits, though,

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1See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sects. 1 and 2.

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that an emergency for constitutional purposes entails something more than simply any “extraordinary” event.

Professor Bertolini attempts to define “emergency” as an extraordinary situation requiring prompt and firm action; therefore, emergency powers are conferred to the executive, while the role of parliament as well as the protection of some key fundamental rights and freedoms are compressed; the greater detail of such provisions, the less the executive may act without any control or limit; the emergency finished, the normal functioning of the form of government is restored”. She further adds that “the key elements of traditional emergencies are mainly two: a temporary prominent role of the executive power over the legislative and measures that temporary infringe or suspend rights and freedoms; therefore, temporariness is the core word, since the emergency character of the situation requires a deviation from the constitutional legal order; moreover, since the ultimate aim is the restoration of the constitutional legal order, the deviation cannot be temporary.”

As to the constitutional emergency powers undertaken by the executive under such extreme conditions, Dr. Villarreal identifies three basic models:

- The “rule of law” or “business as usual” model, according to which responses emergencies can be framed within the existing, ordinary legal framework, entailing no actual extraordinary measures, since they may be found within the predetermined norms.
- The “constitutional dictatorship” model, in which emergencies lead to exceptional and temporary regimes wherein ordinary norms do not apply.
- The “extralegal model”, in which responses to emergencies are to be found outside of the legal order, on the basis that “necessity knows no law”.

However, as Professor Bertolini submits, not all constitutions provide for an emergency model; what they cannot avoid to provide for, though, are emergency instruments.

The above inevitably lead to Dr. Baraggia’s point that the notion of emergency powers is deeply intertwined with the concepts of sovereignty and of the ultimate detention of power. It is in this framework, that he poses inter alia the following questions:

- Does emergency represent a breach into a legal order or does it constitute an additional source of law?
- Who has the power to decide in an emergency?
- Does an emergency legitimate fundamental rights violations?

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2See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 4.
3See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sect. 2.A.
4See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.
5See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”.
Dr. Villarreal’s\(^6\) contribution provides some answers to the above questions: “[D]eclaring an emergency for constitutional purposes would entail an expansion of governmental authority, usually of the administrative or executive branch[; t]he “extreme” version is the French Constitution, which [...] grants the President the power to declare an emergency by her/himself, putting congressional or judicial oversight aside altogether[; y]et even in this model, a lack of legally established institutional checks-and-balances does not mean that there is simply no possibility of having counterweights when declaring emergencies [...] without ignoring the fact that “extra-legal” (social, political) counterweights are also a force to be reckoned with, sometimes more so than legality[; t]he underlying assumption for enhanced executive decision-making is that the regular processes do not allow for an efficient response to an outstanding threat[; s]ome events, whether caused by persons or naturally occurring (war, terrorist attacks, economic meltdowns, natural disasters), surpass the inherent capabilities of institutions to deal with them in an “ordinary” manner[; t]he assumption in the background is that the executive has the best tools for facing such a situation”.

As to the concerns over the restriction of fundamental rights under extreme conditions, Dr. Villarreal\(^7\) admits that “a series of human rights are susceptible of being suspended, or even derogated, when an emergency justifies it[; t]he idea that human rights are an “obstacle” to the attainment of certain abstract goals, like the “very existence of the State” clearly does not bode well with everyone; [f]or another strand, there is simply no possible justification for the use of emergency powers outside of the rule of law, thus devoting all emergencies to a “business as usual” model[; …] according to this view, no situation could possibly warrant a restriction, much less a derogation of human rights, since any such case would most likely be a façade[; f]rom a normative perspective, the establishment of legal provisions dealing with emergency powers and derogations of human rights are by no means uncontroversial.”

2 Public Health Emergencies: A Business-as-Usual Notion or Not So?

In light of the above, Dr. Villarreal,\(^8\) whose contribution in this chapter deals with a traditional form of emergency, that of public health emergency, concludes that there is still no scientific consensus regarding what constitutes a public health emergency, despite the occurrence of such events since for ever and despite the fact that “infectious disease epidemics can shake the very foundations of societies, whilst straining legal

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\(^6\)See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sect. 2.A.

\(^7\)See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sect. 2.C.

\(^8\)See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sect. 4.
emergencies and states of emergency, exception, siege or defense, they may still provide insights on multiple factual and normative challenges”.

A subsequent challenge of the aforementioned lack of consensus is there is no uniformity with regard to the legal framework for responding to them and, therefore, “a specific fact such as a transborder epidemic warranting a multilateral response does not fall within the purview of clear-cut legal orders, as the constitutional framework of one country and the other may not be comparable [; and other times, they may even set the stage for changes in the reach and scope of human rights”.

3 Economic and Financial Emergencies: Will Europe and Its Member States Be the Same Again?

Along the path of the traditional public health emergency, presented in this Chapter by Dr. Villarreal, Professor Bertolini and Dr. Baraggia opt to deal with a rather unconventional form of emergency that of the economic and financial crises seriously ravaging Europe since 2010.

The crises in name are probably the most significant ones that the EU as a whole faced since its establishment. It was most its complexity which gave rise to an enormous number of various political, institutional and legal questions, with often no (sound) answers. The two concurrent crises displaced the cornerstones of both national and EU fundamental institutional architectures, which inevitably had a serious impact on democracy, legitimacy, accountability and human rights. While a lot of ink has been shed with regard to the economic and financial measures taken to respond to the crises, the effect of those emergencies on the institutional and constitutional orders of the EU and its Member States have not been adequately assessed.

In light of the above, as Professor Bertolini⁹ rightly points, the requirement of temporariness is completely lacking with regard to this particular crisis, which is evident both in the ongoing prominence of governments over parliaments and also in the seemingly never-ending limitation of human rights. Thus, among the effects of the present economic and financial crises are constitutional crises at both national and EU levels. In this context, both authors analyse the national and EU anti-crisis measures and instruments enacted due to the economic and financial crises, as well as the interactions between the multiple EU Member States’ jurisdictions hit by the crisis and the EU jurisdiction.

⁹See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 4.
3.1 National Fundamentals Overturned

Professor Bertolini\textsuperscript{10} embarks her analysis by attempting to draw the relevant constitutional framework: where constitutions provide for a specific section dealing with the state of emergency, they may even provide that a deep economic crisis falls within such an emergency, although the “depth” is a rather subjective criterion. However, Professor Bertolini\textsuperscript{11} wonders:

- Can this pattern be applied to an economic emergency?
- Can all the crisis-related measures, adopted both at supranational and national level, be described as pure and ‘classical’ emergency provisions?
- Are they transitory, as emergency provisions should be, or not?
- How are they adopted and through which instruments?
- In addition, to what extent do they affect and infringe fundamental rights?

It is exactly those questions to which Professor Bertolini and Dr. Baraggia’s contributions in this Chapter provide answers.

Professor Bertolini\textsuperscript{12} admits that economic and financial crises can be equated to e.g. armed insurrections and thereby justifying executive recourse to emergency powers, as there is an undoubted need for immediate action. However, in such cases the duration of the emergency may seem indefinite and the time of restoration of the status ante unforeseeable, thus negatively impacting on democracy, accountability and human rights protection.

Nevertheless, as Dr. Baraggia\textsuperscript{13} points out, “[n]egotiations of conditions are undertaken by governments, with parliaments confined to a role of the ratification of the decision taken in other fora, without the chance to assure democratic accountability control on their respective governments”.

In this framework, both authors embark on exposing notable elements within the national jurisdictions of the protagonist Member States. Common elements among these countries have been inter alia the extensive use of the governments’ power to issue legal instruments, such as e.g. decrees, not requiring lengthy adoption processes, public consultations, political debates, the pivotal involvement of the parliaments in their adoption etc., as it is the case with ordinary statute laws. As Professor Bertolini\textsuperscript{14} very eloquently describes it, “parliaments were basically stripped of the freedom of discussion and proposal of amendments and thus reduced to institutions merely

\textsuperscript{10}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.
\textsuperscript{11}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.
\textsuperscript{12}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sects. 3 and 4.
\textsuperscript{13}See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”, Sect. 2.2.
\textsuperscript{14}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.2.
ratifying decisions taken elsewhere, not under the scrutiny of any elected body and that have to be abode also by national governments”.

In such an environment, the stance of national courts, expected to counterbalance this democratic deficit by assessing the content of such legal instruments and also of the ordinary statute laws embodying the crisis measures, has not been uniform among Member States and also within the same Member State. Namely, the stance of national courts has varied from declaring crisis measures as proportionate, due to the budgetary constraints generated by the extreme conditions and, thus, legitimate, to striking down provisions of the budgetary laws, so as to restore the adequate protection of fundamental, welfare and property rights. Relatedly, Professor Bertolini\textsuperscript{15} poses the additional question of whether external conditionality itself requires measures which violate rights or whether it is the way these measures are nationally implemented which leads to such violations.

Whatever the answer may be, “the economic crisis has […] to be considered as a new genus of emergency that has put the constitutional order under considerable strain”, Professor Bertolini\textsuperscript{16} concludes, adding that “none of the countries seriously affected by the crisis invoked the emergency[; t]herefore, the traditional emergency pattern cannot be applied to the present day economic crisis[; s]urely, this is an emergency but the traditional model does not fit[; s]ince different concerns arise, different constitutional solutions have to be provided for.”

3.2 Can the EU Still Claim to Be a Beacon of Human Rights Protection?

The management of the crisis at the EU level has posed many constitutional concerns, mainly in terms of legitimacy and accountability of the procedures providing for the new instruments, mechanisms, and effects in the long term on the rights protection. Professor Bertolini\textsuperscript{17} remarks, so as for Dr. Baraggia\textsuperscript{18} to add that the EU Treaties did not contain any emergency provision and, therefore, an experimental approach was adopted, trying to fit the existing institutional instruments to the crisis circumstances. Thus, it is not the promptness of the EU’s reaction which should be doubted, but the legitimacy of the procedures chosen by the EU to carry out its action, Professor Bertolini\textsuperscript{19} submits, adding that the related \textit{vacuum} in the Treaties forced Member

\textsuperscript{15}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.3.

\textsuperscript{16}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 4.

\textsuperscript{17}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.1.

\textsuperscript{18}See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”, Sect. 2.

\textsuperscript{19}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.1.
States to opt for solutions partially outside the EU legal order, namely outside the checks and balances system of the EU institutional architecture. The intergovernmental procedure chosen resulted not only in the circumvention of Union law, but also to a potential threat to democracy and to the rule of law Dr. Baraggia\textsuperscript{20} claims.

Professor Bertolini\textsuperscript{21} is even more alarming in this respect, claiming that this shift of power not only from national parliaments to national governments, but also from national governments to international or European institutions shall not be temporary with whatever this entails for the principles of democracy, proportionality, accountability, transparency, non-discrimination and human-rights protection, since the more one distances from the national sovereign the more scarce accountability mechanisms become.

Namely, Dr. Baraggia\textsuperscript{22} notes, the delegation of discretionary powers to supranational institutions has rendered judicial review difficult, since the authorities’ technocratic margin of appreciation has been extended to a degree which leaves courts with little space for posing challenges. Undoubtedly, such a choice has a deep, transformative and long-lasting impact on the EU legal order, leading to EU constitutional transformation. This weakened accountability challenges, in particular, the effectiveness of fundamental rights protection within the EU in times of crisis, he adds, for Professor Bertolini\textsuperscript{23} to explicitly underline that the relevant MoUs as well as the Council Decisions make no reference to either the European Social Charter or the EU Charter of Fundamental Rights, despite the emphasis that the Treaty of Lisbon puts on the EU commitment to social rights.

\textbf{4 Concluding Remarks}

Even though, public health emergencies belong to the sphere of often occurring events, the lack of consensus as to the definition of what constitutes a public health emergency and the lack of uniformity as to how to respond poses multiple factual and normative challenges, Dr. Villarreal admits.\textsuperscript{24} However, the fact that such events have been occurring since ever and they will continue to do so makes the need for their effective regulation at all jurisdictional levels imperative.

The management of the economic and financial crises in the EU also demonstrated a clear deficit at both the national and the EU levels, in this case a democratic

\textsuperscript{20}See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”, Sect. 2.

\textsuperscript{21}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 4.

\textsuperscript{22}See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”, Sect. 2.

\textsuperscript{23}See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 3.3.

\textsuperscript{24}See in this volume Villarreal Pedro A., “Public Health Emergencies and Constitutionalism: Between the National and the International”, Sects. 1 and 2.
deficit: not only were measures adopted not by the legislatives but by the executives, but, moreover, even the EU legal order was bypassed in favor of the international, Dr. Baraggia concludes. The legislatives, both at national and at EU level, were, thus, excluded from the decision-making process and restricted to informative duties. All that happened, despite the effect of the austerity measures as such and their related national implementations on citizens’ fundamental and social rights. It was in this that national—often constitutional or supreme courts—were called to defend the fundamental rights enshrined in their national constitutions but violated due to the crisis.

In particular within the EU, the economic and financial emergency proved to be a *sui-generis* case, he continues, as it was addressed with a legal improvisation ending up to the circumvention of EU law and the deployment of international instruments. In this context, the role of the CJEU was limited both by definition and also by choice, legitimizing the “supra-national discretionary authority”.

In concluding overall, Professor Bertolini highlights that a new constitutional regime within the EU as well as within the Member States needs to be drafted, in order to adequately meet the needs of the globalised economy and the challenges emerging therewith. This new constitutional design should not necessarily involve the enactment of new provisions strengthening monitoring, accountability and protection of social and economic rights, but could also rely on proper constitutional interpretation.

Admittedly, both the economic and the financial crises have had roots not only in the sphere of global failures but also in the sphere of EU failures. Namely, inadequate or inappropriate monitoring and supervision of the sovereign balance sheets, as well as of the national banking systems significantly, contributed to the crises. The signs were evident since a long time, but even when those crises topped, the EU was still unprepared to resolve them. Therefore, the hasty and spasmodic actions of the EU itself and its Member States inevitably caused inter-institutional, inter-state and EU-Member State imbalances and tensions. It finally proved that the innocent victim of those imbalances and tensions were human rights, most social and economic ones, but even the restriction of those rights can harm the very essence of human dignity and value.

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25See in this volume Baraggia Antonia, “Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective”, Sect. 3.

26See in this volume Bertolini Elisa, “Financial Crisis as a New Genus of Constitutional Emergency?”, Sect. 4.