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Emergency Legislation in a Globalized World

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It seems indisputable that emergency legislation represents today a global phenomenon. Soon after September 11, 2001, the US government, in response to the terrorist attacks perpetrated by Al Qaeda, implemented a series of legal reforms that came to seriously affect citizens' rights expressly recognized by the constitution. For some of its leading proponents, such adjustments are justified when they are adopted «in response to the felt needs and conditions of the time» (cfr. POSNER 2006, 147). A constitution «that will not bend, will break» and, sometimes, values such as personal liberty and privacy must give way to equally important values such as public safety and social peace (cfr. POSNER 2006, 1). 16 years later, it seems little has changed. Terrorism is far from having been defeated and the emergency legislation that was at the centre of the Bush administration is now finding its counterpart on the other side of the Atlantic and under an administration of a quite different political sign. Indeed, as a response to the terrorist attacks that took place in Paris on November 13, 2015, the former French President Francois Hollande declared the state of emergency and opened a new phase in our understanding of the relationship between fundamental rights and public safety. With the whole world deeply moved by the Paris events – and the subsequent July 2016 attack in Nice –, it seems that the realization that this is our new reality has finally sunk in. If this is actually the case, and we can expect to see a proliferation of emergency legislation around the world, it then seems reasonable to raise the concern that some of our fundamental rights and freedoms might be permanently lost to us.

Although the above mentioned events share a similar nature, the notion of legal emergency is not exhausted by them. The ongoing refugee crisis, for instance, even though it happens to be causally related to these terrorist attacks, exhibits its own physiognomy and certainly seems to demand a different kind of reaction. What about natural disasters (earthquakes, floods, etc.), economic imbalances and other disruptive phenomena? Indeed, today it seems that almost anything can be presented as a security threat (securitized; cfr. BUZAN, WAEVER, DE WILDE 1998). Assuming that all of these phenomena represent authentic emergencies, their recognition, analysis and resolution seem to require different approaches and different analytical skills.

What is, therefore, a state of emergency? Does it have an ontological status? Can it be defined from a value-free conception of human affairs? When is its declaration justified? What are its legal implications? Is there such a thing as a

basic core of rights and freedoms that deserve absolute protection? Does emergency legislation, especially executive orders, represent the introduction of anomy within a legal order, raising a paradox in Agamben's sense (see AGAMBEN 2003)? Or, on the contrary, does it possess a non-exceptional character, in Troper's sense (cfr. TROPER 2011)?

The essays collected in the present monographic section tackle these and other related issues from different perspectives: political analysis, legal theory, philosophy, international law theory, international relations, history, constitutional law and some others. Their authors, conspicuous scholars from both parts of the Atlantic, are sometimes moved by their own cultural backgrounds and political contexts. However, these idiosyncratic characteristics are no obstacle at all for finding in their writings important contributions to understanding emergency legislation that will be universally appreciated. After all, we are dealing with a world-wide phenomenon, prone to generate no less authentic global consequences.

In the inaugural essay of the collection, *Emergenza, crisi e sicurezza. Decisioni extra-ordinarie tra governo centrale e amministrazioni locali*, Massimo Cuono and Enrico Gargiulo present an introductory approach to “emergency”, reflecting on it as what they call a *normal* and *normalized* instrument of power legitimacy. In their approach, mainly fed off by recent governmental initiatives in the USA and Italy to deal with migration issues, they proceed to link emergencies with (i) the organicists imaginaries related to the concept of crisis, (ii) the reframing of social problems in terms of security and (iii) the political and legal responses justified with the arguments of urgency, exception and necessity. This general and instructive essay serves well to open the monographic section, for it somehow sets the scope of the problems and approaches that the reader may find out in the subsequent essays.

The rest of the collection might be divided into two parts. The first part includes essays by Mariano Croce, Marcela Chahuan and Matías Parmigiani, which are mainly interested in the theoretical subtleties that lie behind emergency legislation. Along these pages, reflections on Schmitt's, Kelsen's and even Rawls' works will clearly stand out. In contrast, the essays included in the second part are more practical in a way, for they intend to use the theoretical tools offered by philosophy, legal analysis and constitutional theory to shed light on how emergency legislation is invoked in the public life of many European countries. In this respect, Ana Carmona Contreras focuses on Spain, Vincent Souty on France, Kriszta Kovács on Hungary, and Matija Žgur on Slovenia. As will be noticed, the selection does not respond to a uniform criterion. Quite the contrary, the wide range of topics covered by the collection as well as the different languages admitted for the essays (English, Spanish, Italian and French) speak for themselves. Nonetheless, we firmly believe that such a variety constitutes a virtue, allowing readers from different parts of the

world the possibility of approaching a rather complex theme that avoids at the same time the risks of oversimplification.

In his article, *What to Do of the Exception? A Three-stage Route to Schmitt's Institutionalism*, Mariano Croce traces a developmental trajectory in Schmitt's conception of law that brings out alternative conceptualizations of the exception. Focusing on the relation between what he calls "nomic force" (the particular phenomenon of bringing order) and "materiality" (the matter-of-factness of a particular entity or phenomenon), Croce displays three different models to explain it, each of which would find support in Schmitt's own intellectual development. Overall, however, Croce believes that Schmitt's whole theoretical trajectory from his initial exceptionalism to his later concrete-order thinking would demonstrate that no exception is needed by a political sovereign who wants to keep her subjects together and her community alive.

In *Legislación de excepción. Una propuesta de análisis sobre la base de la teoría del derecho de Hans Kelsen*, Marcela Chahuan Zedan proposes a legal analysis of emergency legislation drawing upon the alternative tacit clause (ATC) thesis formulated by Hans Kelsen in his *Pure Theory of Law*. The ATC, Chahuan suggests, may function as a powerful instrument to account for legislation in contradiction with constitutional norms establishing the requirements for normative production.

Matías Parmigiani, in his essay entitled *What Does It Mean to Be Objective? Outlining an Objective Approach to Public Emergencies and Natural Disasters*, addresses the problem of objectivity in political justification and legal reasoning when assessing the occurrence of public emergencies and natural disasters. After shedding some light on the pragmatics of objectivity in representative speech, he tries to demonstrate why there might be reasons to believe that Schmitt-inspired approaches to legal emergencies would owe a great part of their appeal to a refusal to see all that might be involved when talking about objectivity in morals as well as in politics. To do that, he trusts in a constructivist notion of "human welfare" as offering the interpretive key.

In *Decreto-ley y crisis económica. O cuando la necesidad (política) no hace virtud (constitucional)*, Ana Carmona Contreras analyses the operative capacity of the Decree-Law as a tool for managing the severe economic crisis that had affected Spain from 2008 through 2015. She exposes the permissive stance adopted not only by the Spanish Constitutional Court when controlling the Government but also by the Parliament. In the end, she regrets, both stances affect the democratic quality of the entire political system, transforming the system of sources designed by the Constitution.

Vincent Souty's contribution *Un jour sans fin. La France sous état d'urgence* aims to present an analysis of the French state of emergency as it is applied since more than one year. From a reading grid of emergency powers based on international

human rights law and domestic comparative studies, it underlines the problems raised by this state of emergency in the lights of the principles of the rule of law.

Kriszta Kovács starts her essay *The State of Exception: A Springtime for Schmittian Thoughts?* by raising a question: When is it justified to declare a state of emergency under the European standards? To answer it, she explores the defining characteristics of a state of emergency to finally concentrate on the Schmittian concept of the state of exception. She argues that Carl Schmitt's view serves as the intellectual basis for the Hungarian declaration and prolongation of state of exception and the constitutionalisation of the unhampered executive power of the prime minister, concluding that in the case of emergency there are only two options: the state either remains a temporarily modified constitutional democracy, or it is not a constitutional democracy at all.

Finally, Matija Žgur, in *The State of Emergency in the Slovenian Constitutional Design*, presents the essential characteristics of the state of emergency regime in the Slovenian constitutional design. He first presents the relevant normative framework by analysing the key stages in the “life” of an emergency – the declaration, the institutional phase of the emergency and its termination. Finding the system generally incomplete and in many ways deficient, he focuses his attention on the two most pressing problems and critically evaluates them. He concludes his analysis by calling for a major overhaul of the emergency management system in Slovenia.

As previously remarked, despite the wide variety of topics and approaches embraced in this volume, we are confident that both students and scholars from different parts of the world will find these discussions illuminating. For making this possible, we would first like to thank every one of our contributors. They not only shared our initial enthusiasm for the project, but submitted their essays in time and rigorously met the highest of standards. Second, we wish to thank *Diritto e Questioni Pubbliche* (and its Editors Aldo Schiavello, Giorgio Pino and Giorgio Maniaci, as well as Marco Brigaglia) for generously hosting our discussion in their journal. Without their support, none of this would have been possible.

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