

# THE STATE OF EMERGENCY IN THE SLOVENIAN CONSTITUTIONAL DESIGN

MATIJA ŽGUR



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PhD in Human Rights (Palermo) & Legal Philosophy (Girona)

E-mail: [matija.zgur@gmail.com](mailto:matija.zgur@gmail.com)

## ABSTRACT

In this article, the author presents the essential characteristics of the state of emergency regime in the Slovenian legal system and provides a critical evaluation thereof. First, he presents the relevant normative framework of the subject matter by analysing all critical stages in the management of an emergency (the declaration, the state of emergency itself and its termination). Then, he focuses on what in his view are two most significant problems of the current regulation and provides critical comments on each of them. He concludes by calling for a major overhaul of the emergency management system.

## KEYWORDS

State of Emergency, Emergency Powers, Human Rights, Republic of Slovenia

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## 1. *Introduction*

Emergencies – be they natural or man-made – are said to represent “the moment of truth” for a given constitutional order. Contemporary constitutions set up complex juridico-political systems of government: they establish key state institutions and frame their powers; determine their mutual relations (e.g. the system of separation of powers and checks-and-balances); and provide limits to these powers in relation to the citizenry in the form of constitutional rights and freedoms<sup>1</sup>. These constitutional designs, however, are intended for “normal”, non-emergency times, that is, for when things run their usual course<sup>2</sup>. Emergencies, on the other hand, are un-usual, most often unpredictable, unexpected, and sudden events<sup>3</sup>. It is precisely when things go awry and the ab-normal occurs that the resilience of a constitutional design is put to the test. Faced with exceptional circumstances threatening its stability and even survival, the constitutional order can demonstrate itself unable to efficiently resolve the crisis by legal means and, consequently, yield to non-law – to a resolution of the emergency situation by way of extra-legal, forceful and arbitrary means; or, it can prove sufficiently

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<sup>1</sup> By way of introduction on the possible meaning(s) of the term “constitution”, see GUASTINI 2014, 147 ff.

<sup>2</sup> «Normality», argue Croce and Salvatore, «is the social world as it is described in the here and now: the implicit, the common sense, the taken for granted, which is perceived as the unquestionable basis for everyday action» (CROCE, SALVATORE 2017, 288). The *Oxford English Dictionary* defines “normal” as «Constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional. (The usual sense.)».

<sup>3</sup> For example: «The term “emergency” connotes a sudden, urgent, usually unforeseen event or situation that requires immediate action». As such, it is inherently linked with the notion of normality (normalcy): «To recognize an emergency, we must, therefore, have the background of normalcy» (GROSS 1998, 439).

adaptable, inclusive of (extraordinary) mechanisms enabling a resolution that is both effective and, more importantly, respectful of the citizens' rights<sup>4</sup>.

The inevitable tension between two often diametrically opposite goals, namely the need to resolve a crisis swiftly and efficiently (the efficiency *desideratum*), on the one hand, and the need to respect the rule of law and fundamental rights (the rule of law *desideratum*), on the other hand, is arguably the main challenge in the legal regulation of emergencies<sup>5</sup>. «The question» says Gross, «is how to allow government sufficient discretion, flexibility and power to meet crises, while maintaining limitations and control over governmental actions so as to prevent or at least minimize the danger that such powers would be abused» (GROSS 2011, 334). Given the unpredictable nature of emergencies, every legal system will establish its own emergency management system, attempting to balance as best as possible the two extremes of the overarching dilemma<sup>6</sup>. In particular, in determining its emergency regime, any legal system is bound to (that is, it ought to) address the following set of problems (here presented in a logical-chronological order)<sup>7</sup>: (i) what counts as an emergency; (ii) who declares the state of emergency and how; (iii) what consequences stem from the declaration (specifically: who decides during the emergency; what institutional changes occur as a consequence of the declaration; which rights can be suspended during the state of emergency and which cannot etc.); and (iv) how the state of emergency is brought to an end<sup>8</sup>.

<sup>4</sup> Cfr. TUSSEAU 2011, 498 f.

<sup>5</sup> The literature on this topical issue, especially in the wake of the 9/11 attacks, is incredibly vast. See, for instance, TUSHNET 2005; ACKERMAN 2006; GROSS, NÍ AOLÁIN 2006; DYZENHAUS 2006; POSNER 2006; FATOVIC 2009; LAZAR 2009, BARBERIS 2017 etc. An evidence of the continued interest in these questions is offered by the programme of the upcoming 2018 world congress of the International Association of Constitutional Law: virtually all plenary sessions and the larger part of the Workshops are dedicated to questions related to emergencies. See: <http://wcccl2018-seoul.org/programme.html>.

<sup>6</sup> This needn't necessarily be the case. Legal scholarship broadly distinguishes three models of emergency regimes: (i) the "Accommodation model(s)", which provide(s) that «when a nation is faced with emergencies its legal, and even constitutional, structure must be somewhat relaxed (and perhaps even suspended in parts)» (GROSS, NÍ AOLÁIN 2006, 17); on the other hand, (ii) according to the "Business as Usual" model, emergencies «[do] not justify a deviation from the "normal" legal system [...] The ordinary legal system already provides the necessary answers to any crisis without the legislative or executive assertion of new or additional governmental powers» (GROSS, NÍ AOLÁIN 2006, 86). There is, finally, the "Extra-Legal Measures" model, with which I will not deal here (on this, see GROSS, NÍ AOLÁIN 2006, III ff.). GROSS (2011, 334) argues that most democratic regimes adhere to the "Accommodation model".

<sup>7</sup> See MINDUS 2007. MARAZZITA (2003, 161 ff.), on the other hand, distinguishes between two fundamental "moments" in this regard, namely (i) "the emergency fact" and (ii) the emergency regime, which are bound by the (iii) "judgment of necessity".

<sup>8</sup> Another crucial question in this respect is (v) what kind of mechanisms of (judicial) control of emergency decisions exist in a given system. *Ex post* judicial mechanisms are particularly important in guaranteeing the preservation of the rule of law and the protection of fundamental rights in all stages of the state of emergency. Regardless, given the spatial limits of this article, I will only touch upon the

In this article, I pursue two broader goals: first, to provide a general outline of the emergency management system in the Slovenian constitutional design (§ 2.). In order to do so, I briefly address each of the questions listed in the above points (i)–(iv). Secondly, to pinpoint some of the most problematic features of this system and provide critical remarks with respect to them (§ 3). On the basis of the developed analysis, I conclude (§ 4.) that the regulation of the state of emergency in the Slovenian legal system is highly problematic and requires major reform.

## 2. *The State of Emergency in the Slovenian Constitutional Design*

In this central part of the article, I introduce the main features of the emergency regime in Slovenia. First (2.1.), I examine the conditions for declaring of a state of emergency and, in particular, discuss what types of events can be considered as emergencies; next (2.2.), I look at how the declaration is to be made by the authorized body; then (2.3.), I analyse the institutional changes that occur as a result of this declaration (2.3.1.), including the conditions for suspending fundamental rights during an emergency (2.3.2.); finally (2.4.), I consider how the state of emergency is terminated<sup>9</sup>.

### 2.1. *What Counts as an Emergency?*

The principal normative source regarding the state of emergency is found in Art. 92 of the Slovenian Constitution<sup>10</sup> (entitled “War and State of Emergency”), which determines that

«(1) A state of emergency shall be declared whenever a great and general danger threatens the existence of the state. The declaration of war or state of emergency, urgent measures, and their repeal shall be decided upon by the National Assembly on the proposal of the Government.

(2) The National Assembly decides on the use of the defence forces.

question briefly below (2.3.2.), leaving a more thorough analysis aside for a future occasion. See, for instance, MAY 1989; GROSS 1998; COLE 2003; EL ZEIDY 2003; DYZENHAUS 2006, VENICE COMMISSION 2006; GREENE 2011 etc.

<sup>9</sup> I should caution that due to the overview (and precedential) nature of this article, the arguments furnished herein are more often than not only superficial and thus in need of further development. This text, as a first attempt to provide a comprehensive overview of the emergency regime in the Slovenian constitutional system, inevitably raises more questions than it is able to answer.

<sup>10</sup> *Official Gazette of the RS*, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16. The English text of the Constitution is available at: <http://www.us-rs.si/en/about-the-court/legal-basis/constitution/>.

(3) In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon its next convening».

The first sentence of Par. 1 determines the conditions for declaring the state of emergency, while the second sentence determines that the declaration of the state of emergency and of a war<sup>11</sup>; moreover, the decisions on urgent measures during such times; and, finally, the decision on terminating the state of emergency (or war), are all made by the National Assembly on the proposal of the Government<sup>12</sup>. This means that the National Assembly cannot, with regard to emergency-related decisions, act neither on its own initiative nor on anyone else's – except for the Government's.

The conditions for the state of emergency are fundamentally three: that (i) “a great and general danger”, (ii) “threatens the existence of the state” and (iii) that the competent authority actually declares the state of emergency<sup>13</sup>. In determining these conditions, the Constitution is rather sparing of words and the terms that it employs are exceptionally vague<sup>14</sup>, giving rise to a series of questions: for instance, what level of intensity of a given event constitutes a “great” danger? Does “general” danger mean that the whole of the territory of the state must be endangered or does it suffice that only one part of it faces peril? Can any type of an event whatsoever be considered a “danger”? What exactly does it mean that the “existence” of the state must be threatened? And so forth.

Neither the Constitution nor any law further specify the meaning of the terms used in the above conditions (i) and (ii)<sup>15</sup>; moreover, laws dealing with related matters do not serve as a reliable mechanisms for the interpretation of these

<sup>11</sup> The Slovenian constitution, therefore, distinguishes two types of emergency rule. I discuss the difference between the (state of) *war* and the *state of emergency* in ŽGUR 2016. Some constitutions (e.g. the South African, Israeli, Maltese etc.) opt for only one type of emergency regime, while others (e.g. the Spanish, German, various Latin American ones etc.) may differentiate between three and more. For a comparative overview of different types of emergency rule, see VENICE COMMISSION 1995; GROSS 2011, 336 ff.

<sup>12</sup> Here, I do not deal with the problems raised by Pars. 2 and 3 of Art. 92. On these questions see, for example, PAVLIN 2016; ŽGUR 2016.

<sup>13</sup> The addition of this last condition might appear redundant. Yet, given the rather wide margin of discretion afforded to the competent bodies in this regard (see *infra* in this section), the declaration of the state of emergency, even in the face of an (obviously) dangerous situation, is not to be taken for granted – (political) considerations against declaring the state of emergency might outweigh those in favour of doing so.

<sup>14</sup> While the nature of emergencies makes it impossible to provide detailed rules for all possible future cases of emergency – and, thus, «constitutional emergency provisions must use broad and flexible language that sets general frameworks for emergency rule» (GROSS 2011, 345) – it is nevertheless the case that the Slovenian constitution is, in this respect, excessively indeterminate.

<sup>15</sup> The Defence Act (Art. 5, Par. 4), for instance, first only reiterates the constitutional dictum regarding the conditions for declaring the state of emergency and then goes on to determine that a state of emergency *may* be declared if there is an increased danger of an attack upon the state or there arises an immediate danger of a war.

conditions<sup>16</sup>; finally, there is also no precedential judicial decision able to provide authoritative interpretation of these key terms, since the state of emergency has thus far never been declared in Slovenia<sup>17</sup>. In the absence of any relevant domestic lead, we are therefore compelled to look to comparative<sup>18</sup> and supranational sources for determining the possible meaning(s) of the terms employed in the Constitution.

In this respect, the case law of the European Court of Human Rights (ECtHR) on Art. 15 of the European Convention on Human Rights (ECHR) is particularly relevant for our purpose<sup>19</sup>. In the leading case on the matter (*Lawless v. Ireland*)<sup>20</sup>, the ECtHR defined the notion of “a public emergency threatening the life of the nation” as «an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed» (Par. 28). Later on, in the so-called *Greek Case*<sup>21</sup>, the ECtHR (actually the European Commission of Human Rights) further elaborated that an emergency, in order to fall within the scope of Art. 15, ought to have the following characteristics: (a) it must be actual or imminent, (b) its effects must involve the whole nation, (c) the continuance of the organised life of the community must be threatened, and (d) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate (Par. 113). In this respect, it is surprising that the ECtHR does not

<sup>16</sup> For example, The Protection Against Natural and Other Disasters Act, as the primary normative source in this field, lists (in Art. 8) war and the state of emergency among “other disasters” (distinguished from natural ones). Clearly, a state of emergency cannot properly be understood as a disaster, since the latter are concrete (empirical) phenomena, whereas a state of emergency is a (artificial) normative concept. Cfr. PARMIGIANI 2017.

<sup>17</sup> It is difficult to estimate, why the state of emergency has never been declared in Slovenia thus far. On the one hand, it could be argued that thus far no emergency situation of sufficient intensity to require such extreme action has occurred and that ordinary measures at the state’s disposal were always sufficient. On the other hand, the recent experience with the mass migration crisis has shown the state’s tendency to follow the “Business as Usual” model and incorporate emergency mechanisms into the ordinary legislation. Regardless, any conclusion in this direction would, at the present time, be premature.

<sup>18</sup> Cfr. VENICE COMMISSION 1995; GROSS 2011.

<sup>19</sup> Art. 15 of the ECHR reads: «(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision. (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.» Cfr. Art. 4 of ICCPR which served as the basis for Art. 15 of the ECHR.

<sup>20</sup> App. no. 332/57, 1 July 1961.

<sup>21</sup> App. no. 3321/67 (*Denmark v. Greece*), App. no. 3322/67 (*Norway v. Greece*), App. no. 3323/67 (*Sweden v. Greece*) and App. no. 3324/67 (*Netherlands v. Greece*).

perceive *temporariness* as a necessary feature of an emergency<sup>22</sup> – given how it is otherwise commonly understood as a fundamental characteristic of an emergency *qua* an exceptional situation (see *infra*, 2.4.).

With regard to the *territorial and personal scope* of the emergency, the ECtHR's subsequent jurisprudence relaxed the requirement and so it «has now been accepted that the whole population may be affected by incidents or events in only part of a state and the derogation may be restricted to that part» (EL ZEIDY 2003, 284). As for the *intensity* of the threat and the *types of events* that can be subsumed under the notion of a public emergency, the ECtHR traditionally affords the states wide – though not unlimited – discretionary powers (i.e. *margin of appreciation*), as it considers state authorities most adept to determine whether a given situation constitutes an emergency of sufficient intensity as to require exceptional means for its resolution<sup>23</sup>.

Numerous criticisms have been furnished against the ECtHR's approach on the matter, pointing out, *inter alia*, that national authorities, including the judiciary, needn't actually be better suited than supranational bodies to assess the nature of the situation<sup>24</sup>. In the end, the critics claim, the extremely low threshold «that a crisis must cross in order to declare a state of emergency» renders the condition in Art. 15 redundant, «as serious scrutiny of whether such a state exists is not undertaken» (GREENE 2011, 1778). Wide deference to the judgment of political authorities, as well as the generally indeterminate nature of emergency clauses, makes the declaration of a state of emergency less of a technical legal act and more a *political decision*<sup>25</sup>. As such, regardless of the limits imposed by the normative regulations, a declaration of a state of emergency is inevitably, at least in part, discretionary<sup>26</sup>.

<sup>22</sup> See the so-called “Belmarsh Case” *A and others v. the United Kingdom*, App. no. 3455/05, 19 February 2009 (Par. 178). For a criticism of this position, see, for instance, GREENE 2011, 1782.

<sup>23</sup> See *Ireland v. the United Kingdom* (App. no. 5310/71, 18 January 1978), where the ECtHR argued that «it falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency». According to the ECtHR, it is because «of their direct and continuous contact with the pressing need of the moment» that «the national authorities are in principle *in a better position* than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it» (Pars. 78-79).

<sup>24</sup> See especially GROSS, NÍ AOLÁIN 2001, 637 ff.

<sup>25</sup> Cfr. GREENE 2011, 1778 arguing that the ECtHR creates the appearance «that a state of emergency is a legal issue, but the effectiveness of judicial oversight and its deference to “national authorities” on this issue means that the *de facto* existence of a state of emergency is left to the political sphere».

<sup>26</sup> Cfr. MARAZZITA 2003, 202 ff. The most prominent representative of the *decisionist* approach to emergency is, of course, Carl Schmitt. The opening sentence in *Political Theology* («Sovereign is he who decides on the exception.») is perhaps the most characteristic example of this kind of position. See SCHMITT 1922. On the other hand, for an attempt at providing an objective formula of an emergency, see PARMIGIANI 2017.



This short excursus into ECtHR's case law on the notion of emergency leads me to the following three conclusions relevant for understanding of the content of the terms employed by the Constitution in this regard:

(i) With regard to the *types of events* they can legitimately declare as emergencies – in our case, as to what may legitimately be perceived as a “danger” – states are afforded wide discretion by the ECtHR. In general, emergency-type events will include natural occurrences (e.g. earthquakes, fires, floods, epidemics etc.), political (e.g. wars or other armed conflicts, terrorism, mass migrations etc.) and economic events (e.g. sudden and extreme inflation, prolonged recession etc.)<sup>27</sup>. Which types of events will actually be considered as emergencies in a given state is a matter relative to the concrete circumstances of a given case and certain characteristics of the state itself, including, but not limited to, its legislation, political history, legal culture, geographical position etc.<sup>28</sup>.

(ii) As to the *territorial scope* of the emergency, given the wide interpretation of this condition by the ECtHR (condition (b) in the Greek case; see *supra*), the state should also be free to declare the state of emergency with respect to only one part of its territory or, alternatively, when only one part of the territory faces an emergency situation<sup>29</sup>.

(iii) With respect to the required *severity* or *intensity* of an event, here too, as we have seen above, the states are afforded wide discretion, with the standard set by the ECtHR being extremely low.

## 2.2. Declaring the State of Emergency

The Slovenian Constitution provides a clear answer to the question as to *who* is authorized to declare the state of emergency: this task is primarily entrusted with the National Assembly – which can, however, do so only on the proposal of the Government (see *supra*, Art. 92/1 of the Constitution). If, however, due to the emergency, the National Assembly is unable to convene<sup>30</sup>, this power falls to the President of the Republic – who, likewise, can only declare the state of emergency on the basis of the Government's proposal (Art. 92/3 of the Constitution).

<sup>27</sup> Cfr. MARAZZITA 2003, 162 f; TUSSEAU 2011, 520 f.

<sup>28</sup> In part, this condition is related to the condition of intensity (iii; *infra*). For example, an earthquake of magnitude 5 in a rural part of Chile, which lies on a seismically highly active area, most likely won't be considered an emergency-type event, whereas it would probably be so in a poorly constructed urban area of an African country, which is one of the least earthquake-prone areas in the world. Cfr. also MARAZZITA 2003, 164.

<sup>29</sup> On my view, this answer should be independent of the specifics of the internal administrative division of the state territory.

<sup>30</sup> It is ultimately the President of the National Assembly that establishes whether or not the National Assembly is able to convene during a state of emergency. See Art. 279 of the National Assembly's Rules of Procedure (the Rules).

A separate, though related question, is *how* the declaration of the state of emergency is made. When this decision is in the hands of the President of the Republic, the answer is straightforward: the Constitution determines (Art. 108/1) that the President adopts *all decisions* related to the state of emergency, including on the declaration of the state of emergency, by *decrees with the force of law*<sup>31</sup>. However, when this decision is made by the National Assembly, the issue is somewhat more complicated and can be further distinguished into the following questions: (i) *what kind of an act* is used for declaring the state of emergency?; (ii) *what kind of a majority* is required for the adoption of such a decision?; and (iii) *according to what procedure* and in what kind of a session is the decision to be made?

As the answers to these questions are substantively the same as with respect to all other decisions that the National Assembly adopts during the state of emergency, I will discuss and answer them in the next section (2.3., especially 2.3.1.).

### 2.3. Systemic Modifications in the Emergency Regime

Following the declaration is the central – and arguably the most important – stage in the management of an emergency. The instauration of the state of emergency typically triggers a series of institutional modifications<sup>32</sup>, the aim of which is to make decision-making in a crisis situation more efficient (simpler, faster etc.)<sup>33</sup>. These changes are usually of two kinds: (i) of the kind that affect the relationship between the branches of government by concentrating power in one of these bodies; (ii) those that enable the derogation of (certain) human rights and fundamental freedoms.

In the next sub-section (2.3.1.), I deal with the problems related to the decision-making process in the state of emergency; then (2.3.2.), I present the conditions for suspending constitutional rights in a state of emergency as determined by the Slovenian Constitution.

#### 2.3.1. Decision-making in an Emergency

According to Par. 1 of Art. 92 of the Constitution, decision-making during the

<sup>31</sup> We should add that the President is obligated to submit all his decisions (i.e. decrees with the force of law) for confirmation by the National Assembly immediately upon the latter's next convening. Several important questions are unresolved in this respect, for instance: (i) what type of act does the National Assembly use to confirm these decrees – a law or some other? (ii) What happens if the National Assembly does not confirm a given decree? Is its validity immediately annulled? (iii) What consequences follow for the President if the National Assembly determines that the decision was unfounded, perhaps even illegal? I cannot discuss these questions here in detail – I deal with some of them in ŽGUR 2016.

<sup>32</sup> As said, this needn't be the case. See fn. 6, *supra*.

<sup>33</sup> E.g. FERREJOHN, PASQUINO 2004, 210: «When the public safety is seriously threatened, there may be a need for quick and decisive action that cannot, perhaps, wait for the deliberate pace of ordinary constitutional rule».

state of emergency is entrusted with the National Assembly. This means that the same body which decides on the declaration of the state of emergency is also authorized to adopt all necessary measures during such time<sup>34</sup>. The same provision also determines that all emergency decisions can only be made upon the prior proposal of the Government. Were the National Assembly unable to convene due to the emergency, the decision-making powers would be transferred to the President of the Republic (see Art. 92/ 3).

The lack of a more comprehensive regulation with respect to the decision-making process in emergencies and the indeterminacy of the existing provisions give rise to a series of difficulties: for example, it is unclear in what form or according to what procedure are emergency decisions to be adopted; or, for that matter, what kind of a majority is required for doing so. These indeterminacies generate a further and more profound confusion regarding the nature of the relationship between the National Assembly and the Government during the state of emergency. In particular, it is unclear which of the two bodies is effectively in charge during an emergency. Below I attempt to address these questions<sup>35</sup>.

The Rules of Procedure of the National Assembly (herein the Rules)<sup>36</sup> regulate the internal organization and the functioning of the National Assembly, as well as determine the procedures for adopting the various acts of the National Assembly and its relationship with other state bodies<sup>37</sup>. Chapter IV of the Rules determines and regulates the acts and procedures of the National Assembly. There, Art. 108/2 specifies that *all issues* referred to in Art. 92 of the Constitution (i.e. those regarding the state of emergency) are to be decided by the National Assembly with *ordinances*. This means that, for instance, the decision on the allocation of additional funds for the police to suppress riots during an emergency; the decision determining the manner in which the right to freedom of movement will be exercised during an outbreak of a highly infectious disease; and, finally, the order

<sup>34</sup> Scholars traditionally distinguish two models of emergency powers, namely the (neo)Roman model and the legislative model. One of the key differences between the two regards *the relationship between the body authorized to declare the state of emergency and the body entrusted with emergency powers*: in the (neo)Roman model these two bodies are different (so-called “hetero-investiture”), whereas in the legislative model they are one and the same (“auto-investiture”). See, e.g. FERREJOHN, PASQUINO 2004, 211 ff. For a comparativist view, see VENICE COMMISSION 1995; GROSS, NÍ AOLÁIN 2006, 54 ff. MARAZZITA (2003, 214 f.) further distinguishes between “controlled auto-authorization”, where the decision on the declaration is subsequently subjected to control and “free auto-authorization”, where such a decision is uncontrolled.

<sup>35</sup> Answers provided herein are relevant also with respect to the questions left unanswered in 2.2., *supra*.

<sup>36</sup> *Official Gazette of the RS*, Nos. 92/07, 105/10, 80/13 and 38/17. The English version is available here: <http://imss.dz-rs.si/imis/7f209c2691236403aa9b.pdf>.

<sup>37</sup> The Rules are a *sui iuris* legal act and views on its exact legal nature vary. The Constitutional Court has determined (see decisions U-I-40/96, U-I-84/96, U-I-95/99 and U-I-104/01) that in the part regulating the procedures for the adoption of the acts of the National Assembly, the Rules have the hierarchical status of law.

for restricting the right to privacy in the aftermath of a large terrorist attack will all be adopted in the same form, i.e. with an ordinance. Moreover, the Rules determine (Art. 58/2) that whenever a decision has to be made in reference to Art. 92 of the Constitution, an *extraordinary session* of the National Assembly can be convened on the proposal of the Government, if the issue is such that it cannot be postponed and cannot be placed on the agenda of a regular session in time. Finally, in absence of any specific rule to the contrary, we may reasonably conclude that all decisions regarding emergency measures (including the declaration and termination thereof) are to be made by the constitutionally prescribed majority, i.e. by a majority of votes cast by those deputies who are present at the session (Art. 86 of the Constitution)<sup>38</sup>.

The legislator's choice of ordinances as the exclusive mechanism for the adoption of emergency decisions requires further scrutiny. Ordinances are a type of sub-statutory act (thus hierarchically inferior to the Constitution and laws) by which the National Assembly usually proclaims constitutional acts amending the Constitution, calls referendums, orders parliamentary inquiries, establishes public institutes and enterprises and regulates the manner of work and the relations within the National Assembly (see Art. 108/1 of the Rules). They are therefore a type of act used either to regulate very specific issues of broader importance or to decide on certain internal organizational matters<sup>39</sup>; in any case, they are not a type of act ordinarily used for regulating rights and duties of citizens.

Due to their legal nature, the procedure for adopting ordinances is highly simplified with respect to the ordinary legislative procedure and allows for a given decision to be adopted within a single session of the National Assembly<sup>40</sup>. In comparison to laws, ordinances have two further specific characteristics: (i) they are not subject to the National Council's<sup>41</sup> (suspensive) veto<sup>42</sup>; and (ii) they are

<sup>38</sup> The condition for the validity of the National Assembly's decision is that a majority of deputies are present at the session. This constitutionally prescribed majority is the so-called "simple majority". A different (more exigent) type of majority can be prescribed either by the Constitution itself or by a law. See MOZETIČ 2010a, 796. The Constitution (Art. 94) determines that the Rules of the National Assembly are adopted by a two-thirds majority of deputies present.

<sup>39</sup> Cfr. GRAD 2013, 35.

<sup>40</sup> Moreover, according to the rules regulating this procedure (see Arts. 169a–171 of the Rules), the draft act needn't contain all the elements it normally has to; the rules on discussing and amending the proposal are also relaxed; voting is to be conducted in the same session etc. The procedure is fundamentally a relaxed version of the procedure for the second reading in the ordinary legislative procedure (see Arts. 125–139).

<sup>41</sup> The National Council is the second chamber of Parliament and is the representative body for social, economic, professional, and local interests (Art. 96 of the Constitution). It may (i) propose to the National Assembly the passing of laws, (ii) convey to the National Assembly its opinion on all matters within the latter's competence, (iii) require that the National Assembly decides again on a given law prior to its promulgation (i.e. suspensive veto), and (iv) require inquiries on matters of public importance (Art. 97/1 of the Constitution).

proclaimed by the National Assembly itself and not by the President of the Republic<sup>43</sup>. Given this set of characteristics, ordinances appear as an appropriate mechanism from the perspective of the effectiveness *desideratum*.

However, this state of affairs raises some doubts from the rule of law *desideratum* point of view. Here, I wish to emphasize two such problems.

(1) First, it is unclear how the rules of procedure for adopting ordinances interact with the rules regulating the work of the National Assembly during the state of emergency<sup>44</sup> and the rules on the urgent legislative procedure – which seems, according to its definition, the procedure (originally) intended and most suitable for adopting decisions in emergency situations<sup>45</sup>. Here is an example of the type of problem I am referring to: Art. 171/1 of the Rules determines that at least ten deputies may, within 15 days from the referral of the draft act (e.g. ordinance) to the working body responsible, require that the National Assembly holds a general debate on the draft act. On the other hand, Art. 144/1 of the Rules determines that in the urgent procedure for the adoption of a law no general debate can be held. Finally, Art. 278 (indent four) determines that during a state of emergency derogations from the provision of the Rules regarding the discussion of draft laws and other acts within working bodies are permissible. What all this means with respect to the discussion of draft ordinances during the state of emergency is unclear. This lack of clarity and predictability of the decision-making process is not only problematic from the rule of law perspective, but in my opinion also represents a potential obstacle to the effectiveness of the process.

(2) Secondly – and more important – the above discussed regulation appears to be in conflict with the Constitution. Let us see how. (1) Art. 87 of the Constitution states that (all) *rights and duties* may be determined by the National Assembly *only*

<sup>42</sup> Art. 91/2 determines that the National Council may, within seven days of the passing of a law (and prior to its promulgation), require the National Assembly to decide again on such law. In such a case, a more demanding majority is required for its adoption. See more in MOZETIČ 2010b, 810 ff. For a criticism of the current procedure for the reconsideration of a law, see ŠTRUS 2016.

<sup>43</sup> All laws must necessarily be promulgated by the Presidents of the Republic before they can come to effect – see Art. 91/1 of the Constitution.

<sup>44</sup> Ch. VII of the Rules contains specific rules regarding the work of the National Assembly during war or a state of emergency: it determines derogations of the rules regarding certain procedural time limits and the rules on the transparency of the National Assembly's work; it states that it is the President of the National Assembly that establishes whether the National Assembly is unable to convene (thus triggering the Constitutional power of the President of the Republic under Arts. 92/3 and 108 of the Constitution) – and whether these circumstances have ceased; that all decisions adopted by the President of the Republic on the basis of Arts. 92/3 and 108 of the Constitution are to be decided upon by the National Assembly immediately upon its next convening; and, finally, it specifies that (and the manner in which) the deputies must be reachable at all time during the state of emergency.

<sup>45</sup> The urgent legislative procedure is intended for the adoption of laws whenever it is so required (i) by the interests of the security or defence of the state or (ii) in order to eliminate the consequences of natural disasters, or (iii) to prevent consequences regarding the functioning of the state that would be difficult to remedy. See Art. 143 of the Rules.

by law. (1.1) *The manner of the exercise of legally determined rights and duties is typically specified by executive acts (e.g. regulations)*<sup>46</sup>. (2) Art. 15, Par. 1 of the Constitution determines that *human rights (and fundamental freedoms) are exercised directly on the basis of the Constitution*. (2.1) Human rights (and fundamental freedoms) are a specific, hierarchically superior or “qualified”, type of rights which are (for the most part) determined by the Constitution itself. Art. 15 is, in this sense, *lex specialis* with respect to Art. 87. (2.2) Art. 15, Par. 2 of the Constitution further determines that *the manner of the exercise of human rights can be – whenever the Constitution so provides or if it is necessary due to the nature of the right or freedom in question – regulated by law (and only by law)*<sup>47</sup>. (2.3) Finally, Art. 15, Par. 3 of the Constitution determines that human rights and freedoms can be *limited only by the rights of others – presumably (constitutionally prescribed) human rights and freedoms –*, and in the cases provided by the Constitution itself<sup>48</sup>. (3) On the basis of Art. 16, Par. 1, *temporary suspensions and restrictions of human rights and fundamental freedoms are permitted only during war or a state of emergency*<sup>49</sup>. (3.1) Art. 16 of the Constitution, however, *does not specify how*, that is, by what type of act, human rights and freedoms may be suspended or restricted during the emergency. This means that we have, at least at the Constitutional level, an apparent *legal gap*. (4) Art. 108/2 of the Rules, however, determines that all *questions regarding the state of emergency* are decided by the National Assembly with *ordinances*. As we have seen above, this includes decisions on the rights and duties that are not also human rights or freedoms; the regulation of the manner of the exercise of all rights and duties – including human rights and freedoms; and, finally, decisions on temporary suspensions and restrictions of human rights and freedoms. According to this provision of the Rules, which apparently fills the legal gap in Art. 16/1 of the Constitution, human rights and freedoms can therefore be suspended or restricted by an ordinance of the National Assembly.

One of the things that emerges from the above analysis is that (constitutional) human rights and freedoms are more specific as, and also hierarchically superior to, all other types of rights: the former are determined by the Constitution itself and can be limited only either by the Constitution itself or by the human rights of others. Also, the manner of their exercise can be determined by – and only by – a law. On the other hand, “regular” rights can be determined by law, while the

<sup>46</sup> Regulations typically determine the details that change so rapidly that the legislator cannot regulate them by law. Regulations must determine such details in conformity with the principles and the rights and duties contained in the law. See PAVČNIK 2015, 254.

<sup>47</sup> In some (perhaps most) cases, it will be difficult to determine whether a law is prescribing the manner of the exercise of a given right or it is already interfering with (i.e. limiting) that right. See more in TESTEN 2010, 195 ff.

<sup>48</sup> Cfr. TESTEN 2010, 198 ff.

<sup>49</sup> See more on this *infra*, 2.3.2

manner of their exercise is typically specified in sub-statutory, executive acts. The “logic” of the Constitutional design in this sense appears clear and reasonable. It therefore follows that even though the state of emergency represents an exception with respect to the ordinary functioning of the legal system, should the constitution-maker wish that emergency decisions be adopted by a type of legal act different from, and inferior to, the law or even desire to defer the decision on the type of acts to be used when suspending or restricting human rights during a state of emergency to the legislator (something that is actually the case here), it would have to explicitly determine so in the constitutional text itself. In absence of any such specification, it can reasonably be presumed that suspensions and restrictions of human rights and freedoms can only be determined by a law. Therefore, on my view, the way to properly understand Art. 16 of the Constitution (i.e. to properly mend the gap from point (3.1) above), is to interpret it as requiring human rights suspensions or restrictions to be ordered by law (and only by law).

If my analysis is right, the situation before us is that of an (partial) *antinomy*<sup>50</sup> between two norms, namely the one contained in Art. 16 of the Constitution and the one from Art. 108/2 of the Rules. Given the different hierarchical rank of the two norms (the former being a constitutional norm, whereas the latter has the rank of a law), the resolution of the conflict will, in any case, come about by the application of the hierarchical principle (*lex superior derogat legi inferiori*). I believe (at least) two different solutions of the given antinomy are possible here:

(1) We could narrowly restrict our disapplication of the hierarchically inferior norm (Art. 108/2 of the Rules) only to the set of cases also regulated by the hierarchically superior norm (Art. 16 of the Constitution) while leaving the former applicable with regard to all other cases that it regulates and with respect to which it is not in conflict with the superior norm. The result of this operation in our case would be that we would now have not one but two different types of acts for adopting decisions in the state of emergency: (a) laws – presumably adopted according to the urgent legislative procedure – for decision suspending or restricting human rights and fundamental freedoms and (b) ordinances – adopted according to the abbreviated procedure mentioned above – for all other emergency-related decisions.

<sup>50</sup> According to GUASTINI (2011, 109), we have a partial *unilateral* antinomy whenever the class of cases regulated by one norm (N<sub>1</sub>) is wholly included in the class of cases regulated by the other norm (N<sub>2</sub>). I submit this is the case here, as the class of cases regulated by Art. 16 of the Constitution (N<sub>1</sub>), namely the class of “human rights and fundamental freedoms temporarily suspended or restricted during a war or state of emergency” falls entirely in the class of cases regulated by Art. 108/2 of the Rules (N<sub>2</sub>), which also regulates other kinds of cases, such as technical measures during emergencies, determinations of the manner of the exercise of “regular” rights and duties etc.

(2) The second possibility would be to declare the inferior norm unconstitutional *in toto* and disapply it as a whole. Doing so, however, would create a new gap insofar as no norm would regulate the type of acts which the National Assembly is supposed to adopt during the state of emergency – except for the norm in Art. 16 of the Constitution regarding human rights suspensions. Given the arguments presented above, especially regarding the nature (hierarchical rank) of human rights and freedoms, this gap ought to be filled, on my view, by analogy from Arts. 15 and 16 of the Constitution, determining that all decisions regarding the state of emergency have to be adopted by laws – presumably according to the urgent legislative procedure.

I propose that the only sensible as well as constitutionally-consistent solution is the latter (2) one. I can provide some short arguments in favour of this claim<sup>51</sup>. First, human rights and fundamental freedoms are one of the highest (if not the highest) constitutional values. One of the ways this high status is reflected is in the fact that they are determined by the Constitution itself, and not by law, and can also be exercised directly on its basis – that is, they can be used without a prior operationalization by the legislator. The legislator can only “interfere” with these rights inasmuch as it is necessary to provide for their effective exercise, but it cannot restrict them in any way<sup>52</sup>. As far as the possibility of restricting human rights is concerned, the Constitution specifies that it is permissible only in exceptional circumstances, namely during a war or a state of emergency. While it is true that the constitution-maker did not determine the type of act by which the National Assembly can suspend or restrict human rights, their weight in the constitutional system is such that any departures from the “logic” of the Constitution regarding human rights protection would require an explicit basis in the Constitution itself: either in the form of an explicit rule determining the type of act to be used in such cases (as it is done in Art. 108/2 of the Constitution with regard to the President of the Republic) or, perhaps, by explicitly authorizing the legislator to regulate the issue by law. Absent any of these two cases, I would argue that Art. 16 of the Constitution should be understood as requiring that human rights suspensions be prescribed only by law. Secondly, by analogy from Art. 108/2 of the Constitution, determining that the President of the Republic may – given the appropriate conditions – restrict individual rights and fundamental freedoms by adopting decrees *with the force of law*, it can be gathered that even when the primary legislator (i.e. the National Assembly) is incapable of performing its tasks, the subsidiary legislator (i.e. the President) can suspend or restrict constitutional rights only with an act of the same force (hierarchical rank)

<sup>51</sup> The first two arguments are purely juridical, whereas the last one is of a juridico-political nature.

<sup>52</sup> See TESTEN 2010, 194 f.



as a law. Finally, the alternative described above in (1) would lead to a chaotic, non-transparent and probably ineffective system of decision-making which would be contrary to the efficiency *desideratum*.

While the solution proposed above in (2) is, in my view, the correct one, it is not without its problems. Namely, if we accept that the law is the (only) appropriate act by which emergency-type decisions can be made, and in the absence of normative regulation to the contrary, then we are also compelled to accept the following consequences:

(i) *Suspensive veto*: Conformant to Art. 91/2 of the Constitution, the National Council has the right to require that the National Assembly votes once more on any law it had already passed. This includes laws adopted in the urgent legislative procedure, even though in such cases the time limits for the National Council's decision are much shorter than normally<sup>53</sup>. The consequence of this possibility is that the decision-making process in the state of emergency can be substantially prolonged or, seeing how on the new vote the required majority is stricter than in the previous one, it may be that the decision is not adopted at all<sup>54</sup>.

(ii) *Promulgation by the President*: According to the constitutional practice, the promulgation of laws by the President of the Republic is a purely technical act with which the President establishes that the law was adopted by the appropriate body in the prescribed procedure and is thus formally correct<sup>55</sup>. Beyond this power to determine whether the formal aspects of the legislative procedure were observed, the President does not have the right to refuse promulgating the law for any other reason – including, it appears, in cases of obvious and grave unconstitutionality of the submitted law<sup>56</sup>. While this can be seen as welcome from the perspective of the efficiency *desideratum*, it raises serious doubts from the rule of law perspective since all state bodies, including the President, are required to protect the constitutional order, including and above all, human rights.

<sup>53</sup> In such cases, the President of the National Assembly determines the time limit within which the National Council must provide its opinion. Such a time limit, taking into consideration the urgency of the matter or the needs of the state, nevertheless may not be shorter than 24 hours (see Art. 215/2 of the Rules).

<sup>54</sup> It should be mentioned that prior to the 2013 constitutional amendment of Art. 90 of the Constitution regarding the legislative referendum, emergency laws could, in principle, be submitted to a *referendum vote* as well. After this modification referenda on laws on urgent measures for ensuring the defence of the state, security, or the elimination of the consequences of natural disasters are no longer permitted (see Art. 90/2 of the Constitution). See more in KAUČIČ 2014, 65 ff.

<sup>55</sup> KAUČIČ 2017, 25.

<sup>56</sup> Cfr. KAUČIČ 2017, 28 f. Many scholars argue for changes that would afford the President more powers (e.g. a kind of veto power), making her (more) responsible for protecting and promoting the rule of law. See, for instance, KERŠEVAN 2016; KAUČIČ 2017.

### 2.3.2. Human Rights Suspensions in Emergency Times

The second set of modifications of the constitutional system that typically occurs in virtue of the instauration of the state of emergency regards the ability of the state to derogate certain human rights and fundamental freedoms during such times<sup>57</sup>. The *ratio* of this widely accepted exception is understandable: although human rights represent the core value of contemporary liberal democracies, and their protection constitutes the test of any state's legitimacy, it is generally acknowledged that situations may arise in which their full protection must give way to certain other values or goals of fundamental importance (e.g. national security), the realization or protection of which might otherwise be jeopardized due to the limits imposed upon the state's ability to act (the range of possible actions available to it) by human rights.

The relevance of the matter cannot be overstated: often the true character of a political regime will be manifested only when, faced with an emergency situation threatening the well-being of the nation, it is given the popular as well as the legal legitimacy to encroach upon human rights. Unbound by ordinary moral and legal constraints, the state authorities may (ab)use these newly acquired powers in order to further other, less legitimate goals. A typical example of such exploitation of emergency powers is seen in the US post-9/11 mass surveillance programs which started as a legitimate mechanism for preventing additional terrorist attacks but which subsequently grew to include monitoring of communications of millions of US citizens. Indeed, it should be borne in mind that in the name of national security – or some other such justification –, fundamental rights of both those who threaten to harm or have harmed the well-being of a state as well as of those who are the (potential) victims of the former can equally be encroached. “Derogation clauses” may thus be used as a “sword” – but they may also serve as a “shield”: «As the former, they allow a state to breach civil rights and the rule of law that ordinarily constrains them. Yet also, by outlining when such measures may be undertaken, they shield and protect human rights in times when conditions do not equate to an emergency» (GREENE 2011, 1766). While the two functions cannot be separated from each other, as they represent two faces of the same medal, I will here nevertheless focus my attention on the shielding function of the derogation clause in the Slovenian Constitution.

Certain relevant questions regarding the authorization for suspending or restricting constitutional rights and freedoms during the state of emergency in the Slovenian constitutional system have already been discussed above. When

<sup>57</sup> This question is at the heart of most all discussions on the topic of emergencies and has gained particular import in the post 9/11 era. I cannot discuss the broader contours of this question here. For that, I refer the reader to the literature listed in fn. 5, *supra*.

commenting on the adequacy of ordinances as mechanisms for emergency decision-making in the previous sub-section (2.3.1.), I established that it is precisely on the question of rights derogation that ordinances prove themselves an inappropriate and, indeed, an unconstitutional solution. I therefore concluded that all emergency-related decisions during the state of emergency ought to be adopted by laws. As a consequence, all conclusions I had made in the above discussion on the use of laws in emergency management (regarding, for instance, the procedure for their adoption, the required majority, the National Council's veto etc.) apply also to the decisions involving suspensions and restrictions of fundamental rights.

On this background, I will here limit myself to presenting only the conditions for suspending and limiting constitutional rights in a state of emergency as determined by the Constitution.

The conditions for rights derogation are spelt out in Art. 16 of the Constitution, which reads:

«(1) Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance.

(2) The provision of the preceding paragraph does not allow any temporary suspension or restriction of the rights provided by Articles 17, 18, 21, 27, 28, 29, and 41».

Par. 1 of Art. 16 thus determines that constitutional rights and freedoms may legitimately be suspended in the state of emergency or during a war – and only during such times – under the following conditions<sup>58</sup>:

- *only exceptionally*, not as a matter of course;
- *temporarily*, not permanently;
- *only as long as the state of emergency (or war) lasts*;
- *to the extent required* by the state of emergency (or war);
- inasmuch as the adopted measures *do not discriminate* on the basis of any personal circumstance.

<sup>58</sup> Cfr. ŠTURM 2010b, 205. Interestingly, the specificity of the state of emergency may allow not only for rights to be suspended but also that certain additional obligations may be imposed upon citizens. An example is found in Arts. 9 and 10 of the Defence Act which determine that during the state of emergency (or war), the National Assembly may impose a work duty for citizens of a certain age who are physically capable of work. Art. 10 (Par. 2) also determines that during the performance of these duties, workers do not have the right to strike.

(1) The condition of *exceptionality* is an important check on emergency powers as it prevents the authorities from haphazardly suspending rights during the state of emergency. Crisis conditions cannot be exploited as a cover for indiscriminate derogations of rights – instead, there must exist, in addition to the reasons for the declaration of the state of emergency, still further conditions that justify the derogation of specific rights<sup>59</sup>.

(2) A crucial condition determined by Art. 16 is that of *temporariness* of derogatory measures. This condition should be distinguished from the condition of the temporariness of the state of emergency (see *supra*, 2.1. and *infra*, 2.4). While the latter is a more contested matter, the temporariness of specific derogatory measures is not questioned. Indeed, according to the conditions set by Art. 16/1, the longest a derogatory measure can stay in force is until the moment the state of emergency is terminated (see the “only for the duration of the war or state of emergency” condition). This check is particularly important if the act by which rights are suspended determines nothing as to its temporal validity. In such cases, therefore, it should be presumed that the validity of derogatory measures automatically ceases with the termination of the state of emergency at the latest.

(3) The next condition, namely the restriction of the derogation to the *extent required by the circumstances* of the situation, is, in a way, the essence of Art. 16 as it requires that an interference with a given right must be *proportionate* to the conditions of the particular case. The point, then, is that the “exceptionality” of the conditions does not absolve the decision-maker of its obligation to act proportionately when interfering with human rights, that is, to adopt measures which are both *appropriate* for achieving the goal and *necessary* (i.e. representing the *ultima ratio*)<sup>60</sup>. This is particularly important to bear in mind in light of the traditional formula *Necessitas non habet legem*, according to which any means whatsoever may be employed for the protection of a given good or value (e.g. the survival of the nation). Necessity, however, is not an empirical fact, but rather a value judgment on the part of the decision-making body<sup>61</sup> and can therefore easily be exploited in order to convince the public of the justification of the use of whatever means deemed appropriate by the state authorities. The principle of proportionality is therefore the key mechanism preventing the argument of necessity from becoming a *par excellence* “trump card” when human rights are put on the line against other arguments<sup>62</sup>. We should mention, however, that as far as the ECtHR is concerned, although the condition in Art. 15/2 of the ECHR is

<sup>59</sup> The same applies in the case of the ECHR: cfr. GREENE 2011, 1776.

<sup>60</sup> For the nature of the proportionality principle as constructed and applied by the Slovenian Constitutional Court, see ŠTURM 2010a, 55 ff.

<sup>61</sup> Cfr. MARAZZITA 2003, 179.

<sup>62</sup> Cfr. MINDUS 2007, 39.

virtually the same as in Art. 16 of the Slovenian Constitution (i.e. “strictly required by the exigencies of the situation”), the ECtHR has nevertheless opted to give the States a wide margin of appreciation in determining the nature and scope of derogatory measures<sup>63</sup>.

(4) Finally, Art. 16/1 also explicitly determines that derogatory measures must not create *discrimination* on the basis of (constitutionally protected) personal circumstances<sup>64</sup>. Note that while the text of Art. 15 of the ECHR does not mention this limitation, the ECtHR in the *Belmarsh Case* nevertheless established that non-discrimination is covered by the principle of proportionality. In the specific case, the Court found the measure to be unjustifiably discriminatory towards non-nationals (see Par. 190 of the judgment).

In Par. 2 of Art. 16, the Constitution enumerates the *absolute* or *non-derogable rights*, that is, those rights that cannot be suspended or restricted even in the state of emergency under the conditions from Par. 1. The non-derogable rights according to the Slovenian constitution are<sup>65</sup>: the inviolability of human life (Art. 17), prohibition of torture (Art. 18), protection of human personality and dignity (Art. 21), presumption of innocence (Art. 27), principle of legality in criminal law (Art. 28), (other) legal guarantees in criminal proceedings (Art. 29) and freedom of conscience (Art. 41)<sup>66</sup>.

#### 2.4. Termination of the State of Emergency

Temporariness is one of the defining features of an emergency (see *supra*, 2.1.). In consequence, the main purpose of (declaring) a state of emergency is in its eventual auto-abolition, i.e. in rendering it no longer necessary and allowing in this way for the restoration of legal normality. In this sense, the state of emergency has a conservative, constitution-preserving character (MARAZZITA 2003, 224 ff.)<sup>67</sup>.

<sup>63</sup> See GROSS 1998; EL ZAIDY 2003, 286 ff.

<sup>64</sup> For this, see also Art. 14 of the Constitution (equality before the law).

<sup>65</sup> See, for instance, LAMPE (2010, 167), who argues that the right to judicial protection (Art. 23) should be added to this list. Cfr. also VENICE COMMISSION 2006, 5 (pt. 13) emphasizing the importance of a functioning judiciary during an emergency as a mechanisms of (internal) control of state actions.

<sup>66</sup> Cfr. 15/2 of the ECHR, which determines that no derogations can be made with respect to the right to life (Art. 2), prohibition of torture and inhumane or degrading treatment (Art. 3), prohibition of slavery and servitude (Art. 4/1), the principle “no punishment without law” (Art. 7). Moreover, Art. 4 of Protocol 7 refers to the non-derogable right of *ne bis in idem*, whereas Protocols 6 and 13 refer to the abolition of the death penalty and can neither be derogated. The International Covenant on Civil and Political Rights, for instance, includes among non-derogable rights also the right against imprisonment for debt and the right to recognition as a person before the law.

<sup>67</sup> The difference between the constitution-preserving and constitution-creating function of emergency dictatorship was emphasized by SCHMITT 1921.

However, we should be careful to distinguish the temporariness of the *emergency fact* (the empirical event and the reason for the declaration of a state of emergency) – which is necessarily of a provisional nature<sup>68</sup> and *the state of emergency* – the latter, as a legal phenomenon, is not necessarily temporary. This important distinction exposes a potential danger emergency regimes carry with them, namely that they may be extended indefinitely (the “permanent state of emergency”) and, in consequence, if left in place for a long period of time, may come to constitute a new normality (the “normalization” of the state of emergency)<sup>69</sup>.

The termination of a state of emergency will usually come in one of two possible ways: there may be a constitutionally (or statutorily) prescribed *ex ante* limit for its duration, meaning that the state of emergency will expire automatically after the prescribed period<sup>70</sup>; or, if there is no specific time limit for the duration of the state of emergency, the Parliament will usually have the power to vote on the cessation of the state of emergency at any time<sup>71</sup>. Both these systems have certain advantages, as well as their weaknesses: the former approach, for instance, does not take into consideration the unique characteristics of each individual emergency situation and hence the differences in the time required for normal conditions to be reinstated; on the other hand, while the latter model evades this problem, it faces another one regarding the majorities required for declaring the end of the state of emergency and, particularly in bicameral parliaments, the problem of building sufficient consensus for such a decision<sup>72</sup>.

The Slovenian Constitution provides an example of the latter approach as it determines no *a priori* time limit for the duration of the state of emergency, leaving the decision for ending it completely in the hands of the National Assembly. Here, again, we should remember that it is actually the Government

<sup>68</sup> We might say that if an emergency fact is not of provisional nature, its (permanent) presence in the system constitutes a new normality. Terrorism, for example, is an emergency fact being increasingly presented as a permanent threat. This, in consequence, may lead to the problem of a permanent extension of the state of emergency and its normalization. See more *infra*.

<sup>69</sup> Agamben even argues that state of exception (of emergency) has become the predominant paradigm of government in contemporary politics and has, as such, actually become the rule. (AGAMBEN 2003, 11, 19). On this subject in the context of France following the 2015 Paris attacks see SOUTY 2017.

<sup>70</sup> An example is found in Art. 230 of the Polish constitution which determines that a state of emergency can be introduced for a period of maximum 90 days (Par. 1), whereas the extension of a state of emergency can only be made once and for a limited period of no longer than 60 days (Par. 2)

<sup>71</sup> Such as is the case in the German Basic Law (Art. 115I, Par.2), which determines that the Bundestag, with the consent of the Bundesrat, can, at any time during the state of emergency (state of defence), decide on its termination.

<sup>72</sup> In this regard, see Bruce Ackerman's noted proposal for the so-called “supermajoritarian escalator” (ACKERMAN 2004). A similar sentiment is expressed by El Zeidy: when discussing the ECtHR case law on Art. 15 of the ECHR, he argues that instead of affording states an even wider margin of appreciation during prolonged emergencies, «[a]n inverse relationship should exist between the scope of the margin of appreciation and the duration of the emergency situation; the longer the emergency, the narrower, not wider, ought the margin of appreciation allowed the state to be» (EL ZEIDY 2003, 317).

that is the first to assess whether or not conditions allow for the termination of the emergency and propose the termination of the state of emergency to the National Assembly. Besides providing no temporal limits, the Constitution also provides no substantive criteria that the National Assembly – or, for that matter, the Government – ought to consider when deciding on whether or not to terminate the state of emergency. This means that the decision is, ultimately, discretionary (unbound)<sup>73</sup>.

Finally, the manner of declaring the end of an emergency situation (i.e. the form); the required majority to do so; and the procedure for adopting this decision are the same as they are for adopting all other emergency-related decisions (see *supra*).

### 3. Critical Comments

In the previous section, I pointed to several critical issues regarding the regulation of the state of emergency in the Slovenian legal system. Due to the limited scope of this text, I am unable to dwell on each of the mentioned problems. In this section, I will therefore focus only on the two most problematic issues from the perspective of the two major goals pursued in any system of emergency regulation, namely the efficiency and the rule of law *desiderata*, respectively.

(1) *Emergency decision-making mechanism*: The first problem regards ordinances as the instruments by which all emergency-related issues are decided by the National Assembly (see *supra*, 2.3.1.). From the perspective of the efficiency *desideratum*, there are several advantages to this arrangement: (i) ordinances can be adopted quickly, in a highly simplified and rapid procedure; moreover, (ii) the National Council cannot suspend their implementation by invoking a veto; finally, (iii) they are proclaimed directly by the National Assembly and not promulgated by the President of the Republic. On the other hand, however, the effectiveness of the process is hampered by the confusion resulting from the indeterminacy of procedural rules. Indeed, it seems that three (different) sets of procedural rules have to be considered in such cases: (i) those regarding the adoption of ordinances, (ii) those regarding the urgent legislative procedure and (iii) those regarding the work of the National Assembly in the state of emergency. It is unclear how these rules interact with each other and which take precedence over the others. The lack of clarity on this matter is an important obstacle for the efficiency as well as the legitimacy of emergency decision-making process (the rule of law *desideratum*).

<sup>73</sup> Given the lack of constitutional time limits for the state of emergency, it would be sensible to consider (*de lege ferenda*) introducing a statutory-level requirement of periodical examination of the continued existence of the conditions for the state of emergency. I thank D. Štrus for emphasizing this point.

The fulfilment of this latter criterion is further questionable as there are, as was shown above, convincing arguments against the constitutionality of the current regulation. The problem is seen most clearly with regard to the possibility of suspending fundamental rights during the state of emergency: human rights are regulated by the Constitution and can be exercised directly on its basis. Exceptionally, the manner of their exercise can be specified by a law. In non-emergency times, it is therefore prohibited to interfere with human rights by sub-statutory acts. With regard to emergency times, however, the Constitution does not specify in what way – by what type of legal act – can human rights be suspended or restricted. Several arguments speak in favour of the conclusion that even during emergencies human rights should not be interfered with by sub-statutory acts. On this basis, the constitutionality of Art. 108/2 of the Rules can legitimately be challenged (see 2.3.1., *supra*).

However, if we accept this “unconstitutionality thesis” and, at the same time, adopt the solution that all emergency-related decisions have to be adopted by law, we inevitably introduce into the equation the problems avoided by the first solution: that is, (i) the adoption of laws entails lengthier procedures; there is also (ii) the ever-present threat of the National Assembly’s veto; and, finally, (iii) in order to become effective, laws need to be first promulgated by the President of the Republic.

(2) *Power relations*: The second problem, largely related to the former one, regards the distribution of power between the National Assembly and the Government and the question of who is effectively in charge during the state of emergency<sup>74</sup>. As has been noted above, the executive, as the most operative branch of government, has traditionally been considered as the most adequate choice to take the lead in an emergency. The executive has access to the widest range of information; it can act quickly and in relative secrecy; it has at its disposal numerous agencies with specialized knowledge; most importantly, it has the monopoly over the use of force – it controls both the police and the military. However, it is not unheard of that the legislator is put in charge of emergency decision-making<sup>75</sup>.

The Slovenian system does not, on my view, provide a clear answer to this question. On the one hand, the final decision is always in the hands of the National Assembly, even though it cannot act unilaterally as the Government is the only organ that can propose the adoption of an emergency measure. On the other hand, the National Assembly can, during the legislative procedure, modify the Government’s proposal – demonstrating, in this way, its control over the

<sup>74</sup> This question directly regards the issue of *ad interim* non-judicial control over decision-making in the state of emergency.

<sup>75</sup> Cfr. VENICE COMMISSION 1995.



content of the final decision. However, in this regard it is unclear whether or not – and if so, until which moment in the procedure – the Government can retract its proposal. If this can be done until the latest stages of the legislative procedure, then it could be argued that it is nevertheless the Government that makes the final decision on whether a decision will be adopted with respect to the emergency – and what will it be.

The above said demonstrates that the current rules do not give a clear answer to our question whether (i) the *dominus* of the procedure is the National Assembly, with its powers being limited by the fact it can only act on the basis of a previous proposal by the Government or (ii) whether the central figure is the Government, whereby its powers are checked by the necessity to have its decisions “confirmed” by the National Assembly. The lack of clarity in this respect is an important *a priori* impediment both to the effectiveness of the process as well as to its compliance with the rule of law.

#### 4. Concluding Remarks

The quality (clarity, unambiguity, coherence etc.) of the legal regulation of emergencies is decisive in our *a priori* assessment whether a legal system will be able to efficiently meet the challenges posed by a given emergency situation while at the same time remaining respective of the rule of law requirements (especially the protection of human rights). Of course, while the ideal is to have a system equally excelling in the pursuit of both of these, at times diametrically opposite, *desiderata*, most of the time we will be forced to settle for some kind of a trade-off between the two: increasing the efficiency of emergency management will come at the price of reduced protection of certain fundamental rights – and *vice versa*. Navigating between the two extremes is thus the main challenge facing lawmakers in this regard.

The underlying goal of this article was to provide the reader with a general overview of the regulation of the state of emergency in the Slovenian legal order and, by pointing out and discussing certain problematic issues in its (constitutional) design, to hypothesize as to the capability of this system to cope with emergencies from the perspective of both of the above mentioned *desiderata*. A subsidiary goal of this discussion was to provide certain reference points for discussions on possible modifications and future development of the emergency regulation in Slovenia.

The above analysis has shown that the current regulation of the state of emergency in the Slovenian legal system is in many ways unsatisfactory. There is, for one, a lack of sufficient normative guidance in this respect: several fundamental questions regarding the declaration of the state of emergency, its management and

the post-emergency period remain *unaddressed* by the Constitution as well as all other related legal acts. Moreover, matters addressed by the constitutional provisions are regulated in a highly, indeed excessively, *indeterminate* manner, impairing both the effectiveness and the legality of the process. There are, finally, several *inconsistencies* between different rules as well as *unconvincing solutions*. Perhaps most problematic in this respect is the choice of the type of act by which decisions in the state of emergency are to be adopted by the National Assembly and, in consequence, the procedure according to which these decisions are to be adopted. As I have tried to show above (see 2.3., *supra*), all solutions offered by the current regulation are problematic with respect to both of the pursued goals.

Considering these deficiencies of the legal regulation, there is an increased probability that once actually faced with an emergency situation requiring the declaration of the state of emergency (remember that the state of emergency has yet to be declared in Slovenia), the decisions in the emergency situation will be adopted outside of the legal framework, arbitrarily and without proper legal checks. In order to avoid such a scenario, a comprehensive analysis of the current state of affairs and a serious juridico-political reflection on these questions would be required, followed by a comprehensive reform of the emergency management system.

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