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FOREWORD

The Novel Coronavirus (COVID-19) pandemic fundamentally transformed life in the world. By a scale of their reach in such a short period of time, the measures taken by the states to contain the spread of the virus are unprecedented. The critical need to protect public health prompted the states to restrict human rights by instant decision-making. It will not be exaggerated to assert that the foregoing tendency puts a present-day liberal democracy to a test, since it risks the concentration of excessive powers within the executive.

Intrinsically, against a backdrop of crisis governance caused by the pandemic, questions were raised from the standpoint of modern constitutionalism and the existing literature, due to insufficiency of research, did not prove to be able to answer those. The need to engage into academic discussion on managing the containment of the pandemic and, in general, on a crisis governance model thus becomes evident. This is further attested by several cases pending before the Constitutional Court of Georgia, whereby emergency legislation on measures adopted by the state is subjected to a dispute. In order to ensure the effectiveness of the existing constitutional order and strengthen its viability, it is essential to set forth clear, consistent and uniform constitutional standards in relation to the functioning of emergency regime and crisis governance.

The present publication of the "Journal of Constitutional Law" is a special issue, which is devoted to the emergency regulation in constitutional law and the protection of human rights. The publication consists of eight academic pieces both from Georgian and foreign authors. The journal combines the articles of young Georgian researchers on important legal topics, such as the law-making procedure during the emergency (by Nodar Kherkheulidze), the protection of the right to property during the pandemic (by Tamar Khavtasi), the threats emanating from the emergency regime (by Ana Jabauri), and the functioning of the parliament during the emergency (by Giorgi Melikidze and Nana Uznadze).

I am glad that the present issue, also encompasses the work of three authoritative and highly-cited foreign scholars – Bruce Ackerman, Eric A. Posner and Clarisa Long – on the regulation of emergency in the United States of America, alongside the protection of private information during the pandemic. The article by Professor Bruce Ackerman, which discusses the accordance of power to the executive in the aftermath of 9/11 terrorist attacks from the constitutional perspective, is one of the most authoritative contributions regarding the emergency governance. He authors the second piece where he presents an opinion on what may be done to balance the executive power during the

emergency. The article by Professor Eric A. Posner considers the doctrine of deference to the executive authority and its scope in the United States of America. The newly published article by Professor Clarisa Long on the collection of private information by the states during the COVID-19 pandemic is just as interesting and pertinent.

I wish to express my sincere gratitude towards foreign Scholars – Bruce Ackerman, Eric A. Posner and Clarisa Long, as well as Professor Cass R. Sunstein for their cooperation with the publication of the Constitutional Court of Georgia and for making their academic work available to Georgian readership.

I wholeheartedly hope that the present issue of the "Journal of Constitutional Law" will be a valuable contribution in understanding the emergency regulatory regime from constitutional law perspective and will facilitate further academic discourse in this direction.

ZAZA TAVADZE

PRESIDENT OF THE CONSTITUTIONAL COURT OF GEORGIA

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Bruce Ackerman*

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THE EMERGENCY CONSTITUTION**

ABSTRACT

Terrorist attack of September 11, 2001 shocked the world, it caused major changes in understanding the safety and security. Very soon we saw that our lives have changed, in response to the threat governments around the world began imposing restrictions on different rights for ensuring the prevention of similar attacks. But one major discussion was how the governments deal with the emergencies. This paper asks a relevant question – what happens when we see next attack, what it will it look like. Nineteen years later the world faced a completely different threat – a public health emergency, yet the discussion that commenced post-9/11 is an extremely relevant point to start discussion. The foregoing paper, published in 2003 is one of the strongest and most discussed work on the topic of emergencies, relevant for the readers to the date, when assessing the boundaries and the perspectives of emergencies.***

INTRODUCTION

Terrorist attacks will be a recurring part of our future. The balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it-

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* Sterling Professor of Law and Political Science, Yale University. I presented earlier versions of this Essay at the Cardozo Conference on Emergency Powers and Constitutions and the Yale Global Constitutionalism Seminar. I am much indebted to the comments of Stephen Holmes and Carlos Rosenkrantz on the former occasion, and to a variety of constitutional court judges who participated in the latter event. Ian Ayres, Jack Balkin, Yochai Benkler, Paul Gewirtz, Dieter Grimm, Michael Levine, Daniel Markovits, Robert Post, Susan Rose-Ackerman, Jed Rubenfeld, and Kim Scheppele also provided probing critiques of previous drafts. Thanks finally to a fabulous group of Yale law students for research assistance: Lindsay Barenz, Ivana Cingel, Inayat Delawala, David Gamage, Markus Gehring, Anand Kandaswamy, Thomas Pulham, and Amy Sepinwall.

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not on a plane next time, but with poison gas in the subway or a biotoxin in the water supply. The attack of September 11 is the prototype for many events that will litter the twenty-first century. We should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time around?

If the American reaction is any guide, we urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens: After each successful attack, politicians will come up with repressive laws and promise greater security – only to find that a different terrorist band manages to strike a few years later.[1] This disaster, in turn, will create a demand for even more repressive laws, and on and on. Even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050.

It is tempting to respond to this grim prospect with an absolutist defense of traditional freedom: No matter how large the event, no matter how great the ensuing panic, we must insist on the strict protection of all rights all the time. I respect this view but do not share it. No democratic government can maintain popular support without acting effectively to calm panic and to prevent a second terrorist strike. If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war against terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic.

To avoid a repeated cycle of repression, defenders of freedom must consider a more hardheaded doctrine – one that allows short-term emergency measures but draws the line against permanent restrictions. Above all else, we must prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty. Designing a constitutional regime for a limited state of emergency is a tricky business. Unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity. Governments should not be permitted to run wild even during the emergency; many extreme measures should remain off limits. Nevertheless, the self-conscious design of an emergency regime may well be the best available defense against a panic-driven cycle of permanent destruction.

This is a challenge confronting all liberal democracies, and we should not allow American particularities to divert attention from the general features of our problem in institutional design. Nevertheless, the distinctive character of the U.S. Constitution does create special

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[1] There has been a vast outpouring of work analyzing the USA PATRIOT Act and the unilateral actions undertaken by President Bush and Attorney General John Ashcroft after September 11. For a representative sampling and further citations, see DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 147-87 (2d ed. 2002); STEPHEN J. SCHULHOFER, THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 (2002); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375 (2002); and Kim Lane Scheppele, *Law in a Time of Emergency: Terrorism and States of Exception*, 6 U. PA. J. CONST. L. (forthcoming 2004). My Essay does not aim to contribute to this burgeoning literature. Instead, I hope to consider how further cycles of repression may be avoided.

problems, which I discuss separately when the need arises. My argument proceeds in two stages: The first is diagnostic, the second prescriptive. The exercise in diagnosis involves a critical survey of the conceptual resources provided by the Western legal tradition: Are our basic concepts adequate for dealing with the distinctive features of terrorist strikes? Part I suggests that we cannot deal with our problem adequately within the frameworks provided by the law of war or the law of crime. This negative conclusion clears the conceptual path for another way to confront the problem: the "state of emergency." The paradigm case for emergency powers has been an imminent threat to the very existence of the state, which necessitates empowering the Executive to take extraordinary measures.

Part II urges a critical reassessment of this traditional understanding: September 11 and its successors will not pose such a grave existential threat, but major acts of terrorism can induce short-term panic. It should be the purpose of a newly fashioned emergency regime to reassure the public that the situation is under control, and that the state is taking effective short-term actions to prevent a second strike. This reassurance rationale, as I call it, requires a sweeping revision of the emergency power provisions currently found in many of the world's constitutions.

But it requires something more: a reconsideration of the self-confident American belief that we are better off without an elaborate set of emergency provisions in our own Constitution, and that we should rely principally on judges to control our panic-driven responses to crises. Part III takes up this common law prejudice, and suggests why it will no longer serve us well under the conditions likely to prevail in the twenty-first century.

This is the point at which cultural diagnosis gives way to constitutional prescription. If I am right that the threat of terrorism cannot be cabined within the traditional categories of war and crime, that we cannot rely on judges to manage the panic-reactions likely to arise, and that existing constitutional provisions do not focus on the reassurance rationale, we have our work set out for us. What should a proper emergency constitution look like?

I offer a three-dimensional approach. The first and most fundamental dimension focuses on an innovative system of political checks and balances, with Parts IV and V describing constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures. The second dimension-Part VI-integrates economic incentives and compensation payments into the system. Finally, Part VII moves from political economy to the legal realm – proposing a framework that permits courts to intervene effectively to restrain predictable abuses without viewing judges as miraculous saviors of our threatened heritage of freedom.

Part VIII confronts some American political realities. Something like my design may prove attractive in countries that already possess elaborate emergency provisions. Given the formidable obstacle course presented by Article V of the U.S. Constitution, my proposal is a nonstarter as a formal amendment. Nevertheless, much of the design could be introduced as a "framework statute" within the terms of the existing Constitution. Congress took a first

step in this direction in the 1970s when it passed the National Emergencies Act.[2] But the experience under this Act demonstrates the need for radical revision. The next few years may well create a political opening for serious consideration of a new framework statute, especially if the Supreme Court acts wisely in some great cases coming up for decision in the next year or two.

We shall see.

I. BETWEEN WAR AND CRIME

Our legal tradition provides us with two fundamental concepts-war and crime-to deal with our present predicament. Neither fits.

A. WAR?

The "war on terrorism" has paid enormous political dividends for President Bush, but that does not make it a compelling legal concept. War is traditionally defined as a state of belligerency between sovereigns. The wars with Afghanistan and Iraq were wars; the struggle against Osama bin Laden and al Qaeda is not.[3] The selective adaptation of doctrines dealing with war predictably leads to sweeping incursions on fundamental liberties. It is one thing for President Roosevelt to designate a captured American citizen serving in the German army as an "enemy combatant" and try him without standard scrutiny by the civilian courts;[4] it is quite another for President Bush to do the same thing for suspected members of al Qaeda.[5]

The difference is obvious and fundamental: Only a very small percentage of the human race

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[2] Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (2000)); *see also infra* Section VIII.A (discussing two exemplary framework statutes of the twentieth century).

[3] Traditional definitions hold that a state of warfare exists when "states through the medium of their armed forces, such forces being under a regular command, wearing uniform or such other identifiable marks as to make them recognisable at a distance[...]conduct […] their hostilities in accordance with the international rules of armed conflict." L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 54-55 (2d ed. 2000). For the evolution of the laws of war, see THE LAWS OF WAR (W. Michael Reisman & Chris T. Antoniou eds., 1994); and LAWS OF WAR AND INTERNATIONAL LAW (Ren6 van der Wolf & Willem-Jan van der Wolf eds., 2002). The ongoing crisis of definition posed by the existence of guerrilla and terrorist groups is the subject of much recent scholarship. See BRUCE HOFFMAN, INSIDE TERRORISM 13-44 (1998) (finding that a definitional difficulty arises from confusion over the meaning of "terrorism"); *cf* LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 164 (2002) (noting the uncertainty over the status in international law of internal armed opposition groups).

[4] See *Ex parte* Quirin, 317 U.S. 1 (1942).

[5] The most notorious example of presidential unilateralism involves the decision to place Jose Padilla, the alleged "dirty bomber," under indefinite detention in a Navy brig. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *affg in part, rev'g in part,* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *cert. granted,* No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004); *see also* Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003) (outlining the background of *Padilla* and the legal issues at stake); *infra* notes 131-132 and accompanying text. Although the Second Circuit recently ruled for Padilla, *see infra* note 7, the Supreme Court will have the final word on this case.

is composed of recognized members of the German military, but anybody can be suspected of complicity with al Qaeda. This means that all of us are, in principle, subject to executive detention once we treat the "war on terrorism" as if it were the legal equivalent of the war against Germany.

War between sovereign states also comes to an end; some decisive act of capitulation, armistice, or treaty takes place for all the world to see. But this will not happen in the war against terrorism. Even if bin Laden is caught, tried, and convicted, it will not be clear whether al Qaeda has survived. Even if this network disintegrates, it will likely morph into other terrorist groups. Al Qaeda is already collaborating with Hezbollah,[6] for example, and how will anybody determine where one group ends and the other begins? There are more than six billion people in the world-more than enough to supply terrorist networks with haters, even if the West does nothing to stir the pot. So if we choose to call this a war, it will be endless. This means that we not only subject *everybody* to the risk of detention by the Commander in Chief, but we subject everybody to the risk of *endless* detention.[7]

If the President is allowed to punish, as well as to detain, the logic of war-talk leads to the creation of a full-blown alternative system of criminal justice for terrorism suspects. This system is already emerging in the military, and we are beginning to argue about the way it should be constructed: How little evidence suffices to justify how much detention? Can detainees ever get in touch with civilian lawyers? Can these lawyers ever scrutinize the evidence, or must it remain secret?[8]

These are important questions, but it is even more important to challenge the war-talk that

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[6] *See* Dana Priest & Douglas Farah, *Terror Alliance Has U.S. Worried*, WASH. POST, June 30, 2002, at Al; Susan Schmidt & Douglas Farah, *Al Qaeda's New Leaders*, WASH. POST, Oct. 29, 2002, at Al.

[7] In an important opinion, the Second Circuit recently offered the most significant judicial resistance yet to presidential pretensions to extraordinary powers in the "war" against terrorism. It denied that the President's position as Commander in Chief enabled him, without explicit statutory authorization, to sweep American citizens into military prison for indefinite detention simply by declaring them "enemy combatants." *See Padilla*, 352 F.3d 695. Perhaps to compensate for this strong holding, the court's opinion is full of extravagant dicta that seek to conciliate the President to his defeat. In particular: "We [..] agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts." *Id.* at 712 (citing Johnson v. Eisentrager, 339 U.S. 763, 789 (1950)). But *Eisentrager* involved the status of enemy aliens overseas who were engaged in the service of a government at war with the United States. It is a big stretch to use *Eisentrager* as the source of a political question "enemy combatants" doctrine in support even though of presidential they are power not in to the declare service that of citizens any hostile government. The power of the Executive to expand the category of war to include such groups as al Qaeda is much too important a question to be treated in such casual dicta. It should be deferred for critical consideration until such time as it is squarely raised by the facts of a real case.

[8] The American Bar Association's Task Force on Terrorism and the Law has issued a report on the military commissions proposed by the Bush Administration. Although the Task Force supports the President's general authority, it recommends against using the tribunals without the explicit authorization of Congress to prosecute people who are in the United States legally. It also argues that the United States, as a signatory to the U.N. International Covenant on Civil and Political Rights, should abide by its obligations under Article 14 to ensure that the tribunals are generally open to the public and to the media, that the trials are not unnecessarily delayed, and that prisoners have the right to obtain habeas corpus relief from a U.S. court. See ABA TASK FORCE ON TERRORISM & THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS 16-17 (2002).

makes the entire enterprise seem plausible.[9] The only legal language presently available for making this critique - the language of the criminal law-is not entirely persuasive. But it is powerful.

B. CRIME?

For the criminal law purist, the "war on terrorism" is merely a metaphor without decisive legal significance, more like the "war on drugs" or the "war on crime" than the war against Nazi Germany. Al Qaeda is a dangerous conspiracy, but so is the Mafia, whose activities lead to the deaths of thousands through drug overdoses and gangland murders. Conspiracy is a serious crime, and crime fighters have special tools to deal with it.[10] But nobody supposes that casual talk of a "war on crime" permits us to sweep away the entire panoply of criminal protections built up over the centuries. Why is the "war on terrorism" any different?

Recall too the experience of the Cold War. There was pervasive talk of a Communist conspiracy-and in contrast to al Qaeda, the shadowy cells of grim-faced plotters were supported by a great superpower commanding massive armies with nuclear weapons. American presidents also had substantial evidence of links between domestic Communist cells and the Soviet GRU, which was a military organization.[11] For decades, we were only minutes away from an incident that could lead to nuclear holocaust. From a legal point of view, domestic Communist cells were virtually front-line troops in something very close to a classic war between sovereign states.

Yet no president ever suspended the normal operation of the criminal law by calling domestic Communists "enemy combatants."[12] The Communist conspiracy was treated as a Communist *conspiracy*; the accused were provided all the traditional protections of the criminal law. If Cold War anxieties did not overwhelm us, why should war-talk justify extraordinary military measures against small bands of terrorists who cannot rely on the

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[9] For further cautions about the abuse of the war metaphor, see PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 19-36 (2003).

[10] For a thoughtful reappraisal of conspiracy law, see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003). For a critical assessment of statutory enhancements to the armory of prosecutorial tools against conspirators, see Gerard E. Lynch, RICO: *The Crime of Being a Criminal* (pts. 1-2), 87 COLUM. L. REV. 661 (1987).

[11] Throughout much of the Cold War, there were two main Soviet intelligence-gathering operations. One was the KGB and its many predecessor organizations. The other was the GRU, the Chief Directorate for Intelligence of the Red Army's General Staff. GRU officers interacted with members of the Comintern, which supervised the Communist Party of the United States, and also supervised Communist Party agents within the U.S. government. *See* VENONA: SOVIET ESPIONAGE AND THE AMERICAN RESPONSE, 1939-1957, at viii-ix (Robert Louis Benson & Michael Warner eds., 1996). For a historical account of the GRU's early activities in the United States, see DAVID J. DALLIN, SOVIET ESPIONAGE 402-13 (1955).

[12] This presidential restraint is especially noteworthy since statutory authority could have been stretched to support such actions. *See* Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1019, 1021 (repealed 1971) (authorizing the detention, during an "Internal Security Emergency," of persons for whom there was a "reasonable ground" to believe that they would "probably" commit, or conspire to commit, espionage or sabotage). The repeal of these provisions makes it far more difficult to sustain President Bush's actions to detain American citizens as "enemy combatants," especially in light of the Code provision accompanying the repeal. See 18 U.S.C. § 4001(a) (2000); *see also infra* notes 130-131 and accompanying text.

massive assistance of an aggressive superpower?

These are powerful questions that provide a crucial context for questioning the remarkable success of the present administration in persuading the public that wartime emergency measures are appropriate responses to our present predicaments.[13] Richard Hofstadter warned Americans long ago that they were peculiarly vulnerable to the paranoid style of political leadership.[14] We are succumbing yet again.[15]

Despite the excessive rhetoric and repressive practices, there is one distinctive feature of our present situation that distinguishes it from the scares of the past. Begin with the criminal law purist's normative benchmarks: the traditional legal response to the Mafia and other wide-ranging conspiracies. The purist rightfully emphasizes that the criminal law has managed to contain antisocial organizations within tolerable limits without the need for arbitrary police-state measures. Nonetheless, the reassurance such analogies offer is distinctly limited.

Even the most successful organized crime operations lack the overweening pretensions of the most humble terrorist cell. Mafiosi are generally content to allow government officials to flaunt their symbols of legitimacy so long as gangsters control the underworld. Whatever else is happening in Palermo, the mayor's office is occupied by the duly elected representative of the Italian Republic. But the point of a terrorist bomb is to launch a distinctly political challenge to the government. The deaths caused by terrorists may be smaller in number than those caused by the drug-dealing Mafia. Nevertheless, terrorists' challenge to political authority is greater. The only way to meet this challenge is for the government to demonstrate to its terrified citizens that it is taking steps to act decisively against the blatant assault on its sovereign authority.

The political dimension of the terrorist threat makes the lessons from the McCarthy era more relevant, but once again there is a difference. For all the McCarthyite talk of the Red Menace, the danger remained abstract to ordinary people. While the Cuban Missile Crisis brought us to the brink of World War III,[16] it did not conclude with an event, like the toppling of the Twin Towers, that dramatized America's incapacity to defend its frontiers.

The risk of nuclear devastation during the Cold War might well have been much larger than the terrorist danger today.[17] But we were lucky, and the threat of nuclear holocaust remained

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[13] For a probing critique along these lines, see David Luban, *The War on Terrorism and the End of Human Rights*, PHIL. & PUB. POL'Y Q., Summer 2002, at 9. On the potential for strategic manipulation of the categories of war and crime, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002).

[14] RICHARD HOFSTADTER, *The Paranoid Style in American Politics, in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 3 (1965).

[15] For a historical account of civil liberties crises in the Republic, see Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms, in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 23 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

[16] For the classic study, see GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971).

[17] *See* JOHN LEWIS GADDIS, WE NOW KNOW: RETHINKING COLD WAR HISTORY 86 (1997) ("Even if this taboo on nuclear nuclear technology will make made it most *unlikely* that a War so greatly feared, would assessment of the terrorist threat use should someday break down-a possibility the proliferation of more and

a threat. In contrast, the changing technological balance in favor of terrorists means that events like September 11 will recur at unpredictable intervals, each shattering anew the ordinary citizen's confidence in the government's capacity to fend off catastrophic breaches of national security.[18]

Paradoxically, the relative weakness of terrorists compared to the Communist conspiracy only exacerbates the political problems involved in an effective response. If the Cold War threat of nuclear annihilation had been realized, it would have meant the end of civilization as we know it. The survivors would have been obliged to build a legitimate government from the ground up. This will not be true in the new age of terrorism. It may only be a matter of time before a suitcase A-bomb obliterates a major American city, but there will be nothing like a Soviet-style rocket assault leading to the destruction of all major cities simultaneously. Despite the horror, the death, and the pain, American government will survive the day after the tragedy. And it will be obliged to establish – quickly – that it has not been thoroughly demoralized by the lurking terrorist underground.

C. REASSURANCE

So neither of the standard legal rubrics is really adequate. The rhetoric of war does express the shattering affront to national sovereignty left in the aftermath of a successful terrorist attack. But when translated from politics to law, it threatens all of us with indefinite detention without the traditional safeguards developed over centuries of painful struggle. The rubric of the criminal law has proved itself adequate (with ongoing fine-tunings) to protect fundamental rights while handling serious criminal conspiracies, but only within a social context that presupposes broad-ranging confidence in the government's general capacity to discharge its sovereign functions. When this premise is called into question by a successful terrorist attack, a distinctive interest comes into play.

Call it the *reassurance function*: When a terrorist attack places the state's effective sovereignty in doubt, government must act visibly and decisively to demonstrate to its terrorized citizens that the breach was only temporary, and that it is taking aggressive action to contain the crisis and to deal with the prospect of its recurrence. Most importantly, my proposal for an emergency constitution authorizes the government to detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion. Government may well assert other powers in carrying out the reassurance function, but in developing my ar-

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more likely over the years-the end of the Cold War has global conflagration, of the kind those who lived through the Cold be the result."). Paul Pillar also provides an exceptionally sober that punctures many of the hysterical bubbles of the moment. *See* PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 22 (2001) ("Given such challenges, development of a CBRN [chemical, biological, radiological, or nuclear] capability to cause mass casualties would require a major, sophisticated program that is well beyond the reach of the great majority of terrorist groups.").

[18] For a useful introduction to the social-psychological mechanisms generating mass panic, see Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003).

gument, I shall be focusing on the grant of extraordinary powers of detention as the paradigm.

My aim is to design a constitutional framework for a temporary state of emergency that enables government to discharge the reassurance function without doing long-term damage to individual rights.

Easier said than done.

II. RE-RATIONALIZING EMERGENCY

Written constitutions typically deal with states of emergency, though sometimes in a rudimentary fashion. Before descending into the details, it is more important to reconsider the fundamental rationale guiding traditional efforts.

Call it the *existential rationale*: It is invoked by the threat of an enemy invasion or a powerful domestic conspiracy aiming to replace the existing regime. The state of emergency enables the government to take extraordinary measures in its life-and-death struggle for survival.

These apocalyptic scenarios suggest great caution in limiting the scope of emergency powers on those occasions – hopefully rare – when they are legitimately deployed. For example, Article 16 of the French Constitution of the Fifth Republic authorizes the President "[to] take […] the measures required by these circumstances," and refuses to declare anything off-limits during the struggle for survival.[19]

The French solution is undoubtedly extreme, but it cannot be categorically rejected within the horizon framed by the existential rationale. A constitution's framers cannot know the de-

[19] Article 16 of the French Constitution authorizes the President of the Republic to exercise emergency powers "[w]hen the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted." CONST. art. 16, *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FRANCE 6 (Gisbert H. Flanz ed., 2000). The President not only decides whether a particular threat qualifies under the two conditions, but also how long the state of emergency endures. *See* FRANÇOIS SAINT-BONNET, L'ÉTAT D'EXCEPTION 15 (2001); MICHÈLE VOISSET, L'ARTICLE 16 DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 26 (1969). Worse yet, both conditions may be interpreted to authorize presidential powers in situations falling far short of genuine existential threats. For example, the working group of the Ministry of Justice convened to comment on the draft constitution suggested that Article 16 might be invoked to protect against a general strike that effectively endangered "la vie de la nation." VOISSET, *supra*, at 22 (citing official records of the constitutional deliberations). Similarly, Article 16 does not envision the total incapacitation of governmental operations, but only their partial disruption. This is implied, for example, by a textual provision permitting Parliament to convene and remain permanently in session during the period of the emergency-a condition inconsistent with total paralysis. *See* CONST. art. 16; *see also* VOISSET, *supra*, at 31-32 (citing Jean Lamarque, *La Théorie de la Nécessité et l'Article 16 de la Constitution de 1958*, 77 REVUE DU DROIT PUBLIC DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 558 (1961)). Article 16 has been invoked only once – by President de Gaulle in 1961 in response to an attempted military insurrection in Algeria. This seems to have been an appropriate response to the crisis, though the President was much criticized for his decision to continue the state of emergency for months after the putsch had been suppressed. *See* VOISSET, *supra*, at 26. The constitutional text provides abundant potential for this sort of abuse.

tails of the particular apocalyptic threat endangering the regime before it happens. Given their ignorance, any effort to restrict emergency powers may deprive the government of the very tools it needs to counter the threat to its survival.[20] Abraham Lincoln said it best when referring to the suspension of habeas corpus: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[21]

But Lincoln's one-liners do not resolve all doubts.[22] A grant of carte blanche poses obvious risks of abuse, and many thoughtful constitutionalists have insisted on protecting core civil and political liberties during even the most severe crises. The modem German Constitution, for example, adopts this view,[23] reflecting the catastrophic role that the Weimar Constitution's broad emergency provisions played in the Nazi ascent to power in the 1930s.[24]

Our present problem requires us to move beyond this classic debate. Terrorist threats do *not* trigger the existential rationale, but require the articulation of a different framework for emergency power. To make the key point, distinguish between two different dangers posed

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[20] This rationale for the French approach is explicitly presented by François Saint-Bonnet. *See* SAINT-BONNET, *supra* note 19, at 16.

[21] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421,430 (Roy P. Basler ed., 1953).

[22] Daniel Farber provides a modem defense of Lincoln's apologia. At one point, he suggests that Lincoln's actions are "consistent with our current views of legitimate executive power." DANIEL FARBER, LINCOLN'S CONSTITUTION 163 (2003). At another point, he remarks:

> In short, on careful reading, Lincoln was not arguing for the *legal* power to take emergency actions contrary to statutory or constitutional mandates. Instead, his argument fit well within the classic liberal view of emergency power. While unlawful, his actions could be ratified by Congress if it chose to do so ("trusting, then as now, that Congress would readily ratify them"). The actions were also morally consistent with his oath of office ("would not the official oath be broken…?")

Id. at 194. I am a liberal, but I reject Farber's "classic liberal view" of emergency power in the brave new world inaugurated by September 11. We should not content ourselves with retroactive congressional approval. We should insist, instead, upon ongoing legislative review and reauthorization of extraordinary powers. *See infra* Part IV. For a more nuanced view of Lincoln's conduct, see J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-39 (1926).

[23] The German emergency provisions broadly authorize the central government to establish public order without regard to the powers normally reserved to the states or the limitations normally imposed on military operations. But they endorse only very limited incursions on fundamental rights – namely, the detention of individuals for up to four days without judicial hearings and the confiscation of property without compensation or other normal safeguards. See GRUNDGESETZ art. 115c(2)(1)-(2). As a further safeguard, the constitution (known as the Basic Law) explicitly provides that "[n]either the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its Judges may be impaired." *Id*. art. S15g, *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 87 (Gisbert H. Flanz ed., 2003). For further discussion, see *infra* notes 25, 54-55.

Among more recent constitutions, that of South Africa is notable for the broad range of fundamental rights it expressly protects against infringement during emergencies. *See* S. AFR. CONST. § 37(5)-(6) (providing explicit safeguards regarding "Equality," "Human Dignity," "Life," "Freedom and Security of the person," "Slavery, servitude and forced labour," "Arrested, detained, and accused persons," and certain rights of children, as well as extensive protections for persons detained without trial during the emergency). The Polish, Portuguese, and Slovenian Constitutions also provide noteworthy enumerations of protected rights. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ art. 233; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 19(6)-(7); CONSTITUCIÓN DE ESLOVENIA art. 16.

[24] *See* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 29-73 (Transaction Publishers 2002) (1948).

by terrorism: the physical threat to the population and the political threat to the existing regime.

Future attacks undoubtedly pose a severe physical threat: The next major strike may kill hundreds of thousands, or even millions. But they do not pose a clear and present danger to the existing regime. Even if Washington or New York were decimated, al Qaeda would not displace the surviving remnants of political authority with its own rival government and police force. The terrorists would remain underground, threatening a second strike, while the rest of us painfully reconstructed our traditional scheme of government on the ground – providing emergency police and health services, filling vacancies in established institutions, and moving forward, however grimly, into the future.

Government will not disintegrate in the face of a terrorist threat, but politicians will have a powerful incentive to abuse the reassurance function. In their eagerness to calm the prevailing panic by taking effective steps against a second strike, they will destroy civil and political liberties on a permanent basis. Our constitutional problem is not that the government will be too weak in the short run, but that it will be too strong in the long run.

This diagnosis sets a different challenge for constitutional design. According to the existential rationale, it seems a great luxury to worry too much about the long-run fate of civil and political liberties: If the constitutional order disintegrates, it will be up to somebody else to worry about the long run. According to the reassurance rationale, however, the regime is going to stagger onward, and the challenge is to provide it with the tools for an effective short-run response without doing unnecessary long-run damage.

This means that French-style emergency regimes are *categorically* inappropriate models for the terrorist threats confronting the mature democracies of the twenty-first century. The last thing we want is to authorize the President to do whatever he considers necessary for as long as he thinks appropriate. This makes it far too easy for him to transform the panic following a horrific attack into an engine of sustained authoritarian rule and bureaucratic repression. We should be searching instead for innovative designs that make it difficult for emergency actions to spiral out of control, destroying the framework of limited government that they were supposed to protect.

This common project will assume different forms in different constitutional cultures. Many countries around the world already possess rather elaborate provisions for emergency power, but these have been largely designed with the existential rationale in mind. If they are of the French type, they should be thoroughly revised; if they are of the more restrictive German sort, they should be rethought. Existing constitutional limitations may not make sense within the new framework.[25] In marking the way forward, it will not suffice to classify existing

[25] Germany, for example, has an elaborate set of emergency provisions, but none was fashioned with terrorism in mind. Article 35, which concerns threats to public order, may readily apply, *see* GRUNDGESETZ art. 35, but it is a rather weak provision authorizing special assistance between the federal and state governments. The Basic Law's other emergency provisions do not seem to apply at all. They involve threats to the very existence of the state-either from internal forces, *see id.* art. 91, or external enemies, *see id.* art. 11 5a. Some of these provisions contemplate the operation of political checks and balances before they may be exercised. *See infra*

provisions after a canvass of the legal status quo. A more fundamental analysis is required, beginning with first principles: What should an emergency constitution look like if it systematically focuses on the reassurance function as its raison d'être?

In seeking a comprehensive answer to this question, we will find that other countries-most notably Canada and South Africa-have already come up with partial solutions that warrant worldwide attention.[26] But only systematic model-building will enable us to identify the innovative bits and pieces swirling about in a sea of law shaped by the existential rationale. If this initial exercise is successful, it can provoke a broader multinational debate that may help motivate sustained reconsideration of existing emergency provisions in the years ahead.

I expect a more skeptical reception to my model-building efforts in countries, like the United States, that do not already possess a complex constitutional text regulating emergency power. Within these constitutional cultures, my call for the self-conscious creation of a new emergency framework may strike most thoughtful observers as distinctly premature. Haven't we been doing well enough, thank you, without an elaborate set of emergency provisions? Isn't it far too dangerous to place the question of emergency power on the agenda for serious political consideration?

These skeptical questions represent the conventional wisdom of the largely American readership of this journal. So it is wise to confront them head-on before proceeding.

III. THE MODEL OF JUDICIAL MANAGEMENT

Do we really need an emergency constitution?

Shiny new solutions may contain serious blunders that will be difficult to change once solemnly enshrined in legislation or, even worse, in constitutional provisions. Putting aside the real danger of initial mistakes, the very creation of an elaborate structure may increase the frequency with which officials use emergency powers. They now handle the overwhelming majority of disturbing events within the traditional framework of the criminal law. But the new machinery will normalize the rhetoric of emergency, making extraordinary powers part of the ordinary discourse of government. If you build it, they will come – officials will seek to invoke "emergency" powers to handle middling crises, resulting in yet another sad story of unintended consequences.

To be sure, the U.S. Constitution does contain a rudimentary emergency provision, permitting the suspension of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[27] But it largely leaves the rest to the judicial imagination. Rather than issuing a call for self-conscious redesign, perhaps we should cherish the clouds that presently obscure our subject?

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notes 54-55.

[26] *See infra* text accompanying notes 63-66, 75-77.

[27] U.S. CONST. art. I, § 9, cl.2.

During normal times, the common law fog allows judges and other legal sages to regale themselves with remarkably astringent commentaries on the use of emergency powers, cautioning all and sundry that they are unconstitutional except under the most extreme circumstances. This creates a cloud of suspicion and restrains officials who might otherwise resort to emergency powers too lightly. Then, when a real crisis arises, judges can display remarkable flexibility for the interim, while covering their tracks with confusing dicta and occasional restrictive holdings. As the crisis abates, they can then inaugurate a period of agonizing reappraisal, casting doubt upon the constitutional propriety of their momentary permissiveness. After a revisionist decade or two, the oracles of the law can then return to their older habit of casting aspersions on the entire idea of emergency powers-leading to an atmosphere of genuine restraint, until the next real crisis comes around.[28]

So why not let this common law cycle deal with the problem of emergencies? Won't the effort to build a new legal structure be more trouble than it's worth?

This seemingly plausible response rests upon a controversial premise. It supposes a lucky society in which serious emergencies arise very infrequently – once or twice in a lifetime. This was more or less true in America during the last couple of centuries. Perhaps it was also true of the island polity of Great Britain from which our common law tradition derives.[29] But no longer. The realities of globalization, mass transportation, and miniaturization of the means of destruction suggest that bombs will go off too frequently for the common law cycle to manage crises effectively.

Korematsu v. United States[30] provides a revealing example of both the strengths and limits of a judge-centered approach. I myself believe that Justice Hugo Black-that great civil libertarian-was wrong in upholding the wartime concentration camps for Japanese Americans. But the fact that Justice Black *was* a great libertarian suggests how dangerous the emergency appeared at the time to right-thinking people. It seems fair, then, to view *Korematsu* as a paradigm case representing the "permissive" moment in the common law cycle.

It was then followed by decades of revisionist activity that can be seen to vindicate the common-lawyer's confidence in his methods. By the 1980s, it was hard to find a constitutional commentator with a good word to say for the decision.[31] Governmental institutions

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[28] For a remarkably complacent view of this cycle, see Mark Tushnet, *Defending* Korematsu?: *Reflections on Civil Liberties in Wartime,* 2003 WIS. L. REV. 273, 283-98.

[29] In both the American and British cases, it all depends on how serious a crisis must be in order to count as a "genuine" emergency. As Professor Mark Tushnet's historical overview suggests, the last serious crisis occurred a full generation ago – during the McCarthy and Vietnam War periods. *See id.* at 286-87. I fear that the lengthy period without a crisis may lead many legal commentators to take an overly optimistic view of the likely future operation of judicial management.

[30] 323 U.S. 214 (1944).

[31] Agonizing reappraisal began early, with Dean Eugene V. Rostow's famous critique of *Korematsu.* Eugene V. Rostow, *The Japanese American Cases-A Disaster,* 54 YALE L.J. 489 (1945). More than forty years later, Rostow claimed that *"Korematsu* has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The case has been overruled in fact because of the criticism it has received […]. " Charles J. Cooper, Orrin Hatch, Eugene V. Rostow & Michael Tigar, *What the Constitution Means by Executive Power,* 43 U. MIAMI L. REV. 165, 196-97 (1988) (footnote omitted). So it seemed in 1988, but what will be the view in 2008?

slowly responded to a broader change in public opinion, with President Ford symbolically rescinding President Roosevelt's order authorizing the wartime detention in 1976[32] and Congress granting compensation to inmates of the concentration camps in 1988.[33]

Nevertheless, Korematsu has never been formally overruled, a fact that has begun to matter after September 11. Even today, the case remains under a cloud. It is bad law, very bad law, *very, very* bad law. But what will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the "war on terrorism"?[34]

Suppose that, as the current Justices are pondering their decision, there is another devastating terrorist attack. If Hugo Black fell down on the job, will his successors do any better? Another bad decision will have much worse consequences. The war with Japan came to an end, but the war against terror will not.

The result is the normalization of emergency conditions-the creation of legal precedents that authorize oppressive measures without any end. Sensing the gravity of this danger, two recent articles have suggested drastic measures to avoid it. Rather than stretching the law, officials may be well-advised to proclaim that the emergency requires them to act with utter lawlessness – or so Professors Oren Gross and Mark Tushnet suggest.[35]

They recognize, of course, that this public break with the rule of law is a desperate expedient. But isn't it preferable to the normalization of emergency conditions? At least the legal system would not be corrupted by legal precedents that live on indefinitely. And when the emergency comes to an end, the lawless officials may find themselves subject to legal liability unless their fellow citizens choose to ratify their actions retroactively.[36]

But, of course, there is a downside. Lawlessness, once publicly embraced, may escalate uncontrollably. By hypothesis, we are dealing with a terrorist strike that has generated mass panic. Once officials make a virtue out of lawlessness, why won't they seek to whip up mass hysteria further and create a permanent regime of arbitrary rule?

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[32] *See* Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976) (declaring that Proclamation No. 2714, which formally ended World War II, also rescinded President Roosevelt's Executive Order No. 9066).

[33] *See* ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR 11, at 88-106 (1993); LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993).

[34] Chief Justice William H. Rehnquist leaves the matter in some doubt in his book, *All the Laws but One: Civil Liberties in Wartime.* He agrees that the relocation of the Nisei (American born children of Japanese immigrants) occurred without sufficient justification. But he defends the military's internment of their noncitizen parents (the Issei) on the grounds that the Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24 (2000), was still valid law during the World War I era. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 209-10 (1998). Although he recognizes that "Eugene Rostow suggests the possibility of a judicial inquiry into the entire question of military necessity," he calls this "an extraordinarily dubious proposition." ***Id.*** at 205.

[35] *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Tushnet, *supra* note 28, at 299. Of the two articles, Professor Gross's provides a much more elaborate defense of this view.

[36] *See* Gross, *supra* note 35, at 1111-15.

Gross and Tushnet offer us a grim choice: legally normalized oppression or a lawless police state. Before placing our bets, it seems wise to reconsider this high-stakes gamble. Undoubtedly, there are times when a political society is struggling for its very survival. But my central thesis is that we are not living in one of these times. Terrorism-as exemplified by the attack on the Twin Towers – does *not* raise an existential threat, at least in the consolidated democracies of the West.[37] If Professors Gross and Tushnet are suggesting otherwise, they are unwitting examples of the imperative need to rethink the prevailing rationale for emergency powers. We must rescue the concept from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy.[38] Rather than indulge in melodramatic invocations of existential threats, liberal constitutionalists should view the state of emergency as a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law.[39]

I do not suggest that the concerns voiced by Professors Gross and Tushnet are irrelevant once we reorient the theory of emergency powers to focus on the reassurance function. To the contrary, they are absolutely right to emphasize that we face grave risks of legal normalization in dealing with terrorist attacks. I suggest, however, that these risks can be minimized if we take some of the load off judges in managing front-line legal responses, and create new constitutional structures that will more reliably respond to the recurring tragedies of the coming century.

We must build a new constitution for the state of emergency, but with modest expectations. If terrorist attacks become too frequent, no legal structure will save us from a civil liberties disaster. I do not suppose, for example, that clever constitutional design will suffice to constrain the repressive forces that may be unleashed by a Palestinian intifada that continues at its present intensity for years and years.[40] My proposals make the most sense for societies afflicted by *episodic terrorism – where* events like September 11 remain exceptional, but not so exceptional that we can count on the decades-long process of common law recuperation to do its work.

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[37] *See supra* Part II.

[38] *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985) (1922) ("Sovereign is he who decides on the exception."); *see also* Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy,* 21 CARDOZO L. REV. 1825, 1825-30 (2000) (considering whether Schmitt "sought to facilitate the destruction of liberalism and democracy" through his theory of the exception). For more general overviews of Schmitt's philosophy, see THE CHALLENGE OF CARL SCHMITT (Chantal Mouffe ed., 1999); and JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY (1997).

[39] For some important recent reflections on this theme, see JosE ANTONIO AGUILAR RIVERA, EN POS DE LA QUIMERA: REFLEXIONES SOBRE EL EXPERIMENTO CONSTITUCIONAL ATLANTICO 57-94 (2000) (examining the role of emergency powers in liberal constitutionalism).

[40] Israel has been under an official state of emergency since its creation. Under Section 38 of the Basic Law of Israel, the Knesset may declare a state of emergency on its own prerogative, without consulting the other branches of government. See BASIC LAW (The Government, 2001), § 38, S.H. 165. Under the Israeli Basic Law, an emergency can last for no more than one year, but it can be renewed indefinitely by simple majority vote. Under much more constrained conditions, the Executive can declare an emergency unilaterally. *See id.* § 38(c) (granting this power when there is an urgent need to declare the emergency and it is impossible to con-

Crystal balls are notoriously unreliable, but as I write these lines in early 2004, episodic terrorism seems to be the most likely fate of the West in general, and America in particular, for a very long time to come. Within this context, constitutional structures can perform a crucial channeling function. Bad legal structures will channel temporary needs for reassurance into permanent restrictions on liberty; good structures will channel them into temporary states of emergency, without permanent damage to fundamental freedoms.

IV. CHECKS AND BALANCES

In designing basic institutions to discharge this channeling function, we will be proceeding on the constitutional level of reflection. My approach depends crucially on the construction of a political system of checks and balances, and this is the subject of the next two Parts. I then turn to consider the plight of the principal victims of the state of emergency – the thousands of innocents who will be caught up in dragnets launched under the government's emergency powers of detention that aim to prevent a second terrorist strike. Elementary principles of justice, as well as more functional considerations, mandate full financial compensation for the time they spend in detention. After filling in this political and economic background, I finally turn to define the place of judges. While it is a mistake to depend on courts to manage panics on their own, judges do play crucial backstopping roles within the emerging system. On the macro-level, they help enforce the special emergency system of checks and balances; on the micro-level, they protect the detainees' core rights to decent treatment.

A. FROM ANCIENT TO MODERN

The Roman Republic represents the first great experiment with states of emergency, and it serves as an inspiration for my heavy reliance on a political system of checks and balances. At a moment of crisis, the Senate could propose to its ordinary chief executives (the two consuls) that they appoint a dictator to exercise emergency powers. Sometimes the consuls acted jointly; sometimes one was chosen by lot to make the appointment. But in all cases, there was a rigid rule: The appointing official could not select himself. As a consequence, the consuls had every incentive to resist the call for a dictatorship unless it was really necessary. There was a second basic limitation: Dictators were limited to six months in office. The term was not renewable under any circumstances. About ninety dictators were named during

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vene the Knesset immediately).

This is hardly the place for a mature assessment of the overall operation of emergency powers by the Israeli authorities-a subject on which there exists a wide spectrum of opinion. *Compare* Claude Klein, *Is There a Case for Constitutional Dictatorship in Israel?, in* CHALLENGES TO DEMOCRACY: ESSAYS IN HONOUR AND MEMORY OF ISAIAH BERLIN 157 (Raphael Cohen-Almagor ed., 2000) (concluding that a constitutional dictatorship, different from the traditional emergency regime, is an inevitability in Israel), *with* Raphael Cohen-Almagor, *Reflections on Administrative Detention in Israel: A Critique, in* CHALLENGES TO DEMOCRACY: ESSAYS IN HONOUR AND MEMORY OF ISAIAH BERLIN, *supra*, at 203 (arguing that administrative detentions under the emergency regime are unjust).

the three-hundred-year history of the office, but none violated this rule. And no dictator used his extraordinary powers to name another dictator at the end of his term.[41]

During his six-month tenure, the dictator exercised vast military and police powers, with only a few significant limitations. Most notably, he remained dependent on the Senate for financial resources; he could not exercise civil jurisdiction as a judge (though he did have the power of life and death); and finally, he was charged with suppressing domestic upheaval and protecting against foreign attack, but he had no authority to launch offensive wars.[42]

The Roman model was very clever, but I do not think that it is either desirable or practical under modem conditions. In contrast to the Romans, we do not depend on a rotating group of aristocrats exercising executive powers for very short terms. (The consuls rolled over every year.) We depend on a professional political class with a lifetime commitment to high office. We select the most seasoned professionals to serve as president or prime minister, and it would be odd to replace them with a temporary dictator just when the going got roughest. If we are lucky enough to have a Winston Churchill when we need him, we should rejoice in our good fortune – not push him out for fear of his dictatorial ambitions.

Nevertheless, the Roman concern is a very real one. Indeed, it is no different from the anxiety that motivated the model of judicial management. Once we create an elaborate structure authorizing extraordinary powers, there is a danger that ordinary officials will exploit the system to create too many "emergencies," using a wide range of repressive measures despite the adequacy of more standard frameworks involving the criminal law. If the Roman system of executive displacement is implausible, are there other political checks and balances that will serve to contain this risk?

B. THE SUPERMAJORITARIAN ESCALATOR

European nations have had a long and unhappy historical experience with explicit emergency regimes. Speaking broadly, these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue them for lengthy periods.[43] This is a fatal mistake. The Executive should be given the power to act unilaterally only for the briefest period-long enough for the legislature to convene and consider the matter, but no longer. If the legislature is already in session, one week seems the longest tolerable period; if not, two weeks at most. [44]

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[41] For a concise description of the Roman dictatorship, see ROSSITER, *supra* note 24, at 15-28.
[42] *Id.* ROSSETIER, *supra* note 24, at 24. During the later history of the office, the dictatorship was also occasionally employed for ceremonial purposes or other lesser functions, but these were merely derivative uses of the position. *Id.* at 22.
[43] Clinton Rossiter provides an illuminating review of the use of emergency powers in Germany, France, and England during the nineteenth century, continuing through the 1930s. *See id.* at 31-205.
[44] Of course, the constitution should contain special arrangements if the attack makes it impossible to convene a legislative quorum. For example, the German Basic Law establishes a joint committee of the Bundestag and Bundesrat to function in the place of the full legislative chambers. *See* GRUNDGESETZ arts. 53a, 15a(2).
For a suggestion on how to fill this gap in the U.S. Constitution, see THE CONTINUITY OF Gov'T COMM'N,

The state of emergency then should expire unless it gains majority approval. But this is only the beginning. Majority support should serve to sustain the emergency for a short time – two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter.

There are matters of principle here, but also important issues involving institutional incentives. Principles first. The need for repeated renewal at short intervals serves as a first line of defense against a dangerous normalization of the state of emergency. The need for a new vote every two months publicly marks the regime as provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?

The supermajoritarian escalator requires further principled commitments. Even if a bare legislative majority repeatedly votes to sustain an extension, this should not be enough to normalize emergency powers: We can never forget that hundreds or thousands have been placed in detention without the evidence normally required. Some may believe that this breach, once it has occurred, does not get worse with the passage of time. I disagree. Preventive detention for six months or a year disrupts ordinary life far more than incarceration lasting a week or even a month.

But there is more at stake than the devastation of individual lives. Despite repeated debates in Congress or Parliament, repeated votes of approval threaten to erode the general sense that emergency powers should be reserved for truly extraordinary crises. By subjecting these decisions to increasing supermajorities, the constitutional order places the extraordinary regime on the path to extinction. As the escalator moves to the eighty-percent level, everybody will recognize that it is unrealistic to expect this degree of legislative support for the indefinite future. Modem pluralist societies are simply too fragmented to sustain this kind of politics – unless, of course, the terrorists succeed in striking repeatedly with devastating effect.

The supermajoritarian case becomes even stronger once the dangers of political abuse are taken into account. A "state of emergency" provides a wonderful electioneering tool for the majority party: "All true patriots must rally around the existing government in this time of need. We cannot give in to the terrorists by allowing them to force us to change our leaders when the going gets tough." This may be blather, but it will bring out the votes. Supermajoritarian escalators give smaller and smaller minority parties veto power over such manipulations. Even if the minority allows the emergency to continue during elections, the majority can no longer easily present itself as the country's savior, since the support of the minority is fundamental to the extraordinary regime.

The escalator will also have a salutary effect on the Executive. When extraordinary powers are authorized, the President knows that he will have a tough time sustaining supermajorities

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PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS (2003), http://www.continuityofgovernment.org/pdfs/FirstReport.pdf (suggesting a formal constitutional amendment to give Congress fairly broad authority during a national emergency to fill vacant seats temporarily).

in the future, and this will lead him to use his powers cautiously. The public will bridle if his underlings run amok or act in arbitrary ways that go well beyond the needs of the situation. So the political check of supermajorities will not only serve to make the emergency temporary, but also to make it milder while it lasts.

In addition, the escalator will force the Executive to recognize the distributional injustices imposed by the emergency regime. Each terrorist wave will generate a distinctive demonology. Right now, the demons come largely from the Arab world, but twenty years onward, they may emerge from Latin America or China. Or they may have signed on to some universalistic creed, secular or religious, as in the case of the Cold War or the still-avoidable struggle against something called "Islamic fundamentalism."

Each demonology will mark out segments of the population as peculiarly appropriate targets for emergency measures, and the supermajoritarian escalator may play a greater or smaller role in checking the abuses that such discrimination invites.[45] This may not operate too forcefully in America during the present wave, but it will serve as a more potent check in Europe, given the larger size of its domestic Arab and Islamic minorities. But the next terrorist wave may well shift the ethnic distribution of political interests in very surprising directions.

Even when the prevailing demonology casts a relatively small shadow in domestic politics, the supermajoritarian escalator will provide political cover for civil libertarians who are looking for an excuse to call an end to the emergency regime. Immediately after the terrorist strike, they can polish their antiterrorist credentials by voting for the state of emergency when only a simple majority is required. This is a moment for maximum reassurance, and it is overwhelmingly likely that fifty-one percent of the legislators will support the measure regardless of protests from their libertarian colleagues. So there is no real harm done if the vote is ninety-nine to one rather than seventy-five to twenty-five.

As time marches on, contrarian legislators will be accumulating political capital that will make it easier for them to defect as the need for reassurance declines: "I have now voted twice to continue the emergency," they can say, "but enough is enough. I want to commend the President for keeping the situation under control, but now that the situation is stabilizing, we should return to the protection of our normal liberties. If we allow the continued erosion of our freedoms, the terrorists will have really triumphed."[46] And so the vote this time is seventy-nine to twenty-one, and the emergency comes to an end, at least for now.[47]

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[45] For the role of a judicial check, see *infra* Section VII.C.

[46] But will there be enough contrarian legislators to serve as an effective check? Although the USA PATRIOT Act passed by overwhelming margins in the immediate aftermath of September 11, the 107th Congress contained a substantial cadre of civil libertarians (both on the right and the left). For example, the ACLU compiled a scorecard on each member of the House based on his or her vote on fifteen civil liberties issues, including the USA PATRIOT Act: 198 representatives voted the ACLU way on fifty percent of the issues, 176 on sixty percent, 150 on seventy percent, and 115 on eighty percent. *See* ACLU, National Freedom Scorecard, at http://scorecard.aclu.org (last visited Oct. 4, 2003) (providing an interface that lets visitors look up how their representatives scored). On the Senate side, forty-four senators voted with the ACLU on at least three of the five issues included in its scorecard. *See id.*

C. *Minority Control of Information*

The supermajoritarian escalator will shorten the state of emergency and soften its administration, but it will not work miracles. By hypothesis, the emergency begins with a terrorist attack that deeply embarrasses the nation's military, police, and intelligence services. *Res ipsa loquitur*: Whatever they did was not enough, and in retrospect, it will be easy to find clues that might have alerted superalert guardians of order. The bureaucratic reaction will be swift and predictable: On the one hand, displace responsibility for past mistakes; on the other, strike out aggressively against the forces of evil.

But especially in the beginning, the security services will be striking out blindly. After all, if they had been on top of the conspiracy, they would have intervened beforehand. So they are almost certain to be in the dark during the early days after a terrorist attack. Nevertheless, early dragnets may well be functional, and not only because they provide appropriate television footage for calming public anxieties. While many perfectly innocent people will be swept into the net, the "usual suspects" identified by counterintelligence agencies may well contain a few of the genuine conspirators. If we are lucky, the detention of a few key operators can disrupt existing terrorist networks, reducing the probability of a quick second strike and its spiral of fear.[48]

Given the virtual certainty of massive error, the Executive will be tempted to keep secret all information concerning the particular injustices that are the inevitable consequence of emergency dragnets. The supermajoritarian escalator will only heighten this perverse incentive. Perhaps the President or Prime Minister can convince his party loyalists to remain faithful when the opposition press generates a public uproar by headlining the worst abuses wreaked upon the most sympathetic victims. But if the emergency regime requires the increasing support of the legislative minority, it will be hopeless for the Executive to appeal to party loyalty. Perhaps the only hope of satisfying the supermajority requirement is to treat as top secret all potentially embarrassing facts surrounding the dragnets?

Despite the grave risk of partisan abuse, a simple rule requiring total openness is simpleminded. Terrorists are newspaper readers and Internet surfers like the rest of us, and they can learn a lot about the government's surveillance activities that might allow them to escape detection. Much of this information quickly decays over time. News of particular dragnets may pinpoint geographical areas that terrorists should avoid. But investigators change focus quickly, and old news no longer has much value a week later. Other information, however, will have more enduring significance. How, then, to separate the wheat from the chaff?

In parliamentary systems in Europe, individual deputies generally have much less freedom of action than in the United States, but this is typically offset by a greater number of parties in parliament due to the prevalence of proportional representation. The crucial decision in these cases, then, will be made by the leaders of these parliamentary fractions, rather than individual members.

[47] Once an emergency expires, the supermajoritarian vote needed for a new state of emergency should de-escalate on the same time schedule under which it escalated previously. If eighty-percent support is required, the percentage drops to seventy percent after two months, then to sixty, then to fifty, as time marches on.

[48] This seems to be true in the case of the Mafia, where the detention of a few key players can effectively destroy large conspiracies. *See* Federico Varese, Social Capital, Protection and Mafia Transplantation 31 (2002) (unpublished manuscript, on file with author).

A political system of checks and balances provides distinctive tools for a constructive response. While the Executive is in charge of day-to-day affairs, the emergency regime returns to Congress every two months. The legislature cannot act effectively if it is at the mercy of the Executive for information. What is more, the state of emergency can survive only with the support of the increasingly large legislative coalition required by the supermajoritarian escalator. It follows that the majority party cannot be allowed to use its normal control over the legislature to deny informational access to minority parties. Instead, our emergency constitution should contain special safeguards to assure that the minority is well-informed when it is asked to join the majority in authorizing a two-month extension of the emergency regime.

Members of opposition political parties should be guaranteed the majority of seats on oversight committees. The chairpersons of these committees should also come from the opposition, though it should not be allowed to select any candidate it likes. Instead, it should be required to offer a slate of three nominees to the majority and allow majority members to pick the chairperson they find least offensive.

Such practices may seem alien to Americans, who take it for granted that the legislative majority should control all committees. But this is by no means true in other leading democracies. In Germany, for example, Chancellor Schroeder's Social Democratic Party controls only nine of twenty-one committee chairmanships.[49] Minority control means that the oversight committees will not be lap dogs for the Executive, but watchdogs for society.[50] They will have a real political interest to engage in aggressive and ongoing investigations into the administration of the emergency regime.[51]

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[49] *See* German Bundestag, Organization: Committees, at http://www.bundestag.de/htdocs-e/orga/-03organs/04commit/Olcomminf.html (last visited Oct. 7, 2003). Even though the British House of Commons grants broad control to the majority party, the government generally grants chairmanships of a number of important committees to the minority. At least ten committees are presently chaired by members of minority parties. *See* The U.K. Parliament, Select Committee Membership at 18 November 2003, at http://www.parliament.uk/directorieshciolists/ selmem.cfm (last visited Dec. 10, 2003). For general information on the membership and chairmanship of parliamentary committees, see ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 628-39, 692-96 (Donald Limon & W.R. McKay eds., 22d ed. 1997); *see also* COMM. OFFICE, HOUSE OF COMMONS, THE COMMITTEE SYSTEM OF THE HOUSE OF COMMONS 13 (2003), http://www.parliament.uk/commons/selcom/cteesystemmay2003.pdf ("[T]here is usually an informal understanding about the party from which each [select committee] chairman will be chosen.").

[50] In a parliamentary system, the identity of political minorities is straightforward-these are the parties that remain outside the governing coalition. But in a presidential regime, like that of the United States, identifying "the opposition" can be tricky when one party controls the presidency and the other controls Congress. In these cases, legislative oversight should go to the party that does not control the presidency, even if it does hold the majority in Congress. After all, the operational command over the security services is vested in the Executive, and this will give the President control over all sensitive information. Since our constitutional aim is to create a structure that effectively challenges the Executive's informational monopoly, the watchdog role should not be turned over to the President's party, even if it happens to have "minority" status in the legislature.

[51] Under propitious political conditions, congressional committees have successfully played this role even when they were controlled by the majority. During World War II, a committee headed by Senator Harry S. Truman played a legendary oversight role. *See* DONALD H. RIDDLE, THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY (1964); Theodore Wilson, *The Truman Committee, 1941, in* 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 3115 (Arthur M. Schlesinger,

The emergency constitution should require the Executive to provide the committees with complete and immediate access to all documents. This puts the government on notice that it cannot keep secrets from key members of the opposition and serves, without more, as an important check on the abuse of power. It should also be up to the committee majority to decide how much information should be shared more broadly. In contrast to ordinary committees, oversight groups will not have a strong incentive to suppress information merely because the government finds it embarrassing. But they will not make everything public since this would open them up to the charge of giving aid and comfort to terrorism. Instead, the committees will be structured to make the tradeoff between secrecy and publicity in a politically responsible fashion.

The oversight committees also should be explicitly required to give a report to their colleagues, in secret session if necessary, as part of the debate on each two-month extension. Even here, they can hold back particularly sensitive details to reduce the risks of damaging leaks. Nevertheless, they have every incentive to apprise the majority and minority of the main costs and benefits of continuing the emergency effort. Legislators, in turn, have the fundamental right to pass on the main points to the public as they debate and defend their votes.

We have designed a permeable sieve, not an ironclad wall of secrecy. But that is just the point. In the immediate aftermath of a massive attack, the need for emergency measures may seem self-evident, but this need must be continually reassessed as time marches on. An extraordinary regime cannot be allowed to continue for four or six months, or longer, without the *informed* consent of the broader public. Leading members of the opposition are in the best position to appreciate this value. We should leave it to them to play a central gatekeeping role.

Finally, when the emergency comes to an end, the constitution should require a legislative inquest, chaired once again by an opposition member with an opposition majority, on the administration of the entire emergency. A public report, with formal recommendations, would be due within a year.

D. THE NEED FOR CONSTITUTIONAL REVISION

I have begun with the problem of legislative control because it exposes the most important constitutional weakness of existing practices in the United States and Europe. The American provision for suspending habeas corpus is in Article I of the Constitution, dealing with congressional powers. This placement suggests that legislative consent is required for a suspension of habeas, but the text does not say so, and Lincoln famously suspended the writ unilaterally at the beginning of the Civil War.[52] The French Constitution is explicit, but mis-

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Jr. & Roger Bruns eds., 1975). But so long as this oversight function is in the hands of the majority party, the incentives move in the wrong direction.

[52] *See* FARBER, *supra* note 22, at 158.

guided, in authorizing the President to declare and maintain an emergency unilaterally.[53] The Germans do better, insisting that a state of emergency must gain the support of a simple majority of the Bundestag.[54] Unfortunately, the Basic Law allows the emergency to continue indefinitely until a majority of both Houses of Parliament vote to eliminate it.[55]

With the notable exception of Russia,[56] the new constitutions of Central and Eastern Europe also have rejected French-style unilateralism.[57] Reacting strongly against a half-century of totalitarianism, most countries explicitly require parliamentary consent, and Hungary requires a two-thirds majority before an emergency goes into effect.[58] While Poland does not always require explicit legislative approval, it creates a compensating structure involving strict time limits. On recommendation of the Council of Ministers, the President can declare an emergency for a period no longer than ninety days.[59] If he wants a one-time extension, he can obtain sixty more days with the express approval of a majority of the Sejm (the more powerful chamber in Poland's bicameral system).[60]

Poland's self-conscious concern with termination makes a significant contribution, but it suffers from serious technical flaws. The Sejm can only grant a single renewal, and the emergency terminates regardless of real-world conditions. Creating such a gap between law and reality is an invitation to lawlessness and should be avoided at all costs. The Polish ban is undoubtedly rooted in the country's terrible experience with a continuing state of emer-

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[53] *See supra* note 19 and accompanying text.

[54] The requirement of parliamentary approval applies only to those emergencies generated by external threats. GRUNDGESETZ art. 80a. The Basic Law also envisions a heightened state of emergency that it calls a "state of defense" for cases where armed attack is imminent. A two-thirds majority of the Bundestag is required to move into this condition, and the consent of the Bundesrat is also required. *Id.* art. 11 5a(1). If it is impossible for Parliament to convene, this decision can also be made by a special joint committee created for interim decision-making. *See id.* arts. 53a, l15e(1).

[55] *Id.* art. 1151(2). This provision applies to the heightened "state of defense." *See supra* note 54. There is no similar article regulating the elimination of the basic state of emergency established by Article 80a.

[56] KONST. RF arts. 87-88, 102 (1993). The President must immediately notify both Houses of Parliament – the Federation Council and the State Duma – upon declaring a state of emergency, *id.* art. 88, or martial law, *id.* art. 87(2). The Federation Council has jurisdiction to approve presidential decrees issued during a state of emergency. *Id.* art. 102(1)(c).

[57] For a thoughtful overview, see Venelin I. Ganev, *Emergency Powers and the New East European Constitutions,* 45 AM. J. COMP. L. 585 (1997). Ganev suggests that the Romanian President has the power to declare an emergency independently of Parliament, but this claim ignores the explicit requirement that Parliament consent within five days. *See* CONSTITUȚIA ROMÂNIEI art. 93.

[58] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 19(4). Ganev reports that Slovakia requires a three-fifths majority, *see* Ganev, *supra* note 57, at 590, but this requirement has since been eliminated by an amendment of February 23, 2000. *See* Gisbert H. Flanz, *The Constitution of the Slovak Republic: Introductory and Comparative Notes, in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE SLOVAK REPUBLIC, at v-vi (Gisbert H. Flanz ed., 2001). Under the new rule, the President proclaims a state of emergency after a proposal from the government. *See* ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] arts. 102(l)(m), 119(n) (Slovk.). The government consists of the Prime Minister, deputy prime ministers, and ministers, *id.* art. 109(1), and is dependent on the continuing support of Parliament. So it would be a mistake to say that Slovakia has adopted French-style presidential unilateralism.

[59] KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 230(1). While the President does not require the affirmative approval of the Sejm during the first ninety-day period, this assembly can annul the emergency by an absolute majority vote in the presence of at least half the statutory deputies. *Id.* art. 23 1.

[60] *Id.* art. 230(2)

gency during the 1980s.[61] Nevertheless, a supermajoritarian escalator provides a more realistic response to the problem of normalization, making it increasingly difficult to sustain the state of emergency without preventing an overwhelming majority from responding effectively to the exigencies of the moment.[62]

From this vantage point, recent developments in South Africa constitute a genuine breakthrough. As in Poland, the country suffered bitterly from an ongoing state of emergency during the apartheid era.[63] But this experience led to some fresh thinking, which has produced the first supermajoritarian escalator in the constitutional world.[64] While a state of emergency can be introduced with the support of a simple majority of the National Assembly, it must be renewed at three-month intervals by "a supporting vote of at least 60 per cent of the members of the Assembly."[65] To be sure, this escalator takes a rather simple two-step form – first fifty percent, then sixty percent, without any further upward movement. Especially in a country like South Africa, where a single political party regularly wins large majorities, it might prove possible to obtain virtually indefinite extensions on party-line votes.[66] Only a more elaborate multistage mechanism can reliably steer the system toward the eventual dissolution of emergency conditions. Nevertheless, I am greatly encouraged by these provisions: It is one thing for a theorist, sitting in New Haven, to commend the idea of a supermajoritarian escalator; it is quite another for a constitutional convention, reflecting on its bitter historical experience, to enact the principle into its higher law.

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[61] *See* M.B. BISKUPSKI, THE HISTORY OF POLAND 164-68 (2000).

[62] Other constitutions have introduced termination clauses that require frequent legislative revotes in order to continue the emergency. Unlike South Africa, these constitutions do not contain supermajoritarian escalators, and therefore make the indefinite continuation of the emergency a real possibility. *See, e.g.,* CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE art. 40(2), (6) (providing that a state of siege may not exceed ninety days, may be terminated by an absolute majority of the members in each chamber or by the President, and may be extended for up to ninety days by Congress upon the request of the President); CONSTITUICAO DA REPOIBLICA PORTUGUESA art. 19(5) (providing that a state of siege or emergency may be in effect for "not more than fifteen days," though it may be renewed subject to this time limit, but if the declaration results from war the state may last for a period specified by law), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL 15 (Gisbert H. Flanz ed., 2002); TÜRKİYE CUMHURİYETİ ANAYASASI [Constitution] arts. 120-21 (providing that a state of emergency may not exceed six months, that the Turkish Grand National Assembly may reduce or extend the state of emergency upon the request of the Council of Ministers, that each extension may not exceed four months, and that the Turkish Grand National Assembly may lift the state of emergency).

[63] For the best legal account of the South African state of emergency, see STEPHEN ELLMANN, IN A TIME OF TROUBLE (1992).

[64] *See* S. AFR. CONST. § 37. The structure of the constitutional provisions is slightly more complex than the text suggests. Under Section 37, a simple majority of the Parliament first approves a state of emergency that only endures for twenty-one days at most. During this time, Parliament can approve an extension of no more than three months through a simple majority. It is only at this point that the sixty-percent escalator operates for all further extensions. The emergency provisions are analyzed in G.E. Devenish, *The Demise of* Salus Republicae Suprema Lex *in South Africa: Emergency Rule in Terms of the 1996 Constitution,* 31 COMP. & INT'L L.J. S. AFR. 142 (1998). Devenish's essay, however, fails to emphasize the innovative character of the supermajoritarian escalator. For a good history of the struggle out of which the Constitution of South Africa was born, see generally HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (1998).

[65] S. AFR. CONST. § 37(2)(b).

[66] During the last general election, the African National Congress won 266 of 400 seats in Parliament-slightly less than two-thirds of the total. Election Results 1999, *at* http://www.gov.za/elections/results99.htm (last visited Oct. 4, 2003).

The challenge is to develop the South African idea to its fullest potential, and to move onward to elaborate other structural mechanisms for disciplining emergency powers. For example, no established democracy has yet taken a serious step to control the abuse of information by the Executive during emergency periods.[67] But as we have seen, the supermajoritarian escalator may make it even more tempting for the Executive to conceal embarrassing facts. Both in theory and in practice, we are only at the beginning of the process of disciplining the use of emergency powers by the creative development of the tradition of checks and balances.

V. QUESTIONS OF SCOPE

Consider the merits of an alternative model, relying exclusively on command and control rather than checks and balances. This approach regulates the future by writing substantive standards directly into the constitution – limiting the conditions under which the emergency can be declared and restricting the extraordinary powers that can be exercised. The resulting legalisms may look impressive, but they will only function effectively when they are embedded within a vibrant system of separation of powers. If a political panic prevails, and there is no institutional check on the President, textual formulae will not be enough to constrain him in the crunch. Lawyers are cheap, and the President can always call upon the best and brightest to stretch the legalisms to cover his case. Though opponents may energetically protest, the resulting fog will only serve to perplex the general public – who will be far more impressed by the President's explanation of the pressing need for decisive action.

Command and control is a serious option only when the constitution clearly requires the Executive to share decision-making with others. Perhaps the Executive can exploit a political panic to gain a single act of legislative consent even when real-world conditions do not qualify as an emergency under the applicable constitutional standards. But this gap between law and the real world will prove to be a serious obstacle as the President repeatedly returns to the legislature for increasing shows of supermajority support. Within a short time, the constitutional gap will tend to legitimate legislative resistance and push fence-sitters into the "No" column at voting time. To put the point in a single line: Command and control is a comple-

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[67] The only constitution I have found that adverts to this problem is that of Ethiopia, which provides that the House of Peoples' Representatives, upon declaration of a state of emergency, must create a State of Emergency Inquiry Board. ETH. CONST. art. 93(5). The Board has the power:

> (a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest.
> (b) To inspect and follow up [to determine] that no measure taken during the state of emergency is inhumane.
> (c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds any case of inhumane treatment.
> (d) To ensure the prosecution of perpetrators of inhumane acts.
> (e) To submit its views to the House of Peoples' Representatives on a request to extend the duration of the state of emergency.

Id. art. 93(6). Generally speaking, I have not been citing the constitutions of countries whose claims to democratic status are as contestable as those of Ethiopia. But this constitutional development seems significant enough to warrant making an exception.

ment to, but not a substitute for, checks and balances. Call this the priority of checks and balances.[68]

So long as this priority is recognized, the formulation of appropriate command-and-control provisions is a crucial matter, and one requiring radical reconceptualization. As we have seen, the classic rationale for emergency power authorizes sweeping grants of power while the government engages in a life-and-death struggle. Indeed, the grant of carte blanche, *à la française,* may well be a plausible response when confronting an existential threat. But in the present case, a blank check sends precisely the wrong message. In the worst case, it provides the means for a would-be dictator to bootstrap his way to permanent power; in the best, an open-ended grant of authority is in tension with the overriding aim of presenting the emergency regime as a temporary and limited exception to the principles of limited government.

There are two ways of dealing with the problem of scope: the positive way, which specifies affirmative grants of power, and the negative way, which explicitly insulates certain zones of liberty from emergency control. Beginning with the positive, I will distinguish between two distinct rationales: relief and prevention. Relief is concerned with the current disaster; prevention, with its future recurrence. Both rationales provide the emergency powers needed to reassure the public that the government is acting effectively to relieve distress and to prevent a second strike. But they do so in a different spirit.

The relief rationale conceives of the emergency in a technocratic spirit. Disaster has struck: An epidemic rages, a city is devastated, and there are countless things to be done to return to normal. The model here is provided by the countless statutes dealing with "states of emergency" generated by natural disasters. Aside from providing emergency relief, these statutes grant extraordinary powers to seize property and impose quarantine, which may seem intolerable under normal circumstances.[69]

Drafting these provisions is a tricky business, but the controversies surrounding them lack a crucial political dimension. Temporary restrictions on property and liberty are always regrettable, but there is little chance that the victims will be treated as political enemies. As a consequence, a technocratic orientation seems entirely appropriate: The faster and more effective the response, the smaller the overall damage to society as a whole. The primary objective of the emergency legislation should be a speedy collective response. Once the dis-

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[68] This priority is central to Federalist constitutional theory. *See* THE FEDERALIST No. 48, at 332-33 (James Madison) (Jacob E. Cooke ed., 1961) ("Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? But experience assures us [...] that some more adequate defence is indispensibly necessary for the more feeble, against the more powerful members of the government.").

[69] Shortly after September 11, the Centers for Disease Control and Prevention (CDC) commissioned a team, led by Lawrence Gostin of the Georgetown University Law Center, to develop a draft model law to assist states in updating their statutes governing public health emergencies. The team consulted very broadly, but the first draft of its Model Act received a great deal of criticism for overreliance on coercive measures and insufficient attention to civil liberties protections. *See* John M. Colmers & Daniel M. Fox, *The Politics of Emergency Health Powers and the Isolation of Public Health,* 93 AM. J. PUB. HEALTH 397 (2003) (surveying the political controversy generated by the Model Act). In response, the Gostin group issued a revised Act on December 21, 2001. *See* Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases,* 288 JAMA 622 (2002).

aster is under control, there will be time enough to do justice to individuals whose property and liberty have been restricted. So long as appropriate legal procedures are securely in place, there is good reason to expect decisionmakers to treat these victims with special solicitude, since their sacrifices for the common good are the result of sheer bad luck.[70]

In contrast, the prevention rationale is squarely concerned with the primal distinction between friend and foe. To one degree or another, the emergency regime suspends the normal protections of the criminal law in its effort to detect and arrest potential terrorists before they have a chance to strike again. The critical question is how broadly to define the scope of this extraordinary power. This is a task requiring great sensitivity, and one upon which reasonable people will invariably disagree. Since it is impossible to do justice to the full complexities in an exploratory essay, I will be focusing on the crux of the matter – the power to detain people on mere suspicion, without the evidence generally required for arrest or continuing confinement. Mass preventive detention will predictably violate the rights of countless innocent people, and the main point of the economic and juridical dimensions of my proposal is to soften this blow. But for now, it is enough to pause a moment in recognition of the painful injustices inexorably involved.

We can seek to limit the damage by explicitly exempting certain liberties from the exercise of emergency powers. On an individual level, the issue is raised most starkly in the case of torture, but this question is best deferred to a more general consideration of the role of judges in the emergency regime. On a collective level, the exemption strategy seems most compelling in the case of political liberties. Most fundamentally, the emergency authority should be barred from revising any of the basic laws organizing the legislature, judiciary, and executive.[71] The case for specifically denying the power to impose censorship is also compelling, especially when the separation of powers mechanism is taken into consideration. Quite simply, if the government can censor, the political opposition will have a new incentive to vote for the premature termination of the state of emergency, so as to regain its full rights to communicate to the public. By expressly insulating political expression and association from the emergency power, the constitution not only enhances the vitality of the democratic process; it encourages the minority to contribute constructively to the legislative decision terminating the emergency regime. The timing of elections is another sensitive matter; perhaps a one-time deferral of an election by a six-month period might be authorized by an

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[70] Indeed, policy wonks typically complain that federal disaster programs can be counterproductive, *see, e.g.*, RUTHERFORD H. PLATT, DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS 38-41 (1999), or that compensation is overly generous, *see* HOWARD KUNREUTHER, RECOVERY FROM NATURAL DISASTERS: INSURANCE OR FEDERAL AID? 2, 29-32 (Am. Enter. Inst. for Pub. Policy Research, Evaluative Studies No. 12, 1973).

[71] *See, e.g.*, KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] arts. 228(6)-(7), 233 (Pol.) (stating that during a period of extraordinary measures, no amendments may be made to the constitution, laws on elections, or the statutes on extraordinary measures); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 19(7) (stating that a declaration of a state of emergency or a state of siege "may not affect the enforcement of the constitutional provisions with respect to the powers and the operation of the organs with supreme authority and the organs of self-government of the autonomous regions, nor the rights and immunities of their members"), *translated in 15* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL, *supra* note 62, at 9; CONSTITUȚIA ROMÂNIEI art. 148(3) (Rom.) (forbidding revisions to the constitution during a state of siege, emergency, or war).

eighty-percent supermajority. But we are now well within the zone of good faith disagreement.[72]

There remains a final issue of great importance. I have been speaking broadly of a "terrorist attack," but more clarity is required in determining the triggering event for a state of emergency: Should our constitutional framework require an actual attack, or should it allow the government merely to invoke a "clear and present danger"?

I would insist on an actual attack, basing this requirement on the reassurance function that serves as my organizing constitutional rationale. Something large and dramatic like September 11 shakes ordinary citizens' confidence in their government's capacity to discharge its most basic sovereign function: the preservation of law and order. The best way for government to respond to these fears is to do something large and dramatic to reassure the populace that the breach of sovereignty was only temporary and that the state is taking every plausible step to prevent a second strike. But when an attack has not occurred, panic-reactions do not seem unmanageable by standard techniques.

A "clear and present danger" test also generates unacceptable risks of political manipulation. Presidents and prime ministers receive daily reports from their security services on terrorist threats. While these risks ebb and flow, they are always portrayed as serious. Security services have no incentive to play the role of Pangloss. As a consequence, politicians will almost always be in a position to cite bureaucratic reports that detect a "clear and present danger" lurking on the horizon. To make matters worse, these reports will always carry a "top secret" label. The Executive will understandably be reluctant to publish documents revealing the extent to which our spies have penetrated the terrorist network. So how are the rest of us to assess whether there really is a "clear and present danger"?

It is fatuous to require the Prime Minister to go to court and try to persuade judges that he is really justified in crying wolf this time. By the time due process has been observed, the situation will have changed once more, for better or for worse.[73] In contrast, a major terrorist attack is an indisputable reality, beyond the capacity of politicians to manipulate. That's what makes it so scary. And that's why it serves as the best trigger for an emergency regime.

But if this is right, it remains to devise a legal formula that restricts the triggering event with-

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[72] Under the German Constitution, all expiring parliamentary terms are automatically extended until six months beyond the termination of the heightened form of emergency called the "state of defense." *See* GRUNDGESETZ arts. 1 15a, I 15h(l); *supra* note 54. Most parliamentary systems are not committed to a fixed electoral calendar. Within this context, it makes sense to deprive the government of the power to exploit the prevailing panic to its electoral advantage by dissolving parliament during the emergency. *See, e.g.*, CONST. art. 16 (Fr.) (providing that the National Assembly may not be dissolved during times of emergency); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 28A(1) (Hung.) (providing that the Parliament may not be dissolved during a state of national crisis or emergency); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 228(7) (Pol.) (providing that terms of office may not be shortened, nor elections held, during a period of emergency and for ninety days thereafter); CONSTITUȚIA ROMÂNIEI art. 89(3) (Rom.) (forbidding dissolution of the Parliament during martial law or a state of emergency).

[73] In contrast, judicial review may make more sense if the triggering event involves something as obvious as a major terrorist attack. For further discussion, see *infra* text accompanying notes 91-93.

in its proper bounds. In personal conversations, some have suggested that the triggering provision specify a quantitative bright line, requiring that an attack destroy, say, one thousand lives before an emergency regime can be inaugurated. This is the best way, some suggest, to avoid a slippery slope into the normalization of extraordinary powers. They have a point, but I think it wiser to rely on the exercise of political judgment, rather than a mathematical formula – something like: "A state of emergency may be proclaimed by the Executive in response to a terrorist attack that kills large numbers of innocent civilians in a way that threatens the recurrence of more large-scale attacks. The declaration lapses within seven days unless approved by a majority of the legislature." A president who invokes this provision without sufficient cause will obtain an almost immediate rebuke from the legislature, and this should help deter trigger-happy behavior.

We are now in a position to glimpse the overall shape of my political proposal: Emergencies can be declared only after an actual attack; they can be continued for short intervals only by increasing supermajorities in the legislature and only after minority parties obtain privileged opportunities to inform themselves as to the real-world operation of the emergency regime and to publicize the facts as they see fit; and the scope of emergency powers is limited to the needs for relief and prevention that justify them in the first place.

This distinctive design requires, in turn, further critical reflection on the basic contours of existing emergency provisions. Generally, the world's constitutions deal with all emergencies as if they were alike. The Constitution of South Africa is typical in authorizing a state of emergency when "the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency."[74] But this "one size fits all" approach is a mistake. Standards and procedures that may be appropriate for existential threats will generally be too permissive when dealing with terrorist attacks. Future constitutions should be multitrack affairs that differentiate among types of emergencies.

Canada can serve as a model here. Its Emergencies Act distinguishes among four types of emergencies – natural disasters, threats to public order, international emergencies, and states of war[75] – and treats each threat separately.[76] For example, terrorist threats to public order

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[74] S. AFR. CONST § 37(1)(a).

[75] The Act refers to these as "public welfare," "public order," "international," and "war" emergencies, respectively. Emergencies Act, R.S.C., ch. 22, §§ 5-45 (Supp. IV 1985). Public welfare emergencies are those arising from natural disasters. *See id.* § 5. Public order emergencies encompass terrorist attacks. *See id. §* 16 (adopting the definition of "threats to the security of Canada" assigned by the Canadian Security Intelligence Service Act, R.S.C., ch. C-23, § 2 (1985), which characterizes terrorist attacks as security threats). International emergencies are those that "threaten […] the sovereignty, security or territorial integrity of Canada or any of its allies." Office of Critical *Infa*structure Prot. & Emergency Preparedness, Fact Sheets: Highlights of the *Emergencies Act, at* http://www.ocipep-bpiepc.gc.ca/infopro/fact-sheets/general/ Lhigh-emer-e.asp (last visited Dec. 10, 2003).

[76] Note that the Canadians handle this matter through a framework statute-the Emergencies Act-and not through explicit constitutional provisions, which provides a useful precedent for my proposed solution for the United States.

While the government initiates a state of emergency, both Houses of Parliament must assent, and they can also revoke the emergency or any of the regulations issued under it. Emergencies Act §§ 58-62. Emergency measures are constrained by provisions within the Emergencies Act as well as those within the charters of rights that Canada has adopted. The Act, for example, prohibits the detention of Canadian citizens or permanent residents on the basis of race, religion, ethnicity, or national origin, *id. §* 4(b), and requires that

require renewal by Parliament every thirty days, while war emergencies require a revote every 120 days – a sensible differentiation, though it would have been even better if Canada had adopted a supermajoritarian escalator in the terrorist case.[77]

But I don't want to seem hypercritical. The Canadian decision to differentiate emergencies should be recognized for what it is: a legal breakthrough that deserves emulation – and improvement – elsewhere.[78]

VI. COMPENSATION

Focus now on the core of the emergency power: the authority to detain suspects without the kind of evidence normally required by liberal constitutions. There will be dragnets sweeping up many innocent people in an effort to remove a few central operators and thereby reduce the threat of a second strike. As of yet, my emergency constitution does not confront the crushing costs imposed on dragnet victims. This Part argues for financial compensation to all innocents who have been swept into preventive detention.

As September 11 suggests, the public and politicians can be counted on to respond generously to the financial needs of some victims of the war on terrorism. Congressionally mandated payments for survivors of those killed at the Twin Towers and the Pentagon were in amounts as high as $7.6 million.[79] But generosity turns to callousness when it comes to another class of victims: the hundreds or thousands of innocent men and women caught up in antiterrorist dragnets. To be sure, the lives of these people are only temporarily disrupted, while the families of terrorist victims suffer a permanent loss. Nevertheless, a sudden seizure is a traumatic experience, especially when you know you have not done anything wrong, and especially when it is followed by weeks or months of detention. Dragnet victims also have families, with acute anxieties and significant financial needs. Yet these obvious facts have not generated a groundswell of public opinion in favor of granting compensation to them as well. To

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compensation be paid to anyone injured by the emergency measures, *id. §§* 46-56. The Canadian Charter of Rights and Freedoms permits deviations from its protections only if they are "reasonable" and "demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The Charter can also be overridden by explicit parliamentary legislation designed to derogate from any of an array of protected rights. *Id. §* 3 3(1). In addition, Canada is a signatory to the International Covenant on Civil and Political Rights, which imposes constraints on the use of emergency powers, though many of these rights are also subject to derogation. *See* International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 4, S. EXEC. DOc. E, 95-2, at 24 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976; accession by Canada May 19, 1976).

[77] *See* Emergencies Act § 18(2) (setting a thirty-day limit for public order emergencies); *id.* § 39(2) (requiring that war emergencies be renewed every 120 days); *cf id. §* 7(2) (requiring renewal of public welfare emergencies ninety days after the initiation of such states of emergency); *id.* § 29(2) (requiring that emergency declarations made after international emergencies be renewed every sixty days).

I defer consideration of whether the supermajoritarian escalator is also appropriate in wartime emergencies, which raise a very different range of problems, only some of which are canvassed in Part I.

[78] The German Constitution also differentiates between different sorts of emergencies, *see supra* notes 54-55, but none of its provisions was designed to confront the distinctive threats of modem terrorism.

[79] *See* U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001, *at* http://www.usdoj.gov/victimcompensation/payments-injury.html (last visited Oct. 28, 2003).

the contrary, their losses are forgotten amid the general anxiety generated by the terrorist strike.

This blindness is absolutely typical. It took almost half a century before the Japanese-American victims of wartime concentration camps gained financial compensation, and then only by a special act of Congress that awarded incredibly tiny sums.[80]

Such callousness suggests a deeper distortion in the law of just compensation. When a small piece of property is taken by the government to build a new highway, the owner is constitutionally guaranteed fair market compensation, even if owed a relatively trivial sum. But when an innocent person is wrongly convicted by the criminal justice system, he or she is not guaranteed a dime when the mistake is discovered afterward, despite the scars of long years of incarceration. The Constitution's requirement of "just compensation" has never been interpreted to include this particularly devastating loss of human capital.[81] Worse yet, American legislators have been remarkably deficient in providing statutory relief. Only the federal government, fifteen states, and the District of Columbia provide any compensation whatsoever, and some jurisdictions impose ridiculously low ceilings on recovery.[82] For example,

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[80] In 1988, Congress passed the Civil Liberties Act, which apologized for the harm done to Japanese Americans and Aleuts interned during World War II. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989-1989d (2000)). The Act awarded $20,000 in compensation to each individual who was interned, *id.* § 1989b-4, and by accepting the award, the recipient surrendered the opportunity to pursue any other claims against the U.S. government, *id.* § 1989b-4(a)(6). Twenty thousand dollars equals the yield an internee would have received in 1988 from a deposit of $2454 in a bank account in 1945 if compounded at an annual interest rate of five percent. The compensation thus amounts to $3.36 per day if the detainee had been confined for two years. To make matters worse, the Act made eligible only those internees, or their spouses or parents, who were still living on the date of statutory enactment, August 10, 1988. *Id.* § 1989b-7. It thereby deprived the children of deceased internees of the right to receive payments for their parents' reparations claims. *But cf.* Ishida v. United States, 59 F.3d 1224, 1232-33 (Fed. Cir. 1995) (allowing the child of internees to claim compensation as a result of his exclusion from his parents' home during the time of their internment).

[81] There has never been a Supreme Court decision squarely confronting an innocent's claim to compensation under the Takings Clause. The Supreme Court did uphold a statute paying material witnesses only one dollar a day for every day that they spent in government confinement while waiting to testify at trial, but only because "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." Hurtado v. United States, 410 U.S. 578, 588 (1973). There was no question that Hurtado was in fact a material witness, who actually owed the public a duty. But in the cases we are considering, the confined person has done nothing that places him or her under a public duty to serve time in jail. It is only an erroneous legal process that has imposed such an obligation.

[82] Only four of these jurisdictions-the District of Columbia, New York, Tennessee, and West Virginia-impose no statutory ceiling on compensation. D.C. CODE ANN. §§ 1-1221 to 1-1225 (1981); N.Y. JUD. CT. ACTS LAW § 8-b (McKinney 1989); TENN. CODE ANN. § 9-8- 108(7) (1999); W. VA. CODE ANN. § 14-2-13a (Michie 2000). The other jurisdictions providing relief are: Alabama, ALA. CODE §§ 29-2-150 to -165 (2003) (providing $50,000 for each year of incarceration, prorated for periods of less than a year, plus a discretionary amount that the committee in charge of compensation decisions may request from the state legislature); California, CAL. PENAL CODE §§ 4900-4906 (West 2000 & Supp. 2004) (providing $100 per day, not included in gross income for the purposes of state income taxation); Illinois, 705 ILL. COMP. STAT. 505/8(c) (1999) (providing "for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000" plus cost-of-living adjustments); Iowa, IOWA CODE ANN. § 663A.1 (West 1998) (granting attorneys' fees and court costs, liquidated damages up to $50 per day of incarceration, and up to $25,000 per year of lost income directly related to conviction and imprisonment); Maine, ME. REV. STAT. ANN. tit. 14, §§ 8241-8242 (West 2003) (allocating up to $300,000 for damages and costs, which may not include punitive damages); Maryland, MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West, WESTLAW through 2003 Reg. Sess.) (providing actual

the federal government will pay an innocent convict only $5000, regardless of the amount of time he has wasted in prison.[83] But this is a princely sum compared to the zero afforded innocents in thirty-five American states.

This dismissive response contrasts sharply with the relatively openhanded treatment offered by European governments.[84] The wide disparity between America and Europe has endured for generations, and I am puzzled by the failure of American scholars to mount a sustained constitutional critique.[85] Not only is this callous treatment scandalously unjust, but it cannot be justified by any of the theories of just compensation law that are taken seriously by the courts or commentators.[86]

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damages due to confinement plus a reasonable sum for counseling); New Hampshire, N.H. REV. STAT. ANN. § 541-B: 14 (1997 & Supp. 2003) (providing $20,000); New Jersey, N.J. STAT. ANN. §§ *52:4C-1* to :4C-6 (West 2001) (granting the greater of twice the claimant's income in the year prior to his incarceration or $20,000 for each year of imprisonment); North Carolina, N.C. GEN. STAT. §§ 148-82 to -84 (2003) (authorizing payments of $20,000 per year, not to exceed $500,000); Ohio, OHIo REV. CODE ANN. § 2743.48 (Anderson Supp. 2002) (providing $40,330 per year of incarceration plus court costs, attorneys' fees, and lost wages); Texas, TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.052, 103.105 (Vernon Supp. 2004) (stating that an award determined by a court may not exceed $500,000, and if the award is determined by the state comptroller, it is $25,000 per year if the detention is for less than twenty years, and $500,000 if twenty or more years); and Wisconsin, Wis. STAT. ANN. § 775.05 (West 2001) (awarding S5000 per year up to $25,000, although the claims board may petition the legislature for additional compensation). These state programs impose other stringent requirements before recovery, sometimes making it an entirely discretionary matter. For more on this dark comer of American jurisprudence, see Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999).

[83] *See* 28 U.S.C. §§ 1495, 2513. The Innocence Protection Act, originally proposed in 2001 and still pending in Congress, would increase the ceiling to more realistic levels, authorizing the payment of $50,000 per year, with an increase to $100,000 per year in capital cases. *See* Innocence Protection Act of 2003, H.R. 3214, §§ 301-332, 108th Cong. One can only hope that this provision will be enacted sometime soon.

[84] The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms guarantees compensation to anyone who has been unlawfully arrested or detained. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(5), 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953). A subsequent protocol authorizes compensation for convicts who have been pardoned, or had their conviction overturned, on the ground of miscarriage of justice. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1988); *see also* Carolyn Shelbourn, *Compensation for Detention,* 1978 CRIM. L. REv. 22, 25 (comparing approaches to compensation in various European countries and the United States)

[85] There has been remarkably little legal scholarship on this issue. Professor Edwin M. Borchard of the Yale Law School remains the only significant figure who persistently engaged the subject throughout his distinguished career. He once wrote:

> Among the most shocking […and] glaring of injustices are erroneous criminal convictions of innocent people. The State must necessarily prosecute persons legitimately suspected of crime; but when it is discovered after conviction that the wrong man was condemned, the least the State can do to right this essentially irreparable injury is to reimburse the innocent victim, by an appropriate indemnity, for the loss and damage suffered.

EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at vii (1932). For Professor Borchard's eight-part treatment of the subject, see Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925); Edwin M. Borchard, *Governmental Responsibility in Tort* (pts. 4-7), 36 YALE L.J. 1, 757, 1039 (1926-1927), 28 COLUM. L. REV. 577 (1928); and Edwin M. Borchard, *Theories of Governmental Responsibility in Tort* (pt. 8), 28 COLUM. L. REV. 734 (1928).

[86] For a canvass of the general theories of just compensation, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 41-87 (1977). My book does not draw this specific implication from the prevailing theories-it has only dawned on me more recently. But I think that the chapters cited do provide substantial support for my claim. Professor Borchard utilized two theories to justify his views: an eminent domain theory and a social welfare theory. *See* Edwin Borchard, *State Indemnity for Errors of Criminal Jus-*

For present purposes, I need not launch a general theoretical critique to urge a different approach for the innocent victims of emergency dragnets. These men and women are in an especially vulnerable position. By hypothesis, they do not enjoy the full panoply of rights guaranteed the normal criminal defendant, and this makes it much more difficult for them to gain quick release by establishing their innocence. This is a bitter price to pay for reassuring the general public after a catastrophic attack, and it is not one that is paid by criminal defendants generally. Though a financial payment will not fully compensate the innocent victims and their families, it is the least that a decent society can do to cushion the blow. Compensation will also have desirable systemic effects. The emergency administration should be obliged to pay these costs out of its own budget. Given the chaotic conditions in the aftermath of an attack, the threat of substantial budgetary costs can serve to concentrate the bureaucratic mind. It would not make economic sense to devote all resources to sweeping more suspects into the net without determining the likely guilt of those already in custody. Rather than stockpiling suspects in prison, budgetary costs will give security forces new incentives to spend time and energy determining who has been caught up by mistake.[87] So it is not only simple justice that requires compensation, but bureaucratic efficiency as well.[88] Provision for innocent detainees should be part of a larger compensation package that includes payments for the direct victims of terrorist attack. These people have suffered lifelong losses, and they should be compensated much more generously. Nevertheless, the emergency constitution should seek to do justice to all victims of the emergency, not only to some.[89]

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tice, 21 B.U. L. REV. 201, 207-08 (1941).

[87] It is a fair question how much impact these budgetary costs will have on the bureaucratic mind. Skeptics may suggest that agency heads will expect Congress to pay compensation without subtracting the cost from other areas of the agency budget. This may well be true to some extent, but it would be a brave agency that expected total absolution. The prospect of budgetary costs may still have a significant impact on the margin even if a partial congressional offset is anticipated.

[88] What about detainees who are ultimately convicted of terrorist acts? Surely, they do not deserve compensation. But as a bureaucratic matter, I would not make all detainees wait for payment for years, simply because a few may be successfully prosecuted over time. The compensation needs of detainees and their families are short-term. They need money to put bread on the table and cushion the search for a new job after the detainee is released; deferred compensation loses much of its utility. It probably makes sense, then, to pay compensation to all detainees, and then try to claw it back from those who are later found guilty.

There remains an intermediary case: detainees who continue to be imprisoned under normal the standards of the criminal law after sixty days, but who are ultimately released or acquitted at trial. These detainees should receive compensation for their initial period of emergency detention, but should then be treated like all others in a similar situation-in America, this means no compensation. Beyond the simple justice of the matter, denying compensation for the initial imprisonment would create a perverse incentive for the authorities to charge innocent people with crimes so as to avoid the need for payment.

[89] The prevailing pattern of partial compensation also violates another basic norm: When property is seized by private actors, the owners cannot generally expect the state to compensate them for the loss. It is only when government agents are involved in the seizure that government payments are constitutionally compelled.

The reverse is happening in the aftermath of September 11. The government is offering large sums to the victims of al Qaeda terrorists while it is offering nothing to those seized in the dragnet following the tragedy. But it is the latter individuals who have been directly affected by government officials, not the former.

VII. THE PLACE OF JUDGES

The political and economic aspects of my proposal provide a distinctive pathway to the legal sphere. Although judges cannot themselves construct an adequate emergency regime, they play a vital role in sustaining it. Distinguish two levels: macromanagement, concerned with the integrity of the emergency regime as a whole, and microadjudication, concerned with safeguarding individuals against the predictable abuses of the system.

A. MACROMANAGEMENT

Should judges be asked to second-guess the initial decision by the President or Parliament to declare a state of emergency?

I am skeptical about the wisdom of immediate judicial intervention. With the country reeling from a terrorist strike, it simply cannot afford the time needed for serious judicial review. If the President can convince a majority of the legislature of the need for emergency powers, this should suffice. At this early stage, we should rely on the legislature, not the judiciary, to restrain arbitrary power.[90]

But perhaps there is a Solomonic compromise available, at least in some legal cultures. This is suggested by an ingenious French provision. As we have seen, the President of France is granted unilateral authority to declare an emergency. The French Constitution does require him, however, to consult with the constitutional court, the Conseil Constitutionnel,[91] which responds by issuing an advisory opinion that is provided to the general public. If the Conseil Constitutionnel advises against the emergency, the President can disregard its opinion. But an adverse judgment by the Conseil would have a powerful impact on the public, and the prospect of a negative opinion can serve as a constraint on presidential abuse, especially in the absence of a legislative check.[92]

In any event, such a compromise seems implausible in legal cultures like America's, where constitutional judges have a deeply ingrained instinct to avoid advisory opinions. Here it seems wiser to deploy a familiar variety of "passive virtues" to avoid premature decision and see whether the political branches, aided by the supermajoritarian escalator, will call an early halt to emergency declarations that lack an adequate basis in reality.[93] Judicial intervention on the merits should be reserved only for the most egregious cases.

In contrast, the constitutional court does have a crucial backstopping role on more procedural matters. The great danger is this: The supermajoritarian escalator will eventually require the

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[90] *See supra* Part IV.

[91] CONST. art. 16, paras. 1, 3.

[92] Article 16 is interpreted to require a public opinion by the Conseil Constitutionnel. *See* VOISSET, *supra* note 19, at 50 (noting that while the opinion by the Conseil Constitutionnel may not be legally binding, the publicity surrounding the opinion would give it political and moral importance).

[93] *Cf* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115 (1962) (stating that "the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society").

termination of the emergency regime, but the Executive may refuse to give up his emergency powers. After all, the President or Prime Minister may still remain extremely popular even though he has failed to gain the necessary legislative supermajority, which may be as high as eighty percent. It can be tempting to play the demagogue and appeal to the people for support against the minority that seeks to terminate extraordinary conditions: "As President, I cannot allow a small minority in the legislature to sabotage the national interest. I hereby declare that the country remains in a state of emergency."

Here is where the judges can play a fundamental role. Their opposition to the continuation of the emergency regime will transform the nature of the political battle. The President can no longer pretend that he is merely fighting a bunch of minority politicians. He will be obliged to take on the courts as well, casting himself as an enemy of the entire constitutional order. Such high stakes should deter much reckless behavior.

But not all of it. Demagogues may call the courts' bluff, and then it will be up to the country to decide. But at least the courts will go into the struggle on relatively advantageous terms. The President's breach of the rule of law will be plain for all to see: The vote was seventy-five to twenty-five when it was supposed to be eighty to twenty. The court will not be obliged to justify its intervention with complex legalisms. The issue will be clean and clear: Is the country prepared to destroy the rule of law and embark on a disastrous adventure that may end with dictatorship?

To dramatize the stakes further, the emergency constitution should explicitly command the courts to begin considering habeas petitions immediately upon the legal termination of the emergency. This will require countless officials throughout the country to ask where their ultimate loyalties lie-to the usurper or to the constitution. At least some will uphold the law and hand their prisoners over to the judges, putting the burden on the usurper to take further extraordinary actions. All this may help provoke a popular movement in support of the constitution – or it may not.

So much for visions of apocalypse. The constitutional court also has a backstopping role to play in more humdrum scenarios. For example, my proposal virtually guarantees a struggle between the Executive and the legislature over control of information. By placing the legislative oversight committees in the hands of the minority party, we can be sure of countless protests against executive claims of secrecy based on national security. These unending tensions are entirely healthy, and judges should largely keep to the sidelines while the parties work out a reasonable accommodation on their own.

Nevertheless, the Executive has most of the chips in this game, and if it abuses its bargaining power, judicial intervention may sometimes be desirable to enforce legislative demands. This will call for a great deal of judicial tact and discretion in sifting the facts of particular cases-a matter that can only be discussed intelligently at retail, not wholesale.

B. MICROADJUDICATION

But of course, the bulk of judicial activity will not involve macromanagement of the separation of powers. It will require the microadjudication of cases raised by particular detainees. Begin by considering how the political and economic aspects of the emergency constitution shape the disposition of these cases before they get to the judges.

Start with the prosecutors and how they will respond to the provision for a series of two-month extensions. The supermajoritarian escalator puts them on notice that the emergency will not go on and on. When the regime terminates, all the cases of emergency detention will be dumped on their desks at once. At that point, they must release all suspects whose detention cannot be supported by hard evidence. To avoid an embarrassing jail delivery, prosecutors have every incentive to prepare their cases during the emergency so that they will not be caught off guard by the operation of the supermajoritarian escalator. This means that the "emergency" will not denote a period of sheer lawlessness, but a time for prosecutors to undertake serious investigations of the merits of individual cases. When a preliminary probe reveals an evidentiary vacuum, the prosecutors themselves will serve as a powerful lobby for the release of innocent detainees.

At this point, the economic aspect of the proposal kicks in. Since compensation payments come out of the budget of the security services, a prosecutorial inquiry about a particular detainee will serve as an institutional prod. To avoid budgetary costs, the security services have an incentive to focus their energies on the particular detainees singled out by the prosecutors. And if their investigation does not show any progress, they have reason to release the detainee rather than hold him to the bitter end.

So much for prosecutors and police officers. The supermajoritarian escalator also will have a salutary impact on the behavior of judges. Judges are conservative folk who are likely to interpret their legal mandate very cautiously during the immediate aftermath of a massive terrorist strike. I think this caution is perfectly appropriate, but those who disagree on the merits must conjure with my empirical prediction that judges will tend to exploit ambiguities in the constitutional text to minimize energetic inquiry during the period of most acute crisis. If my prediction is right, another key operational question emerges: How do we apprise the judiciary that the time has come to shift gears and move from extraordinary restraint to their normal activities on behalf of fundamental rights?

This is where my proposed system of political checks and balances becomes important. As time moves on, the supermajoritarian escalator makes it possible for twenty-one percent of the legislature to terminate the emergency regime. From a juridical point of view, it is not important that only a small legislative minority has in fact triggered the shift back to normalcy. The key point for judges is that they are off the hook, that the legislature has taken responsibility for terminating the emergency in a highly public fashion. Once the legislature has taken the lead, judges will resume their normal role in the criminal process, safeguarding individual rights and providing due process of law. And they will do this even though a majority of the legislature, and the general population, may not yet have fully recovered from the anxieties generated by the terrorist attack.

Some may think that my timetable is too precipitous and that the return to judicial normalcy should proceed with more deliberate speed. But this cautionary judgment can be readily accommodated by recalibrating the speed of the supermajoritarian escalator-changing the extension periods from two to three months, slowing down the rate of ascent to the supermajoritarian heights, and reducing the ultimate requirement from eighty percent to some lower figure.

But as you tinker with the terms, remember this: No matter how you redesign the escalator, the return to judicial normalcy will always inspire lots of anxiety in the hearts of lots of people. The "war on terrorism" will never end. There will always be disaffected groups scurrying about seeking terrible weapons from unscrupulous arms dealers and rogue states. There will always be fear-mongering politicians pointing with alarm to the storm clouds on the horizon. And there will always be many people who, understandably enough, have not recovered fully from the trauma of the last outrageous attack. Even committed civil libertarians will find it hard to suppress a residual doubt: Is it really safe to lift the state of emergency?

I have no inclination to deny the reality of these pervasive anxieties. To the contrary, they motivate my call for a constitutional approach to the problem. We should take advantage of periods of relative calm to anticipate the political difficulties involved in returning to juridical normalcy and take steps now to channel the predictable political resistances of the future. We should not allow reasonable disagreements about the design of the escalator to generate constitutional paralysis and allow the entire project to be overtaken by events. Every terrorist attack will make it more difficult to frame a response that prevents the permanent erosion of civil liberties. Almost any supermajoritarian escalator is better than the status quo.

The particular design of the glide path to normalcy will, in turn, shape our decisions on a crucial issue: What is the appropriate judicial role during the emergency period itself?

The longer the likely period of emergency, the greater the need for judicial supervision. Indeed, it may make sense to design a graduated system of increasing judicial scrutiny: minimal for the first two months of detention, with more intrusive scrutiny thereafter. But for now, I will be focusing on the central problems involved in defining the absolute floor for judicial protection.

Begin by recalling that other aspects of our proposal will already provide some protection. The compensation provisions give the security services a bureaucratic interest in releasing innocent detainees, and the clear prospect of the termination of the emergency regime creates a similar incentive for government lawyers. Within this context, I do not favor immediate judicial hearings that weigh the evidentiary basis for detention in individual cases.

Nevertheless, there are good reasons for requiring the prosecutor to bring detainees expeditiously before a judge even if the suspects cannot challenge the factual basis for their detention. At this initial hearing, the judge should ask the prosecutor to state the grounds for

detention on the record.[94] Even if the reasons may not be rebutted, the need to explain will encourage the prosecutor to operate as a first line of defense against totally arbitrary conduct. Before the hearing commences, he must at least obtain a statement from the detaining officers that explains the grounds for their suspicion. If the officers' statement is a sheer fabrication, motivated by personal animus against the detainee, there will be a basis for a punitive lawsuit after the emergency ends.[95]

The initial hearing also will serve to give the detainee a firm bureaucratic identity. It would otherwise be easy for people to get entirely lost in a system reeling in response to the unexpected attack. While innocent people will not take much solace in knowing that they are "Suspect 1072," whose charges have been reviewed by "Judge X" on "Day Y," these formalities will serve to start the clock running and alert all concerned that there *will* be a day of legal reckoning. After forty-five or sixty days, prosecutors should be required to present hard evidence of the detainee's complicity with the conspiracy.

Such a lengthy period is regrettable, but by hypothesis, the terrorist attack will have taken the security services by surprise, and they will be scrambling to create a coherent response to the larger threat. They will be stretched too thin to devote large resources to evidentiary hearings in the immediate aftermath of the attack, and if they skimp on legal preparation, they may fail to make a compelling presentation of the information at their disposal. They may even fail to provide judges with all of the evidence that actually exists in the agencies' computer banks, leading to the judicial discharge of detainees who have genuine links to terrorist organizations. Given this risk, most judges will bend over backwards to give the government the benefit of the doubt, leading to lots of hearings without much in the way of effective relief.

I would set a different goal for the judges during the early period of detention. Decency, not innocence, should be their overriding concern. *Do not torture the detainees.* That should be an absolute, and judges should enforce it rigorously. The fact that many of the detainees are almost certainly innocent makes the ban more exigent. Professor Alan Dershowitz has recently urged us to rethink this absolute prohibition, trotting out familiar law school hypotheticals dealing with ticking time bombs and the like.[96] But I am entirely unimpressed with the relevance of such musings in real-world emergency settings. Security services can panic in the face of horrific tragedy. With rumors flying about, amid immense pressures to

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[94] If security requires, this might be done in camera, with release of the record to the detainee at a later point.

[95] *See infra* text accompanying note 103. The European Convention on Human Rights creates a fundamental right to a "prompt […]" judicial hearing. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 84, art. 5(3), 213 U.N.T.S. at 226. The European Court of Human Rights has taken repeated steps in terrorism cases to protect this right. *See* Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 553; Brogan v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) 117 (1988). But when the United Kingdom exercised its power to file a "derogation" from the Convention in the case of terrorism in Northern Ireland, the Court deferred-excessively in my view – to the British decision to delay these initial judicial hearings in terrorism cases. *See* Brannigan v. United Kingdom, 17 Eur. Ct. H.R. (ser. A) 539 (1993).

[96] *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 142-63 (2002). For another – and very reflective – essay on the problem of torture in an age of terrorism, see Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11,* 81 TEX. L. REv. 2013 (2003).

produce results, there will be overwhelming temptations to use indecent forms of interrogation. This is the last place to expect carefully nuanced responses.

Dershowitz recognizes the problem, and proposes to solve it by inviting judges to serve as our collective superego, issuing "torture warrants" only in the most compelling cases.[97] But judges are no more immune from panic than the rest of us. To offset the rush toward torture in an emergency, they would be obliged to make their hearings especially deliberate and thoughtful. But if they slow the judicial proceedings down to deliberate speed, the ticking time bomb will explode before the torture warrant can issue. Serious deliberation is simply incompatible with the panic that follows a terrorist attack. Once the ban on torture is lifted, judges will not systematically stand up to the enormous pressure. It is far more likely that they will become mere rubber stamps, processing mounds of paper to cover up the remorseless operation of the torture machine.

Even a few judicial lapses will have devastating consequences, carrying a message that transcends the cruelties and indecencies involved in particular cases: "Beware all ye who enter here. Anyone swept into the emergency dragnet may never return with his body and soul intact. The state is hurtling down the path of uncontrolled violence." Once word gets around that judges cannot be trusted to guard against abusive torture, ordinary people will wonder whom they *can* trust.

There is another danger: If torture runs rampant, the torturers will form a formidable pressure group. Working behind the scenes, they will try to extend the emergency to defer the bitter calls for retribution that are sure to follow when victims and their families regain their full freedom. These officials may become sufficiently desperate to support a violent coup if this is their only hope of preventing a return to normalcy.

Dershowitz utterly fails to confront these problems. He recognizes that torture may have long-run legitimacy consequences, but fails entirely to consider its devastating short-run consequences in a state of emergency.[98] Our overriding constitutional aim is to create an emergency regime that remains subordinated – both in symbol and in actual fact – to the principles of liberal democracy. Without the effective constraint of the rule of law, it is simply too easy for the emergency regime to degenerate into a full-blown police state.

So let us keep torture a taboo, and consider how judges may effectively enforce this ban.[99] Here is where the right to counsel enters – a right that has proved remarkably vulnerable in America in the aftermath of September 11.[100] Regular visits by counsel are the crucial mech-

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[97] *See* DERSHOWITZ, *supra* note 96, at 158-61.
[98] *See id.* at 145.
[99] In 1992, the United States ratified the International Covenant on Civil and Political Rights. Article 7 of the Covenant states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, *supra* note 76, art. 7, S. EXEC. DOc. E, 95-2, at 25, 999 U.N.T.S. at 175. In ratifying the Covenant, the United States filed a reservation stating that it "considers itself bound by Article 7 to the extent that 'cruel, inhuman, or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." S. EXEC. REP. No. 102-23, at 22 (1992).
[100] *See* Nickolas A. Kacprowski, Note, *Stacking the Deck Against Suspected Terrorists: The Dwindling Proce-*

anism for policing against torture. Once security services know that detainees have direct access to the legal system for their complaints, torture will no longer be a thinkable option.[101] To be sure, regular visits by counsel may also make more legitimate forms of interrogation less effective. Detainees will feel themselves less isolated and vulnerable, and so may prove less cooperative. But this is simply the price that any decent society must be willing to pay.

Quick access to counsel is also crucial for other purposes. While hearings on the question of innocence won't happen immediately, they will occur within sixty days of detention. Detainees have the fundamental right to ask their lawyers to collect exculpatory evidence rapidly before memories fade or physical materials disappear. Finally, lawyers play a crucial intermediary role between detainees and their families, friends, and employers in the outside world. These people must be in a position to hear from the lawyer, and quickly, that the detainee has not disappeared into a police state hellhole. They also should be permitted to monitor the attorney's performance to ensure that their loved one is treated with respect, and to engage replacement counsel if they so choose.

Special limitations on these rights may be tolerable so long as they do not undermine the fundamentals. For example, the detainee's intimates must have access to his counsel, but they may be forbidden to publicize further any information they receive. Some restrictions on the right to choose particular lawyers may well be tolerable. But we are reaching the realm of reasonable disagreement, and I am restricting myself only to some very basic fundamentals.[102]

From this vantage point, we must take steps to anticipate another potential abuse: Suppose that, after sixty days of detention, the government cannot produce the evidence required to justify further incarceration. The judicial hearing concludes with the release of the detainee, but the security services respond by seizing the newly freed person at the courthouse door, and arresting him for another two-month emergency detention. We require an adaptation of the "double jeopardy" principle to block this transparent abuse. While the security services have the power to detain new suspects so long as the state of emergency continues, they cannot engage in revolving door tactics. By hypothesis, they have already focused on the

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dural Limits on the Government's Power To Indefinitely Detain United States Citizens as Enemy Combatants, 26 SEATTLE U. L. REV. 651, 666 (2003).

[101] As a further safeguard, judicial hearings on torture complaints should be expedited, and security officers found to be complicit should be subjected to immediate administrative discharge and timely criminal prosecution.

[102] This brief discussion emphatically does not provide a full list of core rights meriting protection under emergency conditions. A comprehensive assessment goes far beyond the scope of a single essay.
Further study should include careful reflection on the rights protected during an emergency by the South African Constitution, *see supra* note 23, as well as the nonderogable rights specified by Article 4 of the International Covenant on Civil and Political Rights, *supra* note 76, art. 4, S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174, and the fundamental guarantees established by Protocol I to the Geneva Convention, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, art. 75, 1125 U.N.T.S. 3, 37-78. In addition, a very thoughtful Declaration of Minimum Humanitarian Standards was elaborated by a leading group of jurists meeting in 1990 at the Institute for Human Rights in Turku/Åbo, Finland. *See* Declaration of Minimum Humanitarian Standards (Dec. 2, 1990), http://www.abo.fi/instut/imr/publicationsonlinetext.htm.

detainee and have failed to find evidence of his complicity with the ongoing terrorist conspiracy. If further investigations uncover new evidence, by all means arrest the suspect once again – but this time, the prosecution must make its case for detention under the standard ground rules established by the criminal law.

C. *The Power of Hindsight*

I have been distinguishing between macro- and microjudicial interventions – the former dealing with the integrity of the system as a whole and the latter with the treatment of individual cases. But this neat distinction will blur over time. Some individual detainees, once released, will predictably complain about their treatment during confinement. These complaints will accumulate into larger patterns as they slowly reach appellate tribunals. With any luck at all, the state of emergency will have ended before the highest court begins to consider a series of typical grievances stemming from the recent crisis.

Microadjudication will merge into macromanagement. The high court should try to do justice in the particular case, but in ways that will shape future patterns of emergency administration. How will the structure of the emergency constitution guide the path of this ongoing judicial dialectic?

Consider the way our compensation requirement will shape judicial perceptions. Since all innocent detainees will be receiving fair payment for their time in jail, only lawsuits alleging truly outrageous conduct will seem plausible. And this is just as it should be. Even in retrospect, the courts should give a wide discretion to the judgments of the emergency authorities. Nonetheless, there will be abuses. Even if the system steers clear of torture, the emergency will predictably tempt some members of the security services to use their extraordinary powers in the service of personal vendettas: Inspector Smith has always hated his next-door neighbor, Jones, and seizes the chance to throw him behind bars for sixty days by calling him a terrorist.

While proving animus is always difficult, the procedural framework will make it possible. Although an evidentiary hearing may be deferred for forty-five or sixty days, the emergency constitution requires an immediate judicial hearing at which the prosecution must state the grounds of suspicion that support the detention.[103] If it later develops that these charges are bogus, the question naturally arises whether the officials making them were acting in good faith. The entry of a few punitive damages awards, moreover, will have a structural consequence – both the bad publicity and the budgetary hits will induce agencies to get rid of their "bad apples" and institutionalize more rigorous controls.

A more systemic problem may arise if criminal prosecutors use emergency powers as a shortcut for ordinary procedures. Even though the prosecutor may not have enough evidence to move against a suspected car thief, why not call him a terrorist and subject him to imme-

[103] *See supra* text accompanying notes 94-95.

diate detention and interrogation? In these cases, structural remedies are even more important than damages: Not only should errant prosecutors lose their licenses to practice law, but errant prosecutorial offices should be required to take systematic steps to assure that such abuses do not recur.

And then there will be problems of ethnic, religious, and racial profiling. Some terrorist groups will not invite this practice since they are drawn primarily from the dominant groups – consider the Oklahoma City bombers. But the current war on terrorism is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions.

The International Covenant on Civil and Political Rights sets the proper standard. Article 4 applies even during states of emergency and prohibits states from discriminating *"solely* on the ground of race, colour, sex, language, religion or social origin."[104] In signing the Convention, the United States accepted this provision without reservation, but filed an "understanding" that it did not "bar distinctions that may have a disproportionate effect upon persons of a particular status" during a "time of public emergency."[105] During the early period of panic, it will be tough for courts to determine how well the security services are complying with these principles. While a dragnet may well sweep certain groups into detention disproportionately, this may be entirely due to the group's disproportionate allegiance to one or another terrorist ideology. But as the smoke clears, and the emergency lifts, patterns of gross discrimination may well emerge. Once again, the challenge for courts is not only to provide punitive damages for abusive conduct, but to consider how they might encourage the bureaucracy to take structural measures to reduce these discriminatory impulses when future emergencies strike.

Patterns of individual complaints will undoubtedly accumulate to reveal other problematic practices as experience develops over time. The challenge for both courts and agencies is to learn from this experience and take ongoing measures that will make emergency administration tolerable, if never satisfactory.

D. AN OVERVIEW

Move back a step and take the measure of the overall proposal. Simplifying drastically, I will sum up the whole with three principles drawn from each of three domains: political, economic, and juridical. Politically, the emergency constitution requires increasingly large majorities to continue the extraordinary regime over extended periods of time. Economically, it requires compensation for the many innocent people caught in the dragnet. Legally, it requires a rigorous respect for decency so long as the traditional protections of the criminal law have been suspended.

Supermajorities, compensation, decency. These three principles, and their corollaries, do

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[104] International Covenant on Civil and Political Rights, *supra* note 76, art. 4, S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174 (emphasis added).
[105] S. EXEC. REP. No. 102-23, at 22 (1992).

more than provide substantial protection to the unlucky individuals caught in the net of suspicion. They combine to present a picture of the "state of emergency" as a carefully limited regime, tolerated only as a regrettable necessity, and always on the path toward termination. Undoubtedly, the admission of this regime into our constitutional order would represent a recognition that the moment of triumphalism after 1989 has come to an end, and that liberal ideals may sometimes require extraordinary actions in their defense. It is better to face up to this sad truth now than to allow terrorists to provoke repeated cycles of public anxiety that will trigger recurring waves of repressive legislation.

VIII. TRAGIC COMPROMISE

Although the twenty-first century opened with the terrorist attacks on New York and Washington, we are not dealing with a uniquely American problem. The next strike may occur in London or Paris, not Los Angeles or Chicago. Every Western country has an interest in creating an emergency constitution. Since the Europeans have not recently been traumatized by a massive first strike, they may well be in a better position to make progress more quickly.

But it is too soon to count America out. And if this Essay does provoke serious discussion, particular characteristics of the American Constitution will drive the conversation in distinctive directions. The most serious problem is generated by the notorious difficulty of formal constitutional amendment. Proposals on far less controversial matters have regularly failed to navigate the formidable obstacle course established by Article V. If my proposal has any future in the United States, it will not take the form of a constitutional amendment. Throughout the twentieth century, Congress has enacted "framework statutes" that have sought to impose constitutional order on new and unruly realities that were unforeseen by the Founders. The same technique will serve us well here.

After reviewing past experience, I propose a framework based on a tragic compromise: Civil libertarians should allow the Executive to detain suspected terrorists for a period of forty-five to sixty days, without the ordinary safeguards of habeas corpus, but only in exchange for the principles of supermajoritarianism, compensation, and decency elaborated in this Essay.

A. PAST EXPERIENCE

The most notable framework statute of the twentieth century is the Administrative Procedure Act (APA).[106] The Founders did not foresee the rise of the bureaucratic state, and it was only during the last half-century that Congress and the courts responded creatively to fill the gap. Although it is packaged as a statute, the APA is the product of constitutional thought, and the courts have given quasi-constitutional status to its provisions. While one may quibble endlessly with particular acts of judicial interpretation, the overall result has been a triumph

[106] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

of constitutional adaptation: The framework provided by the APA has successfully imposed fundamental constraints on bureaucratic government in the name of democracy and the rule of law.

We have been less successful when it comes to states of emergency, but it has not been for want of trying. From the Great Depression through the Cold War, Congress passed no fewer than 470 statutes granting the President authority to exercise one or another power during a declared state of "national emergency,"[107] and presidents made abundant use of this authority.[108] But in response to abuses of executive power, culminating in the Watergate scandal, Congress inaugurated a new approach based on a framework statute. The National Emergencies Act (NEA) of 1976[109] terminated all existing states of emergency[110] and established a uniform procedural framework for the future exercise of all such powers.[111] But it did not go further to revise the disorganized, but massive, grants of authority that had accreted to the Executive over the decades.[112]

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[107] *See* SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, A RECOMMENDED NATIONAL EMERGENCIES ACT, S. REP. No. 93-1170, at 2 (1974), *reprinted in* SENATE COMM. ON GOV'T OPERATIONS & THE SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, THE NATIONAL EMERGENCIES ACT (PUBLIC LAW 94-412): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 19, 20 (Comm. Print 1976) [hereinafter THE NATIONAL EMERGENCIES ACT SOURCE BOOK] (providing examples of the President's "extraordinary powers, among others, to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens"); SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW Now IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, at iv (1973) (compiling a list of "all provisions of Federal law, except the most trivial, conferring extraordinary powers in time of national emergency"); SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES: A WORKING PAPER app. at 135-40 (Comm. Print 1974) (Harold C. Relyea) [hereinafter HISTORY OF EMERGENCY POWERS] (summarizing several "provisions of law which [..], would become operative upon proclamation of a national emergency by the president").

[108] In 1933, President Roosevelt, in a then-novel invocation of wartime emergency powers to deal with a domestic economic crisis, declared a state of emergency with respect to the Depression-era banking crisis. *See* HISTORY OF EMERGENCY POWERS, *supra* note 107, at 119. President Truman followed in 1950 with an emergency declaration during the Korean conflict, *see* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989), while President Nixon twice invoked his emergency authority during the balance of payments crisis and the Post Office strike of the early 1970s, *see* HISTORY OF EMERGENCY POWERS, *supra* note 107, at 120. The Senate's Special Committee on National Emergencies and Delegated Emergency Powers found that none of these states of emergency had been terminated by the President or Congress, 120 CONG. REc. 29,976 (1974) (statement of Sen. Church), and that the Truman order had actually served as the basis for an unrelated embargo against Cuba begun during the Kennedy Administration, *see* Lobel, *supra*, at 1401.

[109] Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601-1651 (2000)).

[110] 50 U.S.C. **§** 1601.

[111] For example, the NEA requires that all future declarations of national emergencies be published in the *Federal Register, id. §* 1621, that the President specify the statutory powers to be exercised during the emergency, *id. §* 163 1, and that the President report to Congress on emergency orders and expenditures, *id. §* 1641.

[112] *See* ABRAHAM RIBICOFF, COMM. ON GOV'T OPERATIONS, NATIONAL EMERGENCIES ACT, S. REP. No. 94-1168, at 3 (1976), *reprinted in* THE NATIONAL EMERGENCIES ACT SOURCE BOOK, *supra* note 107, at 290, 292 ("The National Emergencies Act is not intended to enlarge or add to Executive power.

The past quarter-century has seen frequent tests of the NEA framework, most notably in the conduct of foreign affairs.[113] Although presidents never used the NEA framework to detain suspects before September 11, they regularly invoked it to block foreign assets and restrict foreign travel.[114] This experience has only dramatized the serious problems with the existing framework.[115]

Not only does the President retain the power to declare an emergency unilaterally, but the statute's weak consultation and reporting procedures have been largely diluted or ignored.[116] Most importantly, the statute provides that "each House of Congress shall meet" every six months to consider a vote on terminating the emergency.[117] But neither chamber has ever met to consider this action, and despite the mandatory force of the word "shall," courts have found "no legal remedy for a congressional failure to comply with the statute.[118] Although

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Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.").

[113] One year after passage of the NEA, Congress passed the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707). IEEPA authorizes the President to exercise wide-ranging emergency economic powers in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. §§ 1701-1702. This substantive grant of authority is regulated by the NEA framework, *see id. §* 162 1(b) (stating that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only in accordance with this chapter"), but IEEPA also imposes additional procedures. For example, pursuant to § 1703(a), the President must consult with Congress "in every possible instance" prior to invoking the statute. He is also required to specify the circumstances constituting an emergency and the powers to be exercised, *id.* § 1703(b), and to report to the Congress every six months following the exercise of such powers, *id.* § 1703(c).

[114] During the 1990s, IEEPA was used increasingly as a tool against terrorist groups, but never to arrest or detain suspects. For a detailed summary of the orders issued under IEEPA, see James J. Savage, *Executive Use of the International Emergency Economic Powers Act-Evolution Through the Terrorist and Taliban Sanctions,* CURRENTS: INT'L TRADE L.J., Winter 2001, at 28, 32-37.

[115] The best essay on the NEA and IEEPA, and their real-world operation, is Lobel, *supra* note 108. *See also* Harold C. Relyea, *Reconsidering the National Emergencies Act: Its Evolution, Implementation, and Deficiencies, in* THE PRESIDENCY AND NATIONAL SECURITY POLICY 274 (R. Gordon Hoxie ed., 1984); Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability,* 52 S. CAL. L. REV. 1453 (1979).

[116] IEEPA imposes procedural requirements in addition to those demanded by the NEA, *see supra* note 113, but these safeguards have fared no better in real life. Professor Jules Lobel describes presidential reports pursuant to the NEA and IEEPA as "pro forma" documents and presidential declarations as simply "track[ing] the language of the statute and provid[ing] sparse details of the basis for the purported emergency." Lobel, *supra* note 108, at 1415; *see also id.* at 1416 ("Instead of one generic emergency droning on and on without review, we now have a number of little but no less dubious emergencies-unchecked, unreviewed, and perfunctorily reported."); Relyea, *supra* note 115, at 316 (noting President Carter's failure to meet the six-month reporting requirements during the Iran hostage crisis); Note, *The International Emergency Economic Powers Act: A Congressional Attempt To Control Presidential Emergency Power,* 96 HARV. L. REv. 1102, 1118-19 (1983) (arguing that IEEPA's consultation provision is "-essentially a request, and not a requirement").

[117] 50 U.S.C. § 1622.

[118] Lobel, *supra* note 108, at 1417. When he was a circuit court judge, Justice Breyer interpreted the provision as granting Congress a discretionary "chance to force a vote on the issue." Beacon Prods. Corp. v. Reagan, 814 F.2d 1,4-5 (1st Cir. 1987).

In its major decision in the area, the Supreme Court also took a very deferential posture toward the exercise of executive emergency power under IEEPA. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981). As Harold Koh explains, "[U]nder Justice Rehnquist's *Dames & Moore* reasoning, a court may construe congressional inaction or legislation in a related area as implicit approval for a challenged executive action." Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair,* 97 YALE

emergency declarations automatically lapse after one year,[119] there is nothing to stop the President from renewing them immediately, and he has often done so.[120]

Even if Congress took its responsibilities seriously, the NEA does not provide it with an effective mechanism to control an overreaching president. When it was originally passed, the statute did authorize Congress to end an emergency without the President by means of a concurrent resolution passed by a majority in both Houses.[121] But once the Supreme Court held such legislative vetoes unconstitutional,[122] Congress amended the NEA to require a joint, instead of a concurrent, resolution.[123] Since these are subject to presidential veto, it now requires a two-thirds majority to override the "inevitable" opposition of the White House – something that will never happen during periods of crisis.[124] Even if a miracle occurred, the President could use his unilateral authority to proclaim a new emergency under the same (or different) statutory authority.[125]

Despite its structural weaknesses and lamentable performance, the NEA remains a path-breaking achievement. Thanks to the work of the last generation, American law now self-consciously affirms the need for a framework statute to control the pathologies of emergency declarations. The challenge for the twenty-first century is to revise the framework so that it will have half a chance of fulfilling this great task.

B. A THOUGHT EXPERIMENT

A thought experiment may help refine the high stakes involved. Suppose that, sometime in the 1990s, Congress had glimpsed the tragic possibility of September 11, and had possessed the wisdom and will to prepare the legal terrain in advance. Reflecting on the obvious inade-

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L.J. 1255, 1311 (1988).

[119] *50* U.S.C. § 1622(d). To renew an emergency declaration, the President need only publish a statement in the *Federal Register* and provide notice to Congress that the emergency is to continue in effect. *Id.*

[120] *See, e.g.*, Notice of August 14, 2002, 67 Fed. Reg. 53,721 (Aug. 16, 2002) (continuing the "Emergency Regarding Export Control Regulations"); Notice of July 30, 2002, 67 Fed. Reg. 50,341 (Aug. 1, 2002) (continuing the emergency over Iraq); Notice of June 21, 2002, 67 Fed. Reg. 42,703 (June 25, 2002) (continuing the "Emergency With Respect to the Western Balkans"); Notice of May 16, 2002, 67 Fed. Reg. 35,423 (May 17, 2002) (continuing the emergency with respect to Burma); Notice of January 18, 2002, 67 Fed. Reg. 3033 (Jan. 22, 2002) (continuing the "Emergency Regarding Terrorists Who Threaten To Disrupt the Middle East Peace Process"); Notice of January 3, 2002, 67 Fed. Reg. 637 (Jan. 4, 2002) (continuing the Libyan emergency); Notice of November 9, 2001, 66 Fed. Reg. 56,966 (Nov. 13, 2001) (continuing the twenty-two year-old national emergency with respect to Iran).

[121] National Emergencies Act of 1976, Pub. L. No. 94-412, § 202, 90 Stat. 1255, 1255-57 (current version at 50 U.S.C. § 1622).

[122] *See* INS v. Chadha, 462 U.S. 919 (1983).

[123] *See* Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 99 Stat. 406, 448 (1985) (codified at 50 U.S.C. § 1622).

[124] *See* Koh, *supra* note 118, at 1303-04 (arguing that a joint resolution "requires Congress to exercise a measure of political will that historically, it has only rarely been able to muster"); *see also* Lobel, *supra* note 108, at 1416 (noting that "[t]he statute now provides for a termination procedure that would ordinarily be available if there were no NEA").

[125] *See, e.g.*, Relyea, *supra* note 115, at 315 (noting "the potential […] for Congress to be harassed with repeated proclamations of national emergency in a contest of wills where the stakes are very high").

quacies of the present National Emergencies Act, it adopted a framework statute along the lines presented here. How might this precautionary action have reshaped the legal debate currently developing in the courts?

Consider the notorious *Padilla* case, now before the Supreme Court.[126] Jose Padilla is an American citizen who the government believes is a terrorist but whom it refuses to try under the criminal law. The President claims that his powers as Commander in Chief allow him to hold Padilla indefinitely in a military prison as an "enemy combatant," despite the fact that he has never joined a foreign army or fought on a wartime battlefield.

My hypothetical framework statute would have deprived these presidentialist claims of all plausibility. Undoubtedly, the President and Congress would have responded to September 11 by declaring a state of emergency. But two years later, Congress would have been obliged repeatedly to reauthorize the emergency by eighty-percent majorities – a virtually impossible task in the absence of a second serious strike.[127] While the government might well have detained Padilla during the emergency, he would have long since been released, with compensation – unless the government was prepared to charge him with a crime. Within this setting, would any court uphold the President's authority to sweep Padilla into a military prison by unilaterally declaring him an "enemy combatant"?

With the framework statute in place, the case would be a no-brainer. On the one side, the President's men would be arguing for a radical expansion of his powers as Commander in Chief in an endless "war" without a clear enemy. On the other, Padilla's lawyers would be urging the Court to prevent an end run around Congress's carefully crafted effort to call the crisis by its true name: not a "war" at all, but a carefully controlled "state of emergency." It is *very* hard to believe that the Supreme Court would pause long before cutting off the President's effort to destroy the integrity of a framework statute that required ongoing collaboration between the political branches.[128]

But isn't this thought experiment merely an idle pipe dream? During the struggle over the National Emergencies Act in the 1970s, the Executive and his congressional supporters managed to block all efforts to constrain presidential claims to unilateral emergency pow-

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[126] *See supra* note 5.

[127] For an analysis of the libertarian propensities of the 107th Congress, see *supra* note 46.

[128] The Court's reaction to presidential unilateralism is notoriously complex. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel plants), *with* Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion) (declaring President Carter's unilateral repudiation of a treaty a "political question"). Even in *Goldwater*, the plurality opinion did not uphold presidential unilateralism, but consigned the question for resolution "by the Executive and Legislative Branches." *Id.* at 1003 (Rehnquist, J., concurring in the judgment). If the branches resolved such sensitive matters through a framework statute, there would be little question that the Court would hold subsequent presidents to the terms of the deal. *Cf* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1267 (2002) ("The requirement that the executive branch persuade Congress of the need for measures that jeopardize liberty dampens the tendency of the executive to undertake such measures without the clearest necessity. Formal involvement by Congress, through a joint resolution or bill, is the least that we ordinarily require in order to provide the transparency, perspective, and wisdom needed to authorize measures that might well be, but need not invariably be, unconstitutional even with such involvement.").

er.[129] Why suppose that future presidents will cooperate in the enactment of a statute that would clearly eliminate these pretensions?

Because presidential powers are not what they used to be. During the early days of the Cold War, Congress was exceptionally profligate in its grants of presidential authority to arrest and detain suspects.[130] But these provisions were explicitly repealed over three decades ago, leaving President Bush an empty statutory cupboard after September 11.[131] This is the reason why he was obliged to depend exclusively on his bare constitutional authority as Commander in Chief to justify his extraordinary detention of Padilla and other American citizens. If the Supreme Court rejects these extreme claims, the President will have little choice but to return to Congress to seek appropriate authority.[132]

So a new framework statute isn't a pipe dream after all. To be sure, working out the details will require many hard, even tragic, choices. The larger terms of the grand bargain should be clear enough: The President gets strictly limited powers of preventive detention, but only in exchange for the key political, economic, and juridical safeguards needed to prevent the normalization of emergency power. Enactment of such a framework would mark a somber

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[129] factors or conditions constituting a 'national emergency,' the amendment was defeated on the grounds it would have limited severely the situations in which the President could 'national effect a emergency' and otherwise restrict his flexibility in responding spontaneously to crisis conditions."); *see also* 121 CONG. REC. 27,641-45 (1975) (documenting the rejection of an amendment that would have required an affirmative act on the part of Congress to extend, by concurrent resolution, an emergency beyond thirty days); Fuller, *supra* note 115, at 1469 (noting the rejection of an effort to require the President to consult with Congress prior to activating the NEA).

[130] *See, e.g.*, Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, § 102, 64 Stat. 1019, 1021 (repealed 1971).

[131] *See* Padilla v. Rumsfeld, 352 F.3d 695, 718-24 (2d Cir. 2003) (analyzing the current statutory foundations of presidential powers of summary detention), *cert. granted*, No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004) (surveying the history of the President's power to detain U.S. citizens and finding no statutes that today satisfy the requirement of legislative authorization for the detentions of Padilla and Yasser Esam Hamdi); *see also Developments in the Law - The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1317 n.133 (1972) ("In repealing the [Emergency Detention] Act, Congress sought to remedy the problem of excessive executive discretion by denying the President the power to undertake preventive detention without congressional authorization.").

[132] In principle, the framework statute should address the treatment not only of citizens, but of all legal residents. The Executive's willingness to accept a statute with such a broad scope will depend, however, on judicial willingness to defend the rights of resident aliens against presidential unilateralism.

At present, lower court decisions show the usual combination of deference and resistance to executive pretensions to extraordinary power. *Compare, e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (demonstrating extreme deference to the President with regard to American citizens allegedly found on or near the battlefield in Afghanistan), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696), Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (upholding the Justice Department's decision to withhold basic information concerning detainees caught up in post-September 11 investigations), *cert. denied*, 72 U.S.L.W. 3446 (U.S. Jan. 12, 2004), Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.) (denying federal habeas jurisdiction to hear the complaints of detainees at the Guantunamo Bay Naval Base), *cert. granted*, 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343), *and* Gherebi v. Bush, 262 F. Supp. 2d 1064 (C.D. Cal. 2003) (same), *with Padilla*, 352 F.3d 695 (rejecting unilateral presidential power to detain American citizens as enemy combatants), *and* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (granting habeas jurisdiction over detainees at the Guant~namo Bay Naval Base).

The scattered judgments of the lower courts serve as highly unreliable predictors for the crucial Supreme Court judgments that will decisively shape our jurisprudence

moment in the history of the Republic, but one that future generations may come to see as a landmark in the preservation of our fundamental freedoms.

C. CONSTITUTIONAL QUESTIONS

Even if such a compromise were wise, would it be constitutional? The existing framework statute does not raise serious problems, but only because the NEA is so unambitious. In contrast, the compromises needed for the new framework raise very fundamental issues. On the one hand, my proposal contemplates the limited suspension of the writ of habeas corpus. Thus, detainees who are innocent of all crimes may be held for forty-five or sixty days without an effective judicial remedy.[133] On the other hand, my supermajoritarian escalator requires an assessment of the extent to which the Constitution allows Congress to change the rules of the legislative game. These two issues may seem very different on the surface, but appearances are deceiving. Before elaborating the linkage, it is best to consider them one at a time.

1. Suspension of Habeas Corpus

The Constitution contemplates the suspension of the Great Writ in "Cases of Rebellion or Invasion [when] the public Safety may require it."[134] The history behind these phrases is not very revealing. When Charles Cotesworth Pinckney introduced the suspension problem at the Constitutional Convention, he proposed that the writ "should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months.[135] This provoked Gouverneur Morris .to suggest the formulation that ultimately appeared in the text.[136] The Morris proposal clarified the notion of "urgent occasions"[137] by limiting them to "rebellion or invasion,"[138] but failed to include anything like Pinckney's twelve-month sunset provision. Madison's notes do not explain why Morris excluded the sunset, nor is it clear that the Convention actually debated the issue. The entire matter arose at a late stage and did not receive the serious treatment it deserved.[139] The deficiency was not cured in the course of the

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[133] I prefer to confront the suspension issue directly, rather than distort current doctrine by suggesting that preventive detention might pass muster under some ancient doctrines that have long since been consigned to the dustbin of history.

[134] U.S. CONST. art. I, § 9, cl. 2.

[135] This is how the provision read when it came to the floor for debate on August 28, 1787. *See* James Madison, Journal (Aug. 28, 1787) [hereinafter Madison, August 28 Journal], *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437, 438 (Max Farrand ed., rev. ed. 1966) [hereinafter CONVENTION RECORDS]. Pinckney had first introduced the subject on August 20, when his proposal was significantly different, providing that "[t]he privileges and benefit of the Writ of Habeas corpus [...] shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding […] months." James Madison, Journal (Aug. 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra,* at 340, 341. Pinckney revised his proposal before submitting the August 28 version. Most notably, he deleted the phrases "by the Legislature" and "and pressing" and filled in the number of months as twelve.

[136] Madison, August 28 Journal, *supra* note 135, *reprinted in* 2 CONVENTION RECORDS, *supra* note 135, at 438-39.

[137] *Id., reprinted in* 2 CONVENTION RECORDS, *supra* note 135, at 438.

[138] *Id*.

[139] *See* Francis Paschal, *The Constitution and Habeas Corpus,* 1970 DUKE L.J. 605, 610 ("The foregoing rec-

ratification debates. Speaking broadly, the Clause only provoked a serious debate about federalism: Given the powers of the individual states to suspend habeas, was it really necessary to grant a similar power to the federal government?[140] This issue pushed the problem of criteria to the periphery. If there was a serious debate about the meaning of "Rebellion" or "Invasion," it has been lost to history. Nevertheless, the record does contain one fascinating tidbit: The New York State Convention, as one of its proposals for additional amendments, did suggest a six-month termination clause.[141] While this gesture is vaguely encouraging for my own sunset provisions, the historical fragments simply do not support confident statements about Founding intentions.

Reflection on the text is more productive. Begin with the constitutional concept of "Invasion." The text does not speak in terms of a legal category like "war," but addresses a very

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ord [Madison's notes from the Constitutional Convention] is obviously incomplete, but it is all that we have."). Unfortunately, Paschal reads too much into the tea leaves when he interprets the Convention's adoption of Morris's text as a self-conscious rejection of Pinckney's sunset idea. *See id.* at 610-13. The record is silent, and we will never know whether Pinckney's idea was ignored in the Convention's haste to move on to other pressing matters.

[140] Each of the individual states established the writ of habeas corpus prior to the constitutional convention, *see* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 115 (1980), and there were already precedents for the states to suspend the writ in times of emergency, *id.* at 142. At the Convention, John Rutledge argued that this made a federal suspension power unnecessary. He did not "conceive that a suspension could ever be necessary at the same time through all the States." Madison, August 28 Journal, *supra* note 135, *reprinted in* 2 CONVENTION RECORDS, *supra* note 135, at 438. Anti-Federalists continued to make this argument during the ratification debates:

> As the State governments have a power of suspending the habeas corpus act in those cases, it was said, there could be no reason for giving such a power to the general government; since whenever the State which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power.

Luther Martin, The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia (1787), *reprinted in* 3 CONVENTION RECORDS, *supra* note 135, at 172, 213.

The Anti-Federalists had two major concerns. First, they worried that the Clause would enable the federal government to oppress the states. *See, e.g., Essay by Montezuma*, INDEP. GAZETTEER, Oct. 17, 1787, at 3, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 53 (Herbert J. Storing ed., 1981); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 249 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY]; Martin, *supra*, *reprinted in* 3 CONVENTION RECORDS, *supra* note 135; Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra*, at 422. Second, the Constitution never explicitly granted the federal government the power to issue writs of habeas corpus. As a consequence, Anti-Federalists feared that the Suspension Clause could be interpreted to support the broader suggestion that the Constitution granted implied powers as well as enumerated ones. *See, e.g.*, Letter from Brutus to New York Journal (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra,* at 528; George Clinton, Remarks at the New York Ratifying Convention (June 27, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra*, at 179; William Grayson, Remarks at the Virginia Ratifying Convention (June 16, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra,* at 1332; John Smilie, Remarks at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra*, at 392 (Merrill Jensen ed., 1976).

[141] *See The Recommendatory Amendments of the Convention of This State to the New Constitution,* COUNTRY J. & POUGHKEEPSIE ADVERTISER, Aug. 12, 1788, at 1, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 140, at 301, 302 (suggesting "[t]hat the privilege of the Habeas Corpus shall not by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress, next following the passing of the act for such suspension."). This proposed amendment was part and parcel of New York State's ratifying submission to the Continental Congress. *See* 18 DOCUMENTARY HISTORY, *supra* note 140, at 294-97.

concrete and practical problem: If invaders challenge the very capacity of government to maintain order, a suspension of the writ is justified when "the public Safety may require it." It is this challenge to effective sovereignty that makes the constitutional situation exceptional.

This is precisely the space that my proposal seeks to occupy. Events like September 11 are distinctive in destabilizing the citizenry's confidence in the sovereign's capacity to defend the frontiers, and my proposal is tailored to respond to the pervasive panic that will predictably ensue. On an instrumental level, the statute authorizes emergency dragnets that seek to remove key operators from the scene and thereby eliminate further "invasions." On a symbolic level, it reassures the citizenry that effective steps to counter the invasion are under way.

But this rationale only covers terrorist attacks, like September 11, involving invaders from abroad. Future cases may well require further reflection on the concept of "Rebellion," and how it differs from riots and mass disturbances. The crucial dimension is political self-consciousness. When a mob runs amok, looting and destroying, it may cause great damage and anxiety, but this does not amount to a rebellion unless mob leaders challenge the political legitimacy of the existing system. This is precisely the mark of the typical terrorist attack: The group does not merely blast innocent civilians, but "claims credit" for the attack and seeks to justify it by denouncing the government in power.

This distinguishes terrorism from mob violence, but perhaps "Rebellion" requires something more elaborate? Perhaps it requires the group to form an alternative government and proclaim its legitimate authority?

The history of the Clause does not support such a restrictive interpretation. The key precedent involves President Grant's suspension of habeas corpus in his effort to suppress the Ku Klux Klan in the postwar South. Congress authorized the President to suspend the writ, but it did not require him to assert that the Klan was trying to overthrow the government, much less form an alternative one. Under the statutory definition, it was enough to qualify as a rebellion if the Klan was "organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or *set at defiance* the constituted authorities of such State."[142] This formula from the Reconstruction era states the aims of modem terrorism with preternatural precision: Defiance of the authorities is the essence.

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[142] Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14 (emphasis added). The Act also contained a caveat, specifically that "the provisions of this section shall not be in force after the end of the next regular session of Congress." *Id.*, 17 Stat. at 15. The Ku Klux Klan can be seen as a prototype for modern terrorist groups; although it challenged state power, it never attempted to create an alternative government or proclaim itself as the legitimate political authority of the South. Instead, the Klan justified its actions as an attempt to defend the supposedly weak and defenseless class of oppressed Southern whites. Beginning in 1870, Congress passed a series of Enforcement Acts that authorized the President to suspend the writ of habeas corpus in disaffected areas and to use the army and navy to put down dangerous and illegal combinations or groups. President Grant employed the Enforcement Acts to put more than forty counties under martial law. In 1871, Grant suspended the writ of habeas corpus in portions of South Carolina. Hundreds of citizens were tried and convicted under the Enforcement Acts. *See* WILLIAM L. RICHTER, THE ABC-CLIO COMPANION TO AMERICAN RECONSTRUCTION, 1862-1877, at 198 (1996).
In suspending habeas corpus, President Grant did not claim that the Klan was going to overthrow Southern

There will be the inevitable line-drawing problems: How large a strike is necessary to make the constitutional case for a suspension? To qualify as an "Invasion," how much evidence of foreign involvement? To qualify as a "Rebellion," how much evidence of political defiance? Though congressional decisions deserve deference, the framework statute should expressly make the Supreme Court the final judge of these matters.[143] The existence of a gray zone, moreover, should be kept in mind as we turn to the second major constitutional challenge involved in my proposal for a tragic compromise: the construction of a phased escalation of the legislative majorities required to sustain emergency conditions.

2. Supermajorities?

Before exploring the problematic aspect of my proposal, begin with the unproblematic: Congress passes sunsets on a host of important matters, requiring future legislators to expose statutory solutions to full reconsideration before they can endure. My framework statute breaks no new ground in applying the same technique to the emergency context. If Congress can terminate key portions of the USA PATRIOT Act after four years,[144] it can automatically terminate emergency legislation after two months. The only serious constitutional question is whether the framework statute can insist that subsequent renewals require escalating supermajorities.

An answer requires us to interpret one of the text's great silences. Both British and colonial legislatures used simple majority rule when enacting statutes, and the Framers certainly supposed that majoritarianism would continue to operate as the basic operational test. But nothing in their text expressly requires this, and the Constitution famously contains a number of supermajoritarian provisions designed for special circumstances.[145] The question is

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governments, but explicitly availed himself of the expanded definition of "rebellion" created by the authorizing statute:

> [W]henever such combinations and conspiracies do so obstruct and hinder the execution of the laws of [the States] and of the United States [...] and [are] organized and armed, and so numerous and powerful as to be able by violence *either* to overthrow *or to set at defiance* the constituted authorities of [the States] and of the United States.

Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *reprinted in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 136, 136 (James D. Richardson ed., Washington, Gov't Printing Office 1896-1899) (emphases added). Grant continued:

> Whereas such unlawful combinations and conspiracies for the purposes aforesaid are declared by the act of Congress aforesaid to be rebellion against the Government of the United States [...] I, Ulysses S. Grant [...] do hereby declare that in my judgment the public safety especially requires that the privileges of the writ of *habeas corpus* be suspended, to the end that such rebellion may be overthrown.

Id. at 137.

[143] It is only reasonable, however, to expect the Court to pause for a while before making a final decision. *See supra* Section VII.A.

[144] *See* Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295.

[145] The text of the original Constitution contains seven supermajoritarian provisions. *See* U.S. CONST. art. I, § 3, cl. 6 (Senate impeachment trials); *id.* § 5, cl. 2 (expulsion of a member of either House); *id. §* 7, cl. 2 (override of a presidential veto); *id.* art. II, **§** 1, cl. 3 (two-thirds quorum of state delegations in the House for election of the President upon deadlock in the electoral college), *amended by id.* amend. XII; *id. §* 2, cl. 2 (Senate ratification of a treaty); *id.* art. V (proposal and ratification of a constitutional amendment); *id.* art. VII (ratification of the original Constitution by the states). Two more supermajoritarian provisions have been added by amend-

whether this list is exhaustive, or whether Congress can add more supermajoritarian rules by means of new framework statutes.

Over the last generation, the Court has looked skeptically upon congressional efforts to change the foundational rules for legislative enactment.[146] As a general matter, I think such skepticism is appropriate. When one Congress imposes a supermajoritarian rule, it not only binds itself, but it also makes it harder for future Congresses – with very different political majorities – to enact their will into law. Any effort by one momentary majority to shackle its successors raises serious legitimacy questions, and ones that have preoccupied me for a long time.[147]

Fortunately, there is something special about this case that permits us to avoid a large detour into these grand theoretical matters. Though the Constitution does grant Congress the power to suspend habeas corpus, the text makes it clear that this power is to be used only under exceptional conditions. This contrasts sharply with standard grants of legislative authority. For example, when the Constitution gives Congress the power of taxation, it contemplates its constant exercise, and it is textually neutral about the propriety of a very broad range of taxes.[148] Given the exceptional character of habeas suspension, the imposition of a supermajority rule should be viewed more sympathetically. It is not simply an effort by one congressional majority to make life more difficult for its political opponents when they come into power. Instead, the supermajoritarian escalator in the emergency statute should be viewed as the product of good faith interpretation by the Congress of its constitutional responsibilities to limit the suspension of habeas corpus to truly exceptional circumstances.

The supermajoritarian escalator seems especially appropriate where, as here, Congress will

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ment. *See id.* amend. XIV, § 3 (amnesty for rebels); *id.* amend. XXV, § 4 (presidential disability).

[146] The great case, of course, is *INS v. Chadha,* 462 U.S. 919 (1983), in which the Court struck down a "legislative veto" under the Presentment Clause.

[147] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, FOUNDATIONS]; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS].

[148] The Constitution does contain special rules that make it practically impossible to impose "direct" taxes. *See* Bruce Ackerman, *Taxation and the Constitution,* 99 COLUM. L. REv. 1 (1999). But this is merely a detail, which does not undermine the main point made in the text.

I use taxation as my example because, during the mid-1990s, I played a role in a campaign against an effort by House Speaker Newt Gingrich to require a supermajority vote of sixty percent for tax increases. *See* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich,* 104 YALE L.J. 1539 (1995) (presenting a letter endorsed by sixteen other law professors). I also participated as counsel in subsequent litigation initiated by members of the House of Representatives. *See* Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997). The majority of the *Skaggs* panel denied standing to the Representatives, but a strong dissenting opinion reached the merits and rejected the constitutionality of the new supermajority rule enacted by the House. *See id.* at 841 (Edwards, C.J., dissenting).

I have no inclination to abandon my previous position, but the present case is distinguishable for the reasons presented in the text. Of course, some scholars are more favorably inclined to supermajoritarian rules. They should find it particularly easy to adopt the argument presented here, though to the best of my knowledge, they have not considered the present problem explicitly. *See, e.g.,* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution,* 80 TEX. L. REV. 703 (2002); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal,* 111 YALE L.J. 1665 (2002). I suspect that my limited argument is also compatible with Jed Rubenfeld's more categorical defense of a majoritarian baseline in Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress,* 46 DUKE L.J. 73 (1996), but this is not entirely clear.

be exploring the linguistic periphery of the relevant constitutional provisions. I have been arguing that major terrorist attacks can satisfy the requirements of an "Invasion" or "Rebellion," but I do not suggest that these are easy cases. If Congress ever suspends the writ in response to terrorism, it will be occupying the borderlands of its constitutional authority. By insisting on a supermajoritarian escalator, Congress is taking a reasonable step to assure that the concepts of "Invasion" or "Rebellion" do not expand over time to cover more and more doubtful cases.[149]

When all is said and done, I do not wish to exaggerate my proposed statute's power to bind future Congresses. A framework statute is only a *statute,* and there is nothing to stop a later Congress from repealing it.[150] Suppose some unspeakable disaster strikes in 2020, and Congress responds by declaring an emergency within the framework established by the Emergencies Act of 2006, miraculously modeled on my proposals. As the supermajoritarian escalator increases to eighty percent, the motion for another extension of the emergency fails in the Senate by a vote of seventy-five to twenty-five. But the majority does not take its defeat easily. It issues a strident call to repeal the framework statute itself, and this time by a simple majority. Doesn't this majoritarian option transform my much-vaunted escalator into a joke?

Not at all. Despite the fifty-one-percent threshold, the attack on the framework statute will prove politically difficult. By hypothesis, the Emergencies Act was passed during calmer times in a self-conscious effort to keep postterrorism panic under collective control. The repeal effort will invariably raise profound questions in the public mind: Does the attack on the statute represent an escalating panic reaction that threatens the survival of liberal democracy? Senators and representatives who might vote enthusiastically for another two-month extension would think twice before destroying the very framework of emergency constitutionalism. Their final votes would be greatly influenced by the character of the larger public debate catalyzed by the repeal effort.

There can be no guarantees, of course. Perhaps, after much *Sturm und Drang,* the majority will choose to destroy the framework of emergency constitutionalism. But perhaps not – and if the statute manages to survive one or two political ordeals, it will become much more difficult for later majorities to destroy. By a curious paradox, the failed efforts to repeal the

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[149] For a more systematic exploration of Congress's role as a constitutional interpreter, though one that does not consider the problem under discussion, see Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

[150] Recently, Eric Posner and Adrian Vermeule have suggested that Congress not only has a broad power to create supermajority rules, but that the Constitution also allows it to entrench this decision by imposing a supermajority rule on any future Congress that wishes to repeal the supermajority requirement. *See* Posner & Vermeule, *supra* note 148. Adopting their position would permit a clean-cut solution to the puzzles presented in the following paragraphs. Unfortunately, I do not find their claims at all plausible. This is partly for reasons elaborated by Stewart Sterk, *see* Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003), and by John McGinnis and Michael Rappaport, *see* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003), and partly for reasons suggested by the more general constitutional approach I have elaborated in volumes one and two of *We the People, see* ACKERMAN, FOUNDATIONS, *supra* note 147; ACKERMAN, TRANSFORMATIONS, *supra* note 147.

framework will lead to its symbolic reaffirmation as a time-tested mechanism for regaining political equilibrium during periods of great stress. Or so one may hope.

Even if the repeal effort succeeds, the orgy of statutory destruction will play an important role when the entire matter comes before the Supreme Court. Recall the basic constitutional issue: Should a terrorist strike count as an "Invasion" or "Rebellion" sufficient to justify a suspension of habeas corpus? It is one thing for the Court to uphold an affirmative legislative judgment when made within a carefully controlled statutory framework. It is quite another to uphold Congress when it has broken free of such restraints and seeks to suspend the writ on a more sweeping and enduring basis. The broken framework, in short, should function as an urgent signal of the need to apply the judicial brake.

At the end of the day, neither the framework statute nor a gaggle of judges may save us from some future all-consuming panic. But surely the flame is worth the candle. We already have a framework statute, the National Emergencies Act of 1976 – painfully inadequate to be sure, but reflecting an increasing self-consciousness about the seriousness of the problem. Other countries, most notably Canada, are using framework statutes to grapple with terrorist emergencies in increasingly sophisticated ways.[151] This is not the time to call a halt.

IX. THE RACE AGAINST TIME

More than two years have passed since September 11, and no massive strike has devastated any world capital. Smaller attacks continue, reminding us that we are living on borrowed time. The question is not whether but when the next strike will occur, and whether we will use the remaining time for constructive purposes.

Constitutional thought has a role to play in our brave new world, but it proceeds at a deliberate pace. It takes time to imagine institutional alternatives, and more time to separate good proposals from bad ones, and more time to engage in a broad-based public discussion, and more time for farsighted politicians to enact a constitutional framework into law.

During all this time, the terrorists will not be passive. Each major attack may breed further escalations of military force, police surveillance, and repressive legislation. The cycle of terror, fear, and repression may spin out of control long before a political consensus has formed behind a constitution for an emergency regime.

But then again, we may turn out to be lucky. One or another leading Western nation may be graced with a political leadership that grasps the need for decisive action at a relatively early stage in the cycle of fear. A single country enacting a sensible framework can serve as a model and catalyze a wave of constructive change throughout the West.

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[151] *See supra* notes 75-78 and accompanying text.

In any event, constitutional thought has no choice but to develop through its own distinctive rhythms. Now is the moment to toss the ball onto the field of legal speculation and invite others to play the game.

Perhaps some good will come of it.

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DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER SEPTEMBER 11**

ABSTRACT

The deference thesis is that Congress and the judiciary should defer to the executive's policy judgments during national emergencies. Criticism of the deference theory draws on the analogy of the emergency room medical protocol to argue that emergencies call for rule-bound constraint of the executive rather than deference to it. However, this criticism rests on a misunderstanding of the tradeoff between rules and standards. This paper was proposed as an analysis of deference thesis and its criticism, it has been modified to cover the general issues regarding the thesis and how rules and standards are relevant for national emergencies, it draws upon on the question of how and when the rules applicable during emergencies should be developed and applied.***

INTRODUCTION

According to the "deference thesis," legislatures, courts, and other government institutions should defer to the executive's policy decisions during national security emergencies.[1] In

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[1] See ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY,

this Essay, I will address two criticisms of the deference thesis. The first argument, which has been developed most powerfully by Professor Stephen Holmes, is that rules dominate standards at moments of crisis.[2] An executive that is unconstrained, that is, not bound by rules, will make worse policy choices than an executive that is bound by rules.[3] This type of argument is usually made in the context of urging legislatures and courts to constrain the executive during emergencies.[4] Some commentators, however, doubt whether it is possible for legislatures and courts to constrain the executive during emergencies.[5] These doubts have led to a second argument that the executive should be bound by institutions within the executive branch such as (in the United States) the Office of Legal Counsel,[6] or through the construction of new institutions that review the executive branch's actions.[7] Both arguments criticize the deference thesis but propose different solutions. The first argument proposes that Congress and the judiciary give the executive less deference; the second proposes that officials within the executive branch give the President less deference. Thus, we can distinguish external constraints on the executive and internal constraints on the President.

Both arguments are flawed. The external constraints argument gets the normal analysis backwards: rules are better for routine, recurring situations. Although some emergencies are, in fact, routine, the type of emergency that calls for deference is not. The internal constraints argument, as normally presented, makes the fatal assumption that the President can be bound by his own agents against his own perceived interest, and relies on other questionable premises about the structure of government in the United States.

I. THE DEFERENCE THESIS

The deference thesis states that during emergencies the legislature and judiciary should defer to the executive.[8] It assumes that the executive is controlled by the President, but to the extent that the President could be bound by agents within the executive, the deference thesis also holds that those agents should follow the President's orders, not the other way around. In normal times, the three branches of government share power. For example, if the executive believes that a new, dangerous drug has become available, but possession of the drug is not yet illegal, the executive may not act on its own to detain and prosecute those who deal and use the drug. The legislature must first enact a statute that outlaws the drug. The execu-

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AND THE COURTS 15–16 (2007) [hereinafter POSNER & VERMEULE, TERROR IN THE BALANCE].

[2] Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 CALIF. L. REV. 301 (2009).

[3] Id. at 305, 354.

[4] This is a more general argument. For present purposes, however, I will consider it only in the context of external constraints.

[5] See Holmes, *supra* note 2, at 347–48; see also Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255 (1988).

[6] See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 32–34, 208 (2007).

[7] See BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 5–7, 10–12 (2010).

[8] See POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 1.

tive also depends on the legislature for financial appropriations and other forms of support. The executive also faces constraints from the courts. If the executive arrests drug dealers and seeks to imprison them, it must first obtain the approval of courts. The courts ensure that the executive does not go beyond the bounds of the new law, does not violate earlier-enacted laws that have not been superseded by the new law, and does not violate the Constitution.

In emergencies, the executive often will contemplate actions that do not have clear legislative authority and might be constitutionally dubious. For example, after September 11, the U.S. government engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens.[9] Many, if not all, of these actions would have been considered violations of the law and the U.S. Constitution if they had been undertaken against normal criminal suspects the day before the attacks. After September 11, both the legislature and the courts gave the executive some deference. The legislature gave explicit authorities to the executive that it had initially lacked;[10] the courts did not block actions that they would have blocked during normal times.[11] But neither body was entirely passive. Congress objected to coercive interrogation and did not give the executive all the authorities that it requested.[12] After a slow start, the courts also resisted some of the assertions the executive made. There is some dispute about whether this resistance was meaningful and caused the executive to change policy or merely reacted to the same stimuli that caused the executive to moderate certain policies independently.[13] In any event, no one disputes that the courts gave the executive a nearly free pass over at least the first five to seven years of the conflict with al Qaeda.

The deference thesis, then, can be strong-form or weak-form. This ambiguity has had unfortunate consequences for debates about post-September 11 legal policies. Few people believe that the courts should impose exactly the same restrictions on the executive during an emergency as during normal times. Indeed, doctrine itself instructs courts to balance the security value of a course of action and its cost to civil liberties, implying that certain actions might be legally justified to counter high-stakes threats but not to counter low-stakes threats.[14] Nor does anyone believe that the executive should be completely unconstrained.

The debate is best understood in the context of the U.S. government's post-September 11 policies. Defenders of these policies frequently invoked the deference thesis — not so much as a way of justifying any particular policy, but as a way of insisting that the executive should be given the benefit of the doubt, at least in the short term.[15] The deference thesis

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[9] See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 510–11 (2004) (describing detention of U.S. citizen without the filing of charges); Rebecca Cathcart, Immigration Officials Arrest 905 in California Sweep, N.Y. TIMES, May 24, 2008, at A15; David S. Cloud, Concerns Led to Revisions, Rumsfeld Says, N.Y. TIMES, Feb. 22, 2006, at A16 (describing United States use of coercive interrogation techniques); Carol J. Williams, Wiretap- ping Lawsuit May Have Its Day in Court, L.A. TIMES, Feb. 28, 2009, at A9.

[10] See, e.g., GOLDSMITH, *supra* note 6, at 208 (noting eventual congressional authorization of military commissions, interrogations, and warrantless electronic surveillance).

[11] See, e.g., Hamdi, 542 U.S. at 507 (permitting detention of an American citizen without a full criminal trial).

[12] See GOLDSMITH, *supra* note 6, at 208–09.

[13] See, e.g., Aziz Z. Huq, What Good is Habeas?, 26 CONST. COMMENT. 385, 401–05 (2010).

[14] See, e.g., Hamdi, 542 U.S. at 531–34.

[15] See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism,

rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats. The other branches lack expertise. Although they may have good ideas from time to time, and are free to volunteer them, the ability of the executive to respond to security threats would be unacceptably hampered if Congress and the courts had the power to block it to any significant degree.

Secrecy is an important part of the argument. Policymaking depends on information, and information during emergencies often must be kept secret. Congress and the courts are by nature and tradition open bodies; if they were to act in secret, their value would be diminished. Meanwhile, the argument continues, the fear of an out-of-control executive who would engage in abuses unless it was constrained by the other branches is exaggerated. The President has strong electoral and other political incentives to act in the public interest (at least, in the United States). Even if the executive can conceal various "inputs" into counterterrorism policy, it cannot conceal the "output" — the existence, or not, of terrorist attacks that kill civilians.

Thus, it was possible for defenders of the Bush Administration's counterterrorism policies to express discomfort with certain policy choices, while arguing nonetheless that Congress and the courts should not try to block executive policymaking for the duration of the emergency — at least not as a matter of presumption. Critics of the Bush Administration argued that deference was not warranted — or at least not more than a limited amount of deference was warranted, although again these subtleties often were lost in the debate—for a variety of reasons. I now turn to these arguments.

II. EXTERNAL CONSTRAINTS: THE PROTOCOL ANALOGY

A. MEDICAL PROTOCOLS

In an article published a few years ago, Professor Holmes uses the arresting image of the medical protocol as a device for criticizing the deference thesis — or, more broadly, the thesis that the executive should be "unconstrained" during emergencies. Holmes describes his own experience in an emergency room, where his daughter had been brought with a serious injury:

"At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter's medical chart. The first recited the words on the bag, 'Type A blood,' and the other read aloud from the file, 'Alexa Holmes, Type A blood.' They then proceeded, following a prepared and careful-

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118 HARV. L. REV. 2047 (2005); John Yoo, Unitary, Executive, or Both?, 76 U. CHI. L. REV. 1935 (2009) (book review).

ly rehearsed script to switch props and roles, the first nurse reading from the dossier, 'Alexa Holmes, Type A blood,' and the second reading from the bag, 'Type A blood'."[16]

To the layman, the repetitive actions of the nurses seem senseless. Why are they repeating themselves when the patient might die unless she receives the blood transfusion immediately? Surely, the nurses should depart from the script rather than follow it in a time of extreme medical urgency. Yet the protocol makes good sense. Experience has taught medical personnel that basic errors — the transfusion of the wrong blood — occur frequently, and that they can be avoided through the use of simple protocols. Although following the protocol uses valuable time, in practice the increased risk to the patient as a result of the loss of time is less than the risk caused by the errors that protocols are designed to prevent.[17]

The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than impro- vise. In this way, agents should be constrained.[18] This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter al Qaeda. Professor Holmes argues — although at times he hedges — that in fact the benefits of giving the President a free hand are zero: A constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong. Constraints both prevent executive abuses such as violations of civil liberties and ensure that counterterrorism policy is most effective.

B. RULES AND STANDARDS

The arresting medical protocol example helps clarify the tradeoffs involved, but it remains merely an illustration of the familiar rules versus standards tradeoff that has been a staple of the legal literature since time immemorial.[19] A rule is a norm that directs the decisionmaker to ignore some relevant policy considerations when deciding on a course of action; a standard is a norm that directs the decisionmaker to take into account all relevant policy considerations when deciding on a course of action. The familiar example is the speed limit. A sixty-mile- per-hour speed limit tells the driver that she does not face a legal sanction if she drives below sixty miles per hour, and that she does face a legal sanction if she exceeds that speed. A standard for example, "drive carefully" — tells the driver that she does not face a legal sanction if she drives carefully, but that she does if she drives carelessly. The standard, unlike the rule, directs the driver to take into account all relevant considerations — the weather, traffic congestion, her own skill and experience, the responsiveness of her car, and so on—when deciding how to drive.

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[16] Holmes, *supra* note 2, at 301–02.
[17] See id. at 302.
[18] See id. at 302–03.
[19] See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 155–58 (tent. ed. 1958). The speed limit example below is drawn from this text. Id.

A skilled and experienced driver who drives at sixty-five miles per hour on a clear day on an empty, straight road poses little threat to anyone, and most people would regard her driving as careful. Thus, under the standard she could not be held liable, although under a rule she would be. Meanwhile, an in- experienced driver who drives sixty miles per hour on a congested, dangerous road, at night, in bad weather, would probably be regarded as careless. He would be held liable un- der a standard but not under the rule. It is in the nature of standards that we cannot be sure that he would be held liable; it depends on the biases, intuitions, and experiences of the legal decisionmaker.[20] Thus, we say that applying standards involves high decision costs. It is in the nature of rules that we can easily tell whether the driver would be held liable or not, but only because the legal decisionmaker is forced to ignore relevant moral and policy considerations that otherwise com- plicate evaluation. Rules are under- and over-inclusive; by de- sign, they cause error.

These considerations lead to a basic prescription.[21] Rules should be used to govern recurrent behavior, and standards to govern unusual behavior. Experience teaches us that if drivers obey certain rules (such as speed limits), the risk of accidents is greatly reduced, although judicious choice of (sometimes complex) rules ensures that error costs are low. When legislatures enact new rules, they can invest a great deal of time and effort determining the optimal rules, because the cost of the rules are then spread out over many instances of the behavior that the legislatures seek to regulate. Yet rules frustrate us because there always seems to be some new, unanticipated case where the application of rules leads to an injustice. The speed limit rule should not apply to the parent who rushes a badly injured child to the hospital. And there are many cases where rules can too easily be gamed. Tax rules, no matter how intricate, can be exploited: Lawyers set up tax shelters that evade the purpose of the rules. Congress reacted to this problem initially by creat- ing ever more complex rules, but eventually trumped them with a standard that prohibited bad faith evasion of the tax laws.[22]

The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving. Indeed, one can think of traffic norms as complex rules with standards — where there are apparently bright-line rules (drive under sixty miles per hour) that are subject to muddy standards (unless there is an emergency).

Medical protocols are just one more example of a choice along the rules-standards continuum. The nurses Professor Holmes describes follow a protocol that ensures that they do not use the wrong blood in a transfusion. Likewise, doctors are instructed to clear the windpipe before staunching the wound.[23] These protocols, like the speed limit, reflect generalizations from past medical experience. Delaying the blood transfusion is less risky than permitting

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[20] See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L.J. 557, 588 (1993).
[21] Id. at 621–23.
[22] See Steven A. Dean & Lawrence M. Solan, Tax Shelters and the Code: Navigating Between Text and Intent, 26 VA. TAX REV. 879 (2007); see also Ellen Aprill, Tax Shelters, Tax Law, and Morality: Codifying Judicial Decisions, 54 SMU L. REV. 9 (2001).
[23] Holmes, *supra* note 2, at 305.

only one nurse to check the blood type. Letting the blood flow from the wound is less risky than leaving the windpipe blocked. In the absence of protocols, medical practitioners may misjudge the situation, or panic, or allow themselves to be distracted by irrelevant factors (the goriness of the wound calls out for attention while the blocked windpipe is hidden). It is important to see that these rules, like the speed limit, are mere generalizations, and in individual cases the generalizations might be wrong. The patient dies because of the delay before the transfusion, yet we instruct medical practitioners to follow the rules because otherwise they are likely to make worse or more frequent errors.

That uncompromising rules produce high error costs supports adopting sensible exceptions to rules. Indeed, medical practitioners may violate protocols. The reasons are obvious. Consider Professor Holmes's insistence that the rule "always wash your hands" is unalterable and written in stone.[24] This clearly cannot be the case. Suppose that, in the midst of an emergency involving a patient with a serious trauma, the staff is informed that the tap water is tainted, it is discovered that a patient has a rare allergy to the only soap available in the emergency room; or, for that matter, the emergency room runs out of soap. Common sense (which is just the application of the standard, "help the patient at minimal risk to him and oneself") will tell the doctors and nurses to deviate from the protocols when they clearly interfere with medical necessity. If they did not, they would be sued, and rightly so. The protocols, like many rules, turn out to be presumptions, which may be over- come by the press of events. That is why medical professionals are so highly trained; if one could really treat patients by following algorithms, one would not need doctors who have vast training and experience that supplies them with judgment and the ability to improvise.[25]

In sum, medical protocols, like rules, provide a valuable service by simplifying the decision-making process at times of high stress, but, like rules, they unavoidably produce wrong results if they are not applied sensitively. Usually, when the stakes are high, rules and protocols create presumptions, but the decisionmaker is free to violate the presumption if circumstances suggest that that the presumption is based on factual assumptions that turn out not to be true in the particular set- ting in which the decisionmaker finds himself.

C. Rules and Standards During Emergencies

I now turn to the bulk of Professor Holmes's argument. Professor Holmes is right to identify confusion about the nature of emergency, and it is useful to distinguish a rule-development stage — which often but not always takes place before the emergency — and a rule-application stage — which takes place during the emergency. Holmes argues that during the emergency, rule application should be controlled by protocol, so the executive does not

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[24] See Holmes, *supra* note 2. at 309.

[25] This problem is famous from labor relations. Workers who seek to pressure employers without going on strike (which in certain cases may be illegal) have frequently adopted the strategy of "work-to-rule," where they follow the rules or protocols of their job in a literal-minded way rather than use them as presumptions. The result is that they become extremely unproductive while maintaining deniability, though no one is fooled. See generally Karl O. Moene, Unions' Threats and Wage Determinations, 98 ECON. J. 471 (1988).

need (much) discretion; while pre-emergency, rule development does not need to be rushed and secret, so the executive can collaborate with Congress. The first problem with this argument is that during the emergency one can follow protocols rather than exercise discretion only if the emergency is the same as earlier emergencies. This was not the case for September 11, though it may be the case for other security threats. The second problem is that the rule-development stage cannot always take place during normal times. For example, September 11 required not only an immediate response to the newly discovered threat but also the development of new rules under the shadow of that threat. Those rules needed to be developed quickly and (for the most part) secretly, and these exigencies limited the ability of Congress to contribute. A final point is that Holmes ignores an important dimension of the problem: the difference between agents, who in theory can merely follow rules and protocols, and principals, who cannot. The Bush Administration did in fact recognize the value of protocols and used them frequently; it just did not apply them to itself.

1. Two Concepts of Emergency

Professor Holmes makes a valuable point, often neglected in the literature, that there are two distinct phases for addressing emergencies[26] — what I will call the stage of rule development and the stage of rule application. As we will see, the two stages can run together, but conceptually they are distinct. The rule-application stage comes when the patient is on the gurney. The doctors follow the protocols in the course of helping the patient. The rule development stage occurs earlier. Someone must decide what the protocols should be. Someone had to invent the rule that two nurses must check the blood type and that doctors should unblock the windpipe before staunching wounds — just as the legislature must determine the speed limit before drivers comply with it and police enforce it.

We might use the word "emergency" to refer to the time of rule application. As Professor Holmes points out, however, for the medical professionals, what seems like an emergency to a layperson is not an emergency at all.[27] They just apply the protocols that have been drilled into them, no different from assembly-line workers. Under this definition of "emergency," it is hard to sup- port the deference thesis and those who argue that the executive must be unconstrained during emergencies. If doctors are con- strained during emergencies, why not executives?

If we refer instead to the time of rule-development, reliance on the idea of emergency seems even less appropriate. The doc- tors who develop emergency room protocols do not do so un- der time pressure but at their leisure. They also can do so in a large body, so as to take advantage of the perspectives of many different people, and in public, so that all stakeholders have a say. The executive can as well, the argument goes. When the executive determines the rules that will govern the response during a terrorist attack, it does so in advance, and it can, in- deed should, do so in consultation with Congress and subject to judicial constraint.

Thus, executive deference is unnecessary. During rule development, there is no emergency,

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[26] Holmes, *supra* note 2, at 309–10.
[27] See id. at 309.

and so the executive, Congress, and the courts can collaborate in developing appropriate rules that will govern during emergencies. They can do so openly, deliberately, and slowly, with full respect for constitutional norms. During rule application, there is an emergency, but the executive can merely follow the rules or protocols that were developed during the rule-development stage. Thus, in the rule-application phase, executive discretion is unnecessary. It follows that deference to the executive is also unnecessary. During rule development, Congress has no reason to defer to the executive. During rule application, courts also have no rea- son to defer to the executive, but should instead insist that the executive comply with the rules.

2. Rule Application

Let us consider the stages in reverse order. We already have addressed some of the problems with Professor Holmes's argument from protocols. Rules are seldom as bright-line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule-governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then making contact with the gunman, and so on. Some officers will be given very simple rule-governed tasks ("don't let anyone cross this line"). But the rules quickly give out. Every hostage-taker is different, and the most highly trained police officers will be given a great deal of discretion to deal with him and to make the crucial decision to use force. But even these types of threats are simple compared with the scenario that opened up on September 11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of al Qaeda were in the United States, what their plans were, what resources were at their disposal, what their motives were, or how much support they had among American Muslims.[28] Protocols were worthless because nothing like the attack had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor.) The government could not follow rules; it had to improvise subject to a vague standard — protect the public while maintaining civil liberties to the extent possible. Improvise it did — instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale.[29]

For the rule-application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debating policy, and voting on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read.[30] For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they

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[28] President George W. Bush, Address to the Nation (Sept. 11, 2001) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/ 20010911-16.html).

[29] But if al Qaeda launched another attack on U.S. soil tomorrow, the argument for deference would be weaker, because more is known about al Qaeda today than ten years ago.

[30] As occurred with the TARP law. See Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. CHI. L. REV. 1613, 1625 (2009).

would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard and halt executive actions that, in the courts' view, violated the standard described above — protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have information about the nature of the threat.[31] Courts can demand this information from the government, but the government will not give it to them because the government fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). Moreover, judges are inexperienced in national security unlike the specialists in the executive branch.

None of this is to deny Professor Holmes's basic point that protocols can be valuable. Indeed, the Bush administration was as protocol-happy as any other institution. Consider the protocols for interrogation which were disclosed in a leaked OLC memo:

"In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated."[32]

So not even the Bush administration disagreed with Professor Holmes's argument that lower-level officials faced with recurrent situations should be subject to protocols where they are appropriate. In this sense, Professor Holmes's argument misses the mark entirely. The problem was not so much that protocols were not used; the problem, if it was a problem, was that they were developed, modified, and revised solely by the executive branch. This leads to the question of rule development.

3. Rule Development

Recall that Professor Holmes says that the argument that the executive can act more swiftly than Congress and the courts does not apply to the rule-development stage because the crisis is past even if the threat remains.[33] But if we think back to September 11, the crisis did not end on that day, even if the immediate threat of violence did. It was reasonable to believe that other plots had been put into action and that violence could erupt at any moment. As the weeks and months passed, these concerns faded. But it also became clear that al Qaeda had sympathizers in the United States, and that these people might strike at any time, possibly on

[31] See Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361, 1405–08 (2009).
[32] Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, to John Rizzo, Acting Gen. Counsel, CIA, Re: Interrogation of al Qaeda Operative, 3–4 (Aug. 1, 2002) [hereinafter Interrogation Memorandum], available at http://s3.amazonaws.com/nytdocs/docs/151/151.pdf.
[33] See Holmes, *supra* note 2, at 310.

their own initiative, or volunteer for training that would later make them considerably more dangerous. The anthrax scare brought home the possibility that al Qaeda could use even more deadly weapons than hijacked airplanes. Every day brought another revelation of a hole in border security. Thus, it was a matter of urgency to develop new rules that would address the threat.

The government maintained the confidentiality of a constant supply of intelligence, for fear of exposing sources and methods.[34] Meanwhile, the government was already taking secret actions (many of which were later exposed), including tapping cell phone calls, tracking monetary transfers, and infiltrating terrorist organizations.[35] Optimal policy going forward necessarily depended on secrecy. Policy *X*, which might seem plausible given publicly available information, might turn out to be unnecessary, redundant, or even counterproductive in light of secret information about the activities of al Qaeda or secret Policy *Y*. Thus, although Congress could no doubt give useful advice, it seems hard to believe that it could have contributed much to the development of counterterrorism tactics, any more than it can contribute to military tactics (where to invade, where to bomb) during a regular war.

A set of constitutional protocols normally applies to the making of policy and its embodiment in government action. The executive must act with Congress, and it must respect the courts; it cannot act by itself. But these rules apply to normal times, and the medical protocol analogy is of little use here. Medical protocols do not need to be secret because patients have no incentive to game them — unlike terrorists who benefit greatly from knowing the methods that the United States uses to spy on them, capture them, and interrogate them. Furthermore, medical protocols are not based on secret information; they are based on widely available medical research. Thus, when medical researchers develop medical protocols at the rule development stage, they can do so publicly without undermining the purpose of developing the protocols in the first place.

By contrast, rules governing counterterrorism operations must be developed mostly in secret, and mostly on the basis of secret information. Hence the importance of keeping rule development as much as possible within the only branch that possesses the power to act against security threats. Those rules, of course, would constrain only lower-level executive agents, not the executive itself. There is an obvious reason for this; if the rules are wrong, they need to be corrected. It would similarly make little sense for doctors to develop emergency room protocols that could never be changed in the future as new technologies and new health problems rendered the old protocols worthless.

Professor Holmes argues that the executive becomes subject to groupthink and other decision-making pathologies when it makes policy itself rather than with Congress and other agents.[36] But the same point can be made about executive decision-making during regular

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[34] See GOLDSMITH, *supra* note 6, at 81 (noting that officials were limited in their ability to reveal legal positions to avoid disclosing counterterrorism measures).
[35] See Jon D. Michaels, All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror, 96 CALIF. L. REV. 901, 904 (2008) (discussing wiretapping and money-transfer tracking programs).
[36] Holmes, *supra* note 2, at 344–47.

wars, when the risk of groupthink (if it is a risk) is tolerated because of the need for secrecy.

If Congress and the judiciary cannot constrain the executive during emergencies because of the problem of secrecy, then perhaps this problem can be overcome by putting the source of constraint in the executive branch itself, where norms of secrecy prevail.

CONCLUSION

Professor Holmes's medical protocol analogy does not provide any reason for doubting the deference thesis. Rules are valuable in many settings, including emergencies, but it does not follow from that observation that courts and legislatures rather than the executive should create and enforce the rules. Each institution has specific advantages; the executive's advantages are salient during emergencies.

The notion that the executive can be constrained by its own components is a paradoxical idea and has little to recommend it. In the end, someone must have discretion to respond to unforeseen events, and in the U.S. system that role has been given to the President. The theory that the OLC or some similar office within the executive branch could constrain the President rests on a confusion between rational self-binding, which the President may, albeit with difficulty, engage in, and external constraint, which the President will resist.

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STATES OF EMERGENCY*

Essay from Cass R Sunstein "Can It Happen Here?"

ABSTRACT

War and emergency talks are attractive to presidency. "War on terror" that US has conducted clearly demonstrates what threats stem from unilateral power. Although terrorist attacks since 9/11 have not resulted in the deaths of thousands, attackers demonstrate their media savvy by choosing symbolically central locations for their assaults. These incidents have sufficed, however, to catalyze draconic revisions in antiterrorist legislation in both Britain and France. It is not hard to imagine what might happen when mass death is a real threat. Global pandemic of 2020 has made this fantasy a reality. Governments around the world are applying emergency powers. The foregoing essay by Bruce Ackerman, excerpted from another leading legal scholar's Cass R. Sunstein's book is an opinion on what is necessary to sustain the similar power of the US president, how sufficient the judiciary is and what role the political branches play in creating a democratic system of checks and balances.**

STATES OF EMERGENCY

There is something about the presidency that loves war talk. Even at its most metaphorical, martial rhetoric allows the president to invoke his special mystique as commander in chief, calling the public to sacrifice greatly for the good of the nation. Perhaps the clarion call to pseudo-war is just the thing the president needs to ram an initiative through a reluctant Congress. Perhaps it provides rhetorical cover for transforming the courts into rubber stamps. Or perhaps it serves as a grand occasion for ego gratification.

** This abstract was drafted by the Editor of the Journal of Constitutional Law. Adaptations if any to the paper were made by the Editor of the Journal of Constitutional Law, neither Authors, nor HarperCollins Publishers are responsible for the present publication.

Or all of the above. We are not dealing with a constitutional novelty. Almost two centuries ago, Andrew Jackson was famously making war on the Bank of the United States, indulging in legally problematic uses of executive power to withdraw federal deposits from The Enemy, headed by the evil one, Nicholas Biddle.

To be sure, the "war on terrorism" isn't as much of a stretch, say, as the "war on poverty" or the "war on drugs." Classical wars traditionally involve sovereign states attacking one another's territorial integrity, and it may seem a small matter to expand the paradigm to cover non-state actors engaging in similar assaults: is there really such a big difference between December 7th and September 11th?

The panic-driven responses of the Bush and Obama administrations only begin to suggest the dangers of equating the two events. The torture chambers at Guantánamo and elsewhere have largely been reserved for foreigners. Yet the presidential embrace of war talk could have also legitimated the sweeping detention, torture, and summary execution of countless Americans on the massive "watch lists" compiled by the security services. This danger is not merely hypothetical – there have been notorious cases involving citizens and legal residents. Nevertheless, their actual number has been relatively small.

I hardly wish to minimize the terrible crimes against humanity committed by the American government over the past fifteen years. Worse yet, its utter failure to make a serious effort to hold the responsible officials accountable only serves to compound our national disgrace. Nevertheless, we should recognize that this dark chapter in American history has not yet led to an all-out presidential assault on liberal democratic life in the United States itself.

There may be worse yet to come. Recent terrorist incidents have not involved the deaths of thousands, as at the Pentagon and Twin Towers, or even hundreds, as at the Oklahoma City Federal Building. They have involved small numbers of deaths inflicted by a small number of attackers – whose weapons are primitive, but who often demonstrate their media savvy by choosing symbolically central locations for their assaults. These incidents have sufficed, however, to catalyze draconic revisions in antiterrorist legislation in both Britain and France, as well as increasingly tough talk by Europe's sensible centrist politicians. What to expect, then, of Donald Trump on the terrible day when Americans learn that five or ten or twenty thousand have been slaughtered in some new disaster?

Make no mistake: we live in an age in which smaller and smaller numbers of terrorists can buy more and more destructive weapons at lower and lower prices. The state is losing its monopoly on mass destruction, and it will be impossible to preempt all future attacks. This is not, I should emphasize, a problem that has anything in particular to do with the threat posed by ISIS or its counterparts. There are 330 million people living in America, and it takes only a few hundred extremists with a few million dollars to obtain weapons that could devastate a major American city. The question is not whether our security services will preempt some of these attacks, - they will. It is whether they will prevent all of them - they won't.

We may be lucky. When the tragedy occurs, the sitting president may turn out to be a sober defender of our democratic traditions. But as *The Federalist Papers* remind us,

“[e]nlightened statesmen will not always be at the helm,” and we would be wise to seize the moment and consider how we might create a new statutory framework to control a full scale presidential assault on our liberal democratic tradition.

From this perspective, the transparent demagogy of President Trump may well represent the last realistic political opportunity to take this question seriously. Within a few short months, Trump's terrorist-tweeting has already generated a bipartisan congressional initiative by Senators Jeff Flake and Tim Kaine to frame a new Authorization for Use of Military Force that would allow the House and Senate to reassert their constitutional authority over unilateral presidential war-making abroad. While this is important, it is no less important to frame an appropriate congressional response to the prospect of the abuse of presidential powers at home.

It would be a mistake for Congress to rely on the Supreme Court to do the job for it. Suppose President Trump responds to a massive attack with a massive roundup of domestic terrorists. It would probably take a year or so before a legal challenge would reach the Supreme Court. Based on the Justices' performance since September 11, it isn't at all clear how they would respond: while a majority has sometimes upheld basic principles of due process in dealing with terrorism, they have failed to fashion effective modes of relief for obvious victims of injustice. Worse yet, they have never formally overruled their infamous World War II decisions – *Korematsu* only one of several – upholding the long-term detention of Japanese-Americans by the commander in chief. Unless they do so, it will be tough to forge effective constraints on the president's power to make war on his fellow citizens. Despite these caveats, it is too soon to dismiss the Court as a paper tiger. Depending on the course of future appointments, the majority may well emerge as a significant force at its moment of truth.

But I wouldn't count on it. Paradoxically, Trump's huffing and puffing, together with his demagogic behavior, may jolt serious Democrats and Republicans in Congress to take seriously the prospect of a draconian response to the next major attack – and seize the moment to consider a new statutory framework that would increase the chance of preserving our democracy before it is too late. The new initiative should explicitly reject the claim, made most explicitly by Jay Bybee and John Yoo for the Bush administration, that the commander in chief has the unilateral power to make never-ending war on the home front. It should instead create a new system of checks and balances based on a different, and commonsense, notion: that a major terrorist attack will predictably create a "state of emergency," warranting extraordinary measures over the short term – so long as decisive steps are taken to guarantee that they won't endure beyond the period of their obvious necessity.

These basic principles are already a familiar part of the legal terrain. The newscasts constantly report declarations of emergency by governors responding to natural disasters – and though this is less familiar to ordinary citizens, presidents regularly declare emergencies in response to foreign threats. The challenge is to adapt these principles to deal with the distinctive features of the problem raised by the increasing ease with which relatively small terrorist networks can obtain weapons of mass destruction.

First and foremost, the new framework should impose strict limits on unilateral presidential

power. While President Trump has forsworn daily briefings, he will undoubtedly hear his national security advisor let him know of the latest looming threats by terrorist networks lurking somewhere in this great land of ours. These threats should never be enough for him to trigger a state of emergency. Instead, only an actual attack on the scale of September 11 creates the distinctive "second-strike problem" that justifies extraordinary action.

The problem is simply this: On the one hand, the major attack has taken the security services by surprise – otherwise, they would have seized the key actors in the terrorist network. On the other hand, the fact that the terrorists have managed to pull off a major attack vastly increases the risk that they are in a position to follow up with a second attack unless decisive steps are taken immediately to preempt the threat. Putting both hands together, the emergency rationale goes like this: Given the ignorance of the security forces, the only way to minimize the chances of a second strike is to detain terrorist suspects on the basis of reasonable suspicion, rather than the higher standards required for criminal prosecution. If they must convince judges that they have probable cause to target particular terrorists, this will give the network enough time to strike again and escalate the panic further – eroding public confidence that the crisis will ever end.

The commonsense case for a state of emergency is, then, compelling. But it comes with a commonsense caveat: there is every reason to expect that the security agencies will systematically abuse the extraordinary powers they have been granted. Since they are unable to pinpoint the key actors in the terrorist network, they will be obliged to rely on “watch lists" they have prepared before the event, which identify tens of thousands of Americans who have been identified as potentially involved in problematic activities. As a consequence, the only way they can disrupt the terrorist network in the short term is to use these watch lists as the basis for massive detentions. Yet while such a step might – or might not – be effective, only one thing is clear. Most of the prisoners behind bars will be entirely innocent.

Given these obvious risks, Trump should be authorized to act unilaterally only for the time it takes for Congress to consider whether a "state of emergency" is truly justified-say, a week or two. Unless the president can persuade a majority of both chambers to approve his initial declaration, the state of emergency should immediately lapse. Even if they do approve, this vote should be valid for only two months – and the matter should then return to Congress to determine whether conditions have sufficiently returned to normal to require the security services to establish that they have “probable cause" for each and every one of their arrests. On this second round of reappraisal, moreover, it shouldn't be enough for a simple majority to go along with Trump's demands for further antiterrorist sweeps. The president must persuade a supermajority of 60 percent of both chambers that extraordinary measures are justified. This supermajoritarian threshold should continue to increase with further presidential requests. When Trump returns after two more months, he must gain a 70 percent majority; and he will confront an 80 percent threshold every time he returns for a further renewal.

This "supermajoritarian escalator" puts the ongoing exercise of emergency power in control of the minority party in Congress – precisely the group that will be especially alive to the

danger that Trump will use his extraordinary powers to further his political ambitions. Especially as election day approaches, they will be especially skeptical of presidential requests for renewal – unless, of course, the terrorist network is continuing to wreak havoc. Rather than depending on judges as the principal check on the abuse of presidential power, the new statute should rely on the political branches to play a central role in creating a democratic system of checks and balances.

Yet courts will also have critical oversight functions to play. As we have seen, the emergency statute should authorize short-term detention on reasonable suspicion, without insisting on probable cause. But given the probable innocence of most of those swept into prison, this is only acceptable on a short-term basis. Once a suspect has been held, say, for forty-five-day period, the security services must inform the court of the reasons why their targets have acted suspiciously, detailing the data provided in their "watch lists" with appropriate provisions for confidentiality. It should never be enough simply to lock a person up on the arbitrary hunch by somebody – or – other in the security hierarchy. Similarly, the statute should provide for an independent civilian authority, supervised by the courts, to prevent torture and other inhumane techniques at detention centers.

But it is not enough to rely on proactive measures by judges and civilian watchdogs during the emergency. The statute should also grant financial compensation to everybody whose fundamental rights have been abused by the emergency sweeps. This includes, most obviously, detainees who have been thrown into jail on the basis of an arb include also the mass of individuals whose names have appeared on "watch lists" but who are never charged with a crime in connection with the attack. They have not only sacrificed their personal liberty for the public good. While trapped in overcrowded cells, they may well have lost their jobs and generated traumatic anxiety among their families and friends. This is fundamentally wrong. The statute should instead provide all innocent victims of the emergency a weekly payment of $3,000 – three times the median weekly income for an American family. This award will not only respond to their material losses; it will also help them deal with the stigma that will otherwise be associated with the fact of their incarceration. By paying them generous compensation, the government will be demonstrating that these victims of the watch list should not be treated as presumptive terrorists by the rest of society – but that they have instead been called to sacrifice their personal lives as part of a broader effort by American citizens to sustain their republic at a challenging moment in its history.

I FIRST PROPOSED A “STATE OF EMERGENCY" REGIME IN THE IMMEDIATE aftermath of September 11 – and my initiative generated a broad-ranging discussion that has had some practical impact both in the US and abroad.[1] But more recently, serious attention to the problem has declined, and this essay is an attempt to revive the conversation. Much

[1] See, e.g., Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113, no. 5 (March 2004): 1029-1091; David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," *Yale Law Journal* 113, no. 8 (June 2004): 1753; Laurence Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," *Yale Law Journal* 113, no. 8 (June 2004): 1801; Bruce Ackerman, *Before the Next Attack* (New Haven: Yale University Press, 2006); Bruce Ackerman, *The Decline and Fall of the American Republic* (New Haven: Yale University Press, 2010), 166–74.

that was said during the first round of debate remains important – clarifying critical issues of statutory design as well as fundamental questions dealing with the place of emergency legislation in the larger constitutional order. But I hope that I have persuaded you that recent events have made it more, not less, imperative to confront these questions once again.

In placing emergency legislation back on the action agenda, we will be redeeming a tradition that goes back to the Philadelphia Convention. In writing the original Constitution, the founders paid very little attention to the nature and scope of fundamental rights – leaving it to the first Congress to fill this gap with a series of amendments. But they made an exception when it came to states of emergency – which they treated in a fashion that parallels the dualistic approach taken here. On the one hand, Article One insists that the guarantee against arbitrary arrest and conviction is indeed foundational; on the other, it recognizes that emergency conditions may justify temporary limitations. To put this dualism in the founders' words: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

The eighteenth-century language invites us to reflect more deeply on our twenty-first-century problem. As I have emphasized, it is of high importance to limit emergency powers to those occasions on which a terrorist organization has successfully engaged in an attack on the scale of September 11. In terms of the founding text, I suggest that such an act of organized violence represents a modern-day version of “rebellion" – in which the extremist group, either secular or religious, seeks to overthrow the very foundations of our constitutional democracy. Our twenty-first-century challenge is to respond in the spirit of the founders – and adapt the principles of checks and balances so that emergency powers may be invoked when “the public safety may require it.” At that same time, we must prevent the exercise of extraordinary authority from destroying the very constitutional order the declaration of emergency purports to protect.

Are we equal to the challenge?

Clarisa Long

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PRIVACY AND PANDEMICS*

ABSTRACT

The beginning of 2020 marked an unexpected turn for the world, the global pandemic of COVID-19 has affected every aspect of life. It has also created an unprecedented opportunity for governments to justify the expansion of their surveillance and collection of data. The foregoing essay, which was first published in Faculty Publications at Scholarship Archive of the Columbia Law School focuses on two types of data collection – governmental mass collection of nonanonymized location data and state-collected nonanonymized data on people's health and immunity status. Several countries have applied one or both practices and it is relevant to look into them with legal perspective. Georgia is one of the countries, that also uses technology for the purpose of locating the possible contacts of the virus infected people, thus making the comparative analysis extremely relevant locally as well as globally.**

INTRODUCTION

The current COVID-19 pandemic has created an unprecedented opportunity for governments to justify post-pandemic expansion of their surveillance and collection of data on citizens and noncitizens alike. The data collected could take multiple forms, but I will focus on two specific types of data collection.

The first is governmental mass collection of nonanonymized cell phone location data showing the physical location of people in a community without the consent of the surveilled, who are not suspected of any crime. The second is state-collected nonanonymized data on people's health or immunity status. Both of these raise fundamental information privacy and

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health privacy concerns. Both would require amendments of existing laws and regulations, or passage of sweeping new laws, in order to pass legal muster. Post-pandemic, governments may try to do exactly this.

In the information privacy community the relevant unit of data is "personally identifiable information," or PII.[2] In the health context, the relevant unit of data is called "protected health information," or PHI.[3] In times of national or global emergency, such as a pandemic, governmental collection of PII or PHI that in normal times would be either prohibited by law or questionable under social norms may become normalized and desirable to combat the spread of disease.

I. DATA COLLECTION IS DESIRABLE

In times of pandemic, extensive data collection, either of individuals' physical location or health status, may be desirable from a public health perspective.

Evidence is emerging that countries that tested for COVID-19 early and monitored the movements of their citizens had better outcomes, both as to infection rates and as to death rates, than countries like the U.S. that did not engage in early testing and monitoring. In the *New York Times*, Anna Sauerbrey says, "Early and persistent testing helps. And so does tracking people."[4] *The Atlantic* magazine argues, "More transmissible and fatal than seasonal influenza, the new coronavirus is also stealthier, spreading from one host to another for several days before triggering obvious symptoms. To contain such a pathogen, nations must develop a test and use it to identify infected people, isolate them, and trace those they've had contact with. That is what South Korea, Singapore, and Hong Kong did to tremendous effect. It is what the United States did not."[5]

II. LOCATION DATA AND COVID-19

Governments around the world are collecting location and tracking data on people in order to stem the spread of COVID-19.

Contact tracing of infected individuals can be done by using cellphone location data. For ex-

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[1] See Paul M. Schwartz & Daniel J. Solove, The PII Problem: Privacy and a New Concept of Personally Identifiable Information, 86 N.Y.U. L. Rev. 1814 (2011) (stating that "PII is one of the most central concepts in privacy regulation. It defines the scope and boundaries of a large range of privacy statutes and regulations.").

[3] See HIPAA Guidelines, 45 C.F.R. § 160.103 ("*Protected health information* means individually identifiable health information.") (emphasis in original).

[4] Anna Sauerbrey, "Germany Has Relatively Few Deaths From Coronavirus. Why?," New York Times, March 28, 2020, available at https://www.nytimes.com/2020/03/28/opinion/germany-coronavirus.html [last accessed on May 25, 2020] (arguing that aggressive early testing and tracking individuals' locations was responsible for the relatively death rate from COVID-19 infection in Germany).

[5] Ed Yong, How the Pandemic Will End, The Atlantic (March 25, 2020), available at https://www.theatlantic.com/ health/archive/2020/03/how-will-coronavirus-end/608719/ [last accessed on May 25, 2020].

ample, government agencies in South Korea used "surveillance-camera footage, smartphone location data and credit card purchase records to help trace the recent movements of coronavirus patients and establish virus transmission chains," according to the New York Times, whereas Israel is looking to use previously-collected cell phone location data[6] to attempt contact tracing of individuals potentially infected with COVID-19.[7] Local governmental authorities in Italy are reported to be using citizens cellphone location data to analyze the degree of compliance with official lockdown orders.[8] The government of Delhi has started tracking cellphone location data of people who are thought to be infected with COVID-19 and who have been quarantined at home.[9] More governments may choose to do the same.

In the U.S., Google -- a private sector entity, not the government -- says it will be publishing cell phone location data, but this data is not tied to any one single person. According to CNN, Google has "said the findings are 'created with aggregated, anonymized sets of data from users who have turned on the location history setting, which is off by default' in Google's services."[10]

Such monitoring and tracking of individuals' movements, especially in the early stage of a pandemic, can be effective, even dramatically effective in slowing the spread of the virus. It is even more effective and can be targeted when nonanonymized. In such public health emergencies, data collection of PII can have enormous social benefits. But under existing U.S. law, however, the U.S. Supreme Court has ruled that *nonanonymized* collection of cell phone location data by governmental entities is a search protected by the Fourth Amendment of the U.S. Constitution, and as such, requires a warrant supported by probable cause.[11]

In the lengthy and usually-unread terms of service that cell phone customers have to sign, cell phone users give wireless companies the ability to collect and sell their location data.[12] Private sector firms that currently collect cell phone location data generally take the position

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[6] See David M. Halbfinger, Isabel Kershner & Ronen Bergman, "To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data," New York Times, March 16, 2020, available at https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html [last accessed on May 25, 2020].

[7] Ed Yong, How the Pandemic Will End, The Atlantic (March 25, 2020), available at https://www.theatlantic.com/ health/archive/2020/03/how-will-coronavirus-end/608719/ [last accessed on May 25, 2020].

[8] Id. (citing https://milano.corriere.it/notizie/cronaca/20_marzo_17/coronavirus-gallera-in-lombardia-1640- decessi- 16620-positivi-e3875744-686d-11ea-9725-c592292e4a85.shtml?refresh_ce-cp). [last accessed on May 25, 2020].

[9] See Swati Gupta, "At Least One Indian Territory is Tracking the Phones of Suspected Coronavirus Patients," CNN, April 1, 2020, available at https://us.cnn.com/world/live-news/coronavirus-pandemic-04-01-20-intl/index.html [last accessed on May 25, 2020] (quoting Delhi chief minister Arvind Kejriwal as saying "We have made a decision and with help from the police, people who have been asked to quarantine themselves at home, we will track their phones over the past few days to ensure that they were staying at home.").

[10] Amy Woodyatt, Google to release your location data to help fight coronavirus pandemic, CNN Business, April 3, 2020, available at https://www.cnn.com/2020/04/03/tech/coronavirus-google-data-sharing-intl-scli/index.html [last accessed on May 25, 2020].

[11] See Carpenter v. U.S., 138 S. Ct. 2206 (2018) (holding that "The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.").

[12] Shannon Liao, "New York City Might Ban Wireless Companies From Selling Your Location Data," CNN Business, July 24, 2019, available at https://www.cnn.com/2019/07/24/tech/nyc-cellphone-location-data-sale-ban/index. html [last accessed on May 25, 2020].

that the data are anonymized,[13] although some privacy experts believe that even anonymized cellphone location data, because it is often collected with a high degree of granularity, can be used to identify individuals.[14] But app creators could write clauses into their Terms of Service saying that users consent to their nonanonymized cell location data being shared with federal and state authorities, law enforcement or otherwise, in the absence of a warrant (The degree to which clauses that require individuals to consent in advance to waive their Fourth Amendment rights, in exchange for receiving cellphone services, are themselves enforceable is another matter.)

III. SURVEILLANCE MAY BECOME PERMANENT

Once surveillance and data collection mechanisms become established, however, they could become permanent.

The threats to information privacy, whether in the collection of nonanonymized cellphone location data or of health status, arise after the pandemic is over. Once the mechanisms to gather and use PII and PHI have been established to meet a public health emergency, they may well prove difficult if not impossible to dismantle. And governments face every temptation to leave surveillance protocols in place. History teaches us that once established, governmental powers of surveillance of, and data collection on, its citizens and residents is unlikely to be voluntarily scaled back.[15] And history has also taught us that once data is collected for one purpose it is difficult to prevent it from being used for other unrelated purposes.

IV. IMMUNITY STATUS DATA COLLECTION

In addition to collecting PII in the form of cell phone location data, governments might also collect PHI in the form of COVID-19 test results or immunity results.

An idea that is increasingly gaining traction, both in the U.S. and elsewhere, is that of creating a nonanonymized database of names of individuals who have recovered from the virus and are thus presumably immune. Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases (NIAID) at the National Institute of Health and the U.S.

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[13] See, e.g., Donie O'Sullivan, "How the Cell Phones of Spring Breakers Who Flouted Coronavirus Warnings Were Tracked," CNN, April 4, 2020, available at https://www.cnn.com/2020/04/04/tech/location-tracking-florida-coronavirus/index.html [last accessed on May 25, 2020].

[14] See, e.g., Jennifer Valentino-Devries, Natasha Singer, Michael H. Keller & Aaron Krolik, "Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret," New York Times, Dec. 10, 2018, available at https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html [last accessed on May 25, 2020].

[15] See, e.g., the Foreign Intelligence Surveillance Act Amendments of 2008, 50 U.S.C. § 1881-81g (2020), which have been extended several times since their creation, despite "sunset" provisions written into the legislation.

government's top infectious-disease official, has said he believes that such "conferred immunity" protects against reinfection.[16]

Germany, for example, is contemplating a proposal to issue "immunity certificates" that would allow individuals who had tested positive for antibodies to the virus to leave lockdown.[17] According to the German newspaper Der Spiegel,[18] researchers at the Helmholtz Centre for Infection Research in Braunschweig, Germany "want to send out hundreds of thousands of antibody tests over the coming weeks that could allow people to break free of the lockdowns."[19] Italy is reported to be considering a similar strategy.[20]

For such health care measures to work and to avoid fraud, however, governmental authorities would need to keep a database, similar to driver's license databases, on who holds an immunity certificate and who does not. That means collecting and recording, in *non-anonymized form*, the PHI of individuals and their antibody status regarding COVID-19. This is necessary in order to minimize the opportunity for fraud by people eager to return to work. (Another concern that has been raised surrounding immunity certificates is "whether people might deliberately seek to get infected in order to – hopefully – recover and go back to work," which could undermine the flattening of the infection curve that governments and health experts are trying to achieve by requiring social distancing.[21]) And such a database would provide a juicy target for hackers and trolls.

Immunity databases in times of pandemic – and even post-pandemic – could provide public health officials with a powerful tool to fine-tune quarantine efforts. Large scale quarantines can be disastrous for the economy even as they are necessary from a public health perspective. Premature lifting of quarantines and stay-at-home orders could allow COVID-19 to return with a vengeance. Yet at the same time, the longer people are out of work and non-essential businesses are shut down, the harder it will be for them to recover financially and for the economy to turn around. Allowing people who have obtained immunity to COVID-

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[16] See Joshua M. Epstein, Are We Already Missing the Next Epidemic?, Politico Magazine, March 31, 2020, available at https://www.politico.com/news/magazine/2020/03/31/coronavirus-americafear-contagion-can-we-handle-it-157711 [last accessed on May 25, 2020].

[17] See Daniel Wighton & David Chazan, "Germany Will Issue Coronavirus Antibody Certificates to Allow Quarantined to Re-Enter Society: Researchers to Test Thousands for Immunity As Berlin Plans Exit Strategy for Pandemic Lock Down," The Telegraph, March 29, 2020, available at https://www.telegraph.co.uk/news/2020/03/29/germany-will-issue-coronavirus-antibody-certificates-allow-quarantined/ [last accessed on May 25, 2020].

[18] See Sauerbrey, note 3 *supra*.

[19] See Adam Bienkov, "Germany Could Issue Thousands of People Coronavirus 'Immunity Certificates' So They Can Leave the Lockdown Early," Business Insider (March 30, 2020), available at https://www.businessinsider.com/coronavirus-germany-covid-19-immunity-certificates-testing-social-distancing-lockdown-2020-3 [last accessed on May 25, 2020].

[20] See Jason Horowitz, "In Italy, Going Back to Work May Depend on Having the Right Antibodies, New York Times," April 4, 2020, available at https://www.nytimes.com/2020/04/04/world/europe/italy-coronavirus-antibodies.html?action=click&module=Top%20Stories&pgtype=Homepage. [last accessed on May 25, 2020].

[21] Laura Smith-Spark, "Is an 'Immunity Certificate' the Way to Get Out of Coronavirus Lockdown?," CNN, April 3, 2020, available at https://www.cnn.com/2020/04/03/health/immunity-passport-coronavirus-lockdown-intl/index. html [last accessed on May 25, 2020].

19 to return to work would allow economies around the world to recover faster, and at least as importantly, would allow individuals to regain their own financial equilibria.

V. CHALLENGES TO INFORMATION PRIVACY

This raises important issues and challenges to information privacy and health privacy law.

Post-pandemic, how can federal, state, and local governments thread the needle of mounting effective and timely responses to a fast-moving public health crisis, while simultaneously protecting (or at least not worsening) existing legal protection for PHI? Existing state-level models may provide a template for further exploration.

Several states have laws requiring medical professionals to provide health risk information to potentially affected individuals through contact tracing.[22] For instance, New York State's HIV Reporting and Partner Notification law (HIVRPN) law allows for contact tracing of cases of AIDS, HIV related illness or HIV infection.[23] It requires that "[d]octors and labs must report to the Health Department the names of persons with HIV infection, HIV illness and AIDS" and "must also report the names of sex and needle-sharing partners of people who test HIV positive that are known to the doctor."[24] The HIVRPN has been described as "one of the most aggressive statutes to protect the public […o]n a spectrum that puts individual patient confidentiality on one end and public health protection on the other."[25] Although not without controversy, the HIVRPN has been lauded in the affected communities as a public health success,[26] and the New York State Department of Health takes the information privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA) into account when enforcing state public health laws.[27]

Post-pandemic, one key issue that must be addressed head on, should governmental data-

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[22] See, e.g., N.Y. Pub. Health Law § 2130: Communicable diseases; control of dangerous and careless patients; commitment.

[23] See N.Y. Pub Health § 2133: Contact tracing of cases of AIDS, HIV related illness or HIV infection.

[24] N.Y. State: Dep't of Pub. Health, What Is Partner Notification?, available at https://www.health.ny.gov/ diseases/ aids/providers/regulations/reporting_and_notification/about_the_law.htm#quest2 (stating that "[d]octors and labs must report to the Health Department the names of persons with HIV infection, HIV illness and AIDS" and "must also report the names of sex and needle-sharing partners of people who test HIV positive that are known to the doctor").

[25] Jacquelyn Burke, Discretion to Warn: Balancing Privacy Rights with the Need to Warn Unaware Partners of Likely HIV/AIDS Exposure, 35 B.C. J.L. & Soc. Just. 89, 105 (2015).

[26] See N.Y. State Dep't of Health Aids Inst., The Impact Of New York's HIV Reporting And Partner Notification (Hivrpn) Law: General Findings Report 5 (2006), available at https://www.health.ny.gov/diseases/aids/providers/regulations/reporting_and_notification/docs/impactreport.pdf [last accessed on May 25, 2020] (showing that "[a] study of 132 partners of HIV- positive individuals located through health department notification found that 87% thought the Health Department did the right thing in telling them about their exposure, and 92% thought that the Health Department should continue to notify persons exposed to HIV.").

[27] See Office of Mental Health, New York State, "Information for Consumers: Privacy Rule," available at https://omh.ny.gov/omhweb/hipaa/consumers/privacy/ [last accessed on May 25, 2020].

base(s) of immunity status be created at the federal or state level, is obtaining informed consent from each of the individuals in such a database to share their nonanonymized testing results with state authorities. This might seem like a no-brainer -- who would not mind the state knowing their antibody status if it meant they could return to work earlier and be released from stay-at-home orders? -- but the underlying issues and implications are not so simple. Given how little the scientific community knows about COVID-19, it is not clear that even a positive test for antibodies is a guarantee of immunity. Similarly, false positive tests -- in which a person inaccurately tests positive for the antibody, and therefore appears immune when in fact they are not -- could undermine the effectiveness of an immunity database. And because all viruses mutate, individuals' immunity status would have to be updated periodically as the virus mutates over time, so reporting immunity status would likely not be a one-time event.

Like HIV, COVID-19 is a transmissible virus that can be readily diagnosed, and for which early detection and treatment are clearly beneficial. Because immunity, whether from vaccination or from successful recovering from a COVID-19 infection, would be viewed as a desirable status, this does not present some of the concerns of social or economic discrimination that a database of results like HIV-positive status present. Even so, such a database of non-anonymized PHI, available to an array of government actors, represent a departure from existing laws and norms regarding the treatment of PHI.

The least controversial route, from a privacy perspective, would be to create a voluntary opt-in government database of people with immunity status, with no penalties for declining to opt in. But as a public health response to monitoring seropositive status after the current pandemic, voluntary self-reporting of non-anonymized immunity status would be only a partial solution. Public health responses that rely on voluntary cooperation of mass numbers of people, some of whom may not have cellphones or even internet access, will not be as effective as mass mandatory self-reporting.[28]

Legal rules and social norms regarding state collection of nonanonymized PHI might not necessarily stop with COVID-19. COVID-19 is not the only transmissible virus. The slope from non-anonymized COVID-19 immunity databases, to governmental collection of non-anonymized information about individuals' immunity status to other viruses, then to their vaccination records, then to their public health wellness generally, is a slippery one indeed.

[28] The Associated Press, School Shutdowns Raise Stakes of Digital Divide for Students, New York Times, March 30, 2020, available at https://www.nytimes.com/aponline/2020/03/30/us/ap-us-virus-outbreak-digital-divide.html [last accessed on May 25, 2020].

CONCLUSION

These issues will not be going away.

There will always be a next pandemic at some point in the future, if not of COVID-19 then of some other infectious agent. The challenges that pandemics present to information privacy are not going to go away or lessen any time soon. After the current pandemic is over, law-makers, public health experts, and information privacy advocates need to address these issues and balance privacy protection with public health concerns so that countries can be better prepared for the next pandemic, whenever it may come.

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RELATIONSHIP BETWEEN THE PROCESS OF EMERGENCY-RELATED NORM-MAKING AND THE PRINCIPLE OF THE LEGAL STATE IN LIGHT OF A STATE OF EMERGENCY IN GEORGIA DECLARED ON 21 MARCH 2020

ABSTRACT

Principle of the Rule of Law is a cornerstone of the Georgian Constitution and organization of the government in general. It determines the way in which government should be conducted. A key aspect of this principle is separation of powers between the branches of the government, which creates a balance among them and ensures exercise of the people's power in a democratic, constitutional and lawful manner. At the same time, there are cases where it is impossible to preserve the said balance. During a state of emergency and martial law, the President of Georgia has the power to issue decrees that have the legal force equal to that of organic laws, thereby substituting the legislature to a certain extent. This paper addresses the issue of norm-making in a state of emergency (based on a Georgian example) and its relationship with the principle of a rule of law state. In particular, in explores whether a decree can completely substitute the law and what should its scope be; which standards are being pulled back and what the rules that should be unalterably observed during the process of norm-making are. In addition, it seeks to analyze whether it is possible to define and impose liability on grounds of the decree, and whether or not a decree can delegate certain powers to the Government of Georgia.

INTRODUCTION

Under the Constitution of Georgia, Georgia is a legal state. State authority shall be exercised based on the principle of the separation of powers, within the ambit of the Constitution and law. The Constitution of Georgia shall be the supreme law of the State. General rules for the adoption and issuance of legislative and other normative acts, and their hierarchy, shall be determined by the organic law.[1]

[1] Constitution of Georgia, Article 4, paragraphs 1, 3 and 4, 1995.

The government consists of legislative, executive and judiciary branches. This separation "represents the cornerstone of a modern democratic state" and "is closely linked to the principle of a legal state".[2] In addition, the government is limited by human rights and the law, and, in particular – by the supreme law – the Constitution. Constitutional principle of the separation of powers does not have a merely declaratory character – it aims at providing an efficient constitutional legal mechanism of checks and balances.[3]

"The Parliament of Georgia is the supreme representative body of the country that exercises legislative power, defines the main directions of the country's domestic and foreign policies, controls the activities of the Government within the scope established by the Constitution, and exercises other powers".[4] It is the prerogative of the Parliament to perform one of the main functions of the State – lawmaking, which is the most important form of state's activities, aiming to create, amend, make additions to or invalidate norms.[5]

"The Government of Georgia is the supreme body of executive power that implements the domestic and foreign policies of the country. The Government shall be accountable and responsible to the Parliament of Georgia".[6] "Judicial power shall be independent and exercised by the Constitutional Court of Georgia and the common courts of Georgia".[7] The Constitutional Court of Georgia conducts constitutional control, while the common courts administer justice.[8]

Besides these three branches, the Constitution of Georgia attributes an important role to the President of Georgia, which "[i]s the Head of the state of Georgia and is the guarantor of the country's unity and national independence, as well as the Supreme Commander-in-Chief of the Defense Forces of Georgia".[9] Due to the fact that currently Georgia is a country with a parliamentary model of government, the President is not considered to be part of the executive branch and exercises only those powers that are directly specified in the Constitution.

Notwithstanding the fact that lawmaking falls within the authority of the legislature, it is not conducted only by the Parliament – formal and material understandings of the law are different. In a formal sense, only Parliament can enact laws. As for the material meaning, - it encompasses all legally binding, abstract and general legal acts that are in force in the country.[10] First and foremost, the latter implies subordinate normative acts. Under Article 7 (9) of the Law of Georgia "On Normative Acts", "subordinate normative act may be adopted (issued) by an adopting (issuing) body (official) within its (his/her) scope of authority only for the implementation of a legislative act". The difference between formal and material concepts of the law is demonstrated by the fact that interference within the protected scope of

[2] Judgment of the Constitutional Court of Georgia №1/7/1275 dated 2 August 2019 in the case of "Alexandre Mdzinarashvili v. National Communications Commission of Georgia", para. II-25.
[3] *ibid.*
[4] Constitution of Georgia, Article 36.
[5] ბეჟაშვილი ლ., საკანონმდებლო ტექნიკა, თბილისი, 2012, 15.
[6] Constitution of Georgia, Article 54.
[7] Constitution of Georgia, Article 59 (1).
[8] Constitution of Georgia, Article 59 (2) and 59 (3).
[9] Constitution of Georgia, Article 49 (1) and 49 (2).
[10] ხუბუა გ., სამართლის თეორია, თბილისი, 2004, 140.

fundamental rights can only be permitted by the law (in a formal understanding of the word).[11]

Although the principle of separation of powers does exist, the Constitution of Georgia envisages circumstances, under which temporary changes might be made to this principle. Under Article 71 of the Constitution of Georgia, martial law might be declared "[i]n cases of an armed attack, or a direct threat of armed attack on Georgia", while a state of emergency can be declared "[i]n cases of mass unrest, the violation of the country's territorial integrity, a military *coup d'état*, armed insurrection, a terrorist act, natural or technogenic disasters or epidemics, or any other situation in which state bodies lack the capacity to fulfil their constitutional duties normally". In both cases, it is impossible to govern a state in accordance with the order established during the peacetime. Under such circumstances, the Constitution gives the President an authority to issue decrees that have the legal force of the organic law upon the recommendation of the Prime Minister. Hence, it is clear that the ordinary balance established by the principle of separation of powers is being obstructed and important powers – although with some constraints – are concentrated within the hands of the President. Under these circumstances, it is important to analyze how the government powers are exercised and how its crucial part – norm-making – is being conducted; which standards are pulled back and which are the rules that are to be observed unalterably, regardless of the existence of a state of emergency or martial law.

I. DECREE OF THE PRESIDENT OF GEORGIA – THE LAW

Under Article 71 (3) of the Constitution of Georgia, "[d]uring martial law or a state of emergency, the President of Georgia shall, upon recommendation by the Prime Minister, issue decrees that have the force of the organic law, and which shall be in force until the martial law or the state of emergency has been revoked. A decree related to the authority of the National Bank shall be issued with the consent of the President of the National Bank. A decree shall enter into force upon its issuance. A decree shall be submitted to the Parliament immediately. Parliament approves the decision upon its assembly. If Parliament does not approve the decision following a vote, it shall become null and void".

Article 7 (1) of the Organic Law of Georgia "On Normative Acts" distinguishes between legislative and subordinate normative acts, and it refers to their combination as "legislation

[11] *Supra* n 10. In this regard, the Constitutional Court of Georgia has provided an interesting definition: "In certain cases, provisions of the Constitution establishing fundamental human rights and liberties require that interference within fundamental rights be conducted through adhering to a particular legal form. According to the Constitutional Court of Georgia, the Constitution of Georgia establishes a strict constitutional legal framework for the exercise of powers of the government, - including legislative powers. Constitutional legal limitations to the legislative branch implies that each legislative act shall be in compliance with the requirements of the Constitution of Georgia, both from the formal and material point of view. Thus, regardless of the content of the regulation, non-observance of material requirements results in unconstitutionality of the rights-restricting norms". See Judgment of the Constitutional Court of Georgia №2/5/700 dated 26 July 2018 in the case of "LLC 'Coca-Cola Bottles Georgia,' LLC 'Castel Georgia,' and JSC 'Water Margebeli' v. the Parliament of Georgia and the Minister of Finance of Georgia", para. II-10.

of Georgia". Article 7 (2) (b) of the same law, a decree of the President of Georgia is a legislative act.

Accordingly, both from the Constitution and from the Law "On Normative Acts", it follows that decrees of the President of Georgia are law, even though they are not formally adopted by the lawmaker – the Parliament of Georgia.[12] Addressing this issue is of a practical importance, since it will answer the following question: whether or not Presidential decrees issued during a state of emergency or martial law can substitute legislative acts adopted by the Parliament? In order to answer this question, we need to look into the text of the Constitution, which will be done in II and III Chapters of this paper (including, - whether or not a Presidential decree can regulate any aspect of public life or establish liability).

It should be noted that, notwithstanding the fact that, in accordance with the above-said provisions, decree is formally deemed to be a legislative act, its ability to operate as a law can be doubtful due to the following question: should we consider a decree to be the law, taking into account that it is issued by the President and the Parliament does not follow the same procedure as it does in case of enactment of laws? As a standard rule, a bill has to go through different stages and procedures (for instance, conclusions of the Legal Department of the apparatus and the Budgetary Office of the Parliament are mandatory, as well as the decision of the Bureau regarding the commencement of the process of considering the bill. Leading committees and other committees shall review the bill, and it should be adopted at the plenary session of the Parliament after voting on it three times). Meanwhile, a decree can be issued immediately and "voting on it is conducted without prior hearing in the committee and other relevant procedures".[13] Notwithstanding the simplicity of the procedure, the aforesaid should not be perceived as something questioning legal force of a decree, as the law, because this is based on flexibility of government branches, which has to do with extraordinary situations – a state of emergency or martial law.[14] All of this is necessary in order to minimize negative consequences of the critical situation and to ensure timely return to the normal constitutional order. Otherwise, under the different interpretation, if Presidential decrees did not have the same legitimacy as the law, it would have been impossible to use them for the purposes of restraining human rights, in which case the legislature would have been required to engage into the law-making process, which would defeat the purpose of declaration of a state of emergency or martial law.

[12] Even though a decree is issued upon the recommendation of the Prime Minister and is further approved by the Parliament, formally, it is the President who is a lawmaker. Thus, he/she is a "temporary lawmaker".
[13] See Rules of Procedure of the Parliament of Georgia, Article 101 (1) and 83 (2).
[14] According to the accommodation approach, whenever there is an emergency, the power shall be concentrated within the government and constitutional rights shall be limited in order for the executive to be able to react in response to the threat. See: Posner, Eric A. and Vermeule, Adrian, Accommodating Emergencies (September 2003). U of Chicago, Public Law Working Paper No. 48, 1.

II. SCOPE AND CONTENT OF A DECREE

As it has been mentioned before, Article 71 (3) of the Constitution of Georgia envisages the possibility for the President, upon the recommendation of the Prime Minister, to issue a decree having the same legal effects as the law. In addition, the Constitution of Georgia, Organic Law of Georgia "On Normative Acts of Georgia", and the laws on "Martial Law" and on "State of Emergency" do not really specify the issues which can be regulated by a decree of the President of Georgia. The only time we see a reference to the content of a decree and determination of the scope of the powers of the President is related to cases of restrictions of human rights listed in Article 71 (4) of the Constitution of Georgia (human rights as guaranteed under Chapter 2 of the Constitution), which can be restricted through the presidential decree.

Taking into account the aforesaid, it can be pointed out that, similar to laws, Presidential decrees issued during a state of emergency can regulate any sphere of the public life, among others, - through enacting rules that differ from the existing legislation.[15] For instance, under the Presidential Decree №1 of 21 March 2020, restrictions prescribed by Article 31 (3) and (4) of the Budget Code of Georgia were suspended for the duration of the state of emergency.[16] The Decree also envisages the possibility of establishing liability, which will be addressed in more detail in III Chapter.

In addition, it should be emphasized that in cases of imposing restrictions on human rights provided in Chapter 2 of the Constitution, such restrictions can be allowed only with respect to provisions directly specified in the Constitution. For instance, among the rights restricted through the Presidential Decree №1 of 21 March 2020 were: Article 13 (human liberty), Article 14 (freedom of movement), Article 15 (rights to personal and family privacy, personal space and privacy of communication), Article 18 (rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority), Article 19 (right to property), Article 21 (freedom of assembly) and Article 26 (freedom of labor, freedom of trade unions, right to strike and freedom of enterprise). In addition, due regard needs to be paid to those provisions of the Decree

[15] This view is supported by the systemic reading of the Constitution, and its Articles 71 (3) and 71 (4) in particular. Article 71 (4) defines the scope of restriction or suspension of human rights, while Article 71 (3), without any clarifications and reservations, states that "[d]uring martial law or a state of emergency", "decrees that have the force of the organic law [are being issued]". Accordingly, if fundamental human rights are not being restricted or suspended, it is only Article 71 (3) that applies. It should also be noted decrees are preceded by recommendations of the Prime Minister, and is followed by its approval by the Parliament. Accordingly, - both the executive and the legislative branch participate in issuing the decree, which to some extent, secures the existing model of parliamentary government and ensures that the President will not be able to go beyond his/her competencies when regulating certain aspects of the public life. In addition, under Article 7 (1) (d) of the Constitution, "determining and introducing the legal regime of a state of emergency and martial law [falls within the exclusive competence of the supreme state authorities of Georgi"a, and the President, in the light of Articles 49, 52 (1) (i), and article 71, during the emergency and martial law, with participation from the Government and the Parliament, is such an authority during a state of emergency.

[16] For example, under Article 31 (3) distribution of funds between the programs of spending organs should not exceed 5% of yearly assignations of the spending organ. Thus, during a state of emergency, now this distribution can be more than 5%.

that give the Government an authority to impose certain restrictions with respect to the said rights, - some questions arise in this regard, and they will be addressed in IV Chapter.

III. INTRODUCING AND IMPOSING LIABILITY BASED ON THE DECREE

Under Article 8 of the Presidential Decree №1 of 21 March 2020, "Every natural and legal person shall be obliged to adhere to the regime of the state of emergency. Violations of the regime of the state of emergency determined by this Decree and the ordinance of the Government of Georgia shall result in administrative liability - a fine of GEL 3 000 for natural persons, and GEL 15 000 for legal persons. Where the same act is committed repeatedly by a natural person who is subject to an administrative penalty, it shall result in criminal liability, in particular, imprisonment for a term of up to 3 years; and where the same act provided for by this paragraph is committed repeatedly by a legal person, it shall result in a fine, with deprivation of the right to carry out activities, or by liquidation and a fine".

To what extent is it possible to establish liability by the virtue of a Presidential Decree? Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Article 15 of the International Covenant on Civil and Political Rights envisage the *nullum crimen sine lege* principle, which is one of the most important principles of criminal law, - providing that there is no crime without the law.[17] The first paragraph of Article 7 of the Convention stipulates that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". Similarly, Article 15 of the ICCPR provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". In addition, under Article 8 (b) and (i) of the Organic Law of Georgia "On Normative Acts", issues relating to legal liability and application of enforcement measures as well as criminal legislation can be determined only by legislative acts of Georgia. Taking into account that Chapter I of this paper established that a decree represents a legislative act, also according to the III Chapter, unless the issue concerns the restriction of constitutionally safeguarded human right, it can, - like laws, - regulate any aspect of public life: the question on whether liability can be introduced by a decree, should be affirmatively responded. The same can be said with respect to the *nulla poena sine lege* principle, which is also affirmed by the afore-mentioned provisions of the Convention and the Covenant.[18]

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[17] მერაბ ტურავა, სისხლის სამართლის ზოგადი ნაწილის მიმოხილვა, თბილისი, 2013, 24.

[18] In general, under the case law of the European Court of Human Rights, while referring to the "law", Article 7 of the Convention implies not only codified laws, but also legal precedents. In addition, the Court always defines the "law" from a material, rather than a formalistic point of view. Thus, it also implies acts that might be lower in the hierarchy than laws (See Kafkaris v. Cyprus, Application №21906/04, 12 February 2008, para. 139). In addition, under the term "law", we should take into account domestic laws in their entirety (See Del Rio Prada v. Spain, Application №42750/09, 21 October 2013). Accordingly, since the Court implies that normative acts too - which are much lower in the hierarchy of legislation - to be laws, given the Georgian reality,

Although liability and sanctions can be prescribed by a decree, it does not follow that human rights and standards applicable to laws as guaranteed under the Constitution of Georgia and international conventions are not to be taken into account. This predominantly implies adherence to the principles of foreseeability, proportionality and non-retroactivity.[19]

"The Constitutional Court emphasizes an obligation of the legislature to enact precise, clear and unambiguous legislation, which satisfies the principles of foreseeability and legal certainty and precludes the possibility of manipulation from the part of those applying the law, - this being of utmost importance for the purposes of protection of the rights of persons involved in criminal proceedings".[20] Presidential Decree №1 of 21 May 2020 prescribes that administrative liability will be triggered in cases of "violation of the regime of the state of emergency determined by the Decree and the ordinance of the Government of Georgia", and in cases where, after imposition of administrative sanctions, an action is committed repeatedly, a person will face criminal liability. This does not satisfy the principle of foreseeability, since the phrase "violation of the regime of the state of emergency" is too broad and makes it impossible to identify actions and gravity of the actions that are deemed punishable.[21] In addition, criminal liability is imposed when a certain act is "committed repeatedly", whereas there are various normative acts and rules regulating a state of emergency, and it is their unity that creates "a regime of the state of emergency" (which is the wording used in the Decree). For instance, under Article 2 (7) of the Ordinance of the Government of Georgia №181 of 23 March 2020 regarding the "Measures Aiming to Prevent the Spread of the Novel Coronavirus (COVID-19) in Georgia", it is prohibited for the passenger to be seated in a front seat next to the driver; meanwhile, Article 5 (2) of the ordinance prescribes that in indoor spaces, everybody is obliged to use a face mask. Accordingly, if e.g. a person was charged for violating the rule regarding transportation of passengers, and, within one year after imposition of the administrative penalty, he/she enters a shop without a face mask, the

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from the point of view of the Convention, liability can be established under the decree having legal force of the organic law.

[19] Importance of the principles of foreseeability, proportionality and non-retroactivity have been emphasized in a number of judgments of the Constitutional Court of Georgia. See *infra* notes 20 and 21 with respect to the principle of proportionality – Judgment of the Constitutional Court of Georgia №1/6/770 dated 2 August 2019 in the case of "Public Defender of Georgia v. the Parliament of Georgia". As for the principle of non-retroactivity, - see Judgment of the Constitutional Court of Georgia №3/1/633,634 dated 13 April 2016 in the "Constitutional Referral of the Supreme Court of Georgia with respect to Constitutionality of Article 269 (5) (c) of the Criminal Procedure Code of Georgia and the Constitutional Referral of the Supreme Court of Georgia with respect to Constitutionality of Article 306 (4) and Article 269 (5) (c) of the Criminal Procedure Code of Georgia".

[20] Judgment of the Constitutional Court of Georgia №2/1/631 dated 18 April 2016 in the case of "Citizens of Georgia – Teimuraz Janashia and Giuli Alania v. the Parliament of Georgia", para. II-16.

[21] In terms of criteria for norms establishing liability, it would be interesting to take a look at the reasoning of the Constitutional Court with respect to Article 314 of the Criminal Code of Georgia (espionage). The Court stated that "foreseeable and unambiguous legislation, on one hand, protects an individual from arbitrary actions of those applying the law, and, on the other hand, guarantees that the person will receive clear information from the state, in order to be able to have a clear perception of the norm and to identify which are the actions prohibited under the law and which of them can result in legal liability. A person should be able to foresee elements of the prohibited action in his or her behavior in order to act in compliance with the rules set forth in the legislation". See Judgment of the Constitutional Court of Georgia №2/2/516,542 dated 12 May 2013 in the case of "Citizens of Georgia – Alexander Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia", para. II-30.

Decree would allow imposition of criminal liability.[22] "Offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account".[23]

In this regard, it is important to take into account the amendments that have been made to the Criminal Code of Georgia on 23 April 2020,[24] whereby the errors of the Presidential Decree have not been corrected, resulting in violation of the principle of foreseeability as well as that of the proportionality of the punishment. Two new Articles were added to the Administrative Offences Code – violating the rules regarding isolation and/or quarantine and violation of the regime of a state of emergency.[25] The first article (42^{10}) declares that violating rules regarding isolation and/or quarantine on the issues specified in the Law of Georgia "On Public Health" is a punishable offence, while the second one (177^{15}) refers to breaches of the regime of a state of emergency as defined by the Presidential Decree and/or other normative acts, including the rules on isolation and/or quarantine with respect to issues identified in the Law of Georgia "On Public Health", in cases where such a rule forms part of the regime of a state of emergency. And again, - this last provision is very broad, making a general reference to all legislative acts that are in force during a state of emergency or martial law, while, at the same time, repeating Article 42^{10}. As for the new Articles of the Criminal Code, they repeat the norms of the Administrative Offences Code, while stating that criminal liability will be imposed in case where a person has already been charged with an administrative offence in accordance with the provisions described above. In terms of reasoning, it is not clear why it became necessary to introduce criminal liability for violation of the rules regarding isolation and/or quarantine. Repeating such an administrative offence might have only formal implications and it might not be linked to the threat that would justify imposition of the criminal liability.[26] As for the violation of the regime of a state of emergency, - this

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[22] The Decree envisages the possibility of imposing a criminal liability to the extent that the two actions in question can both be deemed as violations of the "regime of the state of emergency". In this regard, it would be interesting to hear the court's opinion as to what can be considered as a "repeated" action – whether it should be interpreted literally, or more broadly – as provided by the decree. In terms of drawing a parallel, it might be interesting to refer to Article 15 (1) of the Criminal Code of Georgia, which stipulates that "[r]epeated crime shall mean the commission by a previously convicted person of the crime provided for by the same article of this Code. Two or more crimes provided for by different articles of this Code shall be considered a repeated crime c if so provided for by the relevant article of this Code". Thus, the Code points to committing the crime under the same Article, however, in this case, as opposed to the Decree, Articles of the Code are categorized thematically, meaning that actions too are more or less similar (for instance, for the purposes of Article 109 (3) (e), repeated crime means intentional killing and intentional killing under aggravating circumstances". Meanwhile, "same action" for the purposes of the Decree might mean actions that are completely different. Such an ambiguity is one of the main flaws of the Decree, that can lead to human rights violations.

[23] Del Rio Prada v. Spain, Application №42750/09, 21 October 2013, para. 79.

[24] Law №5887-ს of 23 April 2020 on the "Amendments to the Administrative Offences Code of Georgia" and Law №5889-ს of 23 April 2020 on the "Amendments to the Criminal Code of Georgia". Changes will enter in to force on 2 May 2020.

[25] Amendments have also been made to some other provisions, which could also cause a debate given their potential impact on human rights. However, this part of the paper focuses only on the requirements of foreseeability and proportionality.

[26] Generally, under the case law of the Constitutional Court of Georgia, "a state enjoys a wide margin of appre-

provision too is vague: it can result in criminal punishment, but the Article itself does not differentiate between types of violations based on their degree, and the maximum penalty is 6 years in every case. "Clearly disproportionate punishment which does not correspond to the nature and gravity of the offence is related not only to the constitutional prohibition of cruel, inhumane and degrading treatment and punishment, but are in breach of this requirement" (discussion with respect to Article 17 (2) of the Constitution of Georgia, - edition in force as of 2014).[27] The foregoing leads to questions with respect to one of the most important principles of criminal justice, which is the principle of individualization. This is due to the fact that any breach of the state of emergency regime, - regardless of the gravity and degree – without any alternative, results in imprisonment for up to 6 years, which gives those applying the norm a wide discretion in determining the punishment thereby making the correct application of the sanction dependent merely on the good faith of a person.[28]

Civil society has also expressed their concerns with respect to the amendments to the Administrative Offences Code and the Criminal Code. One of the organizations pointed out some other flaws, which, in their view, occurred in the process of the adoption of the amendments. For instance, an author of one statement stresses that "prescribing imprisonment up to 6 years as a form of punishment places the action among serious crimes. However, in this case, it should not be regarded as such, since the Presidential Decree only prescribes imprisonment for up to 3 years. Accordingly, we cannot apply procedures of the Criminal Procedure Code designed for serious and/or particularly serious crimes to such cases (including covert investigative actions)".[29] In addition, this non-governmental organization emphasized the fact that procedures for adoption of the bill were not observed in the course of adopting the said amendments.[30]

Another problem might be the enforcement of the Decree, given that under Article 31 (9) of the Constitution of Georgia, "[n]o one shall be held responsible for an action that did not

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ciation when deciding upon the criminal law policy […] It falls within the scope of the authority of the state to regulate certain actions, prohibit them and resort to certain measures in response to violations of general rules of conducts. Clearly, the state needs to be vert cautions in this regard, since, on one hand, it is important to ensure that human rights will not be restricted by prohibiting certain actions, and, on the other hand – to ensure that the response is not excessive and disproportionate, since such a response too implies limiting one's liberty. A state cannot interfere within liberties (rights) of a person to a greater extent than objectively required, because in such a case, the goal will become to limit a person, instead of protecting him/her". See Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-32.

[27] Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-25.

[28] It is true that defining the scope of sanctions serves the purpose of giving discretion to those who apply the law (so that it is possible for them to consider individual characteristics of the case), however, according to the case-law of the Constitutional Court of Georgia, "the aim to restore justice through imposing punishment" binds not only those who apply the law, but also those who legislate (See Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-45.d). Accordingly, it is important that legislators determine the scope of sanctions appropriately, differentiate between gravity of each action and establish the frame for potential punishment based on these considerations.

[29] Statement of the Georgian Young Lawyers' Association, available at: https://gyla.ge/ge/post/saia-s-shefaseba-sagangebo-mdgomareobastan-dakavshirebit-mighebul-sakanonmdeblo-cvlilebebze (28.04.2020).

[30] *ibid*.

constitute an offence at the time when it was committed. No law shall have retroactive force unless it reduces or abrogates responsibility". The same is provided under Article 7 of the ECHR and Article 15 of the ICCPR. Article 71 (3) of the Constitution of Georgia stipulates that "[a Decree issued by the President] shall be in force until the martial law or the state of emergency has been revoked". Accordingly, as soon as the state of emergency or martial law comes to an end, rules on liability (forming a part of the Decree) will also cease to have legal effects. Under Article 3 of the Criminal Code of Georgia, "criminal law that decriminalizes an act or reduces penalty for it shall have retroactive force. A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force. If a new criminal law mitigates punishment for an act for which the offender is serving it, this punishment shall be mitigated within the limits of the sanctions of this Criminal Law. If the Criminal Law was amended several times between the commission of a crime and the delivery of the judgement, the most lenient law shall apply". "By prohibiting retroactive application of criminal laws, the Constitution is aiming to guarantee that negative results of operation of laws will be avoided. […] The real retroactive application means application of the law to all the relationships that had occurred before adoption of the new law and which alter the consequences of previously existing legal relationships. Such a retroactivity is a classical retroactivity of an institutional character, which, as a rule, is prohibited and can only be permitted as an exception, where a newly adopted law improves the situation of subjects of the right".[31] Thus, after expiration of a state of emergency, in the light of the principle of non-retroactivity, imposition of liability might be problematic, since the Decree will no longer have legal effects, but the amendments to the Administrative Offences Code and the Criminal Code enter into force on 2 May 2020, - i.e. they cannot be applied to legal relationships that had occurred after declaration of a state of emergency (21 March 2020).

It is noteworthy that the aforesaid standards are also applicable to administrative liability, because according to the ECtHR, certain types of administrative offences fall within the scope of the Convention (e.g. deviations that result in disturbance of public order).[32] Hence, rules establishing administrative liability shall also satisfy the requirements of foreseeability and proportionality. Furthermore, in terms of retroactive application, another problem might arise with respect to imposition and enforcement of the sanctions after expiration of the state of emergency.

In general, imposing liability for crimes as well as for administrative offences and enforcing them can be problematic given the fact that, under the principle of non-retroactivity, liability cannot be imposed on grounds of the law which is no longer valid. At the same time, we can analyze the issue from a different point of view (it would be up to the Court to make a final decision on this matter),[33] - in particular, it would be interesting to look at the position of the

[31] Judgment of the Constitutional Court of Georgia №1/1/428,447,459 dated 13 May 2009 in the case of "Public Defender of Georgia, Citizen of Georgia Elguja Sabauri and Citizen of Russia Zviad Mania v. the Parliament of Georgia", para. II-6.
[32] See e.g. Lauko v. Slovakia, Application №4/1998/907/1119, 2 September 1998.
[33] Taking into account the fact that the process of norm-making under a state of emergency as described in this paper has occurred for the first time in the history of independent Georgia, as of today, there is no case-law which would answer the questions related to normative acts adopted/issued during this period.

Court on the matter of imposing liability and enforcing it based on the Presidential Decree (before entry into force of the amendments to the Administrative Offences Code and the Criminal Code) – for instance, in the light of Article 3 (3) of the Criminal Code. This provision stipulates that "[i]f the Criminal Law was amended several times between the commission of a crime and the delivery of the judgement, the most lenient law shall apply". During a state of emergency, the same action was first – from 21 March 2020 to 22 May 2020 -punishable under the Presidential Decree, and further, - from 2 May 2020 without any time limit, - it became punishable under the Criminal Code. Accordingly, the Court has to define whether the Presidential Decree can be deemed "criminal law" for the purposes of Article 3 (3) of the Criminal Code and whether liability can be imposed on a person for committing a crime after expiration of a state of emergency (until May 2, - that is, before amendments in the Codes entered into force).

IV. DELEGATION OF POWERS TO THE GOVERNMENT OF GEORGIA

Delegation of the power to issue subordinate normative acts serves the purpose of flexibility.[34] "Since the legislative branch does not possess the ability to provide normative regulations for every issue related to public life, legislation requires distribution of work between the executive and legislative branches of the government. The legislative branch has to regulate normative aspects of important issues, while leaving the prerogative to regulate the details to governing bodies".[35] It is important to meet the requirement that certain issues specified in the Constitution be regulated only through the "law". Otherwise, regulating such issues by virtue of normative acts that are lower in the hierarchy might result in unconstitutionality of these regulations on formal grounds.[36] At the same time, "according to the case-law of the Constitutional Court of Georgia, a reference to regulating a matter through organic law or law does not in itself exclude the Parliament's ability to delegate the power to regulate these issues to another body […]. In certain cases, this stems from the necessity to delegate this power to other organs, and it is thus compatible with the requirements of the Constitution".[37]

In order to draw the line between regulating by legislative and subordinate legislative acts, besides general principles (Article 7 (9)), Article 8 of the Organic Law of Georgia "On Normative Acts" lists the spheres regulations to which can only be determined through the legislative act of Georgia.

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[34] "The mechanism of delegating powers significantly simplifies the process of law-making and gives the legislature an opportunity to decide upon principal political and legal matters, while entrusting other organs with regulating the details necessary for their implementation". See Judgment of the Constitutional Court of Georgia №1/7/1275 dated 2 August 2019 I the case of "Alexandre Mdzinarashvili v. National Communications Commission of Georgia", para. II-30.

[35] ტურავა პ., წკეპლაძე ნ., ზოგადი ადმინისტრაციული სამართლის სახელმძღვანელო, თბილისი, 2010, 83.

[36] Judgment of the Constitutional Court of Georgia №2/3/1279 dated 5 July 2019 in the case of "Levan Alapishvili and JSC 'Alapishvili and Kavlashvili – Georgian Bar Group' v. the Government of Georgia", para. II-19.

[37] Judgment of the Constitutional Court of Georgia №2/5/658 dated 16 November 2017 in the case of "Citizen of Georgia Omar Jorbenadze v. the Parliament of Georgia", para II-27.

In this regard, there are serious challenges to the Presidential Decree №1 of 21 March 2020, given that it merely contains reservations regarding restriction of certain rights guaranteed under the Constitution, but it was left up to the Government of Georgia to determine what and to what extent was being restricted. Given the fact that in a state of emergency and martial law the President, to some extent, takes the place of the Parliament of Georgia and issues decrees having legal effects of organic laws,[38] it is obvious that a decree, as a legislative act, possesses the ability to task relevant governing bodies with regulating certain issues. At the same time, a decree should be subjected to Georgian and international standards with respect to law-making and take into account that delegation cannot be conducted to the extent which exceeds the permitted limits.[39] Presidential decrees are not free from the requirements of the Constitution and the Organic Law "On Normative Acts". Notwithstanding the fact that a decree would have the same legal effect as organic laws, the President shall, while issuing a decree, adhere to the requirements of the Law "On Normative Acts" (e.g. Article 8, which distinguishes the spheres of legislative and subordinate legislative regulations) as well as those envisaged in the case-law (in particular, the case-law of the Constitutional Court of Georgia, which sets forth important guiding criteria and principles related to proper delegation of powers). Otherwise, the principle of legal stability will be threatened by the existence of inconsistent and non-uniform legislation. [40]

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[38] For the discussion on this matter, see *supra* I Chapter.

[39] Preciseness, foreseeability and accessibility imply another necessary requirement that the scope of action of those responsible for restricting the rights also be specific, intelligible and clear. Existence of such a requirement is necessary for the purposes of limiting and ensuring further control over persons (bodies) responsible for interference within the rights, because a legal state requires from these officials to achieve a certain public good. In order to be in compliance with the principle of supremacy of the law, the law shall ensure efficient safeguards against arbitrary interference from the government. First and foremost, this means that the law itself should, with appropriate clarity, define powers of the relevant actors in this field. Accordingly, the law should not permit an executive to establish the scope of its actions independently. If a person responsible for interfering within the rights does not clearly and specifically know what is the permitted scope of his or her actions, on one hand, we will have an increased risk of inappropriate, excessive risk of interference within the right, and, on the other hand – a temptation to knowingly abuse the power, which ultimately leads to violation of human rights". See Judgment of the Constitutional Court of Georgia 1/3/407 dated 26 December 2007 in the case of "Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia", II-14.

[40] "Only stable and fair legislation can be deemed as a serious guarantee for the proection of constitutional rights of an individual. Only thus can a normative act preserve its own characteristic. By ignoring these requirements, the breach of the requirement of fairness and irreversibility of the laws occur". See Judgment of the Constitutional Court of Georgia №1/1/126,129,158 dated 18 April 2020 in the case of "(1) Bacchua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, (2) Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, (3) Givi Donadze v. the Parliament of Georgia", VI. In general, it is interesting to consider whether one out of two laws of equal rank can establish requirements for the other (which, in some ways, looks like a "gentlemen's agreement"). Clearly, if we talk about the existing laws, we should use Article 7 (8) of the Organic Law of Georgia "On Normative Acts", which gives preference to a normative act which was issued more recently. This reservation serves the principle of legal security; however, the legislator should not march towards such a collision, and should preserve the rules set forth in the legislation of Georgia. In our case, the President should have taken the Law "On Normative Acts" into account (especially given the fact that the said law obtained the status of the organic law precisely as a result of the latest constitutional amendments and Article 4 (4) of the Constitution even emphasizes its significance. We can also draw a parallel with the Rules of Procedure of the Parliament of Georgia, which is an ordinary law, but is being taken into account in the process of adoption of the laws that stand much higher than it in the hierarchy.

For example, under Article 1 (4) of the Decree, Article 18 of the Constitution of Georgia has been restricted, and the Government of Georgia was given the authority to adopt new rules applicable to public services and administrative proceedings. As a result, an Ordinance №181 of the Government of Georgia of 23 March 2020 "On the Approval of Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (COVID-19) in Georgia", - including its Article 13, - established rules governing procedures for electronic case management, administrative proceedings and release of public information. Under paragraph 1 of the said Article, the timeframe established by law for the submission and review of administrative complaints were suspended. All of this – while Article 8 (i) of the Law "On Normative Acts" stipulated that administrative legislation can only be determined by legislative acts of Georgia. At the same time, rules governing presentation of applications and administrative appeals are prescribed by the legislative act – General Administrative Code of Georgia. In this regard, the Supreme Court of Georgia has an interesting position: with respect to regulating an issue governed by the General Administrative Code through subordinate normative act, the Supreme Court noted that definition of one of the classical forms out of all activities of administrative bodies – administrative legal act – can only be provided by the legislative act and it cannot become a matter of regulation for various administrative bodies in the process of norm-making.[41] Accordingly, whatever is supposed to and is regulated through legislative acts cannot become a subject of subordinate norm-making process. Hence, in this case, it would have been wise for the President to establish rules by the Decree herself, instead of delegating this power to the Government of Georgia, which then issued a subordinate act (Ordinance) to regulate the matter which was already regulated by the law (General Administrative Code of Georgia).

Therefore, when we have the situation, where, on one hand, it is an exclusive authority of the President to issue decrees having legal effect of organic laws during a state of emergency and martial law, and, on the other hand, Organic Law of Georgia "On Normative Acts" exhaustively defines spheres that are to be regulated by legislative acts, delegation of powers with respect to regulating most of the issues (and, in particular, restrictions) to the Government by the President might be problematic. Moreover, this can be regarded as an attempt to bypass the Constitution and the Parliament of Georgia. If issues regulated by the Ordinance of the Government were included in the Decree of the President, they would need the Parliament's approval in order to maintain legal force, - as envisaged under Article 71 (3) of the Constitution, whereas the Government adopts its ordinances in accordance with the standard procedure and is not subject to any kind of parliamentary overview.[42] Delegation to the Gov-

[41] The matter was related to a subordinate act of the Minister of Justice – an ordinance – which prescribed that "the decision of a Notary to reject the execution of notarial action is an individual administrative-law act and its legality can be disputed in the court based on the location of Notary Bureau, pursuant to the administrative procedural law." See Decision of the Supreme Court of Georgia Administrative and Other Category Disputes Chamber dated 2007 June 19, Nბს-468-445(გ-07). From Turava M., Tskepladze N., General Administrative Law Guidebook, Tbilisi, 2010, 181-185.

[42] Under Article 39 of the Rules of Procedure of the Parliament of Georgia, "a committee, within the scope of its competences can assess compatibility of normative acts adopted by the Government, Ministers, other leaders of the executive government with the legislation of Georgia and the status of their implementation. It studies and analyzes flaws detected during operation of these normative acts and adopts recommendations, which are

ernment cannot be justified with the flexibility argument: in a state of emergency, alternation of the balance established by the principle of separation of powers, exercise of certain powers of the legislative by the President and simplified parliamentary oversight (for instance, under Article 83 (2) of the Rules of Procedure of the Parliament of Georgia), "issues related to approval of presidential decrees are considered immediately and voting is conducted without prior hearings in committees and other relevant procedures") is precisely what ensures flexibility. Establishing respective frames is all that the Constitution can offer in order to ensure rapid reaction to a crisis on one hand, and on the other hand – avoid unjustified and excessive restriction of human rights.

In addition, it should be noted that there is a strong critique against Article 14 (3) of the Ordinance of the Government, which provides that in cases where persons under the age of 16 violate the regime of a state of emergency, liability is imposed on their parent or other guardian of the child. This provision is in direct contradiction not only with the Organic Law "On Normative Acts", but also with the Decree of the President, which provides that liability for the offence can only be imposed upon the offender (thus, with respect to persons below the age of 16, Article 3 (3) of the Juvenile Justice Code should have applied).[43] The said provision of the Ordinance violates both formal constitutionality (introducing liability through subordinate act and issuing a subordinate normative act without legal grounds) and the principle of personal liability, since it results in sanctioning a person for an offence committed by another.[44]

CONCLUSION

Although the Constitution of Georgia reinforces the principle of separation of powers, there are circumstances, - such as a state of emergency or martial law – where bodies of the government are deprived of the ability to exercise their constitutional functions in a standard manner, and the constitution itself envisages the possibility of temporary modifications to the principle of separation of powers and respective balance. After declaration of a state of emergency, the President of Georgia can, upon recommendation by the Prime Minister, issue

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sent to a respective body". Under Article 39 (3), "In case of non-performance of tasks and non-adherence to recommendations envisaged under this Article, the committee makes a respective decision". Thus, according to the existing legislation, the Parliament has no efficient mechanisms of control and is only limited by issuing recommendations.

[43] Minimum age of responsibility – the minimum age, which is 14 years in the case of criminal liability and 16 years in the case of administrative liability.

[44] See Judgment of the Constitutional Court of Georgia №3/2/416 dated 11 July 2011 in the case of "Public Defender of Georgia v. the Parliament of Georgia". Although it was related to a criminal case, but it is still interesting that the Court did not deem Article 42 (5^1) of the Criminal Code of Georgia (of the edition in force by that time), which provided that in cases where an accused was a minor and insolvent, parents, custodians or guardians were under an obligation to pay the fine imposed on him/her by the court. The Court noted that there was no breach of the principle of personal liability, given that criminal liability was imposed on the minor, whereas imposition of the obligation to pay the fine upon a parent, guardian or a custodian did not amount to a sanction, but was rather stemming from their special relationship with the minor. The Government's Ordinance is also incompatible with this approach, and submits parents or other guardians of a person under the age of 16 to liability as such.

decrees having legal effects of the organic law, which do require approval by the Parliament, but the procedure of its approval is relatively simple and limited as compared to standard process of law-making. Under these circumstances, it is important to observe how the process of governing and law-making are taking place, - which standards are being pulled back and what are the rules that we should adhere to without any alternations, regardless of a state of emergency and martial law.

This paper demonstrated that equating presidential decrees to organic laws is not a fictional notion, - rather, the former represents a legislative act that can substitute legislative acts of the Parliament during a state of emergency and martial law. Just like laws, - presidential decrees can also regulate any aspect of the public life, but when it comes to restricting rights contained in Chapter 2 of the Constitution, the extent and scope of the decree is strictly limited by the Constitution itself.

Taking into account the fact that we considered a presidential decree to be a legislative act, it should also be possible to establish administrative and criminal liability through such decrees. However, it has been demonstrated that existing norms do not meet the requirements of foreseeability and proportionality. In addition, problems regarding imposition of liability and its enforcement have also been demonstrated, since the Presidential Decree will cease to have legal effects after the expiration of the state of emergency. Hence, in the light of the principle of non-retroactivity, once a state of emergency and martial law comes to an end, it might be challenging to impose liability and enforce it based on the Presidential Decree.

Given that a decree of the President of Georgia is a legislative act, it can be used for delegating the power to enact (issue) subordinate legislative acts. However, it has been emphasized that precisely because a decree is a legislative act, it has to meet the requirements applicable to the law-making process and comply with Georgian and international standards in this regard. A decree cannot task the government with regulating such issues which, under the Law "On Normative Acts", can only be regulated through a legislative act. Any other approach, including regulating such matters through the Government's Ordinances leaves the possibility of bypassing the Constitution of Georgia and the Parliament of Georgia.

Thus, in conclusion, it can be said that, regardless of the existence of the state of emergency or martial law, during which the ordinary balance between the branches of government as envisaged by the principle of separation of powers is being hindered, the state power is still limited by the principles of a legal state and, - as a "temporary legislator", - the President of Georgia is obliged to adhere to national and international principles related to norm-making. The same obligation applies to the Government of Georgia. The latter does not have an authority to make decisions on such matters that were not delegated to it under a decree of the President of any other legislative act.

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THE RIGHT TO PROPERTY IN A STATE OF EMERGENCY

ABSTRACT

The spread of the pandemic has drawn attention to the issues regarding the protection of fundamental human rights and liberties. Within the context of a state of emergency, which was declared in order to normalize the situation, there has been a surge of restrictions placed upon such human rights as the right to liberty, freedom of movement, the right to property and others. Nevertheless, it is of vital importance for legal states that, despite the state of emergency, interferences into fundamental rights not exceed the constitutional framework, and that individual rights not be disproportionately violated.

The Constitution of Georgia allows for not only restriction, but also expropriation of private property during the state of emergency. Certainly, in every such case, decisions made by the government must follow the principle of proportionality in order to preserve the essence of the right to property. The point of scrutiny is whether or not the abovementioned criteria are met by the regulations regarding restrictions to the right to property imposed in the context of the pandemic.

INTRODUCTION

The spread of the Novel Coronavirus (COVID-19), which has been classified as a pandemic by the WHO on 11th of March 2020, has posed many legal, economic and social challenges for the international community. Under existing circumstances, the first priority of a legal state is the protection of human lives and health. Therefore, most of the measures are taken in order to prevent further spread of the virus and minimize its potential threat, which in it-self is linked to certain restrictions.

In order to effectively counter the pandemic, a state of emergency was declared throughout the entire territory of Georgia on 21 March 2020. The Presidential Decree introduced a number of measures and enumerated fundamental human rights and liberties that were subjected to restrictions for the duration of the state of emergency. These rights are as follows: right to liberty, freedom of movement, rights to personal and family privacy, personal space and privacy of communication, rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority, right to property, freedom of assembly, freedom of labor, freedom of trade

unions, right to strike and freedom of enterprise. In order to ensure public safety the government's powers increases during the state of emergency, while individuals experience restrictions imposed on their rights. However, said restrictions must be implemented within the legal framework defined by the Constitution, and only to the extent that is proportionate to the legitimate aim that restrictions are intending to achieve, so that the essence of fundamental rights is preserved. [1]

This article will first review legal aspects of the state of emergency and demonstrate its relation with fundamental human rights, and will further focus on the constitutionality of restricting the right in the context of the existing emergency. Under the Decree of the President of Georgia, the Government of Georgia was granted the authority to "restrict rights to property, if necessary, and to use the property and material resources of natural and legal persons for quarantine, isolation and medical purposes". [2]

Given its social importance, the right to property has repeatedly been included in the framework established by the State and subjected to constitutional control, as evidenced by the extensive case-law of the Constitutional Court of Georgia.[3] In one of its decisions, the Court noted that "[t]he economic strength of a democratic, legal and social state is based on the respect and protection of the right to property". [4]

I. State of Emergency as the Basis for the Restriction of Fundamental Human Rights

A state of emergency is a temporary measure enacted in situations "when the state authorities are unable to exercise their constitutional powers in a normal manner".[5] It is "the normalization of the situation as quickly as possible, and the restoration of law and order".[6]

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[1] Constitution of Georgia, Article 34 (3), 24 August 1995; Charter of Fundamental Rights of the European Union, Article 52 (1), 2000.

[2] Decree N1 of the President of Georgia on "Declaration of the State of Emergency throughout the Whole Territory of Georgia", Article 1 (5), 21 March 2020.

[3] Judgment of the Constitutional Court of Georgia N 2/6/1311 dated 17 December 2019 in the case of „LLC 'Stereo +', Luka Severini, Lasha Zilplimiani and Robert Khakhalev v. the Parliament of Georgia and the Minster of Justice of Georgia", Judgment of the Constitutional Court of Georgia, N2/5/700 dated 26 July 2018 in the case of "LLC 'Coca-Cola Bottlers Georgia', LLC 'Castel Georgia' and JSC 'Water Margebeli' v. the Parliament of Georgia and the Minister of Finance of Georgia", Judgment of the Constitutional Court of Georgia N 1/5/675,681 dated 30 September 2016 in the case of "LLC 'Broadcasting Company Rustavi2' and LLC 'Television Company Sakartvelo' v. the Parliament of Georgia", Judgment of the Constitutional Court of Georgia N 1/3/611 dated 30 September 2016 in the case of "LLC 'Madai' and LLC 'Paliastomi 2004' v. the Parliament of Georgia and Head of the LEPL under the Ministry of Environment and Natural Resources Protection of Georgia – National Environmental Agency", Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of "LLC "RusEnergoService", LLC "PataraKakhi", JSC "Gorgota", Givi Abalaki Individual Enterprise "Farmer" and LLC "Energy" v. the Parliament of Georgia and the Ministry of Energy of Georgia".

[4] Judgment of the Constitutional Court of Georgia N2/1/370,382,390,402,405 dated 18 May 2007 in the case of "Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia Others and the Public Defender of Georgia v. the Parliament of Georgia", para. II-3.

[5] Law of Georgia "On State of Emergency", 17 October 1997, Article 1 (1).

[6] *ibid,* Article 1 (2).

It can be said, that it serves to restore the "status quo", where the citizens' security was guaranteed. Since it is not possible to predict every possible scenario, the legislation does not contain an exhaustive list of acceptable grounds for declaring a state of emergency, therefore requiring the gravity of the circumstances to be evaluated on a case-by-case basis.

Interestingly, the main legal problems that arise during the state of emergency are related to the very issues that it serves to protect. Namely, on one hand, the purpose of the declaration of the state of emergency is restoration of the legal order, which implies the restoration of the *status quo* in which universally recognized human rights and freedoms are fully guaranteed and protected. But on the other hand, during a state of emergency, it is often necessary for the government to interfere within protected spheres of fundamental human rights.[7] Furthermore, as demonstrated by the experience of various countries, some of the gravest violations of human rights may occur during the state of emergency.[8] The government is given the power to determine the scope of specific rights, which may lead to the threat of disproportionate use or abuse of power. Thus, it can be argued, that the declaration of a state of emergency is contradictory to the idea of the legal state,[9] whose most important aspect is the protection of fundamental human rights.[10]

Nevertheless, the possibility of declaring a state of emergency is envisioned by such important international instruments as the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15), the International Covenant on Civil and Political Rights (Article 4), and others. According to these documents, states may derogate from obligations only to the extent, to which the severity of circumstances requires.

Thus, it is generally accepted, that despite the risks of excessive human rights violations, the declaration of a state of emergency should be allowed to be used as an emergency measure, provided that its duration, grounds and scope are clearly defined. According to the Venice Commission, security of the state and society can only be effectively protected, if even in the state of emergency, the rule of law is fully upheld, which requires the state of emergency to be under judicial control.[11] The foremost example of parliamentary control is the requirement for the executive's decision to declare a state of emergency to be approved by the Parliament.[12] The executive branch must demonstrate to the legislature that it is necessary to declare a state of emergency and introduce specific measures.[13]

The idea of the Rule of Law state will only come under threat, if the state abuses its power and interferes within the ambit of fundamental human rights to a greater extent than strictly

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[7] H. Boldt, *Der Ausnahmezustand in Historischer Perspektive*, 6 *Der Staat*, 1967. S. 411.
[8] European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Cimmission Opinions and Reports on States of Emergency*, CDL-PI(2020)003, p. 5.
[9] In this regard, see N. Compagna, *Prärogative und Rechtsstaat. Das Problem der Notstandsgewalt bei John Locke und Benjamin Constant*, 40 *Der Staat*, 2001. S. 555.
[10] ლ. იზორია, *თანამედროვე სახელმწიფო, თანამედროვე ადმინისტრაცია,* გამომცემლობა „სიესტა", 2009. გვ. 186.
[11] European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Cimmission Opinions and Reports on States of Emergency*, CDL-PI(2020)003, p. 4.
[12] *ibid*, p. 15.
[13] *ibid*, p. 15.

required by the circumstances. The main goal is to strike a reasonable balance.[14] In this regard, it is interesting to look into the judgment of the Constitutional Court of Georgia, rendered on 25 May 2004, which emphasizes the prudence of limiting the circle of decision-makers in order to minimize risks of the abuse of power, and points to three conditions for guaranteeing human rights during the state of emergency. Firstly, this authority shall rest only upon the President of Georgia (under the current formulation, this power is exercised upon recommendation by the Prime Minister) – this constitutional provision prohibits granting this right to any other actor. Secondly, the President is obligated to immediately submit the decision regarding restrictions of rights for its approval by the Parliament. And thirdly, the President of Georgia may restrict only those rights, which are specified in the Constitution with respect to the state of emergency.[15] Restriction of any other rights, which are not directly referred to in the Constitution, as well as other rights related to them, is prohibited.[16]

II. THE RIGHT TO PROPERTY IN THE STATE OF EMERGENCY

A. THE ESSENCE OF THE RIGHT TO PROPERTY

The right to property is a natural and thus inherent right, which does not depend on a state and by no means represents a value created by the legislature.[17] In one of its decisions, the Constitutional Court of Georgia noted, that the existence of property is an essential element of a democratic society, - "[n]ot only is it the basis of human existence, but it also serves as insurance for freedom, adequate realization of one's capabilities, an ability to lead one's life with own responsibility". [18] However, the right to property is not an absolute or unlimited right, due to its social function and significance.[19] The owner is not isolated, but rather forms an integral part of society, which implies that he or she can satisfy own interest only if they align with those of others.[20]

The scope of interference within the right to property is determined by the Constitution itself, - Article 19 of the Constitution of Georgia envisages the possibility of restricting the right to property or expropriating property if certain formal and material requirements are met. For this reason, the legislature is authorized to define the content of the right to proper-

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[14] Boldt, *supra* n 7, p. 411.
[15] Judgment of the Constitutional Court of Georgia N15/290,266 dated 25 May 2004 in the case of "A group of Members of the Parliament (67 deputies) v. the Parliament of the Autonomous Republic of Ajara and Citizen of Georgia Tamaz Diasamidze v. the Parliament of the Autonomous Republic of Ajara and the Leader of the Autonomous Republic of Ajara", III.
[16] ზ. მაჭარაძე, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი,* თავი მეორე, გამომცემლობა „პეტიტი", 2013. p. 618.
[17] ბ. ზოიძე, *საკონსტიტუციო კონტროლი და ღირებულებათა წესრიგი საქართველოში,* გამომცემელი „gtz", 2007. p. 96.
[18] Judgment of the Constitutional Court of Georgia N1/2/384 dated 2 July 2007 in the case of "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia", para. II-5.
[19] *ibid*, para. II-8.
[20] *ibid*.

ty, the scope of actions and grounds for expropriation in a way,[21] which ensures that the essence of the right to property is not violated.[22]

Thus, while restricting the right to property during the state of emergency, it is important to preserve the essence of the fundamental right, determination of which represents one of the most important dogmatic issues in constitutional theory, mainly due to the lack of clear theory on the fundamental right's nature and scope.[23] This is evidenced by the practice of the European Court of Human Rights. We see frequent references to the concepts of the essence, substance, and core of fundamental rights, however, this notion has not yet been developed in a clear and comprehensible manner.[24]

The Constitutional Court of Georgia has also invoked the principle of preservation of the essence of the fundamental right in reference to the right to property, and noted that "the right to property, which is definable by the legislature, shall not, as a result of definition of the content and the scope of the right to property, be transformed into a right that would largely be dependent on legislative regulations. At the end of the day, we should avoid erosion of the core of the sphere protected by the right".[25]

The study of constitutional law distinguishes between the absolute and relative theories of preserving the essence of fundamental rights. According to the absolute theory, the essence of the fundamental right is predetermined and independent of specific cases; it must be preserved during any interference within the fundamental right, and existence of the fundamental right is impossible without it.[26] Since this theory doesn't allow for the assessment of the essence in specific contexts, it should be understood only as a fundamental guarantee of rights, independent of specific cases.[27] As for the relative theory,[28] - it provides, that the essence of a fundamental right must be determined in each specific case, in relation to other rights creating a collision with it.[29] Therefore, according to the relative theory, to

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[21] Judgment of the Constitutional Court of Georgia N3/1/512 dated 26 June 2012 in the case of "Citizen of Denmark Heike Kronquist v. the Parliament of Georgia", para. 67. See *supra* n 18, para. II-5-8.

[22] Article 21 (2) of the edition of the Constitution of Georgia which was in force before 23 March 2018 directly refered to the necessity to preserve the essence of the right to property while restricting it. Direct reference to it can also be found in the EU Charter on Fundamental Rights, which provides that when restricting fundamental rights, the essence of fundamental rights shall be preserved, and the interference within them shall be conducted in accordance with the principle of proportionality.

[23] L. Blaauw-Wolf and J. Wolf, *A Comparison between German and South African Limitation Provisions,* 113 *S African LJ*, 1996. p. 276.

[24] See S. Van Drooghenbroeck and C. Rizcallah, *the ECHR and the essence of fundamental rights: searching for sugar in hot milk?"*, 20 *German Law Journal*, 2019, p. 905; Case ECtHR "Relating to Certain Aspects of the Use of Languages in Education in Belgium" v Belgium (Merits) Application N1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, § B-5; Case ECtHR "Rees v. the United Kingdom", Application N 9532/81, 17 October 1986, § 50; case ECtHR "Naït-Liman v. Switzerland" Application N 51357/07, 15 March 2018, *Partly dissenting Opinion of Judge Wojtyczek* § 8.

[25] See *supra* n 21, para. 57. With respect to the case-law of the Constitutional Court of Georgia, see *infra* n 32.

[26] R. Schmidt, *Grumdrechte*, Verlag „Dr. Rolf Schmidt GmbH", 15. Auflage 2013. S. 88.

[27] *ibid*. According to this theory, after confiscation of the property due to public necessity, a person does lose the ownership over specific property. However, this does not threaten the right to property, as a universally guaranteed right. Thus, the core of the right is not violated.

[28] This represents a dominant view regarding the essence of the fundamental right in the German law.

[29] Schmidt, *supra* n 26, p. 88.

determine whether the essence of the fundamental right has been violated, we must employ the principle of proportionality – if the degree to which the state interferes with the right to property is proportionate to circumstances, the essence of the fundamental right will be preserved.[30] According to some scholars, the principle of proportionality renders the principle of protection of the essence of the fundamental right obsolete and has only declaratory character.[31] It should be noted, that in a rule of law state, where the principles and values guaranteed by the constitution are safeguarded, the violation of the essence of the right should be a rare problem.

Article 34 (3) of the Constitution of Georgia reinforces the principle of preservation of the essence of the fundamental right, stating the "[t]he restriction of a fundamental human right shall be commensurate with significance of the legitimate aim that it serves".[32] Given such a wording, it is evident that Georgian lawmakers are in favor of the relative theory of maintaining the essence of the fundamental right. This provision can also be perceived as a legislative prescription of the principle of proportionality. In the context of the relative theory it is difficult to draw the line between the principle of preservation of the essence and the principle of proportionality. It can be said, that "the principle of proportionality by itself demands [as well as serves] the protection of the essence of the right."[33]

Thus, when restricting the right to property during the state of emergency, the essence of the right to property can be considered to have been maintained, if the measures taken by the state are proportionate to the aim. The importance of the principle of proportionality and its application to specific situations will be discussed in the last section of this article.

B. Legislative Regulation of the Right to Property during the State of Emergency

The legal basis for interfering with the right to property in the context of emergency is outlined by Article 71 (4) of the Constitution of Georgia, which, under certain circumstances,

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[30] Schmidt, *supra* n 26.

[31] Blaauw-Wolf and Wolf, *supra* n 23, p. 278.

[32] A general provision regarding the principle of preservation of the essence has been included in the Constitution of Georgia as a result of 2017 amendments. However, even before, it used to provide the scope of imposing restrictions upon fundamental rights, as it is demonstrated by the case-law of the Constitutional Court Georgia (Judgment of the Constitutional Court of Georgia N1/1/103,117,137,147-48,152-53 dated 7 June 2001 in the case of "Citizens of Georgia – Valida Darbaidze, Natela Tsimakuridze and Nana Mirvelashvili, Natalia Okujava and Others v. the Parliament of Georgia", para. III-X; საქართველოს Judgment of the Constitutional Court of Georgia N1/3/393/, 397 dated 15 December 2006 in the case of "Vakhtang Masurashvili and Onise Mebonia v. the Parliament of Georgia", para. II-1; Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of "LLC 'RusEnergoService', LLC 'PataraKakhi', JSC 'Gorgota', Givi Abalaki Individual Enterprise 'Farmer' and LLC 'Energy' v. the Parliament of Georgia and the Ministry of Energy of Georgia", para. II-24; See ბ. ზოიძე, *ძირითადი უფლების არსის შენარჩუნების პრინციპი,* V საკონსტიტუციო სამართლის მიმოხილვა, 2012. pp 146-147, - stating that "preservation of the essence of fundamental rights is an implicit legal principle even in the absence of specific constitutional provisions in this regard".

[33] C. Drews, *die Wesensgehaltsgarantie des Art. 19 II GG,* Verlag „Nomos-Verl.-Ges.", 2005, S. 20. Cited in ზოიძე, *supra* n 32, p. 141.

gives the President the power to restrict the rights listed in this provisions, which also includes the right to property. Naturally, in this case as well, the decision to restrict the right to property must be made in accordance with the principles set forth by the Constitution. During the state of emergency, we might encounter both – restriction of the right to property under Article 19 (2) of the Constitution, as well as expropriation of the property under Article 19 (3).[34]

The nature and scope of restrictions placed upon the right to property for the duration of the state of emergency are determined by the Law of Georgia "On State of Emergency". It stipulates that the supreme bodies of the executive authority "also utilize, the property and material means[35] owned by other natural and legal persons, only in exchange for relevant compensation that shall be issued after the end of the state of emergency".[36] In addition, the law defines the scale of actions of the executive branch, the law determines the scope of actions permissible to the executive branch – specifically, decisions must be made in accordance with the circumstances and compliance with the legislative requirements.[37] Thus, the formal grounds for the restriction set forth in Article 19 (2) of the Constitution of Georgia are as follows: the law defines in what cases the right to property may be restricted (during the state of emergency), as well as the guidelines for restrictions – the government can restrict only one aspect of property – its use. Furthermore, as already mentioned above, in order to be able to impose restrictions, the President must issue a decree, which must comply with the requirements established by the Law of Georgia "On State of Emergency".[38]

The legal basis for expropriation of property during the state of emergency is outlined by Article 19 (3) of the Constitution of Georgia, as well as its derivative law "On the Procedure for The Expropriation of Property for Pressing Social Needs". According to this law, a state of emergency represents such an urgent necessity, where it is possible to expropriate property, with the condition of prior compensation.[39] It should be noted, that the constitutional amendments adopted in 2017 allow the President of Georgia to suspend Article 19 (3) during the state of emergency.[40] This might be in regard to the advance payments, since, during the state of emergency, which calls for rapid responses, it might be difficult or even impossible to accurately evaluate the price of property and pay it fully. This should not preclude us from achieving a legitimate aim by invoking expropriation. Suspension of the aforementioned clause obviously does not deprive the owners of their right to receive a full and fair compen-

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[34] The authority to expropriate property in the context of a state of emergency is stemming from the Organic Law of Georgia "On the Procedure for The Expropriation of Property for Pressing Social Needs", 11 November 1997.

[35] The legislation is not familiar with legal definition of material means, - we can frequently encounter this term in military terminology and encompasses various resources with military purpose (weapons, chemical and medical means etc.). It is noteworthy that the notion of property (any movable or immovable and intangible property) also includes material means in itself.

[36] Law of Georgia "On State of Emergency", Article 4.

[37] *ibid*.

[38] ი, კობახიძე, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი,* თავი მეორე, გამომცემლობა „პეტიტი", 2013. p. 198.

[39] Law of Georgia "On the Procedure for The Expropriation of Property for Pressing Social Needs", *supra* n 34, Articles 1 and 2.

[40] Constitution of Georgia, Article 71 (4).

sation once the state of emergency comes to an end, since the obligation to properly reimburse the owner is determined by the Georgian Law "On State of Emergency", even in cases of restrictions on the rights to property, which is a less severe interference than expropriation of the property.

As already mentioned, during the state of emergency, which was declared in order to combat the widespread pandemic, the President issued a decree, which defines the acceptable scope of restrictions of the right of property. Namely, "[t]he Government of Georgia shall be authorized to restrict rights to property, if necessary, and to use the property and material resources of natural and legal persons for quarantine, isolation and medical purposes".[41]

According to the Ordinance of the Government on Georgia, which, in turn, was based on the Decree of the President, we can identify the individuals and legal entities affected by the restrictions. Namely, those, who are in ownership of hotels or similar accommodations, as well as air or motor transports.[42] Hotels and other facilities may be used in order to arrange quarantine areas and prevent further spread of the pandemic, and air and motor transports – for the sake of transporting people and cargo to and from quarantine zones.[43] This regulation will also oblige the above-mentioned persons, as per the government's request, to fulfill additional obligations, such as: providing accompanying services at the hotel, performing charter flights, providing transportation services of cargo and the like.[44]

According to the Ordinance, restriction of the right is linked to the fact of possessing said objects. Besides the owner, a possessor can also be any other person on grounds of property- or obligations-related relationship (e.g. lessee, usufructuary etc.), which, in practice, becomes quite common with the development of circulation. These persons possess an object of the ownership and utilize them for their private interests (use). It is noteworthy that the constitutional understanding of the ownership is broader than its civil-law understanding and encompasses all property rights.[45] Accordingly, the afore-mentioned persons which possess an object of the ownership based on various types of agreements, should be deemed as subjects of the constitutionally granted right.[46] State actions, which result in restricting the right to use the subject of the ownership have a similar impact on the interests of the possessor (use) as on those of the owner, which directly possesses the property.

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[41] Decree N1 of the President of Georgia on "Declaration of the State of Emergency throughout the Whole Territory of Georgia", 21 March 2020, Article 1 (5).
[42] Ordinance of the Government of Georgia №181 of 23 March 2020 regarding the "Measures Aiming to Prevent the Spread of the Novel Coronavirus (COVID-19) in Georgia", Article 8.
[43] i*bid*.
[44] *ibid*.
[45] ლ. თოთლაძე, *საქართველოს კოდექსის ონლაინკომენტარი,* gccc.ge, 2017, მუხ. 170, ველი 1., For more information in this regard, see ზოიძე, *supra* n 17, pp. 116-119; ს. ქერაშვილი, *მფლობელობის კონსტიტუციური დაცვა და მისი ზეგავლენა კერძო სამართალზე: უპირატესად გერმანიის საკონსტიტუციო სასამართლოს პრეცედენტების საფუძველზე,* სტატიათა კრებული ადამიანის უფლებათა დაცვა და სამართლებრივი რეფორმა საქართველოში, 2014. pp. 167-199.
[46] See e.g. Saghinadze and Others v. Georgia, Application no. 18768/05, 27 May 2010, where the European Court of Human Rights has dealt with encroachment upon the interests of a lawful possessor (user) of the cottage under the right to property enshrined in Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In this regard, the Federal Constitutional Court of Germany offers us an interesting interpretation, suggesting that constitutional protection of the right to property is not limited only by the protection of absolute property rights. Rather, the right to property can also encompass any property right which gives a respective person an opportunity to utilize the object of the ownership for his or her personal use.[47] Although the entitlement to administer the object of the ownership is an essential characteristic of the ownership,[48] this does not constitute a constitutional prerequisite for the protection of the right to property.[49]

C. Limitations to the Extent of Interference within the Right to Property

Interesting views on interference within the protected sphere of the right to property can be found in the work of John Locke, who developed a theory on property as a natural right. According to Locke, for the necessity of public good, we might require particular persons to waive their right to life, but we can never do so with respect to the right to property. He proceeds by pointing out that when a soldier is sacrificing his or her life during the wartime, doing so might be necessary for the protection of common good, however there is no pressing need to interfere within the right to property in such a manner.[50] Thus, on one hand, Locke emphasizes the importance of property as an inalienable right and, on the other hand, constructs the principle of proportionality, since he finds interference within the right to property given that it is not necessary for achieving a particular aim.

The principle of proportionality is the constitutional criterion for assessing lawfulness of interference within human rights and it sets limits for such an interference.[51] According to this principle, a legislative regulation that restricts human rights shall be an appropriate and necessary measure for achieving a legitimate aim and, at the same time, the intensity of the restriction shall be proportionate to such an aim.[52] This principle should serve as grounds for assessing whether or not the legislature could have ensured a reasonable balance between private and public interests. If the proportionality requirement is met, it can be said that the essence of the right had been preserved and thus the interference is justified.

Restrictions of fundamental rights provided in the Decree – including the right to property – during the continuation of a state of an emergency throughout the entire territory of Georgia serves a legitimate aim: enabling the State to fulfil its constitutional obligations "to ensure necessary public security in a democratic society, to reduce any possible threat to the life and

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[47] BVerfGE, 83, 201, Beschluss des ersten Senats vom 9. Januar 1991, 1 BvR 929/89, 9, para. 36.
[48] See ზოიძე, *supra* n 17, p. 99, - pointing out that "it is through administration that the right to property is expressed as the free will of a person".
[49] See *supra* n 47. para. 36.
[50] J. Locke, *Second Treatise of Government*, Gutenberg EBook 2010, Sect. 139, available at: https://www.gutenberg.org/files/7370/7370-h/7370-h.htm/ [accessed 29 May 2020].
[51] ლ. იზორია, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი, თავი მეორე,* გამომცემლობა „პეტიტი", 2013. p. 22.
[52] See *supra* n 21, para. 60.

health of the country's population, and to control the situation".[53]

A large-scale spread of the pandemic has threatened the life and health of many people. Due to the rapid growth of the number of infected people, healthcare systems have been overwhelmed in many countries, and people were unable to receive proper medical services.[54] Given this context, it was necessary to introduce certain restrictions in order to control epidemiological situation in the country and respond appropriately. In this regard, the measures related to isolation and quarantine have been put in place and, as a result, persons, who, for different reasons, are facing a high risk of being infected and are thus increasing the threat of the spread of the virus, "[can be isolated] in quarantine spaces (quarantine) provided by the government, or in a space provided by this person (self-isolation)".[55] In addition, in order to ensure safety of Georgian citizens abroad, it was necessary to facilitate their repatriation and undertake other similar steps.[56]

Government resources might not be sufficient for enforcing all these measures, and it might be necessary to resort to the use of objects under private ownership, - such as hotels or vehicles, - which can be regarded as appropriate means for achieving the aim, since, by creating additional quarantine spaces, providing transportation to Georgian and foreign citizens and placing them under quarantine, the State is trying to reduce the number of the infected people as well as the danger threatening the life and health of the population.

The Presidential Decree also emphasizes that interference within the right to property can only take place in case of the necessity, when the State has no other options. According to available sources, the State did face such a necessity, and set up quarantine spaces in more than 80 hotels under private ownership.[57] Furthermore, the Government has tasked airlines with operating special flights in order to repatriate Georgian citizens from abroad.[58]

When assessing restrictions to fundamental rights, decisive significance is attributed to the element of proportionality – there should be a proportionate relation between the legitimate

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[53] Ordinance of the Government of Georgia №181 of 23 March 2020 regarding the "Measures Aiming to Prevent the Spread of the Novel Coronavirus (COVID-19) in Georgia", Article 1.

[54] For information on the situation in various countries, see BBC, Coronavirus: Japan doctors warn of health system 'break down' as cases surge, 18 April 2020, available at: https://www.bbc.com/news/world-asia-52336388 [accessed 30 May 2020]; Coronavirus: Hospitals in Brazil's São Paulo 'near collapse', 18 May 2020, available at: https://www.bbc.com/news/world-latin-america-52701524 [accessed 30 May 2020]; DW, Britisches Gesundheitssystem droht Kollaps, 15 May 2020, available at: https://www.dw.com/de/britisches-gesundheitssystem-droht-kollaps/av-53434309/ [accessed 30 May 2020].

[55] Resolution N01-31/ნ of the Minster of nternally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia on "Rules regarding Isolation and Quarantine", 25 March 2020, Article 1 (3).

[56] For more information in this regard, see the website of the Ministry of Foreign Affairs of Georgia, available at: https://mfa.gov.ge/News/grdzeldeba-intenisuri-mushoba-saqartvelos-moqalaqe.aspx?CatID=5/ [accessed 30 May 2020].

[57] ინფორმაციის თავისუფლების განვითარების ინსტიტუტი (IDFI), *Covid 19-თან დაკავშირებული გამარტივებული შესყიდვები,* 24 აპრილი, 2020. Available at: https://idfi.ge/ge/procurement-_%20related_to_covid_19/ [accessed 29 May 2020].

[58] See Website of the Ministry of Foreign Affairs of Georgia, The Georgian Foreign Minister has presented the schedule of flights for the next two weeks, available at: https:/mfa.gov.ge/News/saqartvelos-sagareo-saqmeta-ministrma-evropis-mima.aspx?CatID=5/ [accessed 29 May 2020].

aim and the restriction of the right to property. Under the existing regulations, one of the elements forming part of the essence of the right to property is being restricted – an owner (possessor) is deprived of the ability to utilize the object of the ownership as he or she pleases.

In addition, it should be pointed out that the element of financial compensations does play a certain role in the process of balancing interests. In one of its judgments, the Constitutional Court of Georgia noted that subjecting an owner to restrictions in order to achieve a legitimate aim might be justified, but in cases where State interference goes beyond what is acceptable, introduction of financial obligations might be successful in balancing private and public interests, and "the legislature will no longer have to choose between public needs and interests of the owner".[59] As it has been noted above, the Law of Georgia "On State of Emergency" only permits restricting the right to property if it is accompanied with proper compensation.[60] According to publicly available information before 4 May, hotels had been used as quarantine spaces in exchange for financial compensation; the amount and conditions of payment were defined on a case-by-case basis, provided by the written agreement with each individual owner.[61] On May 4 2020, the Government of Georgia adopted an ordinance which prescribed the top limit for the amount of compensation. In particular, the price of services provided by hotels should be calculated based on actual costs, however it cannot exceed GEL 100 a day per each beneficiary.[62] Imposition of such a ceiling by the Government raises questions with respect to the principle of appropriate compensation.

Georgian legislation does not provide a legal definition of "proper compensation" and it can be determined on a case-by-case basis, while taking all the relevant circumstances into account. In the given context, it would be interesting to draw a parallel with the Law of Georgia "On the Procedure for the Expropriation of Property for Pressing Social Needs", which provides that "full and fair compensation" shall be no less than the market price for the property.[63] If we apply the same standard to the cases of restrictions of the right to property, proper compensation for utilizing quarantine spaces should be whatever income the owner would have received form the customers during regular commercial operation. However, we should take into account that in this case, we are dealing not with the expropriation of the property, but with the restriction of the right to property, which is a less intrusive measure of interference within the right. In addition, a state is under an emergency, which is why it might be justified to determine the amount of compensation in accordance with lower standards.

Furthermore, another provision of the Ordinance of the Government should be taken into account, which stipulates that owners of hotels will be compensated only based on the factu-

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[59] See *supra* n 18, para. II-13.
[60] Law of Georgia "On State of Emergency", 17 October 1997, Article 4 (i).
[61] ინფორმაციის თავისუფლების განვითარების ინსტიტუტი (IDFI), *Covid 19-თან დაკავშირებული გამარტივებული შესყიდვები - II ნაწილი,* 19 მაისი, 2020. available at: https://idfi.ge/ge/procurement_related_to_covid_19_part_ii/ [accessed 29 May 2020].
[62] Ordinance N290 of the Government of Georgia "On Amending the Ordinance of the Government of Georgia N674 "On Approving Government Programs for Healthcare in 2020", Annex 20, Article 4 (a)
[63] Law of Georgia "On the Procedure for the Expropriation of Property for Pressing Social Needs", Articles 1 (f), 6 (1), 6 (2) and 8.

al costs incurred. This can imply the costs of providing various services (meals, salaries of personnel and other similar expenses). Besides, these factual costs can only be below GEL 100. Limiting compensation only by factual costs might be incompatible with the principle of proper compensation, which is aiming to not only cover current expenses of the owner (possessor), but also to compensate him/her for restricting their right to property. Nevertheless, the existing context should be considered, - currently, due to the pandemic, owners of hotels are deprived of the ability to engage in commercial activities and the use of property for its initial purposes. On the other hand, by setting such limits to compensation, the Government is intending to spare state resources, which also seems to be legitimate in the current economic crisis.

As for the airlines, - within the existing emergency, they were required to operate commercial flights for the purposes of repatriation of Georgian citizens from abroad, with the caveat that the price of each ticked would not exceed EUR 199.[64] Given that they were able to operate flights, the airlines were receiving compensation, but again – is establishing a ceiling proportionate and compatible with the principle of proper compensation? As it has been noted, given the existing circumstances, we cannot equate proper compensation to the market price. Although satisfying commercial interests of individuals, whose rights have been restricted is not among the requirements of the Law "On State of Emergency", this compensation cannot be the same as ongoing expenses either. It is noteworthy that introduction of the ceiling on the ticket price is also connected with the freedom of enterprise – which is closely linked to the right to property, – however, addressing this issue is beyond the purpose of this article.

CONCLUSION

Ensuring the well-being of the entire society on one hand and protecting fundamental rights of every individual on the other hand is the number one task for a State. However, when public safety is threatened and reasons for a declaration of a state of emergency in the country are starting to appear, it might be very difficult, or even impossible to score both of these goals simultaneously. In this case, the aim of a rule of law state should be to preserve public safety while inflicting the least possible damage upon private interests.

Restricting the right to property in the context of a state of emergency reflects its social function. The State is obliged to act with "precaution and proportionality"[65] when interfering within the right to property and determining the scope of regulations. At the same time, it is important to ensure that all three branches of the government are guided by the principles of preserving the essence of the right and proportionality; thus, the executive shall decide upon appropriateness of restricting certain rights and act in compliance with the existing regulations.

[64] See *supra* n 58.
[65] See *supra* n 18, para. II-5.

During a state of emergency, interference within the right to property in accordance with the form and content prescribed by the Presidential Decree is aiming to serve the needs of the public, reduce the risk of the spread of the pandemic and thus is aiming to protect the life and health of the population. Accordingly, it can be deemed as an appropriate measure. What deserves more attention in this context is the element of financial compensations, which intends to balance the interests of owners and public interests. Existing information suggests that the State has not used any objects without paying compensation to the owners (except those companies with high social responsibility, which willingly refused to receive financial compensation). As to whether the compensation offered by the state was appropriate, - this might as well become a matter for the Court to adjudicate upon.

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STATE OF EMERGENCY: A SHORTCUT TO AUTHORITARIANISM*

ABSTRACT

From the beginning of 21st century, legal ramifications of declaring a state of emergency have attracted a lot of attention due to the fact that many states have resorted to this measure in order to combat, first, terrorism threat, and most recently – a new pandemic – COVID-19. However, a state of emergency is certainly not a new issue, and there is a large body of scholarly work dedicated to it, alongside the issue of derogations from fundamental human rights and liberties both from international human rights law and constitutional law perspective.

This article focuses on constitutional legal aspects of the state of emergency and derogations from human rights obligations and is aiming to address some of the problems that might occur during a state of emergency. It will be argued that a state of emergency represents a convenient shortcut to authoritarianism and that a strict constitutional legal framework is necessary to be put in place in order to prevent the spread of exceptional provisions within the legal system, which could lead to the normalization of a state of exception.

INTRODUCTION

A large body of scholarly work has been dedicated to the issue of a state of emergency throughout the last two decades. Although significant work has been accomplished in the 20th century, the topic was further popularized in the beginning of this millennium as a result of declaration of the "war on terror",[1] which allowed a number of states, including well-established democracies, to declare a state of emergency or introduce exceptional provisions into their legal systems without formally derogating from respective rights. While such measures predominantly affected the rights of terrorism suspects, the damage also spread into legal systems in general.

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* Certain parts of this article are based on my LLM thesis submitted to the Central European University's Department of Legal Studies in 2018 under the supervision of Professor Károly Bárd.

[1] See The Guardian, George Bush's address to a joint session of Congress and the American people, Fri 21 Sep 2001 16.31 BST, available at: https://www.theguardian.com/world/2001/sep/21/september11.usa13 [accessed 19 April 2020].

The said emergency measures have altered, *inter alia*, some of the most fundamental principles of criminal justice. Problems arising from introduction of emergency measures are twofold: the first problem is the prolongation of a state of emergency and hence the continued derogation from fundamental rights; the second – introduction of *de facto* emergency provisions into normal legislation. Both of these tactics lead to an important issue with respect to which scholars and experts have continuously expressed their concerns: this issue can be framed as the "normalization" of a state of emergency.

Although this century's main challenges regarding legal aspects of a state of emergency have been linked to anti-terrorism measures, the spread of COVID-19 has once again demonstrated the need to address pressing issues related to the state of emergency and look into the legal ramifications of introducing an exceptional regime. In addition, while the patterns of the abuse of emergency powers were observed as early as the Roman Republic,[2] studies suggest that there is a strong correlation between the wide-spread and grave violations of human rights and states of emergency.[3] This logically leads to the conclusion that more efficient mechanisms are necessary to be put in place in order to prevent the abuse of powers in times of emergency and establish accountability for the abuse thereof.

This article will present some of the problematic areas of a state of emergency from a constitutional point of view. It will argue that, if relevant constitutional provisions are not properly designed, a state of emergency gives leaders the possibility to take over the legislative power and transform democracies into authoritarian or semi-authoritarian states. This is particularly visible in the absence of strict constitutional regulations regarding declaration and prolongation of a state of emergency, as well as derogation from fundamental human rights and liberties alongside the constitutional oversight of the rule by decrees.

Certainly, one of the most important topics is the definition of the scope of human rights protection in a state of emergency. International and regional judicial and quasi-judicial mechanisms as well as some national courts have set forth standards in the field of human

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[2] See Clinton L. Rossiter, *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton: Princeton University Press, 2008, at 70-71.

[3] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, p. 3, available at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf [accessed 17 April 2020]; Subrata Roy Chowdhury, Rule of Law in a State of Emergency: Paris Minimum Standards of Human Rights Norms in a State of Emergency, (London: Pinter Publishers, 1989) p. 205; Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc.E/CN.4/Sub.2/1982/15, 27 July 1982, available at: http://hrlibrary.umn.edu/Implications%20for%20human%20rights%20siege%20or%20emergency_Questiaux.pdf [accessed 17 April 2020]; See also Jaime Oraá, *Human Rights in State of Emergency in International Law* (Oxford: Clarendon Press, 1992), 1; Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, Human Rights Quarterly, Vol. 7, No. 1 (Feb., 1985), pp. 89-131, at 91; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (University of Philadelphia Press, 1994); Parvez Sattar, *Human Rights and Three Special Aspects of the Rule Of Law in the Modern Society*, Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, (Ann Arbor: UMI Dissertation Publishing, May 1998), p. 168; See also European Commission for Democracy through Law, Emergency Powers, CDL-STD(1995) 012, Strasbourg, 1995, p. 2, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e [accessed 13 April 2020].

rights law applicable to emergencies, predominantly with respect to the right to a fair trial and due process. However, it is also important to establish standards beyond human rights law – those aiming to ensure that other democratic values in a broader sense, such as principle of separation of powers and the rule of law are preserved.

In most cases, emergencies require rapid reaction, which leaves very little (if any) room for lengthy procedures of legislative deliberation. For this reason, vast powers are being concentrated in the hands of the executive (Prime Ministers or Presidents, depending on the form of the government), which supposedly is the most "efficient" branch of the government.[4] However, precaution needs to be taken in particular when deciding which powers should be given to the executive in times of emergencies *ex ante*, as well as in the course of selecting *ex post* mechanisms for reviewing measures enacted by the executive to combat public emergencies. Otherwise, we will face a growing risk of aiding the establishment of authoritarian or semi-authoritarian regimes. Eventually, the lesser the risk of "normalization" of the exceptional, the longer the road from a state of emergency to authoritarianism.

The first chapter of this article will provide an overview of a state of emergency in general and will illustrate some practical examples. The second chapter will compare emergency measures introduced during the war on terror to certain restrictions enacted during the 2020 pandemic and argue that, although different in nature, these two types of emergencies share some similarities. The third chapter will offer insights into theoretical aspects of a state of emergency based on studies of Dr. Greene and Dr. Dyzenhaus, however it does not pretend to provide the full analysis of the extensive work done by these scholars in the field of emergency powers. At the same time, it will be pointed out that measures enacted during terrorism and COVID-19-related emergencies are particularly worrisome in that they pave the way for authoritarian regimes. The fourth chapter will present examples of some of the most essential constitutional regulations that should be in place in order to avoid normalization of a state of emergency. This paper intends to underline the necessity to create stronger safeguards for preservation not only of individual rights and liberties, but also other democratic values such as supremacy of the constitution and the rule of law.

I. STATE OF EMERGENCY: NECESSITY AND TEMPTATION

State of emergency is a tempting instrument, allowing states to derogate from fundamental human rights and liberties in order to combat exigencies. Constitutions of most states have an emergency/derogation clause,[5] which prescribes grounds for its declaration as well as the

[4] See e.g. Jonathan Macey, Executive Branch Usurpation of Power: Corporations and Capital Markets, 115 Yale L.J. 2417 2005-2006, p. 2425, available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2348&context=fss_papers [accessed 19 April 2020], - stating that "[t]he executive branch clearly has advantages in this arena over the legislature and the judiciary [in terms of] timeliness of the response".

[5] Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, European Journal of Political Economy, 2017, 1-14, p. 1; See Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, pp. 14-15 and p. 41, available at:

list of non-derogable rights,[6] or the list of rights from which states can derogate.[7] Similarly, international conventions allow states to derogate from their international obligations under exceptional circumstances. However, they "[do] not create a Schmittian state of exception"[8] and the suspension of individual rights is only allowed to the extent prescribed by the derogation provisions.[9]

This does make a lot of sense, - emergencies might prevent states from complying with all their human rights obligations, and national authorities are sometimes required to take exceptional measures in order to combat public emergencies facing the nation. However, it is also true that "emergencies […] challenge the state's commitment to govern through law",[10] and the fact that the state of emergency "put[s] legality to its greatest test"[11] is hardly objectionable. Indeed, as one author puts it, "once law has been established to maintain social order, emergency remains law's nemesis, the unruly force that would overturn the rules and regimes so carefully constructed by the principles and practices of legality".[12] A state of emergency *per se* is dangerous for a normal legal order.

Nevertheless, we tend to put more trust into those who govern during emergencies, - a general pattern is that we tend to be more tolerant towards leaders who are in charge of combating an emergency facing the nation. In emergencies, we frequently hear phrases such as "this is not the time to criticize the government", "the situation cannot be handled otherwise" etc.[13] But sometimes, this narrative leads to overlooking the proper exercise of powers, and it becomes difficult to distinguish which measures are really caused by the necessity to

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558 [accessed 14 April 2020]. However, there are some exceptions, such as the Constitution of the United States of America. The only provision prescribed by the US that is relevant in the context of emergencies is Section 9 (2), which provides that "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".For statistical data and a cross-country comparison of the powers allocated within different political actors in emergency situations, see Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558 [accessed 15 April 2020].

[6] See e.g. Constitution of the Republic of Estonia, Article 130.

[7] See e.g. Constitution of the Kingdom of Spain, Section 55.

[8] Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo [accessed 14 April 2020].

[9] See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 15; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4; Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 27.

[10] Victor V. Ramraj, *No Doctrine More Pernicious? Emergencies and the Limits of Legality*, in "Emergencies and the Limits of Legality", ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 4.

[11] Austin Sarat, *Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under the Conditions of Emergency*, in "Sovereignty, Emergency, Legality", ed. Austin Sarat (New York: Cambridge University Press: 2010), p. 1.

[12] *ibid*, p. 4.

[13] See e.g. The Times of Israel, Stop Criticizing the Government (Shabbos 11), 17 March 2020, 10:03 PM, available at: https://blogs.timesofisrael.com/stop-criticizing-the-government-shabbos-11/ [accessed 19 April 2020].

combat an emergency, and which measures are the result of an executive feeling too comfortable with his or her exercise of exceptional powers. [14]

As a result, it would be no exaggeration to suggest that emergencies can be used as a shortcut to authoritarianism. From this point of view, the Weimar Constitution has been criticized for the lack of sufficient checks on emergency powers, "which ultimately contributed to the rise of Hitler's dictatorship through constitutional means".[15] On one hand, "not every leader is likely to become a Nazi dictator upon declaration of state of emergency",[16] however, as Elkins, Ginsburg and Melton point out, "sometimes, executives are induced to seek more power because of external shocks that render it prohibitively costly to work within constitutional limits conceived under more stable conditions",[17] one of such examples being a military crisis, "which often tempts the executive to pursue security and stability at the expense of individual rights".[18]

Drafters are usually aware of the temptations that those in power might have in states of emergency. For this reason, constitutions include safeguards that prevent certain actions of political actors. Some of the examples are: prohibition of holding elections,[19] introduction of constitutional amendments/undertaking constitutional reforms,[20] or prohibition to dissolve the legislature in a state of emergency.[21]

It is no surprise that a declared state of emergency gives respective branches of the government a relative freedom to gain benefits that would otherwise have faced certain obstacles.

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[14] One of the examples is Donald J. Trump claiming to have "total authority". See e.g. The New Yorker, We Won't Know the Exact Moment When Democracy Dies, 16 April 2020, available at: https://www.newyorker.com/news/our-columnists/we-wont-know-the-exact-moment-when-democracy-dies?utm_brand=tny&utm_source=facebook&mbid=social_facebook&utm_medium=social&utm_social-type=owned&fbclid=IwAR1QrHIsgR5E6l-haOeGNi-AhAp_GEM9yZIdlmLZqpz45FQf1jZIqwMr1Ys [accessed 24 April 2020].

[15] Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 18-19 [hereinafter, "Elkins et. al"];

[16] Ana Jabauri, Preserving Criminal Justice during a State of Emergency: Derogations from Fair Trial and Due Process Rights under the ICCPR, ECHR and the ACHR, Thesis Submitted to the Department of Legal Studies of the Central European University, 2018, p. 6.

[17] *ibid*, 73-74; See also David Dyzenhaus, *The Compulsion of Legality*, in "Emergenices and the Limits of Legality", ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 55, - pointing out that, "even in ordinary times, the executive is prone to try to carve out exceptions for itself, so that it can act largely unconstrained by the rule of law"; See also Bruce Ackerman, *The Emergency Constitution*, Law Faculty Scholarship Series, Paper 121, The Yale Law Journal, Vol. 113, 2004, 1029–1091, p. 1047, - pointing out, in particular, that "European nations have had a long and unhappy historical experience with explicit emergency regimes [whereby] these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue then for lengthy periods".

[18] Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 18-19, - pointing to the examples such as "Lincoln's suspension of *habeas corpus* during the civil war, the relaxing of privacy constraints on law enforcement investigations in the post-9/11 environment, or Indira Ghandi's suspension of elections in India during her period of emergency rule in 1975-1977".

[19] See e.g. Constitution of Georgia, Article 37 (3) for parliamentary elections; see Article 50 (5) for presidential elections and see Article 71 (5) for general elections.

[20] See e.g. Constitution of the Plurinational State of Bolivia, Article 140; See also Constitution of Georgia, Article 77 (7); Constitution of Moldova, Article 142 (3).

[21] See e.g. Constitution of the French Republic, Article 16.

For example, some countries might proceed with legislating on controversial issues during the restrictions on the freedom of assembly. Poland serves as a good example,[22] - legislative proceedings against the women's right to choose have been accompanied by massive protests in the past years. However, since the possibility to hold protests and demonstrations might be restricted due to the rules of social distancing during the COVID-19 outbreak,[23] the Parliament is trying to use this opportunity to pass legislation banning abortions while finding themselves in the comfort of not being distracted by the mass protests.[24] In response to Poland's intent to proceed with examination of the bills restricting women's reproductive rights, Dunja Mijatović, the Council of Europe Commissioner for Human Rights noted that "[i]n this extraordinary time of the COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights".[25]

She is indeed right in calling it a "temptation", - abstaining from legislating on controversial issues takes at least some commitment to democratic values, and not many politicians have such a commitment in emergencies. What is also true is that passing the said bill in Poland would not be an unprecedented example of the legislative branch ignoring the demands of those, who they should in fact be representing. Such events unfold even during the peacetime, and, in some countries, - quite frequently. For the purposes of this paper though, this example stays relevant – only time will show whether or not the Polish legislature will be able to resist this temptation. Meanwhile, the next section will provide more examples of those who have failed to resist, - it will first address terrorism-related emergencies and compare it to COVID-19-related emergencies, and will further address specific deviations from the rule of law in the context of the latter.

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[22] However, Poland is not alone in this regard, - USA also provides another example of how the current pandemic can be used against women's reproductive rights. See e.g. Quartz, Activists are using Covid-19 to set limits on abortion around the world, 17 April 2020, available at: https://qz.com/1834915/activists-are-using-covid-19-to-limit-abortion-access/ [accessed 19 April 2020].

[23] However, we have witnessed an interesting attempt to protest while maintaining the rules of social distancing in Israel. See e.g. The Guardian, Israelis hold 'socially distant' protest against Netanyahu, 20 April 2020, available at: https://www.theguardian.com/world/video/2020/apr/20/israelis-hold-socially-distant-protest-against-netanyahu-video [accessed 24 April 2020].

[24] Euronews, Coronavirus in Europe: Polish MPs set to debate abortion ban while lockdown prevents protest, 12/04/2020 - 18:22, available at: https://www.euronews.com/2020/04/12/coronavirus-in-europe-polish-mps-set-to-debate-abortion-ban-while-lockdown-prevents-protes?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook#Echobox=1586708819 [accessed 13 April 2020].

[25] Council at Europe, Commissioner urges Poland's Parliament to reject bills that restrict women's sexual and reproductive health and rights and children's right to sexuality education, 14/04/2020, available at: https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament-to-reject-bills-that-restrict-women-s-sexual-and-reproductive-health-and-rights-and-children-s-right-to-sexuali?fbclid=IwAR173ivMkNi-eEXxCTueu9cSacgp39MOn2fG2JSupCLBZxGLTjG-saOpAHQ [accessed 14 April 2020]. For HRW's reporting on the issue, see Human Rights Watch, Poland: Reject New Curbs on Abortion, Sex Ed: Don't Manipulate Pandemic to Endanger Women, Adolescents, April 14, 2020 12:01 AM EDT, available at: https://www.hrw.org/news/2020/04/14/poland-reject-new-curbs-abortion-sex-ed?fbclid=IwAR1NthpGs53ahvlm6ApNIt5Z4O1DNBx89jdeDEJhAnfApIAu3dqlvxG9r4I [accessed 15 April 2020].

WAR ON TERROR VS. WAR AGAINST COVID-19

COVID-19 is not the first pandemic that the world is facing, and neither is it the first time that many states simultaneously are declaring a state of emergency. Not to go any further, the beginning of this century was marked by the commencement of the "war on terror",[26] which served as grounds for either announcing a state of emergency *de jure* and formally derogating from fundamental rights as guaranteed by international conventions, or by applying special *de facto* emergency rules to terrorism cases, especially with respect to fair trial and due process rights.

Terrorism and COVID-19-related emergencies are *prima facie* different. The former represents a threat to national security, while the latter threatens public health. Core rights affected by the emergency powers that states have been resorting to might also differ. However, they do share significant similarities. For instance, both of them are open-ended – terrorism has no "natural resting point",[27] which means that states might tend to prolong states of emergency in violation of the basic principles enshrined in derogation clauses, - most importantly the requirement that emergency measures be temporary. Similarly, nobody is aware when the novel coronavirus will be eliminated - we can only hope that it does not last for as long as the war on terror.[28] Given the open-ended nature of these threats, the issue of prolongation of a state of emergency and thus "normalization" of the exceptional is even bigger.

Secondly, although emergency measures undertaken throughout these two types of emergencies serve different goals, the manner in which they affect the legal system, as well as the consequences they might have in terms of altering the normal legal order, are quite similar. Below, we will first review some of the measures enacted during terrorism-related and COVID-19-related emergencies separately, and a comparison of risks posed by them will be offered further. It will be argued that the effect of emergency measures related to novel coronavirus might be just as dangerous as those enacted for the purposes of combating terrorism.

We can look for the first interesting similarity in the linguistic aspect of the speeches made during terrorism-related and COVID19-related emergencies: it is easy to see an identical pattern in the language used by the media and the world leaders in the context of the "war" on terror and the "war" against COVID-19.[29] A rhetoric of anti-terrorism has been very clear

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[26] See *supra* note 1.

[27] David Luban, *The War on Terrorism and the End of Human Rights*, in "The Constitution in Wartime: Beyond Alarmism and Complacency", ed. Mark Tushnet (Duke University Press, 2005), p. 228.

[28] The war in Afganistan is a good example of how long can a "war or terror" last. Recently, the US and Taliban concluded an agreement aiming to end the war which was followed after Afganistan's refusal to hand over Osama bin Laden. See BBC, Afghan conflict: US and Taliban sign deal to end 18-year war, 29 February 2020, available at: https://www.bbc.com/news/world-asia-51689443 [accessed 19 April 2020]. Nevertheless, it is still unclear whether or not this war will eventually be over as a result of the agreement, as no official cease-fire agreement has been put in place. For more insights in this regard, see Global Conflict Tracker, War in Afghanistan: Recent Developments, last updated 17 April 2020, available at: https://www.cfr.org/interactive/global-conflict-tracker/conflict/war-afghanistan [accessed 19 April 2020].

[29] See e.g. The Conversation, Coronavirus: If we are in a war against COVID-19 then we need to know where

particularly since the US announced the "war on terror", - terrorism has frequently been referred to as a common enemy; references to heroism of troops and attempts to create a sense of unity against a common enemy have also been recurrent.

If we look into the linguistic aspects of the speeches made in the context of COVID19-related emergencies, we will see the same pattern, - the virus is a common enemy, against which we are at "war"; medical professionals – i.e. the "troops" are at the "front line" while fighting against the common enemy and often speeches include calls for "unification" and "standing together" in times of this emergency.[30] Executive branch is also trying to play the role of the "protecting power".[31] Interestingly, Donald J. Trump even stated that he is a "wartime President".[32] All of this points to the fact that certain elements of populist discourse[33] come handy in emergency situations, and that terrorism and COVID-19-related emergencies share a lot of similarities in this regard. Although a detailed linguistic analysis of speeches made in emergency contexts is definitely interesting, it falls beyond the scope of this paper. Thus, we will now proceed with providing practical examples of measures undertaken with the intent to combat the two emergencies under consideration.

During terrorism-related emergencies, many problems have been documented both in *de jure* emergencies where states have formally derogated from their human rights obligations, and in *de facto* emergencies, where emergency provisions were hidden in ordinary antiterrorism legislation. Some of the recurring problems in the jurisprudence of international human rights bodies are: trial of civilians by military tribunals, the use of "faceless judges", alterna-

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the enemy is, April 1, 2020 3.51pm BST, available at: https://theconversation.com/coronavirus-if-we-are-in-a-war-against-covid-19-then-we-need-to-know-where-the-enemy-is-135274 [accessed 19 April 2020]. For Noam Chomsky's brief comment on linguistic aspects of COVID19-related emergencies, see Noam Chomsky: Coronavirus - What is at stake? DiEM25 TV, available at: https://www.youtube.com/watch?v=t-N3In2rLI4 [accessed 13 April 2020].

[30] See e.g. the tweet of Donald J. Trump, 17 March 2020, stating that "The world is at war with a hidden enemy", available at: https://twitter.com/realdonaldtrump/status/1239997820242923521 [accessed 13 April 2020]; See also the tweet of Donald J. Trump, 12 April 2020, referring to COVID19 as the "hidden enemy", available at: https://twitter.com/realDonaldTrump/status/1249418405951799309 [accessed 13 April 2020]; See also the tweet of Emmanuel Macron – "Encore et toujours, pour protéger les Français, nos armées s'adaptent et s'engagent en première ligne aux côtés des soignants mobilisés. #FranceUnie", 4 April 2020, available at: https://twitter.com/EmmanuelMacron/status/1246510621962776581 [accessed 13 April 2020]. See also: CNBC, Macron warns 'we are at war' as France unveils $50 billion in coronavirus measures, TUE, MAR 17 20205:28 AM EDT, available at: https://www.cnbc.com/2020/03/17/coronavirus-france-president-macron-warns-we-are-at-war.html [accessed 13 April 2020]. However, such a rhetoric is not typical only for heads of state, - see also World Health Organization Director-General Tedros Adhanom Ghebreyesus stating that "[w]e are at war with a virus that threatens to tear us apart," – NPR, 'We Are At War,' WHO Head Says, Warning Millions Could Die From COVID-19, March 26, 20204:46 PM ET, available at: https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822123471/we-are-at-war-who-head-says-warning-millions-could-die-from-covid-19 [accessed 13 April 2020].

[31] See e.g. the tweet of Emmanuel Macron, 1 April 2020, - "J'ai promis de vous protéger face aux pertes de revenus liées au COVID-19", available at: https://twitter.com/EmmanuelMacron/status/1245271305882079242 [accessed 13 April 2020].

[32] See e.g. Time, War Has Been the Governing Metaphor for Decades of American Life. This Pandemic Exposes Its Weaknesses, April 15, 2020 6:23 PM EDT, available at: https://time.com/5821430/history-war-language/ [accessed 6.11.2020].

[33] The author relies on Hawkins's definition of "populist discourse". See Kirk A. Hawkins, Is Chávez Populist? Measuring Populist Discourse in Comparative Perspective, Comparative Political Studies Volume 42 Number 8, August 2009, pp. 1040-1067.

tion of certain aspects of equality of arms and the presumption of innocence. [34] In this regard, the question we should pose is whether the existing criminal justice guarantees should be altered in the context of counter-terrorism.

Interestingly, some scholars – such as Richard Posner - claim that terrorism suspects "should have no or very few guarantees in criminal proceedings against them",[35] arguing that, due to the *sui generis* nature of terrorist threat, "it requires a tailored regime, the one that gives terrorist suspects fewer constitutional rights",[36] and that "national emergencies in general, or the threat of modern terrorism in particular, justify *any* curtailment of the civil liberties that were accepted on the eve of the emergency" (emphasis in original).[37] This argument is based on the assumption that curtailing civil liberties will result in more efficient counterterrorism efforts.[38] However, "while there are often difficult trade-offs to be made between liberty and security, it does not follow that sacrificing liberties will always, or even generally, promote security".[26]

This paper rejects Judge Posner's argument and claims that states should not depart from existing human rights standards while countering terrorism. [39] Nevertheless, it should be pointed out that international human rights instruments have afforded states some flexibility with respect to standards regarding fair trial and due process rights in the context of terrorism. For instance, while some international bodies have made it clear that, in general, deviation from the presumption of innocence is *always* prohibited,[40] including the cases of suspected terrorists,[41] the ECHR has had a chance to clarify the scope of the right to remain silent in a terrorism-related case and adopted what I believe to be a rather narrow definition. Namely, in *Murray v. the United Kingdom*,[42] the Court found that the right to remain silent is not absolute and, under certain circumstances, drawing negative inferences from the silence

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[34] General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to A Fair Trial, 23 August 2007, CCPR/C/GC/32, para. 23. Whereas the ECtHR as not dealt with this issue, the UN Human Rights Committee and the Inter-American Court of Human Rights have assessed whether such composition of the court complies with the requirements of Articles 14 and 8 respectively. See e.g Lori Berenson- Mejía v. Peru, Judgment of November 25, 2004 (Merits, Reparations and Costs), para. 147; Castillo Petruzzi, para. 133; See also César Landa, Executive Power and the Use of the State of Emergency, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 221-222.

[35] Jabauri *supra* note 16, p. 5.

[36] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006), p. 11.

[37] *ibid*.

[38] David Cole, James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (New York: The New Press, 2006), p. 240.

[39] For a proper critique of Judge Posner's approach, see David Cole, The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11, Stanford Law Review, Vol. 59:1735 April 2007, pp. 1735-1751.

[40] General Comment 32, *supra* note 34, para. 6; *See* UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

[41] Serjio Garcia Ramirez, The Inter-American Court of Human Rights' Perspective on Terrorism, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 799.

[42] See Murray v. United Kingdom, no. 18731/91, 8 February 1996.

of an accused does not amount to infringement upon the presumption of innocence.[43] Moreover, in a more recent case concerning terrorism suspects,[44] the ECHR "quite explicitly disagreed with the UN Human Rights Committee that an emergency, and consequently the derogation measures, can only be 'temporary' [and] the Court's own cases on Northern Ireland confirm[s] that an emergency and a derogation could last for a long while".[45]

At the domestic level, "some common alterations [to criminal trial procedures], particularly since 9/11, have included extended periods of pre-charge or pre-trial detention; limited access to legal representation; suspension or limitation of habeas corpus; the use of special or military courts; restrictions on disclosure of and access to classified evidence; increased reliance on coerced confessions; the lowering of evidentiary standard; the use of anonymous witnesses; and limitations on appeal rights".[46] These alterations took place both during *de jure* and *de facto* emergencies.

Similar to the case of terrorism-related emergencies, states have used the COVID-19-related emergency to derogate from their international obligations. As of mid-April 2020, 9 states[47] have notified the Secretary General of the Council of Europe that they were invoking the derogation clause of the European Convention on Human Rights. In contrast to terrorism, as some argue, "[t]he coronavirus pandemic is possibly the closest we have ever seen of a phenomenon that can objectively be categorised as necessitating exceptional measures".[48] In this regard, the issue of certain countries trying to use emergency powers for unjust restriction of human rights is as pressing as ever.

Many states have resorted to measures that are objectively serving the aim of combating the spread of COVID-19. Some of the most frequent reactions include placing restrictions *inter alia* on "freedom of movement, expression and assembly".[49] It is true that not all measures used have been disproportionate, however many of them can lead to serious problems in the long run, as evidenced by actions of states that have definitely gone a bit too far in their use of emergency powers.

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[43] I disagree with the Court's view on the scope of the presumption of innocence. See Partly Dissenting Opinion of Judge Walsh, Joined by Judges Makarczyk and Lohmus, - expressing the position that there was indeed a breach of Article 6 (2) of the Convention.
[44] A. and Others v. United Kingdom, Application no. 3455/05), 19 February 2009.
[45] Marko Milanovic, European Court decides A and others v. United Kingdom, 19 February 2009, available at: https://www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/ [accessed 20 April 2020].
[46] See Ben Saul, Criminality and Terrorism, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 163.
[47] Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia and Serbia. See European Court of Human Rights, Press Unit, Factsheet – Derogation in time of emergency, p. 2, available at: https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf [accessed 14 April 2020].
[48] Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo [accessed 14 April 2020].
[49] Human Rights Watch, COVID-19 Offers Chance to Address Human Rights Concerns, April 14, 2020 12:00AM EDT, available at: https://www.hrw.org/news/2020/04/14/covid-19-offers-chance-address-human-rights-concerns [accessed 14 April 2020].

Some measures might on the surface appear necessary and proportionate, while threatening such values as transparency of the judiciary, as it will be further demonstrated. The right to a fair trial has been one of the most susceptible rights during terrorism-related states of emergency. However, COVID-19-related restrictions also have an impact on this right, especially the aspect of a public trial, which can be seen as a collateral damage caused by the restrictions on the gathering of large groups of people. In addition, problems might arise from the absence of a clear legal basis for restriction on specific rights. We can take a look at the Georgian example to see how the right to a fair trial might be affected amidst the novel coronavirus.

On 21st of March 2020, the President of Georgia adopted a Decree N1,[50] under which the "court hearings envisioned in the Criminal Procedure Code of Georgia, can be conducted remotely, by electronic means of communication".[51] Although neither the presidential Decree nor the HCoJ recommendations[52] provide a legal basis for the restriction of the right to a fair trial, "the majority of judges restrict [monitoring organizations'] attendance [on trials] by wrongfully citing the regulations".[53] Even though the right to a public trial is not an absolute right (in fact, it is the only qualified element of the right to a fair trial), it can only be restricted under exceptional circumstances, and on *ad hoc* basis. Currently, exclusion of the public and the media from court sessions has almost blanket character in practice, which is problematic not only for the protection of the right to a fair trial *strictu sensu*, but from a broader perspective of the transparency of judicial proceedings as well. In addition, the indefinite nature of such a restriction might, in the long run, lead to corruption and wrongful convictions. Thus, insofar as electronic means of communication allow attendance on trials, the right to a public trial should be respected to the fullest extent possible in order to avoid aforesaid drawbacks.

We can find examples of some States that have gone even further. For instance, "[a]uthoritarian countries such as China can impose stricter controls on movement and more intrusive means of surveillance, such as house-to-house fever checks, tracing and enforcement of quarantines, and are less vulnerable to pressure from businesses and popular opinion".[54] China has banned "all independent civil society and freedom of expression",[55]

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[50] Legislative Herald of Georgia, Decree N1 "On Measures to be Implemented in connection with the Declaration of a State of Emergency throughout the Whole Territory of Georgia", 21 March 2020, available at: https://matsne.gov.ge/en/document/view/4830372?publication=0 [accessed 19 April 2020].

[51] Transparency International, Statement on the Closure of Court Hearings in Common Courts of Georgia and Other Related Problems under a State of Emergency, 13 April, 2020, available at: https://transparency.ge/en/post/statement-closure-court-hearings-common-courts-georgia-and-other-related-problems-under-state [accessed 13 April 2020].

[52] High Council of Justice of Georgia, Recommendations, 13 March 2020 (available only in Georgian), available at: http://hcoj.gov.ge/ge/iustitsiis-umaghlesi-sabchos-rekomendatsiebi/3629 [accessed 13 April 2020].

[53] Transparency International, Statement on the Closure of Court Hearings in Common Courts of Georgia and Other Related Problems under a State of Emergency, 13 April, 2020, available at: https://transparency.ge/en/post/statement-closure-court-hearings-common-courts-georgia-and-other-related-problems-under-state [accessed 13 April 2020].

[54] James Paton, When, and How, Does the Coronavirus Pandemic End?, 3 April 2020, 8:16 PM GMT+4, available at: https://www.bloomberg.com/news/articles/2020-04-03/when-and-how-does-the-coronavirus-pandemic-end-quicktake?utm_campaign=socialflow-organic&utm_medium=social&cmpid=socialflow-twitter-

and made attacks against political dissents, as well as "against 'security threats' such as film festivals and even women working to end sexual harassment on public transit".[56]

The Human Rights Watch reported that

> In Bangladesh, Cambodia, China, Egypt, Ethiopia, Turkey, and Venezuela, journalists and others have been arrested and detained for reporting on or expressing opinions about COVID-19 on social media. Egypt and China have expelled journalists. In Bolivia, authorities have used COVID-19 as a justification to threaten political opponents with up to 10 years in prison for spreading "misinformation".[57]

Similar examples can be found in anti-terrorism legislation, which, among others, either gave states far-reaching detention powers,[58] or gave them an opportunity to use counter-terrorism measures for suppression of the dissent.[59] Recep Tayyip Erdogan has used the 2016 emergency following the attempted *coup d'état* in Turkey to silence critics of the government,[60] and is now once again trying to use the existing emergency "to exert direct control over social media platforms like Twitter, YouTube, and Facebook".[61] In fact, Freedom of expression is only one out of many rights that have potentially been violated during the COVID-19-related emergencies,[62] - "hundreds of citizens have been briefly detained then subjected to criminal investigation and prosecution for social media posts prosecutors deem

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business&utm_content=business&utm_source=twitter&fbclid=IwAR0KJmLhsEN7tqsoMsfXaHLQTRlmCVD2zt7BA3Hi6yFtnrZ_abU2wa1G4GQ [accessed 16 April 2020].

[55] The Hill, Authoritarianism is the Greatest Public Health Risk, 02/23/20 12:00 PM EST, available at: https://thehill.com/opinion/healthcare/484190-authoritarianism-is-a-public-health-risk [accessed 13 April 2020].

[56] *ibid*. Interestingly, some media platforms have voiced an opinion that authoritarian governments might be more efficient in controlling the pandemic, however, this argument is effectively defeated by facts. See e.g. Radio Free Asia, Estimates Show Wuhan Death Toll Far Higher Than Official Figure, 27 March 2020, available at: https://www.rfa.org/english/news/china/wuhan-deaths-03272020182846.html [accessed 19 April 2020].

[57] Human Rights Watch, COVID-19: A Human Rights Checklist, April 14, 2020 12:00 AM EDT, available at: https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist [accessed 14 April 2020].

[58] See e.g. Amnesty International, Switzerland: Draconian counter-terrorism laws would target people without charge or trial, 15 January 2020, 11:35 UTC, available at: https://www.amnesty.org/en/latest/news/2020/01/switzerland-draconian-counter-terrorism-laws-would-target-people-without-charge-or-trial/ [accessed 19 April 2020]; See, in general, Amnesty International, Statement on the Impact of US Counter Terrorism Efforts in Africa on Human Rights Before House Oversight And Reform National Security Subcommittee Dec. 17 2019, available at: https://www.amnestyusa.org/our-work/government-relations/advocacy/us-counter-terrorism-human-rights-in-africa/ [accessed 19 April 2020].

[59] See e.g. Human Rights Watch, Egypt: Intensifying Crackdown under Counterterrorism Guise: Emergency Courts Used to Prosecute Activists, Journalists, Bloggers, July 15, 2018 12:01 AM EDT, available at: https://www.hrw.org/news/2018/07/15/egypt-intensifying-crackdown-under-counterterrorism-guise [accessed 19 April 2020].

[60] See e.g. Human Rights Watch, Turkey: State of emergency provisions violate human rights and should be revoked, October 20, 2016 11:03 AM EDT, available at: https://www.hrw.org/news/2016/10/20/turkey-state-emergency-provisions-violate-human-rights-and-should-be-revoked [accessed 19 April 2020].

[61] Human Rights Watch, Turkey Seeks Power to Control Social Media, April 13, 2020 12:00 AM EDT, available at: https://www.hrw.org/news/2020/04/13/turkey-seeks-power-control-social-media [accessed 14 April 2020].

[62] See *ibid*.

'publicly threaten health in order to create fear and panic among the population'. Some get a spell in jail before trial on that charge".[63]

One of the lucky winners however should definitely be Hungary's Prime Minister - Mr. Viktor Orbán. On 30 March 2020, Hungarian Parliament equipped the Prime Minister with a so-called Enabling Act,[64] which has been compared to Hitler's *Ermächtigungsgesetz* of 1933 on several occasions.[65] The Act gave Prime Minister Orbán "dictatorial powers under cover of declaring a state of emergency to fight COVID-19".[66] It introduces a great deal of restricting measures,[67] however the worst in this story is that "[t]he blanket authorization of uncontrolled executive power will last as long as the 'state of danger' persists, which will be determined by the government itself".[68] Although the parliamentary sessions have not been interrupted, "the act gives the government the power to take extraordinary measures, including suspending or abrogating statutory provisions without parliamentary approval during the crisis".[69] Ultimately, it is the PM who has the power to decide when the crisis ends.

Although the Enabling Act envisages the possibility of constitutional oversight, in the Hungarian context, it is highly debatable whether or not the Constitutional Court can be deemed as an efficient mechanism of oversight, given the fact that the Court has been packed by the ruling party.[70] Thus, a dangerous amount of power is concentrated in the hands of the executive with virtually no viable oversight mechanisms in place. Given the fact that there is no sunset clause in the Act, an emergency can, in principle, last forever (especially since we do not know when the necessity of combating the virus ceases to exist).

Under such circumstances, an executive might get the impression that he or she is omnipo-

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[63] *Supra* note 61.

[64] See Translation of Draft Law "On Protecting Against the Coronavirus", available at: http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/#_ftn2 [accessed 13 April 2020].

[65] Gábor Halmai, How COVID-19 Unveils the True Autocrats: Viktor Orbán's Ermächtigungsgesetz, Int'l J. Const. L. Blog, Apr. 1, 2020, available at: http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/ [accessed 13 April 2020]. See also Kriszta Kovács, Hungary's Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available at: https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/ [accessed 16 April 2020]; Renáta Uitz, Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic [accessed 16 April 2020]; Tom Flynn, Weimar-on-Danube: on the Hungarian Enabling Act, the European response, and the future of the Union, 6 April 2020, available at: http://dcubrexitinstitute.eu/2020/04/weimar-on-danube-on-the-hungarian-enabling-act-the-european-response-and-the-future-of-the-union/ [accessed 16 April 2020].

[66] Gábor Halmai, How COVID-19 Unveils the True Autocrats: Viktor Orbán's Ermächtigungsgesetz, Int'l J. Const. L. Blog, Apr. 1, 2020, available at: http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/ [accessed 13 April 2020].

[67] *ibid*.

[68] *ibid*; See also BBC, Coronavirus: Hungary government gets sweeping powers, 30 March 2020, available at: https://www.bbc.com/news/world-europe-52095500 [accessed 13 April 2020].

[69] Kriszta Kovács, Hungary's Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available at: https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/ [accessed 16 April 2020].

[70] Renáta Uitz, Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic [accessed 16 April 2020];

tent in emergency contexts, and once one gets used to exercising unchecked power, getting back to normalcy might pose a challenge. Accordingly, we might be facing the threat of altering the existing constitutional legal regime. In this regard, it can be argued that Hungary's Enabling Acts amount to the introduction of the "alternate legal regime".[71] Next section of this paper addresses, *inter alia*, the issue of whether or not a new, distinct legal order can be introduced in the course of the exercise of emergency powers. The importance of avoiding gradual "normalization" of emergency measures will also be demonstrated based on a specific example where an exceptional measure eventually transforms to a normal rule.

II. Prolongation of a State of Emergency or the Biggest Threat Posed by Exceptional Regimes

Long before emergency powers became a topical issue due to terrorism threat, Nazi Germany's supporter and a political theorist Carl Schmitt famously declared that the "[s]overeign is he who decides on the exception", which implies the power to decide on "whether an exception exists or not and what ought to be done in such an exception".[72] He argued that Article 48 of the Weimar Constitution "authorized the President to derogate from the rule-of-law provisions of the constitution if this was necessary to save the constitution itself".[73] This approach has provoked an academic debate among some of the most distinguished scholars working on emergency powers, which is briefly reviewed below.

One important question that arises in this regard is whether special powers can be exercised to the extent of absolute discretion when a state of emergency is declared. Another related question is whether or not the exercise of emergency powers *ipso facto* requires departure from normalcy and act beyond the constitutional legal framework. For instance, let us use syllogistic logic and try to answer the question whether any problems would arise as to the legality of police action in the context of an emergency decree that has empowered the po-

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[71] Renáta Uitz, Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic, 6 April 2020, available at: http://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic [accessed 16 April 2020];

[72] Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Hart Publishing, 2018, p. 74. See Carl Schmitt, Political Theology, Translated by George Schwab, The University of Chicago Press, Chicago.

[73] See Marc de Wilde, The state of emergency in the Weimar Republic: Legal disputes over Article 48 of the Weimar Constitution, 78 Tijdschrift voor Rechtsgeschiedenis 135, 158 (2010), p. 136 and pp. 144-145. It should be pointed out that, in *Political Theology*, Schmitt "[departs] from its earlier position and a shift[s] to a revolutionary model of emergency regimes. If his earlier position is characterized by his endorsement of commissarial dictatorship, Schmitt's new formula embraces the model of sovereign dictatorship. Schmitt supplants the classical model of limited emergency powers with a model of unlimited dictatorial powers. According to this new model, an exception is characterized by 'principally unlimited authority, which means the suspension of the entire existing order'. [Thus] a sovereign dictator [has the] power to actively change the existing legal order and transform it, in whole or in part, into something else", - cited from Oren Gross, The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy, 21 Cardozo L. Rev. 1825, 1868 (2000), p. 1841.

lice officials to act "in their absolute discretion, search the property of any individual without a warrant".[74]

This issue is described by Dr. Alan Greene, who points out that, at the first sight, employment of syllogistic logic would lead to the following reasoning:

The order issued by the police to me is validated by the executive order. This executive order is validated by the declaration of a state of emergency, which is itself contained in the constitution. As one ought to obey the constitution, it follows that I ought to obey the directions of the police and consent to my property being searched.[75]

Hence, from this point of view, the employed syllogism would not point to any issues arising with respect to the validity of the action.[76] However, the question that we might pose is whether or not an executive decree can authorize actions that are fundamentally in conflict with the existing constitutional order. Dr. Greene proceeds with the analysis by referring to Dr. David Dyzenhaus, who criticizes Schmitt's view on the scope of executive powers in emergency contexts. Dr. Dyzenhaus argues that "a genuine constitution should not contain the discretionary power to grant another, radically different constitution".[77] Indeed, constitutional provisions that enable introduction of a new constitutional legal regime would amount to constitutional suicide.

It can be argued that there are no present-day constitutions that would explicitly allow governments to unilaterally change the existing constitutional legal order. Accordingly, under these circumstances, the real threat comes from the possibility of creating permanent emergencies as a more subtle way of replacing the existing constitution. For this reason, it is important to focus on prolonged/permanent states of emergencies, for which this paper will again rely on the work of Dr. Greene.

He argues that "a permanent state of emergency can amount to an amendment of the constitution by rendering the impinged norms in question invalid by permanently removing their effectiveness".[78] Indeed, if an emergency is permanent and it removes the effectiveness of constitutional provisions, such an emergency alters the constitution, since validity depends on effectiveness.[79] Accordingly, Constitutions must envisage the possibility of checking the power to declare a state of emergency, as well as measures undertaken throughout its continuation, in order to guarantee that said exceptional measures fulfil their *raison d'être.* While

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[74] Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Hart Publishing, 2018, p. 69. Chapter 3 available at: https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf [accessed 14 April 2020].
[75] *ibid*.
[76] *ibid*. See David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (Oxford University Press, 1997) 116.
[77] Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Hart Publishing, 2018, p. 70. Chapter 3 available at: https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf [accessed 14 April 2020].
[78] *ibid*, p. 95.
[79] *ibid*. The issue of validity and its relation to effectiveness might be subjected to a debate, however, the scope of this article does not allow delving into it. Rather, the view of Dr. Greene regarding dependence of validity of effectiveness is shared.

some might be in favor of precluding judicial review of the state of emergency, it is argued against this view that:

> [such] a legalistic argument […] removes the requirement that a state of emergency be a temporary departure from the *status quo*. With this temporariness not grounded in law, constitutional emergency powers have the capacity to become permanent, thus rendering other constitutional norms ineffective and depriving them of their validity. [80]

As Dr. Greene and Dr. Dyzenhaus convincingly stress, the Schmittean approach that allows the executive to exercise unchecked powers to the extent that they can alter the existing legal order, should be rejected. In addition, we can see that prolongation of a state of emergency is a serious threat even without looking into its theoretical aspects. One practical example of how emergency regulations can have a permanent effect on the legal order and human rights in particular can be found in the UK.

Namely, while the right to remain silent was regarded as one of foundations of the English criminal justice system, it was abolished precisely because of the adoption of the security measures[81] aiming to "bolster [the United Kingdom's] powers needed to wage a comprehensive war on terrorism in Northern Ireland".[82] Before the adoption of such measures, the proponents, including various public officials, were giving assurances that the curtailment would only be applicable in cases of suspected terrorists, within a limited geographical area.[83] However, "the restrictions [on] the right to silence were not limited to those suspected of serious crimes related to terrorism, but were expanded and interpreted as relating to every criminal suspect or defendant in Northern Ireland".[84]

We can also turn to the example of Turkey to see some of the permanent effects of a 2-year long state of emergency on human rights[85] and democracy[86] in the country. Although a state of emergency declared in July 2016 finally came to an end in July 2018, it "was not accompanied by concrete steps to normalize the human rights situation in the country; [i]nstead, many of the measures introduced during the state of emergency [have remained] in force […] and continue to have a profound and devastating impact on public life in Turkey".[87]

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[80] Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Hart Publishing, 2018, p. 98.
[81] Jabauri *supra* note 16, p. 19.
[82] Oren Gross, Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), p. 184 and pp. 186-187.
[83] Jabauri *supra* note 16, p. 19.
[84] *ibid*, pp. 184-185.
[85] See e.g. Human Rights Watch, Turkey: Normalizing the State of Emergency: Draft Law Permits Purging Judges; Prolonged Detention; Curbing Movement, Assembly, July 20, 2018 10:12 AM EDT, available at: https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency [accessed 19 April 2020].
[86] See European Commission for Democracy through Law, Opinion No. 888/ 2017 On the Provisions of the Emergency Decree Law N° 674 Of 1 September 2016 Which Concern The Exercise Of Local Democracy In Turkey, 9 October 2017, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e [accessed 19 April 2020].
[87] Amnesty International, Turkey: Amnesty International's Brief on the Human Rights Situation, 1 February

Some of the extraordinary measures invoked during the state of emergency have infected the ordinary legislation, - for instance, governors' powers "to restrict movement and ban public assemblies [has been extended] … [and the police has been allowed] to hold some suspects for up to 12 days without charge".[88] Moreover, "through emergency legislation, the central authorities [were] enabled […] to appoint unelected mayors, vice-mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the concerned municipalities".[89] Thus, new rules of structural and permanent nature[90] were put in place, and did not cease to apply even after the state of emergency ended.

More generally, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Ms. Ní Aoláin, has also expressed her concerns with respect to the impact of anti-terrorism measures on human rights.[91] In addition to identifying threats posed by emergency measures that are enacted where a state of emergency is formally declared, she addressed the situations of *de facto emergencies.* The Special Rapporteur observed that even in cases when no declaration of a state of emergency and, therefore, no derogation from human rights obligations is made, States are enacting antiterrorism legislation, which by nature is an "emergency regulation".[92]

In the light of the foregoing, it should be concluded that prolonged states of emergencies (1) amount to constitutional amendments and (2) result in weakening of guarantees applicable during normal times, since "temporary" is treated as "permanent" and the "exceptional" is

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2019, p. 1, available at: https://www.amnesty.org/download/Documents/EUR4497472019ENGLISH.PDF [accessed 19 April 2020].

[88] *Supra* n 87.

[89] European Commission for Democracy through Law, Opinion No. 888/ 2017 On the Provisions of the Emergency Decree Law N° 674 Of 1 September 2016 Which Concern The Exercise Of Local Democracy In Turkey, 9 October 2017, para. 97, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e [accessed 19 April 2020].

[90] *ibid*, para. 98.

[91] Un Human Rights Council, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the Human Rights Challenges of States of Emergency in the Context of Countering Terrorism, Advance Unedited Version, 27 February 2018, A/HRC/37/52.

[92] *ibid*, para. 3. It should also be noted that some authors argue against formal derogation from human rights obligations – see e.g. *See* Strasbourg Observers, COVID-19 and the European Convention on Human Rights, 27 March 2020, available at: https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/ [accessed 14 April 2020]. However, Dr. Alan Greene convincingly argues against this position and points to the necessity to derogate under relevant provisions of international human rights conventions. In his view, an "alternative is a situation in which emergency powers are conferred via ordinary legal norms, at the risk of such powers becoming permanent, even after the emergency has ended. In addition, there is the risk that courts may construct the ordinary limitation grounds in an expansive manner in order to accommodate for emergency measures, which may lead to a permanent "downwards recalibration" of human rights protection. The derogation regime mitigates such risks, since it "quarantines" exceptional powers to exceptional situations" – cited from Strasbourg Observers, To derogate or not to derogate? Poll on emergency Covid-19 measures, 2 April 2020, available at https://strasbourgobservers.com/2020/04/02/to-derogate-or-not-to-derogate-poll-on-emergency-covid-19-measures/ [accessed 17 April 2020]. See Dr. Greene's blog on this issue: Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo [accessed 14 April 2020].

being treated as "normal".[93] In addition, "where *de jure* states of emergency have been declared, their ending has not resulted in a return to the *status quo ex ante*; instead, many of the emergency powers are re-enacted as ordinary, permanent laws".[94] Hence, *de facto* emergency provisions are also dangerous for the existing legal order and human rights guarantees in particular. As pointed out by Dr. Greene in one of his most recent works regarding COVID-19-related emergencies, "if there is one lesson to take from Schmitt, it is the dangers of permanent transformative emergency powers, rather than temporary, defensive ones".[95]

III. PREVENTION OF NORMALIZATION OF A STATE OF EMERGENCY

In the light of the dangers and problems demonstrated in the previous section, it would be wise to proceed with some suggestions as to what precautions can the drafters take while designing emergency provisions, in order to avoid alternation of the existing legal order, violation of the principle of separation of powers and unjustified prolongation of a state of emergency. Under certain circumstances, especially in fragile democracies, these measures might not be infallible in the prevention of the worst case scenario, however, they might, in combination, make it more difficult for those in power to transform into omnipotent authoritarian leaders.

First of all, declaration of a state of emergency should be accompanied by at least some sort of legislative control. Even in presidential regimes, where it is most likely for the executives to have the power to initially declare a state of emergency, it should be subjected to *ex post* approval by the legislature.[96] It is true that the safeguards enshrined in constitutions of parliamentary or semi-parliamentary states will differ from those that are present in constitutions of countries with presidential regimes. However, given the threat of the abuse of power in a state of emergency, putting relevant legislative safeguards in place against the executive's exercise of unchecked power is to be regarded as a general recommendation both

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[93] See also César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 205-206.

[94] Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo [accessed 14 April 2020].

[95] Strasbourg Observers, States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic, 1 April 2020, available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/?fbclid=IwAR08vMAWGNprY1BfNpCKi5xKVotei0yafzU6wI3U1ZsfCFGOfUTgmOtm6Vo [accessed 14 April 2020].

[96] Some presidential regimes do have this model. See e.g. Constitution of the Plurinational State of Bolivia, Article 138: "The validity of the declaration of the state of emergency shall depend on the subsequent approval of the Pluri-National Legislative Assembly [which shall be done within seventy two hours following the declaration at the latest]. The approval of the declaration shall indicate the powers conferred, and it shall maintain strict relation and proportion to the case of necessity addressed by the state of emergency". In addition, the Constitution prohibits declaration of a state of emergency within the next year, without *prior* legislative authorization.

for presidential and parliamentary regimes.

In an ideal case scenario, prolongation of a state of emergency should not be possible without the supermajority of the legislature.[97] In addition, if the legislature is not in session, it should be assembled upon the declaration of a state of emergency and continue uninterrupted functioning. This will guarantee that the role of the legislature will be preserved during emergencies at least to some extent. Moreover, if we are aiming to create a strong constitutional framework against the abuse of emergency powers, we should also ensure the executive's accountability before other constitutional bodies. For instance, even though Bolivia is a country with a presidential model of government, its Constitution obliges the executive to report to the legislature with respect to "reasons for the declaration of the state of emergency [estado de excepción], [98] as well as the use that has been made of the powers conferred by the Constitution and the law".[99] These mechanisms altogether might create a strong parliamentary oversight, however, as demonstrated by the Hungarian example, relevant mechanisms at the disposal of the legislature might not be very helpful in cases where the executive has the support of the majority of the legislature.

Another mechanism which in combination with legislative safeguards is likely to reduce the risk of the abuse of emergency powers is judicial review. Approach of states in this regard is far from uniform. Constitutions of some states even explicitly prohibit constitutional judicial review of the executive's decrees. For instance, in Turkey, the Constitutional Court is barred from assessing constitutionality of decrees issued during a state of emergency "as to form or substance".[100] These types of provisions are problematic first, because they put the principle of separation of powers at risk, thereby making the protection of human rights dependent merely upon the generosity of the political branches.[101] Secondly, constitutional prohibition of the review of emergency decrees might be seen as a "blank check" [102] by the executive, who might feel too confident with emergency powers knowing that nothing controls him or her. Luckily, however, such provisions are not common.

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[97] In this regard, Bruce Ackerman suggests a very interesting notion of the "supermajoritarian escalator", implying that each time an executive requests to prolong a state of emergency, a growing majority of the legislature should be convinced in its necessity. See Ackerman *supra* n 17.

[98] Such a wording is provided in the translation of the Bolivian Constitution as it appears on Constituteproject.org (text of the Constitution in English available at: https://www.constituteproject.org/constitution/Bolivia_2009.pdf [accessed 20 April 2020]). However, it should be pointed out that instead of a "state of emergency", the Constitution uses the words "state of exception" (estado de excepción). Text of the Bolivian Constitution available in Spanish on the website of the Plurinational Constitutional Court of Bolivia – Tribunal Constitucional Plurinational de Bolivia, Constitución Política del Estado de 2009, available at: https://tcpbolivia.bo/tcp/sites//default/files/images/pdf/leyes/cpe/cpe.pdf [accessed 20 April 2020]. Nevertheless, in 2019, Evo Morales used the former wording and informed the public about declaration of a "state of emergency" (estado de emergencia) – see e.g. tweet of Evo Morales from 23 October 2019, available at: https://twitter.com/i/status/1186999177944948736 [accessed 20 April 2020]; La Vanguardia, La Constitución de Bolivia no incluye el estado de emergencia, 23 Oct. 2019, available at: https://www.lavanguardia.com/politica/20191023/471158839657/la-constitucion-de-bolivia-no-incluye-el-estado-de-emergencia.html [accessed 20 April 2020].

[99] Constitution of the Plurinational State of Bolivia, Article 139.

[100] Constitution of Turkey, Article 148.

[101] Jabauri *supra* n 16, p. 9.

[102] *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, at 536; Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863, at 587.

In some cases, bodies conducting constitutional review have quite broad powers with respect to emergencies. For instance, under the Constitution of Kenya, the Supreme Court can make decisions not only with respect to "any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency", [103] but also to decide upon declaration of a state of emergency[104] as well as its prolongation.[105] This can be deemed as a good example of strong judicial safeguards. However, we should also take into account that sometimes, political branches will try to strip courts of the jurisdiction on emergency-related issues.

For instance, during the emergency rule in India, Indira Gandhi managed to "[pass] amendments restricting emergency declarations from judicial purview".[106] In this case, by invoking a very important legal argument, the Supreme Court of India had the opportunity to rule on the constitutionality of the amendments and declare them incompatible with the basic structure of the Constitution.[107] However, not all bodies conducting constitutional judicial review are lucky enough to have a notion similar to the basic structure of the constitution. Hence, if initiated, relevant constitutional amendments can make emergency-related measures non-justiciable, even if the Constitution gives courts such a power in the first place. Accordingly, prohibition of constitutional amendments, can, as a side effect, also ensure that judicial review will be conducted in a state of emergency (although we can think of a number of other reasons why constitutional amendments should not be allowed during the times of exception; and of more reasons why the court's jurisdiction should not be stripped).

All of this, however, still does not guarantee that the judicial review will be efficient in the context of emergencies, - judges, like other public officials, share the sentiments of the society and "are [similarly] susceptible to the pressures of events".[108] For this reason, they might be more deferential to political branches than usual.[109] As firstly framed by the federalists, and further reiterated by many, one of the primary tasks of the judiciary branch is to protect fundamental rights and liberties of citizens.[110] However, when it comes to counterter-

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[103] Constitution of Kenya, Article 58 (5) (c).
[104] *ibid*, Article 58 (5) (a).
[105] *ibid*, Article 58 (5) (b).
[106] Zachary Elkins, Tom Ginsburg, James Melton, Endurance of National Constitutions, New York: Cambridge University Press, 2009, p. 155.
[107] Jabauri *supra* note 16, p. 9.
[108] Mark Tushnet, "*Emergencies and the Idea of Constitutionalism"* in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet, London: Duke University Press, 2005, 39-55, at 41; See also Bruce Ackerman, *The Emergency Constitution, Law Faculty Scholarship Series,* Paper 121, The Yale Law Journal, Vol. 113, 2004, 1029–1091, p. 1072.
[109] Some of the most prominent authors in the area of emergency regimes "have evaluated *ex post* judicial control as a rather toothless instrument to constrain government" – See Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, European Journal of Political Economy, 2017, 1-14, p. 4 (referring to Bruce Ackerman and David Dyzenhaus); See, in general: Ackerman, Bruce Ackerman, *The Emergency Constitution, Law Faculty Scholarship Series,* Paper 121, The Yale Law Journal, Vol. 113, 2004, 1029–1091, p. 1072 and David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006. Judicial deference in emergencies is *not* a new tendency. See e. Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Philadelphia Press) 1994, p. 24; See also Clinton L. Rossiter, Constitutional Dictatorship – Crisis Government in the Modern Democracies, Princeton: Princeton University Press, 2008, pp. 70-71.
[110] Jabauri *supra* note 16, p. 8.

rorism or[111] emergencies such as war, there is a tendency within the judiciary to be more tolerant of intrusive measures.[112] Stemming from a formalistic interpretation of separation of powers[113] and based on the justification that, presumably, the executive has a better understanding of the threat and can competently act in accordance with the interests of national security, some jurisdictions have developed a broad understanding of the "political question doctrine", whereby the courts leave more space for the political branches in order for them to undertake certain measures limiting human rights.[114] This is equally true in the context of COVID-19-related emergencies, since judges, as ordinary individuals, might fear for their health as well as that of others, and thus might be more lenient towards the government while the latter is enacting certain restrictions.

The former President of the Supreme Court of Israel, Aharon Barak criticizes such an approach, in particular, in the context of the "war on terror" and stresses that the task of the judiciary is to be loyal to their role as a judge, irrespective of whether the country is in the state of emergency.[115] He stresses that "[i]f [judges] fail in [their] role in times of terrorism, [they] will be unable to fulfill our role in times of peace and security.[116] Similar to the opinion voiced by Lord Atkin in his famous dissent on *Liversidge v. Anderson*,[117] Justice Barak

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[111] See *ibid*, footnote 44: Nowhere in this paper are the terms "war" and "terrorism/counterterrorism" used interchangeably. For the discussion surrounding the application of the laws of armed conflict to terrorism, See Jelena Pejic, *Armed Conflict and Terrorism: There is a (Big) Difference*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, (New York: Oxford University Press, 2012), pp. 171-205; Interesting questions regarding applicability of Geneva Conventions to the detention of a suspected terrorist (Osama Bin Laden's driver) arose in the US Supreme Court case *Hamdan v. Rumsfeld.* For the discussion, see, among others: C.L. Lim, *Inter Arma Silent Leges? Black Hole Theories of the Laws of War*, in in "Emergencies and the Limits of Legality", ed. Victor V. Ramraj, (New York: Cambridge University Press, 2008), pp. 387-396; See also Inter-American Commission on Human Rights [the "IACHR"], *Report on Terrorism and Human Rights*,22 December 2002, OEA/Ser.L/V/II.116, paras. 19 and 73, available at: http://www.cidh.org/terrorism/eng/toc.htm [accessed 20 April 2020].

[112] See David Dyzenhaus, *Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security*, Australian Journal of Legal Philosophy, Vol. 28 (2003).

[113] *ibid*.

[114] Jabauri *supra* note 16, p. 10. Cass Sunstein categorizes such tactics as "minimalism". See Cass R. Sunstein, Constitutional Personae, Oxford University Press 2015, p. 74.

[115] Aharon Barak, *Human Rights in Times of Terror: A Judicial Point of View.* Aharon Barak, The Judge in a Democracy, Princeton University Press 2006, p. 285. For more insights regarding Justice Barak's views on the role of judges in times of terrorism, I suggest reading Chapter 16 of the book, at pp. 283-306.

[116] Aharon Barak, The Judge in a Democracy, Princeton University Press 2006, pp. 283-306.

[117] See Dissenting Opinion of Lord Atkin in *Liversidge v. Anderson*, cited in Norman Dorsen, Michael Rosenfeld, András Sajó, Susanne Baer, Susanna Mancini, "Comparative Constitutionalism: Cases and Materials", 3rd Edition, American Casebook Series, West Academic Publishing, 2016, pp. 1598- 1599:
"In [this country], amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. […] I protest, even if I do it alone, against a strained construction put upon words, with the effects of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. […]. I know of only one authority which might justify the suggested method of constructions. 'When I use a word,' [said Humpty Dumpty], 'it means what I choose it to mean, neither more nor less'. [Alice said]: 'The question is [whether] you can make words mean different things'. 'The question is,' said Humpty Dumpy, 'which is to be master – that's all.' (Alice though the Looking Glass, cvi)".

rejects the maxim *silent enim leges inter arma*, stating that laws are most needed in times of war.[118]

Preservation of democratic values is important not only in war, but in all times of emergencies. This is definitely not an easy task, and even the existence of strong constitutional safeguards does not fully guarantee that transformation to authoritarianism will be avoided in a state of emergency. This can only be achieved if all branches do their jobs properly, - legislators should legislate, and the judiciary should protect individuals against the political branches' infringement upon their fundamental rights and liberties. Another and probably the most difficult task is preservation of the existing legal order, - as necessary as it might be to enact exceptional provisions during emergencies and exercise emergency powers, they should not alter the established constitutional reality and should not be prolonged perpetually.

It should also be acknowledged that the very nature of COVID-19-related emergencies might point to the need of adapting *modus operandi* of existing mechanisms of control to the circumstances. For instance, the pandemic might not allow gatherings of large groups of people, thereby making conduction of court hearings in an ordinary manner impossible, or barring the legislature from assembling. In such cases, it should be allowed to do business by online means, such as presenting judicial actions by email. As pointed out in the light of the Georgian example above, court monitors and the public should also be included in hearings to the fullest extent possible under the existing circumstances.

Similarly, the existing pandemic should not serve as a pretext for suspending all legislative proceedings. Some states have been creative in this regard, - for instance, for the first time in its 209-year-long existence, the Congress of Colombia conducted virtual sessions via Zoom, which went much better than many expected.[119] There might be provisions implicitly or explicitly barring legislature from holding virtual sessions, however, they must be adapted to exceptional circumstances such as the COVID-19 pandemic, in order to ensure that the primary legislator in the country does not lose the ability to perform its functions.

In addition to the foregoing, civil societies in every country must continue to pursue their roles as watchdogs in order to create and/or maintain a strong "support network"[120] between courts and human rights activists. On one hand, it is true that not everything functions perfectly in democracies, however "[u]nlike in authoritarian systems, citizens in democracies

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[118] Jabauri *supra* note 16, p. 11. See Aharon Barak, *Human Rights in Times of Terror: A Judicial Point of View*; See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006, p. 4, - challenging Schmittean approach that the rule of law does not apply to emergencies by arguing that "judges have a constitutional duty to uphold the rule of law, even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project".

[119] See Semana, Las sesiones virtuales del Congreso: sí se pudo..., 4/18/2020 5:27:00 AM, available at: https://www.semana.com/nacion/articulo/coronavirus-en-colombia-el-congreso-inicio-sesiones-virtuales/664279 [accessed 20 April 2020].

[120] For the discussion on importance of synergistic support networks between courts and activists in civil society in general, see Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt, Cambridge University Press 2007.

have established channels through which they can reassert their rights and seek accountability for abuse".[121] The outbreak of COVID-19 and state's responses have once again demonstrated how fragile democracies can be in a state of emergency. However, it is important to remember that we should remain loyal to democratic values and the rule of law even under exceptional circumstances, - and maybe even more so than during the peacetime.

CONCLUSION

Many of us have been cheering for the declaration of a state of emergency and imposition of restrictions on fundamental rights in order to prevent the spread of COVID-19. But while we have been focusing on the importance of health, we may have neglected to consider the toll that the pandemic-related emergencies take on democracy. The first two decades of the 21st century keep demonstrating how dangerous emergency powers can be not only for existing human rights standards, but to other values such as constitutionalism and the rule of law as well.

This paper intended to demonstrate the necessity to preserve these values in a state of emergency and argued that unchecked executive power might lead to transformation of a state to an authoritarian or semi-authoritarian regime. The paper argued that certain constitutional safeguards should be in place in order to avoid alteration of the existing constitutional legal order. One very important part of it is protection of human rights, however, certain measures should also be prescribed for preserving democratic institutions and the rule of law *sensu lato*.

Preventive measures aiming to avoid normalization of a state of emergency and unjust restriction of fundamental rights, as well as alteration of the existing constitutional legal order are twofold: first, constitutional basis should exist for maintaining checks on the executive power during a state of emergency, such as the parliamentary oversight over declaration and prolongation of a state of emergency, as well as judicial review of emergency powers; secondly, relevant actors – the legislature and the judiciary - should remain loyal to their functions while exercising oversight powers, which, by nature, should be no different from what they do during the peacetime. Only thus can we prevent prolongation of a state of emergency and alteration of the legal regime against the basic principles implicit in genuine constitutions.

[121] The Atlantic, Democracies Are Better at Fighting Outbreaks, FEBRUARY 24, 2020, available at: https://www.theatlantic.com/ideas/archive/2020/02/why-democracies-are-better-fighting-outbreaks/606976/ [accessed 14 April 2020].

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PARLIAMENTS DURING THE EMERGENCY REGIMES

ABSTRACT

Since the beginning of 2020 the World woke up to a new reality: due to the dangers of Pandemic, majority of states are forced to change the rhythm of their lives and put it under the strict measures of emergency regime. The massive deployment of the states of emergency has itself put the need to analyse the legislature governing this institute high on the agenda, in Georgia as well as in the world. As the research has demonstrated, naturally, the state of emergency is announced differently depending on the models of governance, such as participation of various institutions in it or the differences of function allocation, however, at all stages the participation of the Parliament, as a controlling body is significant. The foregoing paper will investigate the state of emergency from the parliamentary perspective: the role of legislative body in this process and the threats, that may emerge when exercising governance, will be analysed.

INTRODUCTION

Salus rei publicae suprema lex[1]

The concept of the state of emergency is one of the most important mechanisms, envisaged in number of constitutions worldwide. The relevance of this institution stems from the factor, that it changes the usual constitutional life, since the government bodies are equipped with the powers, that are not within their primary function and, furthermore, the doctrine of separation of powers and even the system of checks and balances is formed completely differently.

"Certain situations can so *threaten* the constitutional(ity of the) state that the binding constitutional provisions cannot, or at least, not with the necessary speed, handle state of emergencies sufficiently".[2] Therefore, in order to stabilise the situation, the basic law allows exceptional regime, when even moving away from the law is allowed. "The old Roman principle [according to which] state saving is the supreme law [...means] that when exceptional circumstances [...] can put in danger the very existence of the state, its bodies may take ap-

[1] The safety of the state is the supreme law.

[2] Andras Jakab, "German Constitutional Law and Doctrine on State of Emergency - Paradigms and Dilemmas of a Traditional (Continental) Discourse" (2006) 7(5) German Law Journal, 453-477, 454.

propriate action even if to do so would violate the law",[3] since the interests of the state is the supreme value.

The institute of the state of emergency is rather risky measure and, in a way, it is similar to slow time bomb, the explosion of which cannot be predicted. When used irrationally and under the bad faith, the threat of "constitutional dictatorship" may arise. The only reason the basic law allows it, is that "behind the suspicion that the protective state will cheat, there is a more fundamental fear, a fear of a life without the state."[4] It is significant that the purpose of the emergency is to eliminate the crisis and not the other way around - to use it as a means to create artificial tensions. Rationalising this process is vested on the legislative body.

I. MAIN ASPECTS OF THE EMERGENCY

"The original model of the state of emergency belongs to the Roman Republic as a mechanism to save the constitution".[5] Nothing expresses the workload of the representative body in the emergency state as, probably, the Roman *Justitium* concept, according to which the Senate was authorised to issue a final decree (*senatus consultum ultimum*), which was not subject to appeal.[6]

A state of emergency is a situation when normal public and political life is disrupted, basic human rights and freedoms are restricted. " there is a danger that a government will take advantage of a state of emergency to introduce unwarranted restrictions on human rights and civil liberties, to neutralise political opponents, to postpone elections".[7] In addition, the risk of misuse of time and economic resources is high. A classic example of this is the case of Ethiopia. Ethiopia declared a state of emergency in February 2018 following the resignation of the Prime Minister. As Authorities stated, the state of emergency should have ensured the stability of the country, however it is considered to have been "a warning to those who might try and cause trouble when a new prime minister is appointed."[8]

In such a difficult situation, it is important to determine which branch of government is responsible for managing the situation. Although in most cases, the initiating entity is the executive, ultimately resolving the issue and overseeing it is a function of the parliament. Despite its growing role in this process, the duty of the parliament is not defined by this fac-

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[3] Mircea Tutunaru, "State of Emergency Decrees and Laws Legislative Delegation in the Rule of Law" (2015) 4 JL & Admin Sci 232-239, 232.
[4] András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999) 24.
[5] Abraham Siles Vallejos, "The Dictatorship in the Classical Roman Republic as a Prime Referent in the Regime of the Constitutional State of Emergency" (2014) 73 Derecho PUCP 411-424, 412.
[6] Scott Shump, "The Senatus Consultum Ultimum and its Relation to Late Republican History" (2011) Summer Research 99, 1, EJLT.
[7] The Geneva Centre for the Democratic Control of Armed Forces (DCAF) backgrounder: States of Emergency, 1-2, https://www.files.ethz.ch/isn/14131/backgrounder_02_states_emergency.pdf accessed 30 May 2020.
[8] "Why has Ethiopia imposed a state of emergency?" (BBC, 21 February 2018), https://www.bbc.com/news/world-africa-43113770 accessed 30 May 2020.

tor alone. The representative body should be committed to taking responsibility for the needs of the public and to calm the current passions so as not to allow usurpation of the power.

As for the head of state, as the constitutionalist Sokol Sadushi points out, "[In emergency regime] the President may be subjected to three kinds of controls: popular, judicial and parliamentary control."[9] "While the first type can degenerate into a revolution, and the second is difficult to achieve quickly in war circumstances, parliamentary control remains the most efficient mechanism."[10] From the analysis of this opinion, we can conclude that although the head of state is the object of control, the parliament is responsible for overseeing it.

A. At the Crossroads of Separation of Powers - A State of Emergency from The Perspective of The Fundamental Principles of The Constitution

1. The Principle of Separation of Powers

The declaration of a state of emergency significantly alters the balance of power: "the power of both the legislature and the judiciary are usually curtailed to the advantage of the executive."[11] "When new circumstances ask for a new balance between personal liberty and public safety, it can be dangerous when emergency decrees lead to the fusion of legislative and executive power."[12] The fact that crisis management requires immediate action is the reason to this, the legislature is deprived of such speediness and, in terms of efficiency, the executive branch can respond more easily. This is explained by the fact that the executive branch consists of the authorities responsible for public safety, including health care, which are the sources of information, that the decisions are based on. In addition, the executive decrees are, in fact, acts with the force of organic law, long parliamentary procedures are not required to adopt them, thus establishing an immediate regulation.

Parliament, due to the procedural complexity of its activities, cannot act easily without hearings, debates and voting. All of this will lead to the result when either the problem cannot be solved, or the law will be voted on, which had not only been written or discussed, but had not been even read.[13] Even if the Parliament of Georgia adopts amendments to the legislative act (which cannot be a constitutional law) in an accelerated procedure, it will take at least

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[9] Sadushi S., "Institutional Interdependence Between the President of the Republic and Constitutional Institutions in Relation to National Security Policies", Constitutio/Constitution, 1/2012. April 2012, p. 113-120, p.117, cited in: Behar Selimi and Murat Jashari, 'The Role of the President in National Security Policies in Parliamentary Republics - The Case of Albania' (2018) 2018 Acta U Danubius Jur 113-124, 122.
[10] *ibid*, Behar Selimi and Murat Jashari, 122.
[11] Christian Bjørnskov, Stefan Voigt, "Why Do Governments Call a State of Emergency? – On the Determinants of Using Emergency Constitutions", (2018) 54(C) European Journal of Political Economy, Elsevier 110-123, 111.
[12] John W Sap, 'The State of Emergency and Human Rights' (2007) 3 European Constitutional Law Review, 492–498, 495.
[13] Eric A. Posner, "Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel", Chicago Public Law and Legal Theory Working Paper N. 363, (2011), 8.

four days.[14] Unlike the latter, the President's decree enters into force upon issuing. That is why "[e]mergency situations amplify a tension at the heart of the separation powers theory: the prevention of a consolidation of power in one branch of government and the potential abuse that could arise from this [are on the agenda]."[15] As a rule, in parliamentary regimes, where legislature and the executive, in fact, are formed by the same political force, rarely if ever the state of emergency initiated by the executive is not satisfied by the parliament, so the greater the risks of the dominance of a common political will, the greater the degree of responsibility for counterbalance from the representative branch.

2. Rule of Law

As noted above, acts issued by the executive (regardless of whether the head of state is an autonomously authorised subject, or if his decision is subject to consultation with the Prime Minister) during the state of emergency may establish a different regulation than provided by the law. In this case, there are two interests at stake: on the one hand, the need to take immediate action in the event of an emergency, and on the other hand, the legitimacy and expediency of the issued acts. The basis for exercising legislative function is the Constitution itself, it arms the highest representative body with the "primary" authority to issue norms, unlike the executive, government, which only possesses a *secundum legem*[16] authority, which means, the acts issued by the latter should should be derived from legislation.[17] In this situation, it is significant, whether the autonomy of the parliament is limited or not, as the constitution allows for delegation of legislative function automatically. When the basic law makes such a concession, naturally, there is a reason for it. "In situations of emergency where the national interest demands rapid and effective action, it will be essential to equip the government with extraordinary powers."[18]Accordingly, the transfer of power to the executive is not a good will of the legislature but a necessity. Therefore, the autonomy of the Parliament in terms of exercising its legislative powers may be hindered, however, it is not restricted. This, on the one hand, is caused by the temporary nature of the delegation of powers, and, on the other hand, the fact that the parliament constantly maintains its oversight function and the final decision is within its competence, should also be considered. It should also be noted that the principles ensuring the legality of the emergency regime apply, which ensure the neutralisation of all the above-mentioned risk factors under the conditions of proper guarantee set by the Constitution.

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[14] Article 117, paragraphs 2 and 5, Rules of Procedures of the Parliament of Georgia, December 6, 2018, webpage, 14.12.2018.
[15] C Montesquieu The Spirit of Laws, tr T Nugent, New York: Cosimo, 2011 (first published 1750), cited in: Alan Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35 (4) Legal Studies 594-620, 600.
[16] According to law.
[17] Yusuf Sertac Serter, 'Presidential Decrees and the Principle of Legality under Turkish Law' (2018) 8 Juridical Trib 779-788, 781-782.
[18] Alf Ross, 'Delegation of Power' (1958) 7 Am J Comp L 1-22, 5.

B. *Principles in Force During Emergency*

In order to eliminate the risk factors that may accompany the declaration of the state of emergency, it is necessary to carry out this process in accordance with a number of principles. These principles are presented in the report of the United Nations, according to which, in order the state of emergency not to take the form of an unlawful and unhealthy process, it is necessary to protect the following principles: legality, proclamation, notification, time limitation, exceptional threat, proportionality, compatibility, concordance and complementarity of the various norms of international law.[19]

Naturally, all values are equally important and the protection of each is essential, however, in connection with parliamentary control, the principle of time constraint should be noted, which means that a state of emergency must be declared in a limited time and it is necessary for the legislature to periodically reconsider its extension. The grounds for the announcement have been eliminated, the state of emergency must be lifted.[20] These are the principles that Parliament must assess before making a final decision.

It is important that the regulations related to the declaration of a state of emergency are clearly spelled out at the level of the Basic Law. This applies not only to the definition and procedure of the authorized subjects, but also to the restrictions related to its enactment. Interestingly, "[c]ountries without constitutionalized emergency provisions are substantially more likely to call states of emergency."[21]

II. The Status of the Parliament of Georgia During the State of Emergency

A. *Subjects Authorised to Declare A State of Emergency*

"The highest authority is the one
who declares a state of emergency"[22]

In January 2019, US President Donald Trump declared a state of emergency over the construction of a wall along the Mexican border. The declaration of emergency paved the way for the Leader of the country to receive funding, which was previously refused by Congress.[23] In response, Congress passed a joint resolution to end the emergency, but the

[19] Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the Question of Human rights and States of Emergency, 9-12, E/CN.4/Sub.2/1997/19, at Chapter II, https://undocs.org/E/CN.4/Sub.2/1997/19 accessed 30 May 2020.
[20] *ibid*, 12.
[21] Christian Bjørnskov, Stefan Voigt, *supra* note 11, 127.
[22] Carl Schmitt, Die Diktatur, München-Leipzig: Duncker and Humblot,1921, p 194, cited in Sajó: *supra* note 4, p. 198.
[23] Peter Baker, "Trump Declares a National Emergency, and Provokes a Constitutional Clash" (New York Times, 15 February 2019), https://www.nytimes.com/2019/02/15/us/politics/ national-emergency-trump.html accessed 30 May 2020.

president vetoed it.[24] After the first defeat, Congress again tried to lift the state of emergency, but to no avail - the president vetoed the resolution again.[25]

This example demonstrates what can result when the head of state is entitled to declare emergency and it is not subject to parliamentary approval. The United States is a classic presidential republic in which the degree of autonomy of each branch of government is rather high. This may explain why the President is only obliged to inform Congress of the decision and he does not need the consent of legislature unlike some presidents in the presidential republics. In Turkey, for example, the president needs the approval of the Turkish Grand National Assembly after the declaration of a state of emergency,[26] in Venezuela, the National Assembly or the Committee with delegated powers approves the declaration of the emergency, then its constitutionality is verified by the Constitutional Division of the Supreme Tribunal.[27]

The case of the Mexican border wall demonstrates how dangerous it is for the executive branch to declare a state of emergency. It is true that the parliament periodically monitors the persistence of the grounds for declaring a state of emergency and even has the right to terminate it, however, in contrast, the president's veto indirectly indicates that, in fact, the will of the head of state is ultimately crucial. Such a practice is quite dangerous, especially when it contributes to the misuse of funds from the state budget.

There are cases in constitutionalism where parliament declares the state of war. The US Constitution authorises Congress to declare war,[28] however, the United States Court of Appeals for the First Circuit interpretation in the case of *Doe v. Bush,* changed the practice of 2003 of the declaration of war by Congress and the President was given sole authority to do so. The role of the Congress was limited to the authorisation alone.[29] This illustrates well the approach of American constitutionalism, in which the executive branch is empowered to declare a state of emergency or war, instead of the legislative. In Latvia, the president declares martial law based on a decision of the Latvian Saeima.[30] In Italy, as well, the Parliament decides on the declaration of martial law and delegates the relevant powers to the executive branch.[31] With regard to Italy, it is noteworthy that the Constitution allows for an increase in the term of each Chamber of Parliament only in case of war.[32] In this regard, it should be noted that the state of war is a sharply expressed fact, in the assessment of which subjectivity is minimised, additionally, the executive branch includes the security or other law enforce-

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[24] Jeremy Diamond, Laura Jarrett, Kevin Liptak, "Trump issues first veto of his presidency, says resolution 'put countless Americans in danger'" (CNN, 15 March 2019), https://edition.cnn.com /2019/03/15/politics/trump-veto-resolution/index.html accessed 30 May 2020.
[25] Brett Samuels, "Trump again vetoes resolution blocking national emergency for border wall" (The Hill, 15 October 2019), https://thehill.com/homenews/administration/465992-trump-vetoes-congressional-resolution-to-overturn-national-emergency accessed 30 May 2020.
[26] Articles 119-121, the Constitution of the Republic of Turkey, 1982.
[27] Articles 337-339, the Constitution of Venezuela, 1999.
[28] Part Eight, the Constitution of the United States.
[29] Doe V. Bush, No. CIV.A. 03-10284-JLT, (23 February 2002).
[30] Article 43, the Constitution of the Republic of Latvia, 1922.
[31] Article 78, the Constitution of the Republic of Italy, 1947.
[32] *ibid*, article 60.

ment agencies, based on the information of which the decision is made, thus, the discretion of the Parliament in this part is not so wide.

Given the variety of forms of governance the common principle that is characteristic to deliberative democracy can be observed: countries, for the purpose of an effective response, vest the declaration of a state of emergency to the executive branch, and the involvement of the parliament in the control thereof is essential. The principle of separation of powers requires the conferred action of government branches to legitimise this process.

"[S]ome overlap in membership between the three branches is not necessarily incompatible with the existence of some forms of separation of powers, it is possible to envisage circumstances where certain parliamentary systems may – by virtue of other factors such as strong safeguards for judicial independence – have 'greater separation of powers than a number of the so- called presidential systems'"[33]

The Venice Commission notes that when it comes to the prerogative to declare a state of emergency, the three most common approaches are:

> "[a] The executive declares the state of emergency without parliamentary involvement. […]
>
> [b] The executive declares the state of emergency but must have this ratified by Parliament before it can proceed with emergency measures […]
>
> [c] Parliament itself declares the state of emergency."[34]

An example of the latter approach is Hungary. According to the Constitution of Hungary, the Parliament is authorised to declare the emergency by the support of at least 2/3 of its members.[35] The Fundamental Law provides not only theoretical, but also practical difficulties such regulations may face. The President is authorised to declare a state of emergency as well as a state of war or national crisis if the Parliament is deprived of the opportunity to do so. One of the reasons for this is the shortage of time it usually takes to respond adequately to a crisis.[36]

According to the Constitution of Georgia, the President is authorised to declare a state of emergency upon the recommendation and countersignature of the Prime Minister. The decision shall immediately be presented to the Parliament for approval.[37] Such regulation is typical for parliamentary republics, as the president is usually not authorised to declare a

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[33] Danny Gittings. "Separation of Powers and Deliberative Democracy" (April 1, 2018) citing Donald S Lutz, "Principles of Constitutional Design" (Cambridge University Press, 2006) 123. Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds.) "The Cambridge Handbook of Deliberative Constitutionalism" (Cambridge University Press, 2018), 115.

[34] European commission for democracy through law, " ON STATES OF EMERGENCY", CDL-PI(2020)003, 2020, 14, paras 248-251 https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e accessed 30 May 2020.

[35] Article 48, paragraphs 1(b) and 2, Constitution of the Republic of Hungary, 2011.

[36] *ibid*, paragraphs 3 and 4.

[37] Article 71, paragraph 1 and Article 53, paragraph 1, Constitution of Georgia, August 28, 1995, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

state of emergency without the consent of the head of the government.

We believe that the procedures for declaring a state of emergency are unreasonably complicated. Specifically, if the President already holds a request of the Prime Minister to declare a state of emergency, it is no longer necessary for him/her to countersign it, as both officials have already given their consent to the entry into force of the act. It is noteworthy that according to the version in force prior to the constitutional reform of 2017-2018, countersignature was not required for an act submitted to the President by the Government or when the Government had given prior consent.[38]

B. Legislative Power of The Parliament

Under the state of emergency, the legislative power of Parliament is limited in many countries. [Like Georgia] In Romania, Poland, Lithuania and Kyrgyzstan, a constitutional amendment is prohibited during the state of war or emergency.[39]

In Poland, in addition, it is prohibited to change the rules for the election of the Sejm, the Senate, local self-government bodies and the President.[40] This is both a mechanism to ensure the Parliament does not make decisions without the involvement of the public, as well as a mechanism for the protection of the Parliament itself, so that it does not become the source of additional destabilisation in the country.

One exception is Turkey. Following the famous events of 2016,[41] in order to restore public order, a state of emergency was declared throughout the country.[42] In parallel of the state of emergency, constitutional amendments were drafted to move from a parliamentary system to a presidential one. It is doubtful whether such a new order is in line with the requirements of a democratic state. The Venice Commission noted in a statement that "[t]here is no formal rule in international law that prevents constitutional amendments during situations of emergency such as times of war, application of martial law, state of siege or extraordinary measures. Yet, such a prohibition is contained in several constitutions".[43] The Commission, had noted earlier, when assessing the constitutional amendments of Hungary, that "transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of

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[38] Constitution of Georgia, *supra* note 37, Article 73 primae, paragraph 3 (version of October 4, 2013).
[39] European commission for democracy through law, "Emergency Powers", CDL-STD(1995) 012, 1955, p. 20, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e accessed 30 May 2020.
[40] Article 228, the Constitution of the Republic of Poland, 1997.
[41] We mean the attempted Coup in Turkey.
[42] "Turkey declares 'state of emergency' after failed coup" (Al Jazeera, 21 July 2016), https://www.aljazeera.com/news/2016/07/erdogan-declares-state-emergency-turkey-160720203646218.html accessed 30 May 2020.
[43] European commission for democracy through law, "Opinion on the amendments to the constitution adopted by the Grand National Assembly", No. 875/2017, CDL-AD(2017)005, p.7, para 29, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e accessed 30 May 2020.

views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process."[44]

It is significant, that during the state of emergency it is difficult to conduct transparent and open processes with the full engagement of all stakeholders, which should be the basis for the legitimacy of the legislation. This situation is caused by emergency measures, in particular, the restriction of human rights and freedoms by the Presidential decree. For example, the state of emergency declared in Georgia on the basis of the spread of the Novel Coronavirus has substantially prevented the exercise of freedom of expression, which is one of the fundamental parts of political rights. According to the Decree N1 of March 21, 2020, any kind of assembly, demonstration or gathering of people in the country was restricted.[45] Resolution N181 of the Government of Georgia prohibited the assembly and / or manifestation provided by the Law of Georgia on Assembly and Manifestations.[46]

Therefore, political processes move to a different phase during the state of emergency. Political rights and freedoms are restricted not only to citizens but also to political parties, which, as mentioned above, prevents the conduct of processes and negatively shifts the political atmosphere in the country.

The Constitution of Georgia partially perceives the named threat and restricts the holding of elections during a state of emergency.[47] Thus, the regulation of the Polish Constitution should be shared, where this threat is perceived in more depth and the Constitution of Georgia should also ensure the prevention of amendments related to democracy during a state of emergency. In this regard, the most important issue in the Georgian reality is the election legislation. Disagreements between political parties over the rules of elections have often been a precondition for a political crisis in Georgia.[48]

Consequently, it is important for the Parliament to be limited during the state of emergency, from additional type of legislative activity as well. This should primarily affect the election legislation.

C. The Oversight Function of The Parliament

During the state of emergency, power is concentrated in the executive branch. The role of the legislative becomes more important at this moment, in order the control to be maintained as much as possible, which is the primarily reflected in oversight activities.

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[44] Venice Commission, "Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary", No. 614/2011, CDL-AD(2011)001, p.5, para 18, https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2011)001-e accessed 30 May 2020.

[45] Article 1, paragraph 6, Decree N1 of the President of Georgia, March 21, 2020, webpage, 21.03.2020.

[46] Article 5, paragraph 1, Resolution N181 of the Government of Georgia, March 23, 2020, webpage, 23.03.2020.

[47] Article 71, paragraph 5, *supra* note 36.

[48] Giorgi Gogia, "Georgia, Events of 2019" (Human Rights Watch, 2019), https://www.hrw.org/world-report/2020/country-chapters/georgia accessed 30 May 2020.

During the martial law or the emergency state, the executive branch has the right to restrict the freedom of expression, however the expression of the Member of the Parliament is protected by the constitution with a higher standard in a number of countries. The Constitution of Georgia also equips the Member of the Parliament with indemnity, declaring his or her legal liability inadmissible for the expression of opinions within or beyond the powers of the deputy.[49] According to the Decrees issued during the state of emergency, the President of Georgia is not authorised to restrict the freedom of expression of the Members of Parliament with this regard. Article 71 of the Constitution exhaustively lists the rights and freedoms that may be restricted by a Decree during the emergency. This provision does not refer to the indemnity of the member of the Parliament and a higher standard set for the protection of the freedom of expression.

Considering this, the parliamentary debates preceding the approval of the state of emergency is also relevant. According to the Rules of Parliament of the Parliament of Georgia, the issue of declaring a state of emergency is not subject to deliberations.[50] This norm caused embarrassment at the Extraordinary Session held on April 22, 2020 at the Parliament of Georgia, when Members of Parliament were not given the opportunity to ask questions to the President and the Prime Minister.[51]

According to the Rules of Procedures of the Portuguese Parliament, the debate may be open or closed. It is necessary to ensure the participation of all parliamentary groups.[52] In France, a debate may be held in Parliament on the matter until the emergency powers expire, but it does not have the power to vote on the issue of authorisation.[53]

Restrictions on debate by the Rules of Procedure of the Parliament of Georgia may be intended to make a decision in a short period of time so as not to jeopardise the ongoing measures for the state of emergency. But, according to the Constitution, the decision to declare a state of emergency and the decree enter into force upon publication. Consequently, the duration of the parliamentary debates will not prevent the current measures from taking effect. It is recommended that the named norm be invalidated, and that Members of Parliament be given the opportunity to ask questions and state their political views when discussing the issue at the plenary session.

After the approval of the state of emergency, the issue of accountability with the Parliament will be raised. The Constitution of Georgia and the Rules of Procedure of the Parliament do not contain special norms for the implementation of the oversight functions of the Parliament in case of emergency. Unlike the French Constitution, which obligates all executive bodies to inform both Chambers of the ongoing effort,[54] the Constitution of Georgia is limited to determining the beginning of an emergency session as soon as the state of emergency is de-

[49] Article 39, paragraph 3, *supra* note 35.
[50] *ibid*, Article 83, paragraph 6, subparagraph "c".
[51] Audio recording of the Plenary Session of April 22, 2020 available on the website of the Parliament of Georgia: https://info.parliament.ge/#law-drafting/20302 [last verified on May 30, 2020].
[52] Article 172, Rules of Procedures of the Parliament of Portugal, 2007.
[53] Article 35, Constitution of the Republic of France, 1958.
[54] Article 16, *supra* note 51.

clared, which lasts until the end of the state of emergency.[55] Moreover, in Brazil The Directing Board of the National Congress designates a Committee comprised of five of its members to monitor and supervise the implementation of the measures concerning the state of defense and the state of siege.[56]

On March 21, 2020, based on the state of emergency declared by the President of Georgia, according to the Constitution of Georgia, the Parliament convened and continued to work in an emergency session.[57] As part of the emergency session, the Parliament has the opportunity to use the existing levers for oversight of the executive branch, including holding committee hearings, setting up temporary commissions, and using an interpellation mechanism. The Venice Commission further points to the authority of the Parliament to conduct an investigation into the use of investigative powers by the executive, which in our case may be a temporary investigative commission .[58]

After the state of emergency declared on March 21, 2020, Parliament has not in fact exercised parliamentary control for two months and has not discussed the proportionality of the human rights restrictions.[59] For example, from March 21 to April 21, there was only one committee meeting, during the whole session of the Parliament there was no investigative or other temporary commission created, two opposition Factions used interpellation mechanism to ask a question, however, Committees or Factions did not summon accountable person for a committee meeting, no ministerial hour was held either.[60] It is noteworthy that Parliamentary Rules of Procedures oblige the Committee to hold a meeting at least twice a month during the session.[61] The regulations do not indicate a different arrangement during an emergency session.

During the emergency session, the Gender Equality Council had parliamentary activity to monitor the implementation of the measure against the spread of the Novel Coronavirus. Recommendations were developed by the Council to the Government of Georgia, which deal with the economic empowerment of women and the prevention of domestic violence in the context of the spread of Coronavirus.[62] The Committee of Environment and Natural Resources on May 20 decided to launch thematic scrutiny - "Lead Pollution of the Environment in Georgia", but it cannot be considered an oversight of the government during

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[55] Article 44, paragraph 3, *supra* note 36.
[56] Articles 140-141, Constitution of the Federative Republic of Brazil, 1988.
[57] Article 44, para 3, *supra* note 36.
[58] European commission for democracy through law, *supra* note 33, p. 15.
[59] "It is unconstitutional to impose restrictions without a state of emergency" (Transparency International Georgia 19 May, 2020), https://transparency.ge/en/post/it-unconstitutional-impose-restrictions-without-state-emergency last verified on May 30, 2020.
[60] This information is apprehended from the official website of the Parliament of Georgia: www.parliament.ge last verified on 30 May 2020.
[61] Article 34, paragraph 1, *supra* note 14.
[62] Recommendations Developed by the Gender Equality Council to the Government of Georgia (Gender Equality Council of the Parliament of Georgia, 2020), http://parliament.ge/ge/ajax/downloadFile/136127/რეკომენდაციები_საქართველოს_მთავრობას last verified on 30 May 2020.

the emergency session, since it is not concerned with the state of emergency basis, in particular, with the spread of the Novel Coronavirus and its consequences.[63]

An emergency session, due to the crisis in the country, should not be perceived as a circumstance for the Parliament to refuse from its supervisory functions. Despite the threats, Parliament should try to delegate as little authority to the government as possible and serve its constitutional obligations effectively. Parliament, instead of actual prorogating, should be an active participant in a state of emergency.

When assessing the factual proroguing of the Parliament of Georgia, the practice and judicial precedents of the countries where it is allowed by law shall be taken into account. In the United Kingdom, in the case of Miller v. Prime Minister, the Supreme Court noted that as Lord Bingham had stated "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".[64] In this way, the executive is overseen by the people's representatives. Despite such a significant issue, such as the exit of the United Kingdom from the European Union, the executive power is obliged to inform and protect its own policies within the walls of the legislative. Citizens are protected from the arbitrariness of the executive branch. Of course, the court assessed the prorogation of the Parliament to have the effect of frustrating or preventing, the ability of it to carry out the constitutional functions.[65]

The court's reasoning underscores the importance of parliamentary oversight in the face of the centralisation of government in emergency situations.[66] It is noteworthy that the executive branch should not abuse discretionary powers. Each time, it must assess how important the challenge is and then decide whether to suspend the functioning of the Parliament, especially when it comes to a democracy in which parliamentary supremacy is recognised and regulated.

Ultimately, the Georgian Parliament should actively monitor the steps taken by the executive during the emergency session. It is important that the Parliament makes the most of all the oversight mechanisms at its disposal (be it thematic sqrutiny, interpellation, temporary commissions, etc.), through which the Parliament will be informed about the measures taken and planned in the country by the officials of the accountable bodies.

D. Constitutional Timelines for the State of Emergency

It is the constitutional prerogative of the Parliament of Georgia to vote the emergency or martial law announced by the executive government.

According to Article 71 of the Constitution of Georgia, the Parliament of Georgia approves

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[63] The letter of the Chairman of the Committee on Environment and Natural Resources of May 21, 2020, is available: https://info.parliament.ge/file/1/BillReviewContent/248395? Accessed on June 1, 2020.
[64] Bobb v Manning [2006] UKPC 22, para 13, cited in: Miller V. Prime Minister, UKSC 2019/0192, para 46.
[65] Miller V. Prime Minister, *ibid*, paras 46, 50.
[66] *ibid*, para 56.

the decision on declaring a state of emergency or martial law as soon as it is convened. Otherwise, it loses its legal force upon voting.

The state of emergency or martial law shall be abolished once the term determined by the Constitution is expired, unless the executive obtains the consent of the Parliament to extend the term. Consequently, the timeline is the most important lever in the hands of the Parliament to control the political and legal expediency of the power transferred to the executive branch to assess the existence of the grounds envisaged by the Constitution for the state of emergency.

The wording of paragraphs 1 and 2 of Article 71 of the Constitution of Georgia makes it unclear how long it will take the President to submit a decision to the Parliament, the timeline for Parliament to convene to discuss the expediency of the state of emergency and martial law is similarly unclear. This norm does not indicate a specific term. Only the immediate submission of a decision by the President to the Parliament is regulated. The word "immediately" which is the sole notion related to the term is subject to evaluation. Interestingly, the pre-2018 edition of the Constitution stipulated that the decision must be submitted to Parliament no later than 48 hours after its adoption.[67] The explanatory note of the draft Law on the State of Emergency states that "the decision shall be submitted to the Parliament immediately, instead of 48 hours."[68] To assess this definition, the new edition sets a higher standard and requires the President to submit a decision less than 48 hours of the decision being made as soon as possible, however, the exact time is still unknown. In addition to the timing of the decision, it remains unclear how long it will take for the Parliament to vote.

Part of the constitutions give the executive the power to declare a state of emergency or war without parliamentary control. In Poland, after a military or emergency state, the President is obliged to apply to Parliament no later than 48 hours for consent. In case of emergency, the President requires the re-consent of the Parliament after the lapse of 90 days, for prolonging the emergency for a maximum of 60 more days.[69]

The Romanian Constitution increases this term. The President may act without the supervision of the Parliament for a period not exceeding five days after the declaration of a state of emergency or siege.[70] The edition of the Constitution of Georgia prior to the 2017-2018 constitutional reform was very specific about the timeline: the state of emergency required submission of the announcement to the Parliament within 48 hours for the consent. This period lasted for up to five days in case the Parliament was dismissed at the moment of announcing the state of emergency.[71]

There is a different practice in the world parliamentarism as well. The French Constitution is quite generous with regards to lifting parliamentary oversight over the state of emergency. The 1958 Constitution of France authorises the Council of Ministers to extend the siege

[67] Article 73, paragraph 1, subparagraphs “g” and “h”, *supra* note 37 (edition of October 13, 2017).
[68] Explanatory note of the Law on State of Emergency of Georgia, 24.05.2018, p.2.
[69] Articles 230 and 231, *supra* note 40.
[70] Articles 92 and 92, Constitution of Romania, 1991.
[71] Article 50, paragraph 3 prima, *supra* note 37 (the edition of 13 October 2017).

for 12 days without parliamentary oversight, after which it is necessary for the legislature to authorise it. This period is limited to 30 days in case of emergency, and four months, in case of the war.[72]

Given the foreign experience, the five-day period of Georgian practice is not a long time for a decision left without parliamentary authorisation, especially given how difficult it is to convene a parliament when its powers are terminated and the new composition is not completed, however the expediency of this term should be analysed reasonably. It is inadmissible for the executive branch to remain without parliamentary control for longer than necessary. In this regard, it is interesting to note the experience of the new constitutions of some European countries that have rejected French-style unilateralism.[73] The President of Lithuania is obliged to submit a declaration of war, a state of emergency, or a state of siege to the Seimas for approval at the nearest session.[74]

In presidential republics, the president directly addresses to the legislature for consent. The discretion of the executive branch in relation to the timeline is so wide that often before the expiration of this period the state of war or emergency is already over.[75]

Nevertheless, there are exceptions when timeframes are not set. For example, the President of Brazil has the right to declare a state of siege only if he/she has the consent of the National Congress. If Congress does not operate, the head of the state may declare a state of war independently, and Congress is obliged to convene immediately and discuss the consent.[76] Similarly, As soon as the President of South Korea declares martial law or a state of emergency, he/she is obliged to notify the National Assembly and obtain his consent.[77] Portugal's Constitution gives the President merely shortest possible time to obtain the approval from the Parliament.[78]

The legislature often faces obstacles in making decisions. The basis for this, in addition to many political actors, is its form - the existence of two chambers. Considering this, it is noteworthy with regards to Germany, that if the situation requires immediate action and if an insurmountable obstacle prevents the invitation of the Bundestag or the Bundestag fails to muster a quorum, the Joint Committee[79] determines this state by a two-thirds majority vote, which must include the support of at least a majority of the members.[80] The German example reveals a problem typical for bicameral parliaments - a timely response. When declaring a state of emergency requires the support of a certain number of members of both chambers, their timely assembly may be complicated. That is why the Joint Committee of the German

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[72] Articles 16, 35 and 36, *supra* note 53.
[73] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale LJ, 1029-1091, 1053.
[74] Article 84, paragraphs 16 and 17 and Article 142, Constitution of the Republic of Lithuania, 1992.
[75] In the former Republic of Yugoslavia, the involvement of the USA in military operations lasted for 78 days. In the case of *Campbell v. Clinton*, the US Court of Appeals for the District of Columbia Circuit could not find a violation of the Constitution by the President for the absence of authorisation from Congress during this time.
[76] Article 84, *supra* note 57.
[77] Article 76, Constitution of the Republic of Korea, 1987.
[78] Article 138, Constitution of Portugal, 1976.
[79] Two thirds of the Joint Committee are Members of Bundestag and one third is the Members of Bundesrat.
[80] Article 115a, Basic Law of the Federal Republic of Germany, 1949.

Constitution has a mechanism for resolving this issue (when it is impossible to convene a parliament, a decision can also be made by a special joint committee set up to make interim decisions).[81]

As can be seen from the above examples, the involvement of different branches of government in this process is quite diverse, however, it should be noted that the participation of the legislature in the decision-making process is essential.

When discussing the parliamentary regimes, it is necessary to mention that other factors have an impact on the declaration of a state of emergency along with the interaction between the government and the parliament. For example, this may apply to party development. As it is known, "parties are systematically stronger under parliamentary […] systems […]. Countries with strong parties have a lower likelihood of declaring emergencies."[82]

Maybe the wording of submission of the announcement of emergency or military state to the parliament or the timeline for parliament session is linked to the existence of such a state itself. For example, during an epidemic, it may be difficult for the Members of the Parliament to physically gather or for the staff to appear in the house of the Parliament. With the spread of Novel Coronavirus, this problem demonstrated itself in almost every country. We believe the answer is the remote work of the Parliament.

On March 11, the draft of Amendments to the Rules of Procedure of the Parliament was registered in the Parliament of Georgia.[83] According to the draft it was possible to move the Parliament's work to remote work in the event of emergencies, military state or other objective reasons. The authority to decide on the transition to a remote mode was prescribed to the Speaker of Parliament.[84] The draft was supported on the first hearing by the Parliament on March 18 after which subsequent voting was not set on the agenda of the extraordinary session.[85]

Unlike the processes in the Parliament of Georgia, a part of parliaments of other countries has not been suspended discussing this issue. On May 15, the US Congress passed a resolution on the work of the Parliament in a remote mode - the so-called "Proxy Voting". According to the resolution, Member of the House is entitled to participate remotely due to the public health emergency during in-person committee proceedings and cast votes.[86]

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[81] Bruce Ackerman, *supra* note 73.
[82] Christian Bjørnskov, Stefan Voigt, *supra* note 11, pp. 5-6.
[83] The Draft of Amendments to the Rules of Procedure of the Parliament of Georgia, available here: https://info.parliament.ge/file/1/BillReviewContent/245911? last verified on 30 May 2020.
[84] *ibid*, article 1.
[85] E-database of legislature of the Parliament of Georgia: https://info.parliament.ge/#law-drafting/20154 last verified on 30 May 2020.
[86] Section 4, Congress Resolution Authorizing remote voting by proxy in the House of Representatives: https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116hres965.pdf last verified on 30 May 2020.

It is imperative that such an important issue be resolved in a timely manner and that the draft law be adopted soon. Paralysing and artificially delaying the exercise of parliamentary powers is inadmissible, especially given the functions of the legislature in an emergency.

E. The Duration of the Emergency

The Constitution of Georgia is silent on such an important issue as the maximum duration of the state of emergency. Of course, the state of emergency is a case that cannot be planned and determined in advance, but based on the parliamentary oversight, the maximum period within which it will be possible to declare a state of emergency must be determined by the Constitution. The purpose of this regulation is to periodically make the extending of the term of the state of emergency a subject of parliamentary deliberation.

The Constitution of Georgia does not oblige the President to declare a state of emergency for a certain period of time. Similarly, the Law on State of Emergency states that the President's order must state the motive and territorial boundaries of such a decision, and there is no such record in terms of time.[87] Moreover, the state of emergency is terminated in accordance with the rules established for the declaration thereof, which means that the Parliament can only repeal a state of emergency when the President addresses it. This precludes, on the one hand, the automatic discussion of Parliament after a certain period of time on the need to extend the emergency, and, on the other hand, the discussion of the termination of the state of emergency by the Parliament independently.

Regarding the duration of the state of emergency, the Venice Commission notes that it should be exceptional and temporary. Declared emergency should be limited in time so that it is not extended for more than the reason for its declaration exists and it should not become permanent.[88] The question of who, when and how decides the termination of the emergency cannot remain within the competences of the executive, which is already enjoying increased power. The Parliament should discuss this issue.[89]

In the United States, a state of emergency can be revised every 6 months by a joint resolution of both Chambers.[90]

According to the Constitution of Turkey, the president is entitled to have a maximum of 6 months to declare an emergency and the Grand National Assembly may reduce or increase its duration.[91]

Unlike the various practice and the opinion of the Venice Commission, the Constitution of Georgia permits the state of emergency to be announced for a long period of time, as well as

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[87] Article 3, paragraph 1, Law of Georgia on "State of Emergency", 17 October 1997, Parliamentary Gazette, 44, 11.11.1997.
[88] European Commission for Democracy through Law, *supra* note 34, 21.
[89] *ibid*, 15.
[90] US CODE. Chapter 34, National Emergencies (Section 1622).
[91] Article 119, *supra* note 26.

for the possibility of declaring it indefinitely, the Parliament has no legal leverage to reconsider the expediency of the state of emergency supported by it after a certain period of time, which leaves the possibility of arbitrariness to the Executive. It is important that the Parliament be given the opportunity to terminate the state of emergency on its own initiative when the grounds no longer exist, however, this will be discussed in more detail below.

F. TERMINATION OF THE STATE OF EMERGENCY

The abolition of the state of emergency is regulated by the Constitution as well as by the Law on the State of Emergency. Both the Basic Law and the special law stipulate that "a decision on the revocation of a state of emergency shall be made in accordance with the procedures established for declaration and approval of the relevant state of emergency." This means that after the President addresses the Parliament pursuant to the proposal of the Prime Minister, the legislature must approve the emergency by a majority of the full membership.[92]

Everything is clear if the state of emergency is lifted when the timeframe lapses or if it is not approved by the Parliament, in which case it loses its legal force upon voting.[93] However, the issue of its early termination is far more interesting.

The provision of the Georgian Law on the State of Emergency before the amendments of October 31, 2018 was formulated as follows: the law stipulated that, on the one hand, the President of Georgia could annul the state of emergency with the co-signature of the Prime Minister and with the consent of Parliament, and on the other hand, if the Parliament believed the condition on which the emergency was grounded no longer existed, it would repeal it.[94]

It is noteworthy that the old regulation contained more clarity, however, as a result of the amendment in the law it was replaced by a more vague regulation. The explanation of the draft amendments in the explanatory note indicated that the purpose of the law was to ensure compliance with the Constitution, as well as to determine the essence of the amendment to article 3, however, there were no additional explanations for the reason for the amendment.[95] As for the constitutional amendments, the authors of the constitutional draft explain that the reform established the grounds for the termination of the state of emergency, which had not previously been regulated by the Basic Law.[96] Thus, the reason for the removal from the law of the initiative of the Parliament to terminate the state of emergency remains unclear.

In any case, the Parliament is a subject authorised to declare a state of emergency and to abolish it, and it is natural that it is the final decision-maker in both cases, since it is logical that whoever decides upon declaration, and the termination decision should remain within its

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[92] Article 71, paras 2 and 7, *supra* note 37.
[93] *ibid*, paragraph 2.
[94] Article 3, paragraphs 2 and 3, *supra* note 86.
[95] *Supra* note 65, p.1.
[96] Explanatory Note of the Draft Constitutional Law of Georgia on Amendments to the Constitution of Georgia, p. 31 (13.10.2017).

authority as well. The issue of lifting the state of emergency at the initiative of the Parliament remains under the question pursuant to current regulation.

While the relevant grounds no longer exist, the state of emergency should be lifted, as the persistence of restrictions in such without the necessary grounds is inadmissible even for a day, although in practice there may be cases when the executive does not want to relinquish the reins prematurely. It would have been desirable to prevent the delay of the termination of the state of emergency by allowing the Parliament to lift it at its own initiative once the grounds for its declaration no longer exists.

CONCLUSION

In conclusion, it should be noted that the mechanism of an emergency is very complex institution, which impacts multiple significant factors for the State. In the process of playing with the influence, the Parliament is given the greatest burden of the oversight body on the executive branch. Naturally, there will always be a danger that government officials will use this leverage to their advantage, although, of course, this should not be a reason to abandon this mechanism, as it has an important role to play against the great evil that threatens statehood.

As András Sajó points out, " It is certain that there are abnormal, extreme, and crisis situations where immediate, extraparliamentary decisions are necessary. But this may be controlled constitutionally (for example, when and for as long as this situation lasts). […T]he aim of the constitutional state in cases of emergency is to render the crisis situations manageable and to make sure that constitutionalism prevails."[97]

It is important that the legislature fully analyses its own responsibilities in this process. Parliamentary oversight is not a burden, it is a prerequisite for legitimising processes and effective governance.

Legislation, in turn, should make it possible to lead the process in a healthy way. Naturally, we cannot demand a detailed regulation of the state of emergency, because if it were possible, there would be no need to declare this state of affairs, so the conscious silence of a basic law is justified, but certain frameworks and shortcomings need to be corrected.

[97] András Sajó, *supra* note 4, p.150.