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Abstract	<p>This chapter analyses the impact the COVID-19 pandemic is having on the European legal systems, and on Spain in particular, through the prism of the studies elaborated in the context of the health crisis by the Venice Commission. These documents explicitly recognise the relevance of the current health crisis in our societies and its impact on the founding objectives of the Council of Europe: the safeguarding of democracy, human rights and the rule of law. The analysis of the criteria of the Venice Commission in relation to the application, regulation and the redistribution of powers during states of emergency is indeed a useful tool to assess the use of the exceptional powers by States during the COVID-19 pandemic. In particular, reference to these standards may be useful to identify possible abuses by populist governments.</p>	

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Preserving Democracy and the Rule of Law 1  
in a Pandemic. Some Lessons 2  
from the Venice Commission 3

*Josep Maria Castellà Andreu* 4

I INTRODUCTION 5

The health crisis provoked by the COVID-19 is a global emergency, yet 6  
the legal responses to it have been eminently national. The pandemic has 7  
raised legal-constitutional reflections in the affected countries on the reaction 8  
of public authorities, on the problems of the application to the current 9  
crisis of the states of exception foreseen by national legal systems and 10  
on the impact the adopted measures have on fundamental rights and the 11  
separation of powers. In all countries, there is indeed a tension between 12

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An extended version of this text has been published in Paloma Biglino y Juan 1  
F. Durán, *Los efectos horizontales de la covid-19 sobre el sistema constitucional: 2  
estudios sobre la primera oleada*, Fundación M. Giménez Abad, Zaragoza, 2021. 3

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Contemporary Democracy in Europe*,  
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13 the need for effective and rapid responses to the pandemic and the neces-  
14 sity to preserve the rule of law and constitutional democracy, in particular  
15 the system of checks and balances and the guarantee of fundamental rights.  
16 Although the legal responses to the crisis varied significantly in each coun-  
17 try, there are, nonetheless, certain common features: the protagonism of  
18 executives, the use of emergency legislation and the restriction of funda-  
19 mental rights in the name of the safety. At the same time, the use of excep-  
20 tional powers by some European governments to confront the health crisis  
21 and its social and economic consequences has been seen with some con-  
22 cern in public opinion and in broad legal sector.

23 The COVID-19 crisis can be analysed from different legal perspectives.  
24 In this work we will adopt the approach employed by the European  
25 Commission for Democracy through Law of the Council of Europe,  
26 known as the Venice Commission, one of the international organisations  
27 that have intervened in the present global health crisis.<sup>1</sup> Specifically, we  
28 will focus on the impact the pandemic has on constitutional democracy  
29 and the separation of powers and on the Spanish case as an outstanding  
30 example of the problems mentioned.

31 Insofar, the Venice Commission has published three documents related  
32 to the COVID-19 pandemic. These documents explicitly recognise the  
33 relevance of the current health crisis in our societies and its impact on the  
34 founding objectives of the Council of Europe and the Venice Commission  
35 itself since its inception in 1990: the safeguarding of democracy, human  
36 rights and the rule of law. This justifies from the outset the attention  
37 reserved by the Venice Commission to the emergency derived from  
38 COVID-19. Besides, there may be another implicit reason for the atten-  
39 tion paid to the current crisis by the Venice Commission. The guidelines  
40 that it had previously elaborated for the management of emergency situa-  
41 tions were designed, just like that on the states of exception, to face seri-  
42 ous problems of public order and national security crisis, or natural or  
43 health catastrophes of lesser magnitude. The first novelty of the current  
44 health crisis, and its effects on the economy, lies in its severity, duration  
45 and effects. Even though many of the general principles of emergency law

<sup>1</sup>The Venice Commission has been included in the so-called Transnational Legal Orders (TLOs) and plays an important role in global constitutionalism, in terms of its function, membership and values, as it operates on legal norms relating to democracy, human rights and the rule of law. See Paul CRAIG, “Constitucionalismo transnacional: la contribución de la Comisión de Venecia”, *Teoría y Realidad Constitucional*, 40 (2017), 90 ss. The author draws on the definitions of Halliday and Shaffer and apply them to the Venice Commission.

AUI are applicable to the new situation, updating and adaptation was necessary. The Reflections<sup>2</sup> and the Interim Report<sup>3</sup> contribute to this. Both documents take into account only the first wave of the pandemic, until the summer of 2020, without taking into account subsequent waves, which present characteristics partly different, both as regards the incidence of the pandemic, and the legal and political responses to it. The Interim Report focuses on actions carried out by EU Member States (and the United Kingdom) to address the pandemic and its effects on democracy, the rule of law and human rights. Earlier the Venice Commission had published a Compilation,<sup>4</sup> which contains the reiterated doctrine of the Venice Commission on emergency law.

These contributions of the Venice Commission include parameters that can help to assess the use of the exceptional powers by States during the COVID-19 pandemic and, in particular, in the case of Spain. The First Section refers to the types of states of emergency and the principles that should guide their regulation and application by States. The Second Section analyses the criteria of the Venice Commission in relation to the redistribution of powers during states of emergency and the parliamentary control of governmental decisions, affecting the parliamentary, constitutional and pluralist nature of democracy, in addition to judicial control, affecting the rule of law. To conclude, the responses of the public powers to the emergency caused by the pandemic will be related to the populism that threatens our democratic and constitutional systems.

<sup>2</sup> Respect for democracy, human rights and the rule of law during states of emergency—Reflections (CDL-PI(2020)005rev). 26 May 2020, the document was “taken into account” by the Plenary session of the Venice Commission of June 2020. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e).

<sup>3</sup> Venice Commission, Interim report on the measures taken in the EU Member States as a result of the COVID-19 crisis and their impact on democracy, the rule of law and fundamental rights, adopted by the Plenary session on 8 October 2020 (CDL-AD(2020)018). Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e).

<sup>4</sup> Compilation of Venice Commission opinions and reports on states of emergency, CDL-PI(2020)003. Published on 16 April 2020. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e)

69           2     THE VENICE COMMISSION AND STATES OF EMERGENCY.  
70                    TYPES OF EXCEPTIONAL STATES AND THE PRINCIPLES  
71                    GOVERNING THEM

72                           2.1   *Opting for the Rule of Law Model*

73     As the Reflections recall, there are two theoretical approaches to situations  
74     of abnormality or exception on the part of States. First, the so-called sov-  
75     ereign approach, which corresponds to the decisionist approach and  
76     evokes Carl Schmitt's way of dealing with them, based on the possibility  
77     for the State to adopt all the measures necessary to guarantee public health  
78     without the limit of what is provided for by the constitutional legal system  
79     or by forcing its interpretation in that direction. And second, an approach  
80     based on the rule of law, in which the law, and the Constitution in particu-  
81     lar, regulates and, therefore, rationalises and limits the exercise of power in  
82     exceptional states, even if it does so in a different way to normal situations.  
83     The Venice Commission opts for the second approach, as it is appropriate  
84     for constitutional democracies.<sup>5</sup> However, in our constitutional states, the  
85     real danger is not so much to opt for one model or the other, but to avoid  
86     decisionist leakages in the responses given by governments or the parlia-  
87     mentary majorities that support them. In the next paragraph the effects of  
88     the legal system's provision on states of emergency are analysed.

89                           2.2   *Types of States of Emergency and Their Regulation*

90     It should be noted at the outset that “state of emergency” is the generic  
91     term usually employed by the Venice Commission to encompass all the  
92     different exceptional states, which are given different names in each legal  
93     system, as well as other emergency regulations. Therefore, the Commission  
94     seems to adopt a broad and material concept of emergency, as opposed to  
95     the stricter concept of exceptional state, formally identified in national  
96     Constitutions—as is the case in Spain.

97     The Venice Commission distinguishes between the different types of  
98     states of emergency that are usually provided for by national legal systems,  
99     when more than one is envisaged, normally following an objective crite-  
100     rion—based on the type of emergency in question—and/or another

<sup>5</sup> Reflections (CDL-PI(2020)005), para. 8; Interim Report CDL-AD(2020)018, paras 18–19.

criterion referring to the gravity of the extraordinary situation.<sup>6</sup> 101  
Accordingly, the distinction must take into account the “nature, severity 102  
and duration of the extraordinary situation”. These aspects will determine 103  
the “type, extent and duration of the emergency measures”.<sup>7</sup> By introduc- 104  
ing this plurality of criteria for identifying each type of state of emergency, 105  
a flexible approach is chosen which takes into account the plurality of 106  
approaches in comparative law and which, furthermore, allows for a cer- 107  
tain degree of modulation in the application of the state of emergency, 108  
depending on the seriousness and duration of the specific event. But, at 109  
the same time, the relative vagueness of the criteria for the delimitation of 110  
the different states of emergency can prompt the authority declaring such 111  
a state, to use the least protective type of state or the one that allows the 112  
greatest governmental intervention. Hence the need, as will be seen, to 113  
specify as precisely as possible the causes that may trigger the application 114  
of a state of emergency or another? 115

In this light, the choice of an objective criterion by the Organic Law 116  
regulating exceptional states, that is, of alarm, exception and siege (LO 117  
4/1981), based on Article 116 of the Spanish Constitution, led Spain, in 118  
my opinion rightly, to declare a state of alarm in March 2020, and not a 119  
state of exception, because the factual situation was in line with what 120  
envisaged in art. 4.b) of the Organic Law (“health crises, such as epidemics 121  
and serious pollution situations”). Yet, the intensity of the restrictions 122  
to fundamental rights that it entailed generated a doctrinal debate on the 123  
compatibility of the measures adopted with the state of alarm, in which 124  
some authors strongly argued for the necessity of declaring a state of 125  
exception instead, entailing different powers and guarantees (Aragón 126  
Reyes 2020).<sup>8</sup> 127

The Venice Commission’s Interim Report provides an overview of the 128  
situation in the EU Member States and the United Kingdom, in which it 129  
classifies the legal responses of these States according to whether or not 130  
they have declared a state of emergency and according to the legal basis of 131  
the emergency measures adopted. As a first point the Report adopts a 132  
broad criterion of state of emergency, including both the exceptional 133

<sup>6</sup>Emergency Powers CDL-STD(1995)012; Compilation CDL-PI(2020)003, 6.

<sup>7</sup>Interim Report CDL-AD(2020)018 para. 20.

<sup>8</sup>In various blogs and interventions on public media intervened in the debate, amongst many others, J. Díaz Revorio, C. Flores Juverías y C. Vidal. Against E. Virgala, J. Tajadura, J. De Miguel y J.M. Castellà.

134 states provided for in national Constitutions and other sectorial emer-  
135 gency regulations, especial health ones, regulated by specific legislation.  
136 When a state of emergency has been declared, some States have chosen to  
137 use one of the constitutionally envisaged exceptional states (nine coun-  
138 tries, seven of them by governmental decision, including Spain, and two  
139 by Parliament, including Portugal), whilst others have preferred not to  
140 apply these exceptional states—even envisaged in their respective constitu-  
141 tions—and to make use of the legislation envisaged for health emergen-  
142 cies, with the adoption of specific measures either by Parliament or by the  
143 government (five countries, including Germany, France and Italy). In con-  
144 trast, 14 other countries have preferred to use ordinary legislation, with  
145 adaptations to the circumstances, without declaring exceptional states or  
146 using emergency legislation (e.g. Austria, Belgium, Greece and the United  
147 Kingdom).<sup>9</sup> Thus, in the Interim Report, the Commission carries out an  
148 analysis according to a material or substantive criterion, without limiting  
149 itself to examining only the cases of those countries that have made a legal  
150 declaration of a state of emergency. In doing so, it takes into account and  
151 assesses the legal response to the pandemic of all EU states and the UK,  
152 irrespective of the route chosen to deal with the health emergency.

153 It should be also added that the responses given by the different states  
154 have not been static, rather they have remarkably varied during the pan-  
155 demic. The Spanish case is a good case in point. We can distinguish at least  
156 three distinct and successive phases to date (March 2020–March 2021).  
157 First, after an initial period of uncoordinated and largely improvised mea-  
158 sures taken by the various national and territorial public authorities, the  
159 national government decreed a state of alarm, which was extended by  
160 Congress on up to six occasions for periods of 15 days (Royal Decree  
161 463/2020, in force from 14 March to 21 June 2020). Second, after the  
162 cessation of the state of alarm, the model known as “co-governance”,  
163 which had already been tried and tested in the last extensions of the state  
164 of alarm, was chosen, consisting of the recovery of political management  
165 powers by the Autonomous Communities and some coordination by the  
166 central government and inter-territorial cooperation through the Inter-  
167 territorial Health Council. This second phase saw the approval of a wide  
168 variety of regional regulations adopted pursuant to Organic Law 3/1986,  
169 of 14 April 1986, on public health (Article 3), and Law 29/1998, on  
170 contentious-administrative jurisdiction (recently modified in relation to

<sup>9</sup>Interim Report CDL-AD (2020)018, paras 35–38 and 41–43.

the courts responsible for authorising or ratifying administrative measures 171  
 adopted by the different health authorities in relation to urgent and neces- 172  
 sary measures for public health entailing non-individualised limitation of 173  
 fundamental rights, Law 3/2020, of 18 September, Articles 8, 10 and 174  
 11). And the third phase, coinciding with the upturn of the pandemic in 175  
 what is known as the second wave and the legal problems caused by the 176  
 application of the aforementioned ordinary regulations, with a new 177  
 recourse to the state of alarm, first for some municipalities in the 178  
 Community of Madrid (Royal Decree 900/2020, of 9 October) and then 179  
 for the whole of Spain (Royal Decree 926/2020, of 25 October). This 180  
 decree, with a single extension approved by Congress for six months 181  
 (Decree 956/2020, of 3 November), empowers the regional authorities 182  
 to adopt measures restricting mobility and social gatherings, without hav- 183  
 ing to request judicial authorisation. 184

The Venice Commission introduces a prescriptive criterion in relation 185  
 to states' use of emergency powers. On this point it explicitly declares its 186  
 preference for the “de jure state of emergency” or “de jure constitutional 187  
 emergency powers” model, because it offers greater guarantees for funda- 188  
 mental rights, the rule of law and democracy compared to the “extra- 189  
 constitutional system” or “de facto state of emergency”.<sup>10</sup> However, the 190  
 Commission, as we have already mentioned, leaves it to the free choice of 191  
 states to opt for emergency legislation based on constitutionalised excep- 192  
 tional states or other sectorial legislative provisions on health emergencies. 193  
 This broad consideration of the so-called constitutional model may lead to 194  
 confusion due to the name that designates it, since it allows justifying the 195  
 option for states of emergency derived from unwritten constitutional prin- 196  
 ciples or included in an “(organic) law” (sic) based on the Constitution. 197  
 In reality, the model that offers the greatest guarantees is the one derived 198  
 from the Constitution itself in the strict sense. The broad interpretation of 199  
 the constitutional or legal criterion does not prevent the Commission 200  
 from identifying the Constitution as the most appropriate norm for estab- 201  
 lishing the “basic provisions” on the identification of such states and their 202  
 delimitation, given that emergency powers “usually restrict basic constitu- 203  
 tional principles”.<sup>11</sup> Another thing is that the development corresponds to 204  
 the legislator, and here the Commission shows a preference for a qualified 205  
 legislator, such as the organic legislator. The Reflections also stress that 206

<sup>10</sup> Ibid., paras 29–31; Reflections CDL-PI(2020)005, paras 22–24.

<sup>11</sup> Reflections CDL-PI(2020)005, para. 26.



207 such regulation must be general and approved prior to the declaration,  
208 during times of normality.<sup>12</sup>

### 209 *2.3 Principles on the States of Emergency*

210 Exceptional states in the broad sense, or states of emergency, as addressed  
211 by the Venice Commission, must be governed by different principles that  
212 operate, with due adaptations, in three different moments and situations:  
213 their regulation, activation and application.<sup>13</sup> These principles guide the  
214 fundamental areas of public and private life on which emergency law is  
215 projected: not only fundamental rights but also the separation of powers.  
216 The principles to be taken into account are listed in the various docu-  
217 ments, but not all of them are systematically cited in a single closed and  
218 exhaustive list. For this reason, the following list is an attempt to organise  
219 them as comprehensively as possible, although possible reiterations may  
220 be admitted.

221 First, we can highlight the principles of legality or rule of law, necessity  
222 and proportionality in the strict sense.<sup>14</sup> To these must be added others  
223 such as the formal nature of their proclamation, and that of exceptionality,<sup>15</sup>  
224 as well as the principle of differentiation between the various exceptional  
225 states, according to which all emergencies cannot be confused or treated  
226 in the same way (we have referred to this in the previous section).<sup>16</sup> The  
227 Reflections, to recapitulate, mention, in addition to the aforementioned  
228 principles of the rule of law, necessity and proportionality, the principle of  
229 temporariness, the principle of effective parliamentary and judicial scruti-  
230 nity, the principle of predictability of emergency legislation and the prin-  
231 ciple of loyal cooperation between institutions.<sup>17</sup>

232 Before referring in greater detail to the application of these principles to  
233 the organisation of powers in the next section, it is worth mentioning, in

<sup>12</sup> Reflections CDL-PI(2020)005, paras 29–30.

<sup>13</sup> On the difference between the last two see: Interim Report CDL-AD(2020)018, para. 28.

<sup>14</sup> Emergency Powers, CDL-STD(1995)012, 30; Compilation CDL-PI(2020)003, 5.

<sup>15</sup> CDL-AD(2016)006, France—Opinion on the Draft Constitutional Law on “Protection of the Nation”, para. 28; Compilation CDL-PI(2020)003, 7.

<sup>16</sup> CDL-AD(2017)005, Turkey—Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 73; Compilation CDL-PI(2020)003, 8.

<sup>17</sup> Reflections CDL-PI(2020)005, paras 6–16.

general terms and beforehand, the content and consequences derived from some of the aforementioned principles. 234  
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For the Venice Commission, observance of the rule of law and the principle of legality, and specifically that of legal certainty, entails, among other consequences, that the rules governing the state of emergency should be a) adopted prior to the declaration of the state of emergency; b) clear and avoid open clauses (“the regulation of these powers should be as detailed as possible”)<sup>18</sup>; c) when Parliament delegates powers to the Executive “the objectives, content and scope of this delegation of powers should be explicitly defined in a legislative act”,<sup>19</sup> as this avoids leaving broad areas of action in the hands of executive powers without clear and determined empowerment. 236  
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With regard to the principle of temporariness, the Venice Commission notes, on the one hand, that the exceptional measures with which most European states have dealt with the pandemic are issued for a limited period, subject to extension. Only in a few states were they adopted without setting a time limit, but using clauses relating to the permanence of the situation (Croatia and Hungary). In such cases, the Commission recommends that, in order for such declarations to be considered lawful, there should be a regular review of the situation.<sup>20</sup> On the other hand, as a prescriptive criterion, it is indicated that, whatever the mode of regulation used, in addition to parliamentary and judicial control, the measures should cease to be in force as soon as the circumstances that led to their approval are over.<sup>21</sup> On this last point, however, the Commission accepts that, first, the emergency measures may be made more flexible as the situation evolves and, second, given the prolongation in time of certain effects of the situation giving rise to the emergency, a special legal regime may be maintained after the end of the state of emergency. In such a case, however, the principles of checks and balances between powers and acquired rights should apply.<sup>22</sup> 246  
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The Spanish case offers a good example of what has just been pointed out. At first the situation that prevailed between June and October 2020 has been called “new normality”, without it being a return to the previous 264  
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<sup>18</sup> Interim Report CDL-AD(2020)018, para. 58.

<sup>19</sup> *Ibid.*, para. 58. With a reference to CDL-AD(2016)007, Rule of Law Checklist, para. 1.4.iii.

<sup>20</sup> Interim Report CDL-AD(2020)018, paras 46–49.

<sup>21</sup> *Ibid.*, para. 25.

<sup>22</sup> *Ibid.*, paras 26–27.

267 situation, given the health, social and economic circumstances.  
268 Subsequently the long duration of the extension of the last state of emer-  
269 gency—six months—without effective control by the Congress of  
270 Deputies, raised problems of compatibility with the Venice Commission  
271 standards. The Venice Commission has indeed stated that “the longer the  
272 emergency regime lasts, the further the state is likely to move away from  
273 the objective criteria that may have validated the use of emergency powers  
274 in the first place. The longer the situation persists, the lesser justification  
275 there is for treating a situation as exceptional in nature with the conse-  
276 quence that it cannot be addressed by application of normal legal tools”.<sup>23</sup>

277 The principle of necessity concerns the type of rules to be adopted dur-  
278 ing the state of emergency. These rules must be linked to the emergency  
279 situation.<sup>24</sup> Thus, it is not possible to take advantage of the rules enacted  
280 to deal with the emergency to include structural rules intended to be per-  
281 manent, such as those that introduce changes in the organisation and  
282 functioning of the institutions.<sup>25</sup> This is precisely what has happened in  
283 Spain in relation to certain changes in the composition of the Commission  
284 of the National Intelligence Centre (CNI), approved during the first state  
285 of alarm in 2020.

286 Finally, and as a consequence of the principle of exceptionality, the  
287 Compilation recalls that constitutional reform cannot be carried out dur-  
288 ing an exceptional state.<sup>26</sup> This principle is enshrined in many constitu-  
289 tions. In the Spanish case, with respect to the beginning of the reform  
290 (Article 169 SC). It is one thing for constitutions to be drafted or reformed  
291 substantively as a consequence of major crises or social or political changes  
292 (constitutional moments), and another for such constitutional changes to  
293 take place in the midst of an exceptional state.

<sup>23</sup>Ibid., para. 51. The Paragraph cites an excerpt taken from: CDL-AD(2016)037, Turkey—Opinion on Emergency Decree Laws nn 667–676 adopted following the failed coup of 15 July 2016, para. 41; Compilation CDL-PI(2020)003, 22.

<sup>24</sup>Interim Report CDL-AD(2020)018, paras 23–24.

<sup>25</sup>CDL-AD(2016)037, Turkey—Opinion on Emergency Decree Laws nn 667–676 adopted following the failed coup of 15 July 2016, para. 80; Compilation CDL-PI(2020)003, 22.

<sup>26</sup>CDL-AD(2017)005, Turkey—Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 29, Compilation CDL-PI(2020)003, 25, with a specific reference to the Spanish case.

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3.1	<i>Redistribution of Powers During Emergencies</i>	297
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With regard to the redistribution and exercise of powers during states of emergency, the Venice Commission takes as its starting point the effect on the distribution of powers in comparative law.<sup>27</sup> Thus, it notes that the health crisis has affected the normal functioning of parliamentary life (difficulty in holding face-to-face meetings with the attendance of all parliamentarians). In such circumstances, the position of central governments has been strengthened, while parliaments have been “relegated to a secondary role”.<sup>28</sup>

As mentioned above, the Venice Commission advocates the application of the principles of control and loyal cooperation between institutions. Both principles constitute the two sides of the relationship between national and local institutions, and between majority and opposition in the declaration and implementation of the state of emergency. Thus, the broadest possible political consensus must be sought in the parliamentary assembly in the adoption of the state of emergency and, at the same time, parliamentary control in its execution in addition to inter-territorial cooperation in politically composite states should be ensured. The meaning of the “principle of the normal functioning of the public powers” must be interpreted in this light; it cannot mean functioning in the same way as in normal times, which is precisely what the emergency leaves aside. The Compilation makes a reference to Spain, specifically to Art. 116.5 SC, as an example of a guarantee of the principle of the normal functioning of public powers:

Emergency rule may or may not involve changes in the distribution of powers among organs of the State or shifts in the competences of such organs. In some cases (eg in Spain and Portugal) the normal functioning of the constitutional organs is not affected by the emergency rule. [...] Normally, the declaration of a state of emergency involves the transfer of additional powers to the executive.<sup>29</sup>

<sup>27</sup> Interim Report CDL-AD(2020)018, para. 52.

<sup>28</sup> *Ibid.*, paras 61, 64.

<sup>29</sup> CDL-STD(1995)012, Emergency Powers, 16; Compilation CDL-PI(2020)003, 14.

327 With this background, the Commission recommends enhancing parlia-  
328 mentary scrutiny over the executive and the provision of qualified majori-  
329 ties in parliaments to declare and/or extend the state of emergency so to  
330 involve the opposition in the decision. Indeed,

331 Many constitutions provide for the possibility of the executive to legislate in  
332 emergency situations. Parliament should be involved in this process through  
333 the approval of the declaration of the state of emergency, and/or through ex  
334 post scrutiny of the emergency decrees or any extension of the period of  
335 emergency. Participation of the opposition in those matters may be ensured  
336 by requiring a qualified majority for the prolongation of the state of emer-  
337 gency beyond the original period (CDL-AD(2016)006, para.63). It may  
338 also be useful to limit the legislative powers of the executive in emergency  
339 situations to certain specific matters, so that the executive cannot use its  
340 legislative functions to suppress opposition rights. The Venice Commission  
341 has emphasised that parliamentary life should continue throughout a state  
342 of emergency, and indicated that Parliament should not be dissolved during  
343 the exercise of emergency powers (CDL-AD(2016)006, para 62). It is rec-  
344 ommended not to undertake constitutional amendments during situations  
345 of emergency (CDL-AD(2017)005, para 29). These limitations prevent the  
346 executive from using an emergency as a pretext for curtailing the rights of  
347 the opposition.<sup>30</sup>

348 As indicated in the Reflections, Parliament is responsible for approving  
349 the state of emergency, or at least extending it. The latter is the provision  
350 in Spain with respect to the state of alarm (Article 116 CE). The  
351 Commission offers a criterion to the legislator: a qualified majority “may”  
352 be required to approve the extension of the exceptional state.<sup>31</sup> It also  
353 refers to the possible creation of commissions of enquiry to facilitate con-  
354 trol over the government’s use of emergency powers. In this way, the  
355 principle of protection of the opposition is given concrete form, either  
356 with requirements of parliamentary consensus for the declaration or at  
357 least for the maintenance of emergency powers, so that they are not used  
358 to bypass Parliament or to limit the powers of parliamentary minorities, or  
359 in the control of the exercise of exceptional powers by the government.<sup>32</sup>

<sup>30</sup>CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist, para. 121; Compilation CDL-PI(2020)003, 16.

<sup>31</sup>Reflections CDL-PI(2020)005, para. 84

<sup>32</sup>Ibid., para. 82.

In the Spanish case, the provision for a six-month extension means that Parliament's role in monitoring the application of the state of emergency is reduced during this period. The decree extending the state of emergency (Decree 956/2020 of 3 November) refers to "accountability" (Article 14), but in reality it limits itself to establish an obligation for the President of the government to appear every two months before the plenary of Congress, and for the Minister of health to appear every month before the congressional health Committee. Yet information is not accountability in the strict sense.

The Venice Commission refers to the frequent use in such exceptional circumstances of government regulations having force of law, such as decree laws, and the intervention of Parliament in their validation (in Spain more than 30 since March 2020, in addition to the many approved by the Autonomous Communities). The Reflections consider legitimate use of these types of rules during exceptional states, but with strict limits on their validity and purpose.<sup>33</sup>

The particular circumstances caused by the health crisis—reduced mobility and public meetings—require changes in the way Parliament functions. The Venice Commission's latest document, the Interim Report, devotes some considerations on how EU Member States have dealt with the situation: remote working, reinforcement of digital tools and so on. The Commission's main warning in this regard focuses on the need to maintain plenary sessions and not to temporarily replace parliamentarians or reduce attendance at sessions, as face-to-face discussion is crucial to the debate.<sup>34</sup>

All in all, the Venice Commission applies to this issue its long-standing doctrine on the centrality of Parliament in the public life of a country. A secondary role of the Parliament during a state of emergency can affect the functioning of democracy, hence the Commission's emphasis on the functions that the Parliament must exercise in relation to such a state of emergency. The Venice Commission therefore concludes:

the Covid-19 crisis should not be used as an opportunity to render governments more powerful at the expense of parliaments and at any rate not

<sup>33</sup>Ibid., paras 63–64. With a reference to: CDL-AD(2019)019, Parameters on the Relationship Between the Parliamentary Majority and the Opposition in a Democracy: A Checklist, paras 119–212. For a review of the factual situation: Interim Report CDL-AD(2020)018, para. 64.

<sup>34</sup>Interim Report CDL-AD(2020)018, para. 75.

393 permanently. In order to prepare for the future, serious consideration should  
394 be given to identifying the best scenario and ensure that the necessary regu-  
395 latory framework is in place to fulfil it as well as identify to what extent some  
396 of these measures could be maintained over time, regardless of whether or  
397 not there is an emergency. Parliament should be the centre of a country's  
398 political life, and in order to maintain this status, the necessary tools and  
399 mechanisms must be in place to ensure this. Continuation of the work of  
400 parliament should be considered an essential requirement during a crisis,  
401 and steps—for instance, in allowing and improving digital meetings of par-  
402 liament when physical meetings are impossible—must be taken to maintain  
403 parliamentary work without difficulty in such situations in the future.<sup>35</sup>

404 The Reflections also mention the role of experts<sup>36</sup> and of the military.<sup>37</sup>  
405 With regard to the armed forces, the Compilation takes the example of  
406 Spain to attest the existence in some countries of special military units to  
407 carry out tasks during emergencies (the UME). The contribution of  
408 experts or technicians and consultative bodies is barely developed, except  
409 to indicate that it contributes to strengthening the government and weak-  
410 ening Parliament. In any case, the so-called technocratic approach brings  
411 us to the relevant question of the relationship between science and public  
412 decision-making in crisis situations and how risk management and account-  
413 ability take place (Esteve Pardo 2020).

414 Finally, the territorial organisation of the state in decentralised systems  
415 is also affected by states of emergency. Thus, as far as the relationship  
416 between central and territorial governments is concerned, the Venice  
417 Commission admits, despite the scant attention devoted to the issue, as a  
418 general rule, that the powers of the central government may limit those of  
419 sub-national authorities: “In some federal States, the declaration of emer-  
420 gency rule may involve the shift of competences from the State and local  
421 authorities to the central government”.<sup>38</sup> Other documents constrain the  
422 scope of such a limitation, which could not go as far as the suspension of  
423 autonomy,<sup>39</sup> or a recentralisation beyond the requirements of the

<sup>35</sup> Ibid., para. 72.

<sup>36</sup> Reflections CDL-PI(2020)005, para. 69.

<sup>37</sup> CDL-AD(2008)004, Report on the Democratic Control of the Armed Forces, para.125; Compilation CDL-PI(2020)003, 27.

<sup>38</sup> CDL-STD(1995)012, Emergency Powers, 16; Compilation CDL-PI(2020)003, 26; Interim Report ... CDL-AD(2020)018, para. 54.

<sup>39</sup> CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emer- gency of Armenia, para. 34; Compilation CDL-PI(2020)003, 26.

exceptional state.<sup>40</sup> The Reflections are more cautious and stress the application of the principles of loyal cooperation and mutual respect.<sup>41</sup> Also at the local level, there is a greater protagonism of the executive over the legislature, whether through the approval of decree laws, decrees or other infra-legal norms to deal with the emergency. The Spanish case is illustrative of two extreme positions: in the first state of alarm (in its first phases: March–May 2020), national government centralisation was total, leaving the Autonomous Regions to implement the measures and giving the meetings of the Conference of Presidents a merely informative character; in the next state of alarm decree, the regional governments are empowered to adopt decisions relating to it, with hardly any coordination and cooperation from the central government.

**3.2 *Judicial Control and Maintenance of the Rule of Law***

The Venice Commission reiterates the need for judicial scrutiny, in addition to parliamentary one, over the declaration of a state of emergency and over the measures taken by the executive “against the risks of abuse”. This is linked to the principle of upholding the rule of law. The greater margin of discretion granted to the government should not make it difficult for the judicial system to provide individuals with an “effective remedy” in the event of a violation of individual rights.<sup>42</sup> Such control can be exercised both by the ordinary and constitutional jurisdiction of each state, as well as by international judicial or quasi-judicial bodies, in particular the European Court of Human Rights. In order to comply with this principle, the guarantee of the independence of the courts and the maintenance of their functioning is emphasised, except in cases of absolute necessity or material impossibility.<sup>43</sup>

In the Commission’s documents a preference for constitutional justice is visible. They even affirm that it should have the power to order “interim measures”.<sup>44</sup> Yet, this will ultimately depend on the legislation of each

<sup>40</sup> CDL-AD(2017)021, Turkey—Opinion on the Provisions of the Emergency Decree Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy, para. 92; Compilation CDL-PI(2020)003, 26.

<sup>41</sup> Reflections CDL-PI(2020)005, para. 61.

<sup>42</sup> Interim Report CDL-AD(2020)018, paras 77, 79.

<sup>43</sup> Reflections CDL-PI(2020)005, paras 87, 89.

<sup>44</sup> *Ibid.*, para. 88. The preference for constitutional justice is nuanced, but not for the adoption of interim measure, in the Interim Report. See: Interim Report CDL-AD(2020)018,



453 state as to respective boundaries between ordinary and constitutional  
454 jurisdiction. The preference for constitutional justice makes sense at least  
455 for the declaration of a state of emergency, although such an option may  
456 negatively affect the very possibility of claiming control. In the Spanish  
457 case, it is well known that standing for constitutional review is restricted.  
458 This question is at the basis of the consideration, in Spain, of the Decree  
459 declaring the state of alarm and those extending it as acts with the force of  
460 law (STC 83/2016, in relation to the first state of alarm of 2010). This  
461 means that it is impossible for the rules declaring or extending the state of  
462 alarm to be challenged by affected or interested individuals. A different  
463 matter is the acts or decrees implementing the state of alarm, whose a  
464 posteriori control corresponds, in the first place, to the contentious-  
465 administrative jurisdiction, and, subsidiarily, to the review of the  
466 Constitutional Tribunal through an appeal for protection (*recurso de*  
467 *amparo*) for infringement of a fundamental right. Apart from the above,  
468 there is the provision for judicial authorisation or ratification of the admin-  
469 istrative measures that fall outside the scope of the alarm decree, as we  
470 have previously seen (Law on Contentious-Administrative Jurisdiction).

471 The Venice Commission admits that jurisdictional control is often lim-  
472 ited in practice due to “judicial self restraint”, as has already occurred in  
473 certain decisions on the declaration of the state of emergency due to the  
474 pandemic or on the measures adopted in its application (Constitutional  
475 Court of the Czech Republic or Serbia; different has been the case in  
476 Portugal or France). This is particularly true in relation to derogations  
477 provided for in international human rights instruments, where the  
478 European Court of Human Rights has recognised a wide margin of appre-  
479 ciation for each State.<sup>45</sup> This does not mean, however, that judicial control  
480 is waived in such cases or in general. The principles of necessity and pro-  
481 portionality still apply in assessing the restriction and derogation of rights.

482 In the Spanish case, it can be observed that such judicial deference to  
483 the government has been habitual—although certainly not unanimous—  
484 in the different tribunals in relation to the application of measures restrict-  
485 ing fundamental rights. This adds to the habitual deference of the  
486 Constitutional Tribunal towards the executive in the recourse to Law  
487 Decrees (even more pronounced during the previous financial crisis). For

para. 88.

<sup>45</sup> *Ibid.*, paras 21, and 83–84. With a reference to the doctrine of the European Court of Human Rights.

the time being, the Constitutional Tribunal has not yet ruled on the appeal of unconstitutionality filed by Vox MPs against the first decree of the state of alarm of March 2020; the same parliamentary group has filed another one against that of November 2020.

#### 4 CONCLUSIONS 492

Prior the COVID-19 the logic that predominated when rationalising the use of exceptional powers in constitutional states governed by the rule of law had been that of exceptional states arising from serious political crises of public order or natural or health crises with circumscribed effects. Hence the difficulties posed by the inclusion of emergencies such as the one now besetting us, which partly—though only partly—explain the varied options followed in European states. This same logic has been the constant orientation in legal studies on exceptional states to date in different—European states, including Spain. Yet, this does not mean that many of the criteria legally or judicially established are not applicable to the current pandemic, although there are certain regulatory gaps and certain adaptations are required. This will undoubtedly oblige legislators to contemplate specific regulations that provide adequate coverage for situations of this kind.

What has just been said in general terms also applies to the documents related to the states of emergency adopted by the Venice Commission in previous years. This explains the rapid and agile reaction of the Venice Commission since the beginning of the pandemic. The documents analysed in these pages, particularly the Reflections and the Interim Report, adapt the general standards for states of emergency (collected in the Compilation) to the particularities of the current pandemic and fill this gap. These contributions, based on international, comparative and constitutional law and good practices in states, derive criteria that can be used to guide legislative reforms that appear necessary in the light of the pandemic or to assess and interpret existing norms.

The Venice Commission noted that the state of emergency entails changes in the relationship between the different state organs, in favour of the central government. Hence, as we have seen, it stressed the temporarily limited or provisional and “truly” exceptional nature of the measures adopted, preferably by applying constitutional emergency rules, and their subjection to the principles of necessity and proportionality. However, this does not prevent the rule of law from remaining fully in force and the

525 provision of safeguards against possible misuse in the adoption and appli-  
526 cation of such measures by governments.<sup>46</sup> Nevertheless, to face the  
527 COVID-19 crisis some states have made recourse to regulatory instru-  
528 ments other than states of emergency. And, even in those that have  
529 declared a state of emergency, this has been done simultaneously with the  
530 approval of decree laws, and after the cessation of such states, there has  
531 been no return to the previous constitutional normality, but rather special  
532 rules have been issued or applied under the umbrella of a “new normal-  
533 ity”, as the health crisis has dragged on and the economic and social crisis  
534 has gained momentum. Thus, either because of the long duration of states  
535 of emergency, or because of the use of emergency legislation outside these  
536 states, we are faced with a long-term application of special rules, in prin-  
537 ciple of a transitory nature, generally of a sub-legal rank (ministerial orders  
538 and resolutions), which extend the scope of emergency law beyond its  
539 traditional boundaries. All this results in the blurring of the special guar-  
540 antees related to emergency law, in particular as regards parliamentary  
541 scrutiny of executive acts.

542 The concentration of powers in the executive hands and the loss of  
543 parliament’s centrality, as well as the government’s habitual use of legisla-  
544 tive powers, are not new situations that have arisen in the current emer-  
545 gency situation. What has happened is an acceleration of known and  
546 studied trends in most constitutional systems. This coincides in time with  
547 the presence of populist parties in the governments of several European  
548 and non-European states. Thus, in some countries, political polarisation  
549 and the difficulty of reaching agreements with the opposition in Parliament  
550 have been exposed, as well as the questioning of judicial control over gov-  
551 ernmental measures. In this way, the various populisms in power have  
552 found in the current pandemic an optimal context to accelerate their divi-  
553 sive and confrontational political agenda and a pretext to justify the  
554 approval of rules that grant governments broad regulatory and decision-  
555 making powers while limiting their political and judicial control. The ero-  
556 sion of constitutional democracies is thus accentuated.

557 In emergency situations, the Venice Commission makes clear the option  
558 for the constitutional model of the exceptional state and what this entails:  
559 the guarantee of state security and public safety in a democracy with full

<sup>46</sup>CDL-AD(2016)006, Opinion on the Draft Constitutional Law on “Protection of the Nation” of France, para. 51; Compilation CDL-PI(2020)003, 12.

respect for the rule of law and fundamental rights, which are the founding objectives of the Council of Europe and of the Venice Commission itself:

The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.<sup>47</sup>

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<sup>47</sup>Rule of Law Checklist (CDL-AD(2016)007), para. 51; Compilation CDL-PI(2020)003, 4.

# Author Query

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Queries	Details Required	Author's Response
AU1	Please check if the text "updating and adaptation was necessary" is correct.	

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