

AMERICAN LESSONS LEARNED – EUROPEAN FUTURE RETHOUGHT

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UDK: 342.5(73:4)
323.2:340.5

Izvorni znanstveni rad
Primljeno: lipanj 2015.

The most notable feature of the notion of states of emergency is the assumption of their unpredictability. As such, it has been both normatively and positively deeply embedded in constitutional thought and practice to this day. However, notwithstanding its unavoidable advantages, I try to claim that it represents a somewhat outdated concept that stands in opposition to the normative development of constitutions in general, and more specifically to the development of the notion of fundamental rights and freedoms. Taking the American history of the evolution of fundamental (constitutional) rights and freedoms as the starting point, I focus on two comparative examples (France and Croatia) which offer some emergency experiences, but which both belong to the period well before these two countries actually started to construe their own constitutional vision of fundamental rights and freedoms (from 1971 and 1999, respectively). My central argument is that the French Constitutional Council and the Croatian Constitutional Court have since then developed a significant body of case-law which must be taken into account when evaluating contemporary constitutional limitations of emergency measures.

Keywords: States of Emergency, crisis, emergency, constitutional review, Fundamental Rights and Freedoms

I. THE UNPREDICTABILITY OF CRISES AND CONSTITUTIONAL DEVELOPMENTS

The long history of political and constitutional thought related to states of emergency seems to constantly confirm one rather crucial conclusion: that

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crisis in itself cannot always be properly anticipated. As a result, legal regulation, seeing as it pertains to both the causes and consequences of emergencies, is faced with strong conceptual limitations. This approach is by no means a contemporary phenomenon because it can be found as early as with such classical authors as J. Locke¹, J. J. Rousseau², A. Hamilton³, C. Schmitt⁴ and C. L. Rossiter⁵ to name a few. At the same time, the influence of this line of reasoning is clearly visible to this day with modern writers who tend to characterize, for example, the modern “terrorist threat” as something essentially new, a state of “sui generis” origin which, for instance, can be qualified neither as a “war” nor a “crime”, consequently requiring the adoption of new tools of response unrestrained by previous historical experiences and constitutional limitations, and which too often leads to the adoption of some sort of “extra-legal models”, or results in various attempts of interpreting the constitution as a flexible document subject primarily to political interpretations.⁶ It must be admitted, however, that constitutional theory in that respect is not completely isolated in its reasoning, since it is true that various comparative constitutional arrangements also follow the same line when defining emergencies in quite

¹ See: Locke, J., *The Works of John Locke in Nine Volumes*, 12th ed., London, Rivington, 1824, Vol. 4., Chapter XIV: Of Prerogative, par. 159, 160. Available at: <http://oll.libertyfund.org/title/763>, March 26th 2014.

² See: Rousseau, J. J., *The Social Contract*, New York, Hafner Publishing Company, 1951, Book IV, Chapter VI: Of the Dictatorship, p. 110.

³ See: Federalist No. 23 (A. Hamilton), *The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union*, December 18, 1787.

⁴ See: Schmitt, C., *Political Theology, Four Chapters on the Concept of Sovereignty*, Chicago, University of Chicago Press, 2005, pp. 6 – 7. On the other hand, for example, see: Machiavelli, N., *The Historical, Political, and Diplomatic Writings of Niccolò Machiavelli*, tr. from Italian by Christian E. Detmold, Boston, J. R. Osgood and company, 1882, pp. 170 – 171.

⁵ See: Rossiter, C. L., *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton, Princeton University Press, 1948, p. 302.

⁶ See generally: Ackerman, B., *Before the Next Attack – Preserving Civil Liberties in an Age of Terrorism*, New Haven & London, Yale University Press, 2006; Ackerman, B., *The Emergency Constitution*, Yale Law Journal, no. 5, Vol. 113, 2004, pp. 1029 – 1091; Posner, E. A. and Vermeule, A., *Terror in the Balance – Security, Liberty and the Courts*, New York, Oxford University Press, 2007; Posner, R. A., *Not a Suicide Pact – the Constitution in a Time of National Emergency*, New York, Oxford University Press, 2006; Yoo, J., *The Powers of War and Peace – the Constitution and Foreign Affairs after 9/11*, Chicago and London, The University of Chicago Press, 2006; Gross, O. and Ní Aoláin, F., *Law in Times of Crisis – Emergency Powers in Theory and Practice*, New York, Cambridge University Press, 2006.

broad normative categories. In fact, the usual approach to constitutional definitions of emergencies, apart from the indispensable invocation of the notion of “war”, often uses classifications which, in a general attempt to respond to the need of protection of the state and social order facing a serious and imminent threat, end up in categories which cannot be precisely defined. As such, it seems that broad definitions of emergencies necessarily operate as standards.⁷

On the other hand, it seems that relying upon “standards” does not completely take into account the fact that modern constitutional documents are no longer pure political proclamations of social needs and desires they may have been at the dawn of constitutionalism in the late 18th century. Throughout history, constitutions have evolved into legal sources which have a solid binding force upon the actors they address, including the principal lawmakers (i.e. legislative bodies) themselves, which is probably best seen when examining the evolution of the general notion of “rights and liberties”. Since this is essentially a normative, but also a comparative claim, some clarifications thereof should be presented here.

On a normative level, the essential idea may be summarized through the argument that, in their evolution, constitutional “rights and liberties” have generally tended to acquire a distinctive qualification of being not just any, but rather “basic” or “fundamental” rights and liberties. As such, rights are not only conceptually directed to the protection of specific, particularly important interests, those that are different from the interests protected by “ordinary” or legislatively conferred rights, but they also aim to be protected on a strict constitutional level.⁸ Accordingly, two other important features of such rights

⁷ See: Gross, O. and Ní Aoláin, F., *Law in Times of Crisis – Emergency Powers in Theory and Practice*, *op. cit.*, p. 45.

⁸ For the issue of a higher level of legal validity of constitutional rights, as they are related to other “ordinary”, legally conferred rights, see: Rivers, J., *A Theory of Constitutional Rights and the British Constitution*, in: Alexy, R., *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2002, p. xix. Similarly, M. Konvitz states that in the American example the constitutional interpretation has produced a “... principle that the Constitution...contains a hierarchy of values, some of which are recognized as “fundamental” and that “...what we have is settled constitutional doctrine that there is, indeed...a hierarchy of rights, and that some rights must receive more vigilance and protection than others.” See: Konvitz, M. R., *Fundamental Rights – History of Constitutional Doctrine*, New Brunswick (U.S.A.) and London (U.K), Transaction Publishers/Rutgers University, 2001, pp. 13 and 17. The concept of a hierarchically supreme position of fundamental rights is also accepted with certain French authors. See: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, 4^e

must also be observed. The first one is a kind of “emancipation” from the parliamentary majority rule or, to put it otherwise, a request that fundamental rights be regulated only on the highest level of political and social consensus, i.e. in a binding constitutional document which itself requires special procedures and majorities to be amended. The second feature is a request for true and efficient legal protection, which is typically worked out through the judicial (constitutional) review mechanism, and which itself becomes normatively important when it satisfies the request that fundamental rights should be protected not through ordinary, but rather a stricter type of judicial scrutiny.⁹

Historically, fundamental rights and liberties in their full capacity do not appear at the very moment of their incorporation into relevant legal documents. On the contrary, a comparative perspective reveals that fundamental rights have been marked by a long and normatively progressive historical process of development which includes several phases. At first, rights and liberties were primarily envisaged as philosophical, moral and social aspirations which, at one point in history, were also politically proclaimed.¹⁰ This phase is clearly expressed through documents such as the American Declaration of Independence of 1776 and the French Declaration of 1789. The second phase comes with the actual inclusion of rights into legal systems by which they cease to represent only certain political and social concepts and appear as real subjective

édition, Paris, Éditions Dalloz, 2007, p. 92. The same in: Feldman, D., *Civil Liberties and Human Rights in England and Wales*, 2nd ed., Oxford, Oxford University Press, 2002, p. 5.

⁹ Particular elements of the definition are in such a way intertwined that it can be concluded that a formal condition of a constitutional level of protection of rights must necessarily be combined with the fulfillment of the judicial review request. Only by satisfying both elements, we may argue that a proper emancipation from the parliamentary majority rule has been achieved. See: Allan, T. R. S., *Law, Liberty, and Justice – The Legal Foundations of British Constitutionalism*, Oxford, Clarendon Press, 1994, pp. 143 – 144. On a comparable use of these elements, see also: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, p. 85; Starck, C., *Constitutional Definition and Protection of Rights and Freedoms*, in: Starck, C. (ed.), *Rights, Institutions and Impact of International Law according to the German Basic Law*, Baden-Baden, Nomos Verlagsgesellschaft, 1987, p. 24.

¹⁰ In this sense, the evolution of the notion of rights and liberties is reflected in both doctrinal and political developments and can be found with a number of classical authors (J. Locke, Ch. L. Montesquieu, J. J. Rousseau, Voltaire, J. R. d’Alembert, M. de Condorcet, Th. Paine etc.). On this, see: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 19 – 23; Colliard, C-A. and Letteron, R., *Libertés publiques*, 8^e édition, Paris, Éditions Dalloz, 2005, pp. 19 – 46.

rights addressed towards state bodies, but for a long time during the classical liberalism period only through legislative regulation. It is only with the third phase, and mostly in the second part of the 20th century, that rights, along with the recognition of the legally binding force of a constitution, acquired a true and effective constitutional meaning.

From that point of view, the experiences of the United States surely deserve primacy because the process of development of rights as briefly described here first started in that country. The American example is somewhat specific because the original version of the US Constitution contained only a few guarantees of individual rights and freedoms¹¹, with the first significant turning point following shortly afterwards with the enactment of the Bill of Rights in 1791, and the introduction of the judicial review mechanism, affirmed in the famous case of *Marbury v. Madison*.¹² But notwithstanding the fact that these two preconditions for the definition of fundamental rights were thus fulfilled very early, a real step forward occurred only later, although still preceding the rest of the world.¹³ In the American paradigm, the decisive historical point of the fundamental rights development was the period after the Civil War and the enactment of the 14th Amendment to the US Constitution. The essential relationship between the 14th Amendment and fundamental rights in the American constitutional system arose from the Due Process Clause, according to which no state shall “*deprive any person of life, liberty, or property, without due process of law*”. Over time, it was recognized that there was a need to interpret the notion of “liberty” referred to in the clause and, accordingly, to resolve the issue of whether such a “liberty” also pertained to individual rights enumerated in the first ten amendments (Bill of Rights), which bound the Federation, but not the states. This way, a long lasting process of so-called “incorporation” of the first ten amendments commenced: following the logic that through the

¹¹ On individual, particular guarantees of rights and freedoms enumerated in the original text of the Constitution of the United States of America (prohibitions on the bill of attainder, ex post facto laws, laws impairing the obligation of contracts, suspension of habeas corpus), among other sources, see: Nowak, J. E., Rotunda, R. D. and Young, J. N., *Constitutional Law*, 3rd edition, St. Paul., Minn., West Publishing Co., 1986, pp. 314 – 315.

¹² *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803).

¹³ However, it should be noted that, for instance, M. Konvitz points out that the first practical steps in the evolution of fundamental rights concepts could be observed already with J. Madison and in the opinion of the judge B. Washington, formulated in the case of *Corfield v. Coryell* in 1823. On this, see: Konvitz, M. R., *Fundamental Rights – History of Constitutional Doctrine*, op. cit., pp. 8 – 10.

Due Process Clause particular rights and freedoms contained in the Bill of Rights could be applied directly to the states, meaning that they are in such a way “incorporated”, it was normatively accepted that this could relate only to those rights that are in a certain way “fundamental”, or such as they “...represented the very essence of a scheme of ordered liberty...principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”.¹⁴

Apart from the process of incorporation, it should also be stressed that the decisive advancement in the protection of rights in the American constitutional scheme came with the distinction between various possible levels of judicial review, which, in short, resulted with two basic tests: the “rationality” review and the “strict scrutiny” review. The latter category, as a form of a stronger judicial review test, at the same time represents the basic parameter in qualifying the fundamental rights, even though its application is not merely bound to them, but is also related to the assessment of measures by which particular “suspect classifications” of subjects are introduced.¹⁵

¹⁴ Palko v. Connecticut, 302 U.S. 319, 325 (1937). Also, the explanation of the notion of “fundamental” was first offered in the case of Gitlow v. New York in 1925. See: Gitlow v. New York, 260 U.S. 652 (1925). On this, see also: Konvitz, M. R., *Fundamental Rights – History of Constitutional Doctrine*, *op. cit.*, pp. 11 – 13. On the process of “incorporation” of particular rights and freedoms from the Bill of Rights through the 14th Amendment and on the resulting notion of “fundamental” rights, see also: Nowak, J. E., Rotunda, R. D. and Young, J. N., *Constitutional Law*, *op. cit.*, pp. 361 – 372; Stone, G.R., Seidman, L.M., Sunstein, C.R. and Tushnet, M.V., *Constitutional Law*, 4th ed., New York, Aspen Law & Business, 2001, pp. 702 – 710; Sullivan, K. M. and Gunther, G., *Constitutional Law*, 14th edition, New York, Foundation Press, 2001, pp. 433 – 450.

¹⁵ In the sense of a direct relationship between fundamental rights and strict scrutiny, M. Konvitz states the following: “It is this test of strict scrutiny that gives advantage to the fundamental rights as distinguished from claims that are not fundamental rights.” See: Konvitz, M. R., *Fundamental Rights – History of Constitutional Doctrine*, *op. cit.*, p. 17. For the same conclusion, see also: Killian, J. H., Costello, G. A., Thomas, K. R. (eds.), *The Constitution of the United States of America – Analysis and Interpretation*, Washington, Congressional Research Service, Library of Congress, 2004 (suppl. 2004 and 2006), p. 1763. From the practical point of view, the strict scrutiny test is thus linked to both the Due Process Clause and the Equal Protection of the Laws Clause of the US Constitution. In both cases, the methodology applied by the courts is basically directed towards the assessment of whether a particular act which places restrictions upon fundamental rights and freedoms, or which introduces “suspect” classifications or classifications pertaining to the enjoyment of fundamental rights and freedoms, is necessary for the furtherance of a particular overriding/compelling state interest. At the same time, the government bears the burden of proof to justify the measure, i.e. to defend the constitutionality of a law.

When summarizing these rather short observations related to the notion of fundamental rights in general theoretical perspective and in the specific American perspective, one might derive three crucial conclusions: first, that through history rights and liberties actually *did achieve* the quality of constitutionally binding categories; second, that they achieved such a status only *in the developed 20th century*¹⁶; and third, that it was done neither by legislative nor executive bodies, but rather by *courts*, and principally so through the invention of special “tests” of judicial review.¹⁷

It seems clear that these conclusions stand in a normative opposition to principal *historically embedded* assumptions about emergencies, namely their previously mentioned *presumption of unpredictability* and an additional (and resulting) idea that everything should be somehow left to the *discretionary power of regulation by the executive*. Let me say something about all of these three dimensions of the problem.

As for the *presumption of unpredictability*, even if one accepts that *causes* of emergencies may not always be properly anticipated or regulated in advance, there is no valid reason to assume that the same can be said generally of their *consequences*. Since, contrary to earlier historical periods, contemporary legal

Contrary to that, where there is a legislative or other act which does not regulate the domain of fundamental rights and freedoms (or does not introduce “suspect” classifications), the courts apply a less rigid test referred to as the rationality review. In substance, the rationality review consists of an assessment of whether there is a rational basis for concluding that, through enactment of such acts which restrict rights and freedoms, the government wanted to pursue a particular legitimate aim. Accordingly, the burden of proof here is on the side of the one claiming the unconstitutionality of a law, while the law itself is presumed constitutional. The general overview of the rationality and strict scrutiny tests in this place is derived from the following sources: Nowak, J. E., Rotunda, R. D. and Young, J. N., *Constitutional Law, op. cit.*; Stone, G.R., Seidman, L.M., Sunstein, C.R. and Tushnet, M.V., *Constitutional Law, op. cit.*; Sullivan, K. M. and Gunther, G., *Constitutional Law, op. cit.*

¹⁶ Accordingly, it seems that the American doctrine reached a consensus on the conclusion that the decisive turning point in establishing the strict scrutiny review was introduced in the famous footnote four by the justice H. F. Stone, added to the opinion in the case of *United States v. Carolene Products Co.* in 1938. See: *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). However, some initial traces of more rigorous forms of review can already be found shortly after the First World War (see: *Abrams v. United States*, 250 U.S. 616 (1919)). On this, see: Konvitz, M. R., *Fundamental Rights – History of Constitutional Doctrine, op. cit.*, pp. 16 – 17.

¹⁷ On a comparative side of the story, the French and Croatian examples reveal significant conceptual similarities to the American experience. On these examples, see the following text.

systems are “filled” with judicially enforceable “constitutional” or “fundamental” rights and freedoms, it seems that there is quite a plausible reason to argue that consequences of crises (emergency measures) nowadays have to deal with exactly such rights and have to take into account their special (constitutional) status and their special (judicial) protection.¹⁸

As to the special emergency *position of the executive*, it is not completely clear why it should have complete crisis predominance over the courts. Once again, the American example in this sense reveals an extreme potential because it shows that even in cases where no full-blown emergency regime has been declared (i.e. the suspension of the *habeas corpus* privilege) and where at least nominally all the governmental branches are included into the conflict, there is still enough room to argue about possible relative advantages of the executive and courts. The arguments put forward by different authors representing opposing positions in this respect depend on numerous factors, including, for instance, the overall normative attitude towards historical emergency experiences¹⁹, relevant, but often opposing precedents²⁰, particular advantages of the

¹⁸ In that sense, even if in previous historical periods the executive in its emergency role of the legislator (i.e., as a general law-making institution) was able to deal with rights and liberties just as easily as it could have generally been done by parliaments in “ordinary times”, nowadays it is faced with additional obstacles arising from the constitutional status of rights, which is also facing the regular parliamentary majority-rule.

¹⁹ Thus, for example, see explanations on two differing views (“political and constitutional failure” and “political and constitutional success”) on history which consequently led to the adoption of either “civil libertarianism” or the “deferential” view, in: Posner, E. A. and Vermeule, A., *Terror in the Balance – Security, Liberty and the Courts*, *op. cit.*, pp. 3 – 4. While Posner and Vermeule affirm the deferential view explaining that throughout history it was successful, others argue in the direction of criticism of emergency “overreactions” and claim that it later led to regret. In this context, for example, see: Stone, G. R., *War Fever*, *Missouri Law Review*, Vol. 69, 2004, pp. 1131 – 1132; Stone, G. R., *Perilous Rimes – Free Speech in Wartime (From the Sedition Act of 1798 to the War on Terrorism)*, New York, W. W. Norton & Comp. Inc., 2004, pp. 12 – 14; Cole, D., *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, *University of Chicago Law Review*, Vol. 75, 2008, p. 1329. See also: Cole, D., *The New McCarthyism: Repeating History in the War on Terrorism*, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 38, No. 1, 2003, pp. 1 – 30.

²⁰ In terms of the relevant historical case-law of the US Supreme Court, these precedents most often include arguments derived from the following cases: *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Ex parte Milligan*, 71 U.S. 2 (1866) and

executive²¹ or disadvantages of courts²². Among such arguments are that, when it comes to emergencies, constitutional interpretations must be “flexible” and take into account the “Hamiltonian” logic of inherent executive powers, as well as unspecified judicial powers²³, that legislative branch in emergencies has also usually played a deferential role²⁴ and so on. However, it seems evident

Korematsu v. United States, 323 U.S. 214 (1944). An excellent overview of the use of these precedents by various opposing approaches (the “Milligan thesis” and the “Crisis thesis”) and consequent additional arguments thereof (e.g. invocation of judicial deference as explained by interpretations of “war powers” constitutionally given to political branches of government, advantages of expertise of political branches to deal with emergencies, reliance upon the “political questions doctrine”) is given in: Epstein, L., Ho, D. E., King, G. and Segal, J. A., *The Supreme Court during Crisis: How War Affects only Non-War Cases*, New York University Law Review, Vol. 80, 2005, pp. 1 – 116.

²¹ See the arguments furthered by A. Hamilton in: Federalist No. 70 (A. Hamilton), *The Executive Department Further Considered*, March 18, 1788; Federalist No. 74 (A. Hamilton), *The Command of the Military and Naval Forces, and the Pardoning Power of the Executive*, March 25, 1788.

²² See, for example, the argument put forward by R. Posner, E. Posner and A. Vermeule that, basically, judges are not experts in national security matters, in: Posner, R. A., *Not a Suicide Pact – the Constitution in a Time of National Emergency*, *op. cit.*, pp. 9 and 35; Posner, E. A. and Vermeule, A., *Terror in the Balance – Security, Liberty and the Courts*, *op. cit.*, p. 49. However, one should also note the opposing “civil libertarian” arguments stressed by G. Stone and D. Cole that, for example: courts have the advantage of not being politically accountable and as such are not under the pressure of the moment to act quickly and decisively, as it is expected from the political branches; that courts have an advantage over the other branches because they “...assess the legality of measures long after they have been adopted (which) means that courts may bring more perspective to the question than those acting in the midst of the emergency”; that “...the fact that legal decisions must offer a statement of reasons that then binds future cases contributes to the judiciary’s ability to exert control over the next emergency”; that case-law “...in the long run... establish[es] principles that are critical to checking future government abuse”; and that “...the formalities of the judicial process mandate the creation of an official record that may facilitate reaching a just result” and “...may make subsequent assessments, beyond the heat of the moment, more reliable”. On this, see: Stone, G. R., *National Security v. Civil Liberties*, California Law Review, Vol. 95, 2007, p. 2209; Cole, D., *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, Michigan Law Review, Vol. 101, 2002-2003, pp. 2575 – 2577.

²³ See: Yoo, J., *The Powers of War and Peace – the Constitution and Foreign Affairs after 9/11*, *op. cit.*, pp. 11 and 18. It seems that the “executive unilateralists” particularly favour the argument on inherent powers as they derive from Article II of the US Constitution and which was first articulated by A. Hamilton.

²⁴ On this, for example, see: Posner, E. A. and Vermeule, A., *Terror in the Balance – Security, Liberty and the Courts*, *op. cit.*, p. 47.

that in the contemporary American experiences related to the “War on Terror” it was affirmed that *courts really do have a significant role* and that *rights as such cannot be simply rejected* as obstacles to effective executive “war making”.²⁵ Additionally, despite these rather serious disagreements in American theory (and practice as well), I believe its discourse might also be inspiring for other countries examined here, notwithstanding their differences as regards the concrete roles played by their (constitutional) courts in emergencies.²⁶

And as to the *historical perspective*, two separate arguments may be made. As it has already been shown, history reveals that the courts really have played a significant, if not decisive, role in the development of rights and that it has happened only in the last few decades. However, even if this at the same time does not directly support the claim that the courts should have exactly the same role as regards rights in the special context of emergencies, there is still solid ground to argue that they indeed might have such a role which, additionally, might in fact be effective and quite supportive of rights.²⁷

²⁵ This was recognized in the principal case I am using here to illustrate the problem of detention (*Hamdi v. Rumsfeld*), but the judicial role was also affirmed in other post-9/11 US Supreme Court cases as well (*Rasul v. Bush*, *Hamdan v. Rumsfeld* and *Boumediene v. Bush*).

²⁶ Thus, both in France and Croatia the (constitutional) courts performing the function of judicial review of laws really do have an emergency function, although in France it is of a rather limited scope and in Croatia it is, at least nominally, envisaged as a full type of review. And the fact that in these two countries the crisis judicial review does exist makes them theoretically comparable to the previously described American discourse on those emergencies which are not qualified by the suspension of the habeas corpus privilege, but rather as situations where particular attitudes towards the practical role and impact of courts may be advanced. However, in an attempt to make relevant comparisons, I am not covering all the arguments developed in the American example, but am rather focusing on the two most typical (general development of rights and liberties and the role of judicial review thereof).

²⁷ In that respect, notable American “civil libertarians” (for instance, G. Stone and D. Cole) argue, basically, that the long-standing practice of American judges to defer to other governmental branches in matters of war or national security in general, characteristic for periods until the 1950’s, was later reversed either through “rejection” of the “logical” presumption of deference by the newly developed case-law or through various forms of political excuse for past mistakes or overreactions. On this, see: Stone, G. R., *National Security v. Civil Liberties*, *op. cit.*, pp. 2203 – 2212; Cole, D., *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, *op. cit.*, pp. 2565 – 2595.

II. A NOTE ON THE METHODOLOGY APPLIED

So far I have been focusing mainly on the American example, not only because of its unavoidable primacy in reference to contemporary crisis experiences, but also because of its overall theoretical and normative significance which might serve as a guideline to other countries which in the future may be faced with challenges similar to the ones posed by the “War on Terror”. Accordingly, and in light of the American experiences in constitutional costs that arose from a broad definition of terrorism and in an attempt to predict the possibility of similar developments in a comparative perspective, I am using the examples of detention and prohibition of torture and focusing on two countries (France and Croatia)²⁸ that also dispose of broad constitutional provisions regarding emergencies and have some experiences in the area²⁹ but which, due to the fact that since after 9/11 they have primarily been “accommodating” on a legislative level, have not really yet tested them after they started to undertake the “rights revolution”³⁰, as previously described.

My principal point is that, since the adoption of a constitutional regulation of states of emergency in the countries I am examining here, constitutional protection of “fundamental” rights and freedoms has constantly been evolving in the way as to (contrary to previous historical periods when it generally amounted to proclamation of merely politically binding standards) give those rights a position of judicially enforceable constitutional rules.³¹ Moreover, if that is the case, then in the contemporary environment emergency powers – when operating in a legislative capacity – must be measured against exactly such a concept of rights. Consequently, “sovereign” crisis prerogatives are not normatively unlimited any more: if they claim to be operating “within”, and not “outside”, of the law, they, at least to a certain extent, must conform to other elements of the legal system to which they claim to belong.

However, in an attempt to make comparisons between the American experience and possible future developments in the other two countries, my aim is

²⁸ In that respect, the French example will be focusing on the issue of “detention”, while the Croatian will be dealing with “torture”.

²⁹ The French events of 1961 and the Croatian War of 1991-1995.

³⁰ From 1971 and 1999 onwards, respectively.

³¹ In other words, my principal conclusion would be that constitutional rights and freedoms have generally been a subject of a progressive historical development, leading to their gradual “emancipation” from the supreme will of the legislator alone, a fact best seen through their protection in the form of a “judicial review mechanism”.

not to produce a comprehensive and completely comparable theory of modern emergencies in all of their relevant aspects. Rather, I am focusing on particular parameters just in order to show that French and Croatian courts might have a general role similar to their American counterparts and that so far they *have produced* certain rulings which in this respect should be taken into account. More precisely, I am focusing on those courts that perform the task of *constitutional review of laws* through which they bind the legislator and at the same time create modern concepts of rights. Consequently, my research focuses on the understanding of rights as they develop *within* a particular constitutional order and as they depend upon the interpretations of *national courts*. Therefore, my approach in the following pages will try: first, to show that France and Croatia have had experiences with emergencies in the past; second, that after these experiences the concepts of rights and liberties significantly evolved through judicial interpretations; and third, that these modern conceptions of rights might be relevant for future emergencies. The main normative reason for that is my attempt to show that there is enough ground to argue that national constitutional systems, through their respective institutions and considering their historical developments, are able in themselves to deal with “hard questions” arising from emergencies. Therefore, my approach necessarily includes certain “methodological reductions”. First, I am not covering all the national judicial interpretations which might be relevant for “shaping” constitutional rights and freedoms. Such is the case, for instance, with those rulings of constitutional courts which are addressed to particular individual measures affecting rights (e. g. the case of the Croatian institution of “constitutional complaint”). Rather, by focusing on the strict review of constitutionality of laws, I am concerned with the most general interpretations of rights which regularly bind the legislator and which, as such, might bind the emergency (executive) institution when it acts in the capacity of a legislator. Second, since my principal aim is to show that in contemporary constitutional systems there is solid ground to argue in favor of the role of (constitutional) courts, both in the general developments of rights and in their possible influence on the position of rights in emergencies, I am not dealing with particular guarantees given to rights by legislative bodies. These guarantees surely do exist and they do evolve as the time passes. But “ordinary” law-making (as opposed to constitutional law-making), since it pertains to a sphere of the “ordinary” majority rule, does not reveal the true constitutional meaning of rights. This particular constitutional meaning of rights, as shown in previous descriptions, conceptually arises primarily from interpretations of constitutional courts which rule on what is beyond the re-

ach of a majority rule and what is or what is not constitutionally permissible. Therefore, my proposal is that, once the constitutional courts have proclaimed a specific guarantee of a right, such a guarantee may not be completely rejected from the (emergency) analysis of the restriction of a right. And third, this means that I am not trying to develop arguments invoked from international law, which itself is without any doubt quite relevant, but which, at least for my present purposes, does not necessarily show that national constitutional systems and their national institutions can themselves offer relevant responses to emergency issues. Otherwise, there certainly are international legal standards (such as, for the European countries especially important, the standards of the European Convention on Human Rights and the case law of the European Court of Human Rights) that should offer additional arguments in resolving those issues.

III. EUROPEAN PERSPECTIVE – THE EXAMPLE OF FRANCE

The central position in the French constitutional approach to states of emergency is found in Article 16 of the Constitution of 1958³², a provision that has so far been used only during the 1961 crisis. However, taking into account that, despite some efforts in that direction, it has not yet been removed from the Constitution, it may well be presumed that its future application is not entirely precluded. If the application could only take place in cases of the gravest dangers³³, there is quite a clear indication that this would concern the phenomenon of “modern terrorism”.³⁴

³² I am focusing here on Article 16 (and not Articles 35 and 36) of the 1958 Constitution because it combines all the important elements of analysis in the French case: it is by far the most powerful emergency provision; it is a typical “executive” power; it is a direct constitutional emergency prerogative; it has only been used once (in 1961) and well before the development of “fundamental” rights and freedoms actually began (in 1971).

³³ For instance, in recent years, France has dealt with emergencies primarily by applying the 1955 Law on the State of Urgency or, especially after September 11th 2001, by way of special legislation. The modern legislative regulation of terrorism in France starts with one law enacted in 1986. See: <http://www.legifrance.gouv.fr/>, March 25th 2014. On modern French anti-terrorism legislation, see also: Lamothe, O. D., *French Legislation Against Terrorism: Constitutional Issues*, 2006, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/constitutionalterrorism.pdf, March 25th 2014.

³⁴ In this sense, see: Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e République, *Une V^e République plus démocratique*

The experiences in the application of emergency measures from 1961 might not cover all the issues that could appear nowadays, although a number of problems related to the interpretation of Article 16 had already been addressed at that time. Among these, it should be clearly noted that Article 16, as interpreted, envisions a rather limited role of the judicial branch.³⁵

On the one hand, the French Constitutional Council (*Conseil constitutionnel*) acts primarily by “consulting” the President on the possibility to introduce (or revoke) a state of emergency and by “consulting” him on particular measures to be undertaken in particular situations. This division of roles is of crucial importance since in the former case the Council actually only verifies whether the conditions for the application of Article 16 have really been fulfilled.³⁶ However, although its “opinion” (*avis*) on the matter is mandatory, it does not really touch upon the very issue of balancing the rights that subsequently might be restricted and the public interest which is intended to be protected. This specific issue should thus be resolved by the Council when it consults the President on particular measures, but in that instance no real control is present since the Council cannot annul the President’s decisions for the reason of their possible unconstitutionality.³⁷

On the other hand, the role of the French State Council (*Conseil d’État*) in relation to Article 16 was principally clarified in one important decision from the era. In the case of *Rubin de Servens and others*³⁸ the Council first stated that it had no competence whatsoever to deal with the initial presidential decision

tique, pp. 20 – 21, available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/074000697/0000.pdf>, March 26th 2014.

³⁵ The overview of the experiences related to the use of Article 16 of the 1958 Constitution is generally reproduced here from the following sources: Favoreu, L. and Philip, L., *Les grandes décisions du Conseil constitutionnel*, 13^e édition, Paris, Dalloz, 2005, pp. 131 – 138; Lamarque, J., *La théorie de la nécessité et l’article 16 de la Constitution de 1958*, *Revue de droit public et de la science politique en France et à l’étranger*, Vol. LXXVII, No. 3, 1961, pp. 558 – 628; Hamon, F. and Troper, M., *Droit constitutionnel*, Paris, Librairie Générale de Droit et de Jurisprudence, 2007, pp. 636 – 642.

³⁶ See Article 16 paragraph 1 of the French Constitution.

³⁷ See Article 16 paragraph 2 of the French Constitution. Moreover, there is no real knowledge of how the Council reacted to presidential measures in 1961, since its opinions related to specific measures have not been published (contrary to that, its opinion as to the introduction of the Article 16 regime is published; see: *La loi organique n°58-1067 du 7 novembre 1958*, article 53).

³⁸ CE Ass. 2 mars 1962, *Rubin de Servens et autres*, Rec. 143. On this decision of the French State Council, see also: Long, M. *et al.*, *Les grands arrêts de la jurisprudence administrative*, 15^e édition, Paris, Éditions Dalloz, 2005, pp. 546 – 555.

to put into force Article 16³⁹ and then concluded that it had the competence to review only those presidential decisions that were touching upon matters which are normally defined through regulations, and not laws.⁴⁰ Since the position of rights and freedoms in the French Constitution – and among these also the rules governing criminal procedure and the setting up of new categories of courts – is reserved to be regulated by laws (statutes), the Council's influence was therefore significantly restricted.⁴¹ This was especially important in the present case due to the fact that the applicants contested the presidential decision establishing a special military tribunal and prescribing its rules of procedure, designed to try crimes and offences against State security and army discipline. As a result, the Council did not deliver its opinion on the specific allegations submitted by the applicants, including the argument that the established procedures infringed the defendants' right that the investigation of a crime should be undertaken by an authority independent from the executive.⁴² In the case of *Canal, Robin and Godot*⁴³, nevertheless, the State Council declared that the "essential guarantees of defense" before the newly established Military Court of Justice were infringed because the prescribed procedure denied any possibility of appeal against the Court's decisions. However, despite its significance, this particular case did not exactly deal with special Article 16 powers, but rather with powers given to the President by means of a law.⁴⁴

³⁹ In that particular case, the Council actually qualified the initial presidential decision as the "act of government", not susceptible to any judicial review of its own.

⁴⁰ Additionally, the State Council continued to rule in the cases where the applicants were not contesting presidential emergency decisions themselves, but specific measures issued on the basis of such decisions.

⁴¹ The approach of the State Council relied upon the division of regulating authority as it is envisioned in Articles 34 and 37 of the French Constitution of 1958.

⁴² The other two arguments of the applicants were that the establishment of the military tribunal was not justified since the conditions for the application of Article 16 did not exist anymore at the time the presidential decision was issued and that the decision infringed the principle of non-retroactivity. But the argument emphasized in the main text above merits the most attention because of its direct link to the problem of the "rights of defense". After the decision in the case of *Rubin de Servens and others* was delivered, the Council also issued several other decisions in the same manner, denying that it had the competence to review presidential decisions, for instance, touching upon individual liberty. See: Long, M. *et al.*, *Les grands arrêts de la jurisprudence administrative*, *op. cit.*, pp. 551 – 552.

⁴³ CE Ass. 19 octobre 1962, Canal, Robin et Godot, Rec. 552. See: Long, M. *et al.*, *Les grands arrêts de la jurisprudence administrative*, *op. cit.*, pp. 556 – 562.

⁴⁴ See: Loi n° 62-421 du 13 avril 1962 concernant les accords à établir et les mesures à prendre au sujet de l'Algérie sur la base des déclarations gouvernementales du 19 mars 1962.

In sum, one has to take into account that relevant French experiences related to Article 16 are, for the purposes of the present discussion, therefore quite limited and above all embedded in a period well before the French constitutional system generally started to provide more sophisticated protection of fundamental rights and freedoms. This part of the story, which begins with the famous decision of the Constitutional Council in 1971⁴⁵, is well known and surely goes in line with general conclusions on the gradual and progressive development of constitutionally (and judicially) protected rights and freedoms. Despite some inevitable procedural obstacles that exist even to this day⁴⁶, I would argue that the line of protection of rights and freedoms which the Constitutional Council has been construing through the “constitutionality block”

⁴⁵ The French example reveals significant resemblance to the general pattern of development of rights and freedoms described earlier in this text. Although the famous Declaration of the Rights of Man and of the Citizen was proclaimed as early as in 1789, it took almost two hundred years before it was actually raised to a true constitutionally binding level, along with other sources of what is nowadays known as the “constitutionality block”. Additionally, all this was done neither by the Parliament nor the President of the Republic, but in fact by the French Constitutional Council. Additionally, the development of French constitutional review reflects another one rather important element showing its qualified approach towards legislative deliberations. Analogue to the American test of judicial review and the Croatian proportionality principle, the Constitutional Council has gradually, and notably well after the experiences of 1961, developed special control tests, called the “manifest error” and “proportionality”, both of which are relevant for review of legislation pertaining to rights and freedoms. On this, see also: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, pp. 121 – 124.

⁴⁶ As it has already been shown, from the procedural point of view, the Constitutional Council has no competence to review the constitutionality of presidential emergency decisions in the strict sense. There remains a possibility that this could be done through the institution of the “priority preliminary ruling on the issue of constitutionality” (question prioritaire de constitutionnalité - QPC), introduced with the constitutional revision of 2008. The present Article 61-1 of the French Constitution provides for the possibility of a posteriori review of “legislative dispositions” (disposition législative). The interpretation of this notion so far has shown that it includes all promulgated laws, be they “ordinary” or “organic laws”, or laws enacted in New Caledonia, as well as ordinances ratified by the Parliament, but it seems that no case-law so far has made any reference to possible application of the QPC to Article 16 decisions. On this, see: Favoreu, L. *et al.*, *Droit constitutionnel*, *op. cit.*, p. 343; Verpeaux, M., *La question prioritaire de constitutionnalité*, Paris, Hachette Livre, 2013, pp. 47 – 49. However, it should be stressed that some French authors explicitly argue that the QPC procedure could be used for a review of Article 16 measures. See: Gaïa, P. *et al.*, *Les grandes décisions du Conseil constitutionnel*, 17^e édition, Paris, Dalloz, 2013, p. 591.

since 1971 should well be taken into account when anticipating possible future Article 16 measures. In more concrete terms, if judicial review, which in balancing public and individual interests finds its basis in various constitutionally entrenched standards as they derive from the “constitutionality block”, binds the legislator, then there is good reason to claim that it also binds the President who acts in the same role during an emergency. Consequently, there immediately arises a separate question: which specific constraints in that respect could be drawn from the case-law of the French Constitutional Council?

As to the problem of detention, the principal paradigm I have taken to explain in reference to the French context, it may be noticed that a number of significant constitutional interpretations have been developed in the last decades, and, most notably, it took place after the 1961 crisis experiences. In French constitutional philosophy, protection from arbitrary detention or arrest is principally linked to the notions of “security” and “liberty”, which find their basis in several sources that make part of the French “constitutionality block”. Therefore, included are the French Declaration of 1789, the Constitution of 1958 and the “fundamental principles recognized by the laws of the Republic”.⁴⁷

French doctrine sees “security” as one of the most important elements of rights and freedoms which primarily finds its field of application in the domains of substantive and procedural criminal law. Moreover, in direct relation to the comparable notions of “Due Process of Law” and “Habeas corpus”, procedural guarantees of security are usually labeled as the “rights of defense” which, in turn, nowadays extend well beyond the narrow field of criminal law into other domains.⁴⁸ And although their first practical application was inaugurated by the French State Council as early as in 1945 (the *Aramu* decision)⁴⁹, the Constitutional Council definitely made them part of the “constitutionality block” through three decisions from 1981⁵⁰ and 1993.⁵¹ Moreover, in the sen-

⁴⁷ See Articles 1, 2 and 7 of the French Declaration of 1789, Article 66 of the Constitution of 1958 and the decision of the Constitutional Council: 75 DC du 12 janvier 1977 (Fouille des véhicules). On this, see also: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, p. 166; Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, p. 176.

⁴⁸ See: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, pp. 183 – 185; Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 322 – 323.

⁴⁹ See: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, p. 182.

⁵⁰ 80-127 DC des 19 et 20 janvier 1981 (Sécurité et liberté).

⁵¹ 93-326 DC du 11 aout 1993 (Garde à vue); 93-325 DC du 13 aout 1993 (Maitrise de l’immigration). Apart from that, some authors emphasize that “individual liber-

se of the latter two decisions, the rights of defense have been interpreted as “a right having a constitutional character, opposable to the legislator”.⁵² On the other hand, it must also be emphasized that, in the field of anti-terrorist legislation, the French Constitutional Council first invoked the rights of defense in its decision from 1986.⁵³

And generally, in the context of what exactly constitutes “rights of defense”, it could be advanced that “essential guarantees” of sorts, as they have so far been confirmed by the Constitutional Council in its case-law, include at least the following: an effective right of communication in an appropriate language; the right to be notified about claims filed against oneself, including, by having access to the claim; the right to be informed on measures that could possibly be applied against someone, including the “right to be heard” as well as the right to have appropriate time for the preparation of defense; the right to an attorney, which extends to the phase of initial detention (*garde à vue*), related to criminal investigations; the right to have a recourse to the courts, including the right to a court decision that suspends the execution of a particular prior decision issued by another body; and, finally, the right to an adversarial procedure and a procedure that satisfies the conditions of justice and equality of parties.⁵⁴

On the other hand, when one approaches the problem from the point of view of individual “liberty”⁵⁵, some other important standards should be bor-

ty” was recognized as one of the “fundamental principles recognized by the laws of the Republic” as early as in 1977 (75 DC du 12 janvier 1977 (Fouille des véhicules)). See: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, p. 176.

⁵² See: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, p. 322. See also: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, p. 183.

⁵³ Décision n° 86-213 du 3 septembre 1986.

⁵⁴ See the following decisions of the Constitutional Council: 248 DC du 17 janvier 1989 (Conseil supérieur de l’audiovisuel); 89-268 DC du 29 décembre 1989 (Loi de finances pour 1990); 93-326 DC du 11 août 1993 (Garde à vue); 93-334 DC du 20 janvier 1994 (Peines incompressibles); 80-127 DC des 19 et 20 janvier 1981 (Sécurité et liberté); 224 DC du 23 janvier 1987 (Conseil de la concurrence); 95-360 DC du 2 février 1995, (Injonction pénale); Cons. const., 2 mars 2004, n° 2004-492 DC, Perben II; Cons. const. 9 janvier 1980, n° 79-109 DC, Prévention de l’immigration clandestine. On this, see: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 201 – 202 and 323 – 325. See also: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, pp. 193 – 196.

⁵⁵ In that context, the reference to “liberty” is connected to the term in a way that it is guaranteed by Article 66 of the 1958 Constitution, which provides that the judiciary is the “guardian of the freedom of the individual”. For this line of argumenta-

ne in mind. First, a total absence of judicial intervention creates a situation of unacceptable arbitrariness of a measure affecting liberty. Also, the legislator can still establish a kind of a “hierarchy” of judicial interventions, which depends on the concrete impact of a measure affecting liberty. Further, only professional judges are included in cases involving liberty. Judicial intervention must be “effective”, which means that it must be done with “the shortest possible delay”, it must evaluate the “necessity” of a particular measure, and have an opportunity to formally explain the reasons justifying necessity. Finally, the principle of proportionality must be applied.⁵⁶

Although it is true that the above standards are derived from a wide variety of cases which themselves are not exclusively linked to the field of criminal law, they nevertheless might generally be used as the French “counterpart” of “Due Process” and thus they might be approached/understood as “*essential constitutional promises (that) may not be eroded*” if one intends to frame a “*basic system of independent review*”.⁵⁷ I would propose that the standards as such might serve as guidance for other future situations.⁵⁸

Furthermore, and on a more general level⁵⁹, since the core of such a review would, according to the American experiences, presumably include the right of recourse to a “neutral decision-maker”, it should be stressed that the French

tion, which is explained furthermore in the main text, see: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 194 – 202.

⁵⁶ In this sense, see the following decisions of the Constitutional Council: Cons. const. 25 février 1992 n° 92-307 DC (Zones de transit); 80-127 DC des 19 et 20 janvier 1981 (Sécurité et liberté); 93-326 DC du 11 août 1993 (Garde à vue); Cons. const. n° 93-323 DC du 5 août 1993 (Contrôles d’identité); Cons. const., 29 août 2002, n° 2002-461 DC, Loi d’orientation et de programmation pour la justice; Cons. const., 20 février 2003, n° 2003-466 DC, Loi organique relative aux juges de proximité; Cons. const., 29 décembre 1984, n° 84-184 DC; Cons. const. 9 janvier 1980, n° 79-109 DC, Prévention de l’immigration clandestine; Cons. const., 2 mars 2004, n° 2004-492 DC, Perben II; Cons. const., 3 septembre 1986, n° 86-216 DC (Entrée et séjour des étrangers). On these sources, see: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 194 – 196 and 200 – 201.

⁵⁷ Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

⁵⁸ In that respect, it should be stressed that the American experience, as shown in the Hamdi case, reveals that in novel situations there may be some space for applying the standards of balancing as they evolved from domains of law outside of the proper scope of criminal law paradigm (e.g. Matthews v. Eldridge test).

⁵⁹ In that sense, the general “right to a judge” examined here extends beyond special guarantees of judicial intervention as they are connected to Article 66 of the Constitution of 1958 and as they have been presented before.

Constitutional Council has also so far “constitutionalized” the “right to a judge” and the principle of “independence of the judiciary”. As to the former, and similarly to previous cases, the “right to a judge”, in the sense of Article 16 of the Declaration of 1789⁶⁰, in which a judge generally protects or guarantees fundamental rights, has only been “constitutionalized” through the Constitutional Council’s case-law from 1980 onwards.⁶¹ And as to the latter, even though the principle of “independence of the judiciary” was explicitly proclaimed in the Constitution of 1958, its real “constitutional value”⁶² was recognized by the Council only in 1970.⁶³

IV. EUROPEAN PERSPECTIVE – THE EXAMPLE OF CROATIA

Similarly to the French example, the drafting of the Croatian Constitution of 1990 was to a significant extent influenced by the context of crisis. This was one of the main reasons it incorporated relatively strong presidential powers, including the ones directly pertaining to executive emergency prerogatives. On the other hand, the relevant provisions regulating states of emergency adopted an approach through which both parliamentary and judicial mechanisms of review over presidential emergency decrees were preserved. Within a very short period of time after the adoption of the Constitution, the executive crisis powers were used through the enactment of a number of emergency decrees having the force of law and regulating a wide variety of issues, including the restrictions of constitutionally protected rights and freedoms. However, the presidential response to the crisis did not escape the constitutional challenge and soon thereafter the Croatian Constitutional Court delivered its opinion in a decision in 1992.⁶⁴ Technically, the Court was dealing with three principal issues: the executive power to unilaterally proclaim/declare an emergency; the power to restrict rights and freedoms regardless of the fact that the Parliament is in session; and finally, the power to enact measures with retroactive application.

⁶⁰ The French Declaration of 1789 thus states: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.” (article 16).

⁶¹ On this, see: Favoreu, L. *et al.*, *Droit des libertés fondamentales*, *op. cit.*, pp. 314 – 317.

⁶² See: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, p. 178.

⁶³ On this, see: Colliard, C-A. and Letteron, R., *Libertés publiques*, *op. cit.*, pp. 177 – 178.

⁶⁴ See the decision of the Croatian Constitutional Court: U-I-179/1991, June 24th 1992.

In sum, the Constitutional Court rejected all arguments submitted by the applicants, arguing that the President had the power to act despite the fact that the Parliament was in session when the emergency measures were enacted, that he had an independent constitutional power to declare a state of emergency and that his decrees were not restrained by constitutional provisions regulating retroactivity.

The most interesting point of the case arises out of its comprehensive theoretical potential: not only that the presidential decrees through which these restrictions were actually made had been enacted contrary to specific constitutional provisions, but their subsequent validation by the Constitutional Court also relied on the fact that they were in the meantime ratified by the Parliament as well.⁶⁵ At the same time, it may be argued not only that the Croatian example therefore once again confirmed the classical pattern of natural “institutional consensus” within a system confronted with a serious threat, but also that it was essentially a logical response of a constitutional system that was at the time only rudimentary developed and in which, despite the formal constitutional proclamations, there existed neither a true concept of “fundamental rights” nor an effective system of their judicial review.⁶⁶ Additionally, it also seems that this was a typical expression of a certain “liberal model” of emergency powers.⁶⁷

To date, this has been the only Croatian experience with emergencies. Since then, however, constitutional protection of fundamental rights and freedoms in the Croatian example has undergone some significant developments. On the one hand, and although the initial “Bill of rights”⁶⁸ of 1990 already

⁶⁵ In theoretical terms, the example thus consists of the following elements: clear unilateral executive exception; subsequent parliamentary ratification; deferential (“process-based”) judicial validation.

⁶⁶ Additionally to what has already been mentioned, it should be emphasized that in its Decision from 1992 the Croatian Constitutional Court did not actually apply a balancing between rights and freedoms on the one hand and public interest on the other. The only relevant conclusion thereof was that the President had the power to enact emergency decrees affecting constitutionally protected rights and that it was significant that they were later ratified by the Parliament.

⁶⁷ See, e.g., Lobel, J., *Emergency Power and the Decline of Liberalism*, Yale Law Journal, Vol. 98, No. 7, 1988-1989, pp. 1385 – 1433. In this respect not surprisingly, the possibility of a direct comparison between the Croatian example and the American experience goes as far back as the Civil War period. See: the Prize cases, 2 Black (67 U.S.) 635 (1863).

⁶⁸ See: the Constitution of the Republic of Croatia (Official Gazette 56/1990), part III.

included a classical list of civil, political, economic, social and cultural rights, this may already be seen in some subsequent amendments to the original Constitution of 1990 which, generally, aimed at both defining rights as universal concepts belonging to all (the citizen and the man) and at the strengthening of their protection through more precise definitions and procedures. On the other hand, it might be argued that the most significant impact came from the body of constantly evolving case-law of the Constitutional Court. In that respect, at least five separate claims may be advanced. First, that the modern Croatian Constitutional Court has gradually abandoned its initial practice to review only the legality of certain legal acts and adopted a more comprehensive approach towards a real “constitutional review” of laws in general, thus aiming at positing real restrictions on the legislator itself. Second, that the Court has also increasingly been applying relevant standards of international protection of rights and freedoms, including the European Convention on Human Rights. Third, it seems that the decisive “break” was the adoption, as a general rule of constitutional review of legislation, of the proportionality principle which entered the Croatian constitutional system not through a formal amendment, but in fact through interpretations of the Court at the end of the 1990s.⁶⁹ Fourth, the Court seems to have developed, especially in the recent years, some rather special concepts of constitutional interpretation related to, besides other values, protection of rights and freedoms, among which the notion of “objective order of values” and “structural unity” of the Constitution. And fifth, the Constitutional Court very recently offered a special constitutional interpretation that aims to introduce the theory of “unconstitutional constitutional amendments”.

In sum, these lines of development in the practice of the Constitutional Court affirm the conclusion that a vision of “fundamental rights” has found its way into the Croatian constitutional scheme. On the other hand, and in direct reference to the particular issue of the prohibition of “torture” and “ill-treatment”, several observations may be made.

In the first place, both of these cases are explicitly prohibited by the Croatian Constitution. Moreover, this prohibition is contained in the provision

⁶⁹ See, for instance, the decisions of the Constitutional Court: U-I-673/1996, April 21st 1999; U-I-1156/1999, January 26th 2000. On this, see also: Bačić, P., *Konstitucionalizam i sudski aktivizam – ustavna demokracija između zahtjeva za vladavinom većine i protuvećinskog argumenta*, doktorska disertacija, Split, Pravni fakultet Sveučilišta u Splitu, 2009, pp. 359 – 360.

related to the regulation of otherwise constitutionally permissible restrictions of rights and freedoms in the context of emergencies.⁷⁰ However, since very recently, this provision has not been used in the Court's interpretations, including the one, as already referred to above, from 1992.⁷¹

Additionally, there are a number of other constitutional provisions that are inherently relevant to the problem of "torture" and "ill-treatment" but in this area, again since very recently, the Court has so far been delivering its decisions mainly in reference to the constitutionality of particular individual measures, and not legislation in general.⁷² However, since these interpretations were delivered in a constitutional complaint procedure, they cannot be seen as directly binding on the legislature and, consequently, cannot be directly relevant for the concept of fundamental rights as it has been described above. Similar conclusions may be made in reference to other constitutional provisions relevant here.⁷³

Finally, in 2012 the Croatian Constitutional Court issued a particular decision which is of utmost importance for the broad problem of "torture" and "ill-treatment".⁷⁴ Reviewing the constitutionality of the Criminal Procedure Act, the Court, among a number of other articles, dealt with a particular provision regulating the inadmissibility of illegal evidence. The category of illegal evidence, apart from that, for instance, obtained by an infringement of constitutional, legal and international law provisions guaranteeing prohibition of torture or cruel and inhuman treatment, extended also to cases where it would be collected in an infringement of constitutional, legal and international law guarantees of the right to a defense, the right to dignity, reputation and honor and the right to inviolability of personal and family life. However, to these latter cases, the Act provided one notable and rather crucial exception: such evidence

⁷⁰ See Article 17/3 of the Constitution of the Republic of Croatia (Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10, 5/14).

⁷¹ In that sense, Article 17/3 reappeared in the decision of the Constitutional Court from 2012 which will be explained later.

⁷² See, for instance, the decisions of the Croatian Constitutional Court: U-III-64744/2009, November 3rd 2010, U-III-4182/2008, March 17th 2009.

⁷³ See Articles 25/1, 29/3 and 29/4 and 35 of the Croatian Constitution.

⁷⁴ See the decision of the Croatian Constitutional Court: U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011, July 19th 2012. For a commentary of this decision, see: Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, V. izmijenjeno i dopunjeno izdanje, Zagreb, Narodne novine, 2012, pp. 38 – 40.

was permissible in cases involving serious crimes and where the infringement of a particular right, taking into account its severity and nature, was substantially lesser than the gravity of the crime. Such a “balancing” procedure was declared unconstitutional by the Court, which first invoked the explicit argument that illegal evidence principally threatens to infringe “fundamental” rights and then reasoned that even though some of the rights contained in the contested provision (the right to a defense, reputation and honor and inviolability of personal and family life) allowed for their weighing against public interests, the same could not be accepted for the right to “dignity”. Concluding that, contrary to other cases in this context, the right to dignity represents an absolute and non-derogative right, the Court interpreted that such a conclusion derives implicitly from constitutional provisions already mentioned here⁷⁵, including, most notably, the one prohibiting torture and cruel and inhuman treatment in the context of emergencies.⁷⁶

V. CONCLUSION

Comparing different countries carries the risk of oversimplification and surely not every aspect of a certain experience can directly be applied to another environment. However, despite rather important differences in various legal systems, social actors often tend to act in the same way when they are confronted with the same or similar problems and, seen in a comparative perspective, the general development of institutions reveals more similarities than differences.

Among these institutions, rights and liberties serve as a good example, showing that different traditions notwithstanding, a general trend in this sense drives towards the adoption of a concept of “fundamental” rights and liberties. At the same time, this creates some very important functional and systemic consequences, among which the rising role of the (constitutional) courts.

If in a future scenario the two countries that were the focus of this paper were to face a grave emergency comparable to the American example, it is beyond doubt that the application of their “strongest” constitutional crisis provisions will be put into a context completely different from the experiences of the past and will have to take into account that, over time, their legal systems have “evolved” in a certain way.

⁷⁵ See Articles 23, 25/1 and 35 of the Croatian Constitution.

⁷⁶ See Article 17/3 of the Croatian Constitution.

Therefore, possible future invocation of constitutional emergency prerogatives in France and Croatia will have to deal with two crucial arguments: a normative one (that the executive is no longer to be seen as the only crisis actor) and a historical one (that an approach to historical experience must not be relative, but rather comprehensive).

Sažetak

Đorđe Gardašević *

AMERIČKA ISKUSTVA – PROMIŠLJANJE EUROPSKE BUDUĆNOSTI

Ključna karakteristika pojma izvanrednih stanja jest postavka o njihovoj nepredvidivosti. Kao takva ona je do današnjeg dana duboko ukorijenjena u ustavnopravnoj misli i praksi. Ipak, bez obzira na eventualne prednosti koje takvo viđenje može pružati, ono u jednoj mjeri predstavlja prevladani koncept koji stoji u opreci prema normativnom razvoju ustava općenito, a posebno prema razvoju pojma temeljnih ljudskih prava i sloboda. Polazeći od američke povijesti razvoja temeljnih (ustavnih) prava i sloboda, u ovom tekstu obrađuju se dva primjera (Francuska i Hrvatska) koji nude određena praktična iskustva u području izvanrednih stanja, ali koja su u obama slučajevima vezana uz povijesno razdoblje koje u znatnoj mjeri prethodi početku izgradnje suvremenih koncepcija temeljnih prava i sloboda (u Francuskoj od 1971., a u Hrvatskoj od 1999. godine). Središnji argument je da su francusko Ustavno vijeće i hrvatski Ustavni sud u međuvremenu razvili značajan korpus sudske prakse koja se mora uzimati u obzir prilikom procjene odgovarajućih ustavnih ograničenja izvanrednih mjera koje bi se u tim državama mogle pojaviti u budućnosti.

Ključne riječi: izvanredna stanja, stanja krize, temeljna prava i slobode, ljudska prava i slobode

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