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NIJHOFF

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 3 (2023) 448–468

The Italian Review of International and Comparative Law
brill.com/iric

Is Climate Emergency a Constitutional Emergency?

A Critical Appraisal

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Received: 9 June 2023 | Accepted: 26 June 2023 |
Published online: 15 November 2023

Abstract

More than 2,000 public authorities worldwide have to date declared a "climate emergency". Can these declarations be framed within the constitutional category of emergency? And what legal consequences do they entail? To answer these questions, this paper confronts the basic features of constitutional emergencies, as arising from legal scholarship and contemporary Constitutions, with the characteristics of the climate issue. The conclusion is that climate change cannot be framed within the category of constitutional emergency, but rather in that of constitutional crisis, as it does not require a temporary suspension of the constitutional order but a structural modification of it.

Keywords

climate change – climate emergency declarations – state of emergency – state of exception – climate constitutionalism

1 Constitutionalism Before the "Next Emergency"

According to the database kept by the website Climateemergencydeclaration.org,[1] over 2,000 public authorities in the world have declared a "climate emergency" as of today.[2] The list consists mostly of local authorities, but also includes eighteen national legislative assemblies and numerous regional authorities,[3] for a total population of over one billion people. In Europe, the first country to proclaim a climate emergency was Ireland (on 8 May 2019),[4] followed in the subsequent months by Spain,[5] Austria,[6] France,[7] Malta,[8] and Italy.[9] On 28 November 2019, the European Parliament also declared a "climate and environmental emergency", calling on the European Commission, Member States, and all global actors "to urgently take the concrete action needed in order to fight and contain this threat before it is too late".[10]

From a legal point of view, these declarations mostly consist of resolutions by legislative assemblies addressed to the Executive, urging it to take urgent

1 The website <www.climateemergencydeclaration.org> is an online portal that collects data provided by a plurality of activist organizations, whose purpose is to sensitize public opinion and political institutions on the climate emergency.

2 The data updated as of 24 May 2023 is equal to 2,335 local and national jurisdictions.

3 Data taken from the register kept by the NGO Cedamia (Climate Emergency Declaration and Mobilization in Action) and available at: <https://www.cedamia.org/fact-sheets/>.

4 The declaration was passed in the form of an amendment to a resolution adopted by the *Oireachtas Éireann* (Irish Parliament) on climate matters.

5 On 11 September 2019 the *Congreso de los Diputados* (Congress of Deputies) declared an "estado de emergencia climática" through a resolution. In the following months, the Spanish Government in turn issued a declaration in thirty points which can be consulted on the website <https://www.miteco.gob.es>.

6 The *Nationalrat* (Lower Chamber of the Austrian Parliament) passed a declaration of climate emergency on 25 September 2019. The minutes of the meeting and the text of the resolution are available at: <https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0944 / index.shtml#>.

7 On 26 September 2019, the French Parliament passed a bill introducing Art. 100-1 of the Energy Code, which states: "Avant le 1er juillet 2023, puis tous les cinq ans, une loi détermine les objectifs et fixe les priorités d'action de la politique énérgetique nationale pour répondre à l'urgence écologique et climatique".

8 The resolution was approved by the Maltese Parliament on 22 October 2019. The news was reported by the local media. Further information is available at: <https://timesofmalta .com/articles/view/government-opposition-reach-climate-change-consensus.744102>.

9 In Italy, the climate emergency was declared with a resolution of the Chamber of Deputies of 12 December 2019 and subsequently with a resolution of the Senate of the Republic of 9 June 2020.

10 European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP).

measures to combat climate change. They are, therefore, purely political in nature and do not involve the formal granting of emergency powers, nor a derogation from the normal separation of powers or guarantees of fundamental rights. Their effectiveness is also doubtful, given that since their adoption there is no evidence of significant deviations in the trajectory of emissions released by the countries concerned. Indeed, the only noteworthy outcome seems to be the submission of multi-year emission reduction plans that arguably would have been adopted anyway.[11]

Despite having marginal legal significance, these statements reflect a change in approach to climate change, which is increasingly taking the contours of a public safety issue rather than simply an environmental problem.[12] This change in register is evidenced by the fact that Oxford Dictionaries elected the phrase "climate emergency" as the Word of the Year for 2019, noting that its use had increased a hundredfold over the previous year, as a result of a conscious linguistic shift aimed at reframing the discussion of climate change with "new gravity and greater immediacy".[13] In the same year, the British newspaper *The Guardian* announced that the phrases "climate emergency" and "global warming" would henceforth be preferred to more neutral ones such as "climate change" or "global warming", so as to convey to the reader the sense that climate change is a "catastrophe for humanity".[14]

In recent years, the rhetoric of climate emergency has stably entered the international political vocabulary.[15] In this sense, one could recall the appeal made in December 2020 by UN Secretary General António Guterres for all States to declare a "state of climate emergency" until climate neutrality is achieved.[16] Of the same sign are the calls by some Democratic Congressmen for U.S. President Joe Biden to declare a climate emergency under the National Emergencies Act, in order to enable the Executive to use the extraordinary

11 A non-exhaustive list of actions following climate emergency declarations is available at: <https://www.cedamia.org/council-post-ced-actions/>. For the most part, these are ordinary measures with a multi-year horizon which could have been adopted even in the absence of emergency declarations.

12 See NEVITT, "On Environmental Law, Climate Change, & National Security Law", *Harvard Environmental Law Review*, 2020, p. 321 ff., p. 328.

13 See: <https://languages.oup.com/word-of-the-year/2019/>.

14 See: <https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>.

15 CORBETT, "The Climate Emergency and Solar Geoengineering", *Harvard Environmental Law Review*, 2022, p. 197 ff., pp. 198–199.

16 A video of the UN Secretary's speech is available at: <https://www.reuters.com/article/uk-climate-change-un-summit-idUSKBN28M0IR>.

powers granted under that legislation to respond to national security threats posed by climate change.[17]

This phenomenon is part of a broader trend which began with the 11 September 2001 attacks and has continued to date, in which the "Laws of Fear",[18] from being an exceptional response to contingent and extremely rare events, have become an ordinary mode of solving chronic problems such as terrorism, immigration and public safety.[19] Indeed, the past two decades can be described as an uninterrupted succession of emergencies, some of which, once declared, have never been lifted.[20] In this context of "permanent emergency",[21] in which "the state of exception increasingly arises as the dominant paradigm of contemporary politics",[22] climate change has been widely referred to as the global "next emergency".[23] Thus, in recent times there have been increasing calls for States to address the climate issue with the same determination and legal instruments used to support the war effort in the Second World War[24] or, more recently, to counter the Covid-19 pandemic.[25]

These issues raise delicate questions from a constitutional point of view. In fact, can an epochal phenomenon such as climate change be treated as a traditional emergency and subjected to a legal regime similar to that of a war or a pandemic?

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17 See the Bill presented by Rep. Blumenauer in 2021 (HR794), available at: <https://www.congress.gov/bill/117th -congress/house-bill/794/text?q=%7B%22search%22%3A%5B%22hr+1%22%5D%7D&r=66&s=1>. Previously, in 2019, a resolution proposal had been presented by Sen. Sanders, which however specified that its approval would not lead to the activation of emergency powers for the President.

18 SUNSTEIN, *Laws of Fear. Beyond the Precautionary Principle*, Cambridge, 2005.

19 See ACKERMAN, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, New Haven, 2006.

20 According to Wikipedia, as of April 2023, 41 national emergencies were pending in the U.S. Data available at: <https://en.wikipedia.org/wiki/List_of_national_emergencies_in_the_United_States>.

21 DYZENHAUS, "The Permanence of the Temporary: Can Emergency Powers be Normalized?", in DANIELS, ROACH and MACKLEM (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Toronto, 2001, p. 21 ff.

22 AGAMBEN, *Stato di eccezione*, Torino, 2003, p. 11 (author's translation).

23 FARBER, "Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies", *Hastings Law Journal*, 2020, p. 1143 ff., pp. 1169–1172.

24 See, for example, the resolutions submitted before the U.S. Congress, referred to in note 17.

25 DUPRÉ DE BOULOIS, "La fin des droits de l'homme?", *Revue des Droits et Libertés Fondamentaux*, 2020.

It may seem an idle question at present, given that the climate emergency declarations adopted so far exclude the activation of extraordinary powers[26] and the proponent environmental organizations themselves conceive such declarations not as veritable legal instruments, but as part of a communication strategy to exert political pressure.[27] However, despite the good intentions of the proponents, it is likely that as climate change exacerbates and the associated extreme atmospheric events intensify, calls for nation-States to address climate issues as a matter of public safety will continue to increase, and it is plausible that, sooner or later, the formal declaration of a "state of climate emergency" may be followed by the actual granting of extraordinary powers to government authorities.

This brings to mind Michael Kloepfer's earlier warning about the risk of an "ecodictatorship" (*Öko-Diktatur*), *i.e.*, a regime in which a technocratic government, in the name of scientific evidence, arrogates to itself the right to derogate from the constitutional separation of powers and the protection of fundamental rights out of necessity to counter environmental threats.[28]

By this, in order to clarify, I am in no way questioning that anthropogenic climate change is a scientifically proven phenomenon of extreme gravity, requiring urgent and incisive measures, which may also involve significant limitations on fundamental rights. Rather, what I intend to investigate is whether climate change meets the prerequisites necessary to justify an emergency declaration and whether emergency declarations are effective tools for addressing the risks posed by climate change.

In order to answer this question, in Section 2 I will conduct a critical review of the constitutional doctrine of the state of emergency, as elaborated in the classical legal literature and positivized in some contemporary constitutional documents. In Section 3, I will then examine whether and to what extent declarations of climate emergency can be framed within the traditional

26 Significantly, the resolution of the European Parliament, in its premises, states that "no emergency should ever be used to erode democratic institutions or undermine fundamental rights" and that "all measures will always be adopted through a democratic process".

27 In this sense, see the article published by two activists of the French association "Notre Affaire à Tous": JOUAYED and GUITTARD, "Les déclarations d'urgence climatique. Un outil purement politique ou un instrument juridique efficace et nécessaire?", *Association EcoRev'*, 2020, p. 175 ff., p. 180. Thus also SPRATT and SUTTON, *Climate Code Red: the Case for Emergency Action*, Melbourne, 2008; CRENEY and NISSEN, "Emergent Spaces of Emergency Claims: Possibilities and Contestation in a National Climate Emergency Declaration", *Antipode*, 2022, p. 1 ff., pp. 3–5.

28 KLOEPFER, "Is There the Threat of an Authoritarian Ecological State?", *European Environmental Law Review*, 1994, p. 112 ff, p. 115.

categories of constitutional emergency. Finally, in Section 4, I will draw some conclusions regarding the inadequacy of emergency instruments to address climate change issues.

2 States of Emergency: a Constitutional Conundrum

The regulation of emergency situations is one of the most controversial issues in constitutional law. The scholarly debate on this subject has long been influenced by Carl Schmitt's famous thesis that "sovereign is whoever decides on the state of exception". According to the German constitutionalist, it is the sovereign who "decides both on whether the extreme case of emergency exists, and on what should be done to overcome it".[29] Hence, the focus placed by early contributors not so much on the justification of the state of exception – which, according to Schmitt, is located outside the legal field[30] – as on the nature of the decision on the emergency and the competence to adopt it.

Over the past century, a number of concomitant factors resulted in the focus of the debate shifting to different profiles. First, following the emergence of rigid constitutions, it is now generally accepted that even the holder of sovereignty does not detain unlimited powers, but must exercise its powers in the forms and within the limits established by the constitution. The idea of an exception located outside the legal system having been overcome, the state of emergency is now commonly conceived as a phenomenon that, while exceptional, is nevertheless part of the constitutional order. The scholarly debate has thus moved from the identity of the subject entitled to declare an emergency to the constitutional justification of the declaration itself.[31]

2.1 *The Constitutional Justification*

Traditionally, the justification of emergency declarations has been identified in the State's right of self-defense, according to the principle *salus rei publicae suprema lex esto*.[32] This conception was reflected in Article 48 of the Weimar Constitution, which allowed the President of the Reich to take the necessary measures, including the suspension of constitutional rights, "when the security

29 SCHMITT, *Politische Theologie*, München und Leipzig, 1922.

30 SCHEPPELE, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11", *University of Pennsylvania Journal of Constitutional Law*, 2004, p. 1001 ff., p. 1011.

31 PINNA, *L'emergenza nell'ordinamento costituzionale italiano*, Milano, 1988, p. 51.

32 RANELLETTI, "La polizia di sicurezza", in ORLANDO (ed.), *Primo Trattato completo di diritto amministrativo italiano*, Vol. IV, Milano, 1908, p. 207 ff.

or public order of the Reich is seriously disturbed or compromised".[33] An echo of this approach can also be found in some contemporary constitutions, such as in Article 16 of the French Constitution of 1958, which authorizes the President of the Republic to take "the measures required by the circumstances"[34] when the independence of the nation, the integrity of its territory or the regular functioning of public powers are threatened.

Over time, the catalog of circumstances that can justify the activation of emergency powers has expanded, in parallel with the affirmation of new purposes of the State: in this context, the basis of the state of emergency has no longer been identified in the preservation of the State per se, but of the liberal values that underpin the democratic State. Consequently, even phenomena that do not represent existential threats to the State, but may seriously affect the rights of citizens or endanger the functioning of democratic institutions, such as economic crises or natural disasters, were gradually assimilated to the situations that had traditionally given rise to emergencies such as wars and sieges.[35]

At the same time, the growing interconnection among States brought about by globalization has resulted in the rise of global emergencies, which as such escape the domain of individual States.[36] This leads to the paradox whereby the sovereign – that is, the one who, according to Schmitt's thesis, by declaring a state of exception should acquire the necessary powers to deal with the emergency situation – today finds itself powerless in the face of an emergency it is unable to govern.

Faced with the growing elusiveness of emergency situations, constitutional law had to adapt, shifting its focus from the typification of the circumstances that justify the declaration of emergency to the regulation of the extraordinary powers that derive from it:[37] in fact, while the former are unpredictable and defy any attempt at systematization, the same cannot be said of emergency powers, which can instead be governed by constitutional law.[38] Therefore, in most contemporary constitutions, emergency powers have been progressively subjected to principles and procedures.

33 Art. 48 of Weimar Constitution (author's translation).

34 Art. 16 of French Constitution of 1958 (author's translation).

35 See PINNA, *cit. supra* note 31, p. 74 ff.

36 ROLLA, "Poteri costituzionali dell'emergenza", in *Rivista AIC*, 2015, p. 1 ff., p. 3.

37 NICOTRA, "Stato di necessità e diritti fondamentali. Emergenza e potere legislativo", *Rivista AIC*, 2021, p. 98 ff., pp. 112–116.

38 ROLLA, *cit. supra* note 36, p. 8.

The most significant example of this attempt to "rationalize" the emergency[39] is the German Fundamental Law, as revised in 1968: it identifies various states of crisis, each characterized by increasing levels of severity, which allow progressive alterations of the ordinary distribution of powers and increasing restrictions of fundamental freedoms. The Spanish Constitution of 1978 also refers to the same model: in fact, Article 116 identifies three different states of exception whose discipline varies according to the different factual circumstances that justify their establishment.[40] On the contrary, other constitutions including the Italian one, remain "silent" in this regard: that is, they do not contain a specific discipline of states of emergency, but provide for certain emergency instruments (e.g., in Italy, the decree-laws) that allow existing legislation to be adapted to extraordinary situations, but without departing from the constitutional framework.

It is not possible here to account for, even briefly, the plurality of emergency disciplines adopted in comparative constitutional law.[41] However, for the purposes of this paper, it should be noted that all these disciplines share some common features, which can basically be traced to the concepts of necessity, urgency and temporariness.[42]

2.2 *The Necessity Requirement*

By "necessity" I do not mean to refer to *necessitas* as "primary and original source of all law", according to the renowned theory of Santi Romano.[43] Rather, I intend to refer to the different and more modern meaning of necessity as a condition for the exercise of powers that are provided for and delimited by positive law.[44] It is in this meaning that this word is used in some contemporary constitutions, as for example in Article 77 of the Italian Constitution, while in others it is assumed as an implicit condition of the declaration of emergency.

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39 VEDASCHI, À la guerre comme à la guerre? *La disciplina della guerra nel diritto costituzionale comparato*, Torino, p. 308.

40 On Spanish states of emergency's constitutional regulation, see CRUZ VILLALÓN, *Estados excepcionales y suspensión de garantías*, Madrid, 1984.

41 For a modeling see LOEVY, *Emergencies in Public Law. The Legal Politics of Containment*, Cambridge, 2016; FEREJOHN and PASQUINO, "The Law of the Exception: A Typology of Emergency Powers", *International Journal of Constitutional Law*, 2004, p. 210 ff.; GROSS, "Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?", *The Yale Law Journal*, 2003, p. 1011 ff.; VEDASCHI, *cit.supra* note 39.

42 MARAZZITA, *L'emergenza costituzionale. Definizioni e modelli*, Milano, 2003; DE MINICO, *Costituzione. Emergenza e terrorismo*, Napoli, 2016.

43 ROMANO, "Sui decreti legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria", *Rivista di diritto pubblico*, 1909, p. 251 ff.

44 PIZZORUSSO, "Emergenza (stato di)", *Enciclopedia delle scienze sociali*, Vol. III, Roma, 1993, p. 551 ff.

Understood in this way, necessity is not to be confused with the factual situation that is its prerequisite: in fact, one thing is the factual situation from which the emergency arises (e.g., a natural disaster); quite another is the assessment – which is based on, but not limited to, the factual circumstances – about the need to derogate from the constitutional separation of powers and/or the ordinary guarantees of fundamental rights. As pointed out by Agamben, the judgment on necessity is not objective in nature, but reflects a subjective assessment that ultimately depends on the pursued aims.[45] In other words, necessity is not an intrinsic character of the factual situation, but is the result of a subjective judgment that relates the inadequacy of the existing law to the exceptional discipline that is proposed to achieve the desired goals.[46] Thus, for example, when faced with the threat of a terrorist attack, one might consider that there is a situation of necessity, and in a general meaning this is certainly true. However, if "necessity" in its technical sense is invoked, as a prerequisite for the declaration of a state of emergency, it is not enough to state generically that "action must be taken", but it must be demonstrated that there is such a danger that cannot be adequately dealt with by ordinary means.

Contrary to Carl Schmitt's view – according to which "the constitution can at most indicate who is to act in such a case", while "both the premise and the content of the competence are necessarily unlimited"[47] – under the rule of law, the decision on the emergency is surrounded by limits that circumscribe the discretion of the subject competent to declare it. In contrast to the Schmittian view, in fact, the declaration of a state of emergency is located within the constitutional order – where it introduces a partial and temporary exception – and is thus subject to the same limitations as all acts restrictive of constitutional rights.[48]

With reference to the judgment of necessity, this implies that a declaration of a state of emergency, to be legitimate, must be justified by the need to pursue a constitutional objective, be adequate to achieve that objective, and not go beyond what is necessary to achieve it. This proportionality test, which evidently replicates the one applied generally to measures restricting fundamental rights, in emergency situations assumes singular traits because of the particular prominence acquired by the time factor.[49]

45 AGAMBEN, *cit. supra* note 22, p. 41.

46 MARAZZITA, *cit. supra* note 42, p. 193.

47 SCHMITT, *cit. supra* note 29.

48 SCHEPPELE, *cit. supra* note 30; DYZENHAUS, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?", *Cardozo Law Review*, 2006, p. 2005 ff.

49 LOEVY, *cit. supra* note 41.

2.3 *The Time Factor*

In assessing the legitimacy of an emergency declaration, the time factor becomes relevant in two respects.

On the one hand, the judgment on emergency involves an additional requirement, which is sometimes considered a corollary of necessity,[50] while at other times, it is presented as an autonomous requirement:[51] urgency. In fact, for it to be "necessary" to activate emergency powers, in the sense defined above, it is not enough that the factual situation demands an extraordinary response, but this response must also be urgent. That is, it must not be possible to wait for the time required to make the desired changes to the existing legal order by following ordinary democratic procedures, because otherwise there would be no "necessity", in the legal sense, to resort to derogatory instruments. Like necessity, urgency is thus a relative concept: nothing is urgent in absolute terms, but it must always be assessed in relation to a certain parameter. For example, in the case of emergency decrees, the parameter will be the time required for the approval of a bill under the ordinary legislative procedures.[52]

Incidentally, it should be noted that the concept of "urgency" should not be confused with that of "imminence". The latter, in fact, is an attribute of the factual situation that may lead to the declaration of an emergency; urgency, on the other hand, refers to the measures that are to be taken to deal with that situation. The two concepts are often linked, so much so that one might be inclined to confuse them: for example, if there is fear of an incoming attack at any moment, the danger is imminent and requires urgent measures. Other times, however, the two terms are dissociated: if a meteorite is predicted to strike the Earth in ten years, but only a few months remain to destroy it, the urgency requirement is met, even if the danger is not imminent.[53]

On the other hand, a further requirement that connotes the state of emergency is temporariness.[54] From the earliest reflections on the subject, scholars have emphasized the distinctive importance of this element: thus, for example, Carl Schmitt distinguished between "sovereign dictatorship" and "commissar dictatorship", noting that while the former aims at the establishment of a new constitutional order to replace the existing one, the

50 MARAZZITA, *cit. supra* note 42, p. 194.

51 As in Article 77 of the Italian Constitution, according to which the Government is allowed to adopt decrees having the force of law in "extraordinary cases of necessity and urgency".

52 NICOTRA, *cit. supra* note 37, p. 126.

53 CORBETT, *cit. supra* note 15, p. 208.

54 ROLLA, *cit. supra* note 36, p. 12.

latter instead, implements a temporary suspension of the constitution with the aim of defending its existence.[55] Similarly, Costantino Mortati proposed to distinguish between "rupture" and "suspension" of the constitution, where the former implements a modification of the general provisions of the constitution, designed to remain stable over time; the latter, on the other hand, introduces a provisional discipline aimed at dealing with transitory situations of emergency, without thereby affecting the validity of the derogated constitutional norms, which resume their force once the suspension is over.[56]

The requirement of temporariness is reflected in the constitutional discipline of emergency. Indeed, in contemporary constitutional documents, emergency powers, where explicitly regulated, are generally subject to predetermined final terms or, alternatively, to periodic reviews as to the permanence of the extraordinary conditions that initially justified their establishment.[57]

Of all the requirements enunciated above, temporariness is arguably the one that best contributes to defining the state of emergency. Indeed, it allows it to be distinguished from other types of states of exception that are usually subsumed under the category of "constitutional crises".[58] In fact, the primary purpose of a declaration of emergency is to eliminate the cause of the exceptional situation, so as to reestablish the conditions for the application of ordinary discipline. It thus has a conservative purpose, in the sense that it aims to return as quickly as possible to the pre-existing situation.[59] To this end, it introduces a parenthesis in the legal order, temporarily suspending the application of the general rules, which are not repealed, but resume their effects as the emergency ceases.[60] When, on the other hand, the exceptional discipline does not pursue the objective of restoring the *status quo ante*, but seeks to permanently modify the constitutional order as to adapt it to supervening circumstances, we leave the field of constitutional emergencies

55 SCHMITT, *Die Diktatur*, Berlin, 1921.

56 MORTATI, "Costituzione (Dottrine generali)", *Enciclopedia del diritto*, vol. XI, Milano, 1962, p. 169 ff.

57 As in Art. 116 of the Spanish Constitution, according to which a state of alert (*estado de alarma*) can be declared by the government for a maximum duration of 15 days, after which any extension must be authorized by the Congress of Deputies.

58 PINNA, *cit. supra* note 31, p. 58 ff.

59 MARAZZITA, *cit. supra* note 42, p. 143.

60 ROLLA, *cit. supra* note 36, p. 5.

and enter that of constitutional crises, that is, of those situations that prelude a structural modification of the constitutional order.[61]

3 Does Climate Emergency Fit into the Constitutional Emergency Doctrine?

Thus having summarized the main elements of the constitutional law debate on states of emergency, we can now turn to the principal question of this paper, namely whether climate change constitutes a constitutional emergency and, in particular, whether declarations of "climate emergency" meet the requirements of necessity and temporariness as defined above.

According to the Oxford Dictionary, "climate emergency" is "a situation in which immediate action is needed to reduce or stop climate change and prevent serious and permanent damage to the environment". Thus defined, climate emergency may seem to satisfy the condition of "necessity" as outlined above, as it is based on the need to act urgently ("immediate action is needed") to prevent irreversible damage.[62] A closer look, however, reveals the issue to be more complex.

3.1 *What Are Climate Emergency Declarations Aimed at?*

The first problem concerns the identification of the aim of climate emergency declarations. In the definition above, emphasis is placed on the need to "stop climate change" and to prevent "serious and permanent damage to the environment". These are undoubtedly worthy purposes that find protection, explicitly or implicitly, in many contemporary constitutions. What needs to be inquired, however, is under what conditions can the need to limit climate change and the associated damages justify a derogation from the constitutional separation of powers and the protection of fundamental rights.

Of course, not all deviations from ordinary climatic conditions, nor all environmental damage, can justify such an exception; otherwise, one would

61 PINNA, *cit. supra* note 31, p. 77 ff. Against this view, it could be objected that some of the more recent emergencies, such as those declared to deal with the terrorist threat, have such extended durations as to cast doubts on whether the provisional nature is still a necessary connotation of the emergency. The point is that, however long an emergency situation may last, it still remains characterized by a conservative purpose, in the sense that it aims to return to a condition of "normality" as soon as possible. Therefore, what distinguishes an emergency from a constitutional crisis is not the duration, but the purpose underlying the related establishment.

62 CORBETT, *cit. supra* note 15, p. 204.

have to conclude that any increase, even minimal, in global temperatures could justify an emergency declaration. Therefore, what level must climate change reach and how severe must the environmental damage be for an emergency to occur? The answer to this question cannot be given once and for all, because it depends on the degree of environmental protection granted by each constitutional order. Thus, for example, in those jurisdictions where the environment is considered a value deserving protection in itself, or even a subject of rights, the standard of judgment will be different than in countries where environmental protection is conceived as instrumental to the satisfaction of human needs. Indeed, in the latter, a derogation from the principles of the rule of law may be justified only to the extent that it is necessary to safeguard essential human needs. In this context, restrictive measures of freedoms, such as those necessary to effectively counter the climate crisis, could be considered legitimate only if and insofar as, they are justified by the need to contain temperature rises within a certain threshold (e.g., 1.5°C or 2°C), beyond which climatic conditions would no longer be compatible with that goal.

3.2 *Are They Adequate?*

A second issue concerns the adequacy of emergency declarations to achieve the desired result. The problem is that climate change is a global phenomenon, the causes of which transcend the domain of national institutions.[63] Consequently, no matter how much a single State may, in the name of emergency, impose drastic restrictions on its citizens, such measures could still not be sufficient to achieve the desired result, in the absence of an equal commitment from other countries. Paradoxically, then, the declaration of a state of emergency would be adequate only if it was declared by all the States of the world, or at least by enough States to influence the emissions trajectory to a degree that would meet climate goals. We face here the "Climate Leviathan" dilemma,[64] according to which effective action against climate change would require the establishment of a global sovereign, empowered to declare a planetary emergency and determine who has the right to pollute and who does not. However, no such power currently exists, and the hypothesis

63 It could be argued that this is also true for other emergencies, such as pandemics. The difference, however, is that in health emergencies, national authorities, if they cannot act on the causes of the disease, can at least limit its spread within their territory, imposing quarantines, etc. This, on the other hand, is not possible in relation to climate change, except what will further be said about adaptation.

64 WAINWRIGHT and MANN, *Climate Leviathan: A Political Theory of Our Planetary Future*, London, 2017; WAINWRIGHT and MANN, "Climate Leviathan", *Antipode*, 2013, p. 1 ff., p. 5.

of an "Earth Constitution"[65] seems a long way off. Therefore, applying to the current situation the Schmittian aphorism that "sovereign is he who decides on the state of exception", one would be inclined to assert that, in the face of climate change, there is no sovereign and therefore no state of exception can be declared because no one is competent to declare it.

It could be argued that each State must do its share, and thus compliance with an individual country's commitments could justify a declaration of emergency to the extent that it contributes to the global effort against climate change. In this sense, one could cite the reasoning followed by some judges, including the German Constitutional Court in *Neubauer*, which on this basis, held that limitations on freedom induced by national climate acts were legitimate to the extent that they were part of a global effort.[66] However, it seems to me that this same reasoning could not be transposed plainly to the event of an emergency declaration. In fact, in the German case, it was a matter of justifying a limitation of constitutional rights as part of an ordinary balancing of conflicting constitutional interests. In contrast, in the case of a declaration of a climate emergency, the standard of judgment would have to be much stricter, because it would be a matter of authorizing a suspension – not just a limitation – of constitutional rights.

The adequacy test would probably be more successful if referred not to climate change mitigation, but to adaptation: the latter, in fact, being aimed at protecting citizens from the effects of climate change, is carried out at the local level and thus falls within the domain of national authorities, which could in hypothesis declare a state of emergency in order to urgently implement the necessary adaptation measures. Adaptation, however, does not seem to be at the center of climate emergency declarations to date, both because it can only limit, but not eliminate, the effects of climate change, so priority is understandably accorded to mitigation; and probably because proponents do not want to place too much emphasis on adaptation, for fear that governments may be driven to implement policies inspired by national interest, to the detriment of international cooperation. Consider, for example, the emergencies that might arise over control of water resources or, prospectively, over the use of "climate geoengineering" techniques.[67]

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65 FERRAJOLI, *Per una Costituzione della Terra. L'umanità al bivio,* Milano, 2022.

66 Bundesverfassungsgericht, First Senate, Order of 24 March 2021 – 1 BvR 2656/18, para. 199 ff., English version available at: < https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html>.

67 CORBETT, *cit. supra* note 15, p. 230 ff.; BIERMANN et al., "Solar Geoengineering: The Case for an International Non-use Agreement", *WIREs Climate Change*, 2022, p. 1 ff.

3.3 *Are They Necessary?*

Regarding the necessity test, we need to consider whether taking measures to combat climate change would really be impossible by ordinary means under constitutional law.

In this respect, literature suggests that, in order to contain the rise in temperatures within the threshold values indicated above, drastic actions might be necessary in the future, such as limitations on freedom of movement, quotas on the consumption of meat and other food, and even the introduction of constraints on housing choices.[68] These are clearly highly severe limitations of constitutional freedoms. However, they could be implemented through ordinary laws and, if proportionate to the circumstances, could potentially be justified within the normal constitutional framework, without the need to introduce exemptions or suspensions of any sort. This is all the more true given that, as the German Constitutional Court pointed out in *Neubauer*, the room for maneuver afforded to law-makers in adopting climate actions is bound to increase as the effects of climate change intensify.[69] It follows that, while remaining within the ordinary constitutional framework, political authorities enjoy sufficiently wide leeway to introduce the necessary measures to counter climate change without having to invoke a state of emergency. If they choose not to fully exploit that leeway, the problem is political, not constitutional.

On the other hand, it should also be noted that measures such as those mentioned above are by no means "necessitated"; that is, they are not choices made inevitable by the emergency situation. Instead, they are part of a wide range of potentially implementable measures, the choice of which can only be left to the representative bodies elected through democratic procedures. Of course, this is not to say that acting against climate change is not mandatory for States; on the contrary, as an increasing number of climate litigations around the world demonstrate, national governments are legally obliged to take action against climate change. The legal constraint, however, concerns only the goal to be pursued, but not the means by which States are to achieve it.

This is the reasoning behind the Dutch Supreme Court's ruling in the *Urgenda* case, which upheld the State's obligation to achieve a 25 percent reduction in greenhouse gas emissions by 2020, while at the same time leaving it up to Government and Parliament to decide what measures were necessary

68 DUPRÉ DE BOULOIS, *cit. supra* note 25.

69 Bundesverfassungsgericht, *cit. supra* note 66, para. 198.

to achieve this goal.[70] Similarly, consider the target of achieving climate neutrality by 2050, which many States in Europe (and beyond) have included in their legislation and which, according to the German Constitutional Court in the *Neubauer* case, is part of the State's climate constitutional obligation. This is a long-term goal that can be achieved through a plurality of alternative pathways, many of which are not yet imaginable and will be determined by technological innovations in the coming decades. In such an uncertain scenario, a State might decide, for example, to force the closure of all polluting factories or to ban the use of private vehicles, or even to start building new nuclear power plants. It is not relevant here to discuss the appropriateness or legitimacy of such measures; what is worth noting, however, is that each of these measures would have a strong impact not only on emissions trajectories, but also on basic economic and social interests. Which of these interests should be sacrificed, and to what extent, to enable the achievement of climate goals is a fundamental political question, which cannot be left to a decision maker placed above the law nor to a technocratic government.[71]

If an exception to the rule of law does not appear justifiable under the criterion of necessity, the same holds true of the criterion of urgency. In fact, as pointed out earlier, the latter cannot be satisfied simply because the measures in question need to be approved "before it is too late".[72] For a constitutional emergency to exist, a generic urgency is not enough; rather it must be demonstrated that it is impossible to wait for the time required for the measures to be approved according to ordinary procedures. This does not seem to be the case with measures to combat climate change. To be clear, not because climate change is not a current danger: indeed, as in the meteorite example, although some of the threats of climate change are not imminent, climate action has a narrow time frame, which scientists identify with the "critical decade" 2021–2030. This means that measures to achieve the goals of the Paris Agreement must be implemented during this period, because after that it would be too

70 Supreme Court, *Urgenda Foundation v. State of the Netherlands*, Judgment of 20 December 2019, para. 8, English version available at: <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf>.

71 HULME, "Climate Emergency Politics Is Dangerous", *Issues in Science and Technology*, 2019, pp. 23–25.

72 Thus the Declaration issued by the European Parliament referred to in note 10.

late.[73] In fact, this circumstance is apt to justify an anticipation of protection, according to the precautionary principle.[74] When discussing the establishment of a state of emergency, however, the question to be asked is a different one: is the remaining time sufficient for democratic institutions to make the necessary climate decisions following ordinary constitutional procedures? The answer, at least for the moment, appears to be affirmative. This, of course, does not mean that governments should or can wait until the last possible moment to implement the necessary measures; however, neither can it be argued that the urgency is such that it is incompatible with the ordinary timeframe of the legislative process or, if necessary, of the constitutional amendment process.

This last observation leads to one of the most sensitive aspects of the climate emergency discussion: legal and political studies on the subject, especially in the United States, reveal that climate emergency declarations have often been invoked by activists and politicians to circumvent the inability of the U.S. Congress, until recently, to pass climate-related bills, partly because of opposition filibustering.[75] Similar considerations could be extended to other countries, where parliaments and governments are reluctant to address climate issues with the necessary resolve, so much so that certain environmental movements are now invoking the "climate necessity" defense[76] to justify acts of "civil disobedience".[77]

These kinds of arguments, however, conceal a vital danger to democracy: indeed, the failure to take the necessary steps to effectively counter climate change, in these cases, is due to a lack of political will and not – as it should be – to factual or legal impediments. Thus, behind a seemingly unexceptionable rationale ("we must do whatever is necessary to counter climate change as soon as possible") lies an existential risk to the rule of law, namely, that the state of emergency may be used to circumvent the political impossibility of taking

73 Add to this that climate change is not a linear phenomenon, but is marked by some "tippings points", beyond which the changes in progress accelerate, increase in intensity and trigger chain reactions. Among these, the one on which there is a greater degree of scientific certainty is the melting of the permafrost, which according to the IPCC would determine the release of the quantities of greenhouse gases trapped in the frozen ground, with the consequent irreversible aggravation of global warming.

74 LINDSAY, "Climate of Exception: What Might a 'Climate Emergency' Mean in Law?", *Federal Law Review*, 2010, p. 255 ff., pp. 269–280.

75 See NEVITT, *cit. supra* note 12, p. 351; CORBETT, *cit. supra* note 15, p. 229.

76 LONG and HAMILTON, "The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases", *Stanford Environmental Law Journal*, 2018, p. 57 ff.

77 See for example the claims of the movement Extinction Rebellion (available at <https://rebellion.global/about-us/>.

the necessary measures through democratic procedures, thereby imposing a political decision, however desirable, on an unwilling majority.[78]

Some might argue that, in the face of an existential threat to humanity such as climate change, it is appropriate to deviate, for once, from democratic rules in order to preserve civil rights and liberties, rather than to jeopardize the latter in order not to deviate from the former.[79] However, this argument is flawed in that it is based on an erroneous assumption, namely that it is possible to deviate "for once" from democratic rules. In fact, should a state of climate emergency be declared in order to overcome the democratic deadlock, nothing would stand in the way of a minority in the future invoking any emergency situation, real or alleged, to impose its will on the rest of the country.

On the other hand, the argument appears stronger to justify the declaration of emergency in view of the need to rebalance the democratic discourse, which would otherwise be excessively unbalanced in favor of the interests of the present time and, conversely, "myopic" toward future needs.[80] This is a real problem, due to the inherently asymmetric nature of the climate problem, which demands democratic institutions to impose present-day sacrifices on voters against the prospect of receiving merely future and eventual benefits;[81] a prospect to which any electorate, however climate-conscious, tends by nature to be reluctant. Yet this problem, serious as it is, does not seem likely to be solved by declaring a state of climate emergency.[82] Indeed, such declaration would result in the introduction of a temporary regulation, which as such would not solve the problem but only postpone it.

4 Constitutional Endgame

At this point, there is a need to address the central issue regarding the relationship between state of emergency and climate change, namely the definitive – and not temporary – nature of the measures needed to address

78 STACEY, "The Public Law Paradoxes of Climate Emergency Declarations", *Transnational Environmental Law*, 2022, p. 291 ff.

79 This is the dilemma raised by the question notoriously attributed to President Lincoln: "[A]re all the laws but one to go unexecuted, and the Government itself go to pieces, last that one be violated?".

80 See NEVITT, "Is Climate Change a National Emergency?", *UC Davis Law Review*, 2021, p. 591 ff., p. 649.

81 LAZARUS, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future", *Cornell Law Review*, 2009, p. 1153 ff., pp. 1159–1161.

82 For some possible constitutional responses to this problem, see JAKAB, "Sustainability in European Constitutional Law", *MPIL Research Paper Series*, 2016, p. 1 ff., p. 6 ff.

the climate issue. The fact is that, unlike circumstances that traditionally justify the activation of emergency powers, such as wars and natural disasters, climate change is not a temporary event, but rather an ongoing set of irreversible and worsening processes.[83] Co2 emitted into the atmosphere remains there for decades and, added to emissions released in previous periods, contributes to rising temperatures, which in turn causes phenomena such as loss of biodiversity, rising sea levels, multiplication of extreme weather events, etc. This implies that even a sudden halt in Co2 emissions would not solve the problem in the short term, as temperature increases caused by past greenhouse gas emissions would continue to take place.

A similar reasoning can be replicated for the causes of climate change: unlike other catastrophic events – also human-driven, such as environmental disasters – the responsibilities of climate change are not attributable to one or more determined facts, but to a production model that, for centuries, has been exploiting fossil resources for the satisfaction of human needs. It follows that, if climate change is to be "mitigated" (since it is not possible to eliminate it altogether), a temporary change of habits, however drastic, would not suffice. Instead, a permanent transition to an ecologically compatible socio-economic model is required. The same applies to adaptation: since the effects of climate change, for the above-mentioned reasons, will persist over time, whatever actions are concretely taken to prevent further global warming, taking temporary adaptation measures would not be adequate to prepare the population for the new climatic conditions.

This has profound repercussions from a constitutional point of view. Indeed, modern constitutionalism has been described as a "fossil" constitutionalism.[84] Relying on the limitlessness of natural resources, it has indeed promised (and partially realized) a progressive enhancement of the material conditions of present citizens at the expense of future generations and ecosystems. However, by undermining the natural foundations of life, this model has exposed to mortal threat those very goals on which the constitutional compact is based, namely the protection of fundamental rights and freedoms. If it is to survive, constitutionalism must, therefore, reconsider its foundational values to steer the course of progress on a sustainable trajectory.

Confronted with this epochal challenge, a temporary suspension of constitutional guarantees, such as that inherent in state of emergency

83 CARDUCCI, "Natura, cambiamento climatico, democrazia locale", *Diritto costituzionale*, 2020, p. 67 ff., pp. 87–89.

84 CARDUCCI, "'Estrattivismo' e 'nemico' nell'era 'fossile' del costituzionalismo", *Diritto Pubblico Comparato ed Europeo*, special issue, 2019, p. 61 ff., p. 71.

declarations, could be useful in responding to specific temporally and territorially delimited "climate-related emergencies", such as those arising from severe drought, desertification, coastal erosion, etc. Climate-related emergencies could be declared for the purpose of, for instance, temporarily suspending participatory guarantees or landscape restrictions that hinder the construction of renewable energy production facilities. However, such exceptions should be temporary and motivated, for example, by the need to meet periodic emission reduction targets, after which ordinary constitutional guarantees should return in place.

Conversely, a declaration of climate emergency that is generic, *i.e.*, referring to the entire spectrum of climate problems, in addition to not being "necessary" in the sense specified above, would also not be suitable for effectively addressing the climate issue. In fact, a temporary diversion from the rule of law would not allow addressing the root causes of this phenomenon, which, being structural, require not provisional, but definitive and long-term responses, concerning every aspect of economic and social life.[85] Not to mention that, once declared, a climate emergency could hardly ever be lifted, since climate change is an irreversible process, so that a return to the *status quo ante* is unconceivable.[86]

What we are ultimately facing is not a constitutional "emergency" but a constitutional "crisis", the solution to which requires a permanent revision of the values on which the current constitutional compact is based. What is needed, in other words, is to inscribe in the constitution an "ecological parameter" that subtracts fundamental climate choices from the disposal of contingent political majorities and elevates them to a standard of legitimacy of the decisions adopted by legislators. Not a suspension of the constitution, but a modification of it in the name of "climate constitutionalism".[87] Not a parenthesis in the constitutional framework, after which a return takes place to the previous system, but a transition to a new constitutional order that allows for the reconciliation of democracy, protection of fundamental rights and respect for the environment.

Will all this be enough to avert what has been referred to as "Climate Endgame"?[88] Or will a new "Climate Leviathan"[89] emerge from the ashes of

85 STACEY, *cit. supra* note 78, p. 307 ff.

86 HULME, *cit. supra* note 71, p. 25.

87 On the notion of "climate constitutionalism", see JARIA-MANZANO and BORRÁS (eds.), *Research Handbook on Global Climate Constitutionalism*, Cheltenham, 2019; VIOLA, *Climate Constitutionalism Momentum. Adaptive Legal Systems*, Cham, 2022.

88 KEMP et al., "Climate Endgame: Exploring catastrophic climate change scenarios", *PNAS*, 2022.

89 WAINWRIGHT and MANN, *cit. supra* note 64.

democracies and, like the one theorized by Thomas Hobbes, establish a new form of ecological absolutism? Much will depend on whether and when democracies will be able to revise their values to adapt to the challenges posed by climate change. What is at stake is the survival, if not of humanity itself, at least of liberal constitutionalism.