

CONSTITUTIONALISM AND EMERGENCY RULE: COMPARING GERMANY'S AND SPAIN'S RESPONSES TO THE COVID-19 PANDEMIC

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ABSTRACT

Regulated differently in modern constitutions, emergency rule is a case of awkward, and dilemmatic, legal fine-tuning of an ambivalent political move that leads the executive of a democratic regime to the verge of the constitutional system. For that reason, as an utmost situation emergency rule becomes a testing field for the resilience of the constitutional order. It affects its own foundations, the basic rights, and thus the constitutional capability to make possible their fulfilment. It also serves to appraise the workings of democratic regimes and, accordingly, the type of legitimacy derived from their institutional performance. And furthermore, it provides a vantage point to watch the reactions of both their representatives and their publics. Focused on the covid-19 pandemic, this paper compares the cases of Germany and Spain through their legal regulations of emergency rule and their governments' responses. Having rather analogous emergency legislations, from 2020 through 2022 there have been significant differences in their decision-making patterns.

Keywords: Constitutionalism; emergency rule; Germany's emergency laws; Spain's emergency laws; covid-19 pandemic

Tackling the covid-19 pandemic, whose first outbreak dates from December 2019, has become an instructive example to survey political responses across countries. Reactions to curb the pandemic, despite being guided by public health goals, are the offshoot of political decisions. In this regard comparisons among democratic regimes are especially meaningful, for under akin conditions, resorting or not to emergency powers makes a great difference (see e.g., Goetz and Martinsen, 2021). It attests in varying degrees to each government's accommodation to its constitutional role, but also to each country's constitutional and parliamentary cultures.

Emergency rule, governing under emergency conditions, adds a disquieting challenge to normal politics, because drawing on extraordinary measures to be used within a fixed time span, even if a legal option, tests constitutional orders to their limits. Among European democracies comparisons provide information about the uses, and abuses, of emergency powers, persuasively evincing that their leaders have not been safe from autocratic leanings. And although in this case democratic governments have accessed a similar stock of constitutional instruments, as can be inquired through the Venice Commission of the Council of Europe's Observatory on Emergency Situations (Venice Commission, 2022), their responses through the consecutive waves of the pandemic well into 2022 bring to light very different understandings of the functioning of constitutional democracy.

This paper aims to compare the uses of emergency powers in two constitutional democracies, Germany, and Spain. Both share basic constitutional arrangements, and the Spanish constitutional politics over the past century has largely followed the German example. Yet, there has been a remarkable difference as regards the grounds for emergency rule claimed by the government of each country. Their decision-making strategies from 2020 to 2022 have advanced in divergent directions: towards a stronger centralization in Germany and towards a rising decentralization in Spain. Such contrast, it is argued as a hypothesis, is not just a result of institutional differences. It is also an outcome of their mismatched constitutional and parliamentary cultures regardless of the many parallels that exist between their emergency laws.

The first section of this paper presents the rationale of the comparison between the German and the Spanish constitutional orders. The second section selects some representative aspects of German constitutional understandings of emergency rule. The third section focuses on Spain's partly synchronous history of legal adjustments of what turns out to be an ambivalent political move. An account of their contrasting political decisions in response to the covid-19 pandemic is given in section four. The paper finally weighs up the constitutional and political effects of this extraordinary recourse.

EMERGENCY POWERS IN GERMANY AND SPAIN: THE COMPARISON IN BRIEF

Regarding the constitutional intricacies of emergency rule, its political uses, and their surrounding debates Germany has gathered for more than a century a broad and telling experience (see e.g., Dyzenhaus, 2012). Deeply affected by its overuse during the Weimar Republic through the 1920s and 1930s, and its contentious legal and political

effects, the later constitutional recasting of emergency powers from 1949 has unremittingly proceeded against that background. That experience keeps inspiring disputes about the aptness and proportionality of emergency rule, and remains a needful reservoir of comparative knowledge outside of Germany.

Because of its exemplary character, in matters of emergency laws the constitutional histories of other democracies, not just from Europe, have looked into the mirror of Germany's. Even though concerning its usages quite a few transnational comparisons are of interest, out of all cases several very significant parallels and variances are traceable from the 1930s till the present between Germany and Spain. Their contrast provides a distinctive view of how and why similar normative instruments are taken into political practice in rather divergent ways.¹

To begin with, the twentieth-century constitutional history of Spain, through its polity's democratizing changes of the 1930s and the 1970s, has found in German constitution-making, and in particular its grounds for emergency powers, a fruitful precedent. Yet, the similarities between their state structure and powers are not many, and their differences shed light on each country's distinct decision-making patterns and governability conditions. For example, there is a lack of correspondence between each country's upper chamber of parliament, being the *Bundesrat* the representative chamber for Germany's sixteen federated states (*Länder*), whereas that function is only having a symbolic role in the Senate for Spain's seventeen autonomous communities (*comunidades autónomas*). So, being Spain constitutionally a federal-like state, displaying indeed noticeable differences with federal countries, its governing approach throughout the covid-19 pandemic has gradually become more decentralized than those of federal Germany's two executives (a new government took office on December 8, 2021).

Conceptualizations of emergency rule in the Weimar Constitution (the Constitution of the German Empire) of 1919 and the Basic Law of 1949 were partially reproduced in Spain's 1931 and 1978 Constitutions. A greater resemblance became discernible through the ordinary laws and decrees enacted in Germany from the 1920s and in Spain during the 1930s; and later, between the constitutional amendment of 1968 in Germany and the Spanish emergency law of 1981. Their conceptual affinities in emergency legislation are noteworthy, but no parallels exist between political decision-making patterns in each country under emergency conditions beyond the 1930s. Only of late, all round the several waves of the pandemic from 2020 to 2022, Germany's and Spain's governments have shown partly coincident reactions. They largely resemble those of other democracies, in particular their trial-and-error paths.

Concerning their political performance there is, however, another noteworthy difference which lies in the role fulfilled under emergency conditions by each parliament, and most notably their lower chambers. Thus, whereas Germany's *Bundestag* has kept during the pandemic many of its regular activities going on, Spain's Congress of Deputies has shrunken them, especially the parliamentary oversight of the executive and parliament's legislative production, the latter largely replaced by governmental decrees. A different matter has to do with regional parliaments for the time of the pandemic, as some similarities exist re their downsized role in front of expanding executives.

Being the German and the Spanish constitutional provisions fairly comparable, their political strategies (and no major change came with the new German government after December 2021) display very different grasps of the uses of emergency rule, backed in each case by parliamentary majorities, and the running under emergency conditions of a constitutional democracy.

HOW EMERGENCY RULE TESTS CONSTITUTIONAL ORDERS:

GERMANY'S LESSONS

One of modern constitutionalism's insights was that under normal political circumstances even freely elected governments tend to exceed their own powers (McIlwain, 1947, pp. 123–46). So, when from the end of the eighteenth century the elements of modern democratic thought (from ideas to institutional blueprints, practices, techniques, and procedures) began to be carried out in institution building experiments across Europe and America, it became apparent that the separation of sovereign and government easily faded away at the expense of the sovereign people. Keeping a democratic government in check required further institutional oversights that liberal constitutions have devised ever since; and no less important, it also demanded a permanent vigilance from other representative institutions, in particular parliaments, and from citizens alike.

Long after, at the interwar constitutional debates the controversies around emergency powers were interpreted in a new light. On the one hand, the Weimar experience cleared doubts re their convenience and reasonability: the longer their use, the more difficult would become to restore the proper functioning of a constitutional democracy. This is probably the main political lesson whose worth has endured the passage of time till the present. Article 48 section 2 of the Weimar Constitution empowered the Reich president, and article 48 section 4 the *Länder* governments, when “public security and order” were at risk, to take measures to restore them even at the price of suspending (*außer Kraft setzen*) basic rights. No corresponding empowerment would be granted to the federal president or the governments of federal provinces

(*Länder*) by the Austrian Constitution of 1920 (articles 60–68 B-VG)) which revised the prerogatives enjoyed by the Austro-Hungarian emperor-king. Conceivably the 1918 and 1919 revolutionary events in Germany played a part in the constitutional project, especially as regards the balance of authority between president and parliament.

While in force, this constitutional authorization to rule by decree became almost the norm, thus severely disabling parliamentary oversight (on this paradoxical move of parliamentary supremacy, see in comparative perspective e.g., Lindseth, 2004, pp. 1343–49). Under Friedrich Ebert, the first president on the Weimar Republic, fifteen emergency decrees (*Notverordnungen*) were approved in 1919, eight in 1920, twelve in 1921, and ten in 1922; under Paul von Hindenburg, the second president, one emergency decree was approved in 1925, three in 1930, thirteen in 1931, and three in 1932; then in the transit towards the Third Reich regime, twenty in 1933, and three in 1934 (*Notverordnungen*, 2004). Besides, from 1920 to 1927 seven “empowering” laws (*Ermächtigungsgesetze*) were approved, mostly to deal with the mounting economic crisis (*Wissenschaftliche Dienste des Deutschen Bundestages*, 2014, pp. 8–11). The last one, completing the neutralization of the *Reichstag* and inaugurating the National Socialist period, was the Law to remedy the misery of the people and the empire (*Gesetz zur Behebung der Not von Volk und Reich*), approved on March 24, 1933.

On the other hand, this controversial shift in constitutionalism (accelerated through the Weimar years), which in some way rehabilitated the doctrine of reason of state in a democracy, became the object of constitutional debates. In his *Verfassungslehre*, first published in 1928, Carl Schmitt explains the difficulty and the need to keep these presidential powers within the boundaries of the constitutional order (Schmitt, 2003 [1928], pp. 26–7 and 111–2) assuming Richard Grau’s doctrine of constitutional inviolability (*Unantastbarkeit*). That to protect the constitutional order such

extraordinary powers could be required was eloquently portrayed as “the dictatorial power of Reich presidents and of *Länder* governments” (Grau, 1922). The author of the constitutional draft, Hugo Preuß, whose version of article 48 remained largely unmodified, would argue afterwards the need of article 48 to protect the integrity of the republic convinced that it would not lead to an emergency regime (Preuß, 2008 [1925]).

So risky was to find a tempered balance, that in practice it turned likelier to bypass the legal requirements of article 48. Ebert’s and Hindenburg’s performance fell short of the leadership needed. This remark is not a criticism but evidence of their unlikely roles to halt the downfall of the Republic (Möller, 2008, pp. 11–82). The overuse of emergency powers set off a vicious circle that for practical purposes rendered parliament powerless, although that was not the only cause of its conundrum. Through successive elections, the rising presence of antiparliamentary groups in the *Reichstag* left it oftentimes trapped in legislative gridlocks (Mommsen, 2009, pp. 329–82; see also the *Wikipedia* entry Reichstagswahlen in Deutschland, 2021).

Government’s decisive share in the “disintegration of the political system” over the last years of the Weimar Republic (Kolb & Schumann, 2013, pp. 130–53) happened, infamously, after chancellor Heinrich Brüning formed in March 1930 his government, known as the first presidential cabinet (*Präsidentalkabinett*). President Hindenburg accepted his appeal to rule by emergency decrees as the suitable way to face the economic and social upheaval caused by the world financial crisis. Government sidestepped the parliamentary oversight but its decisions, largely unrestrained, were born without enough legitimacy. In a newspaper piece of April 1930, Otto Kirchheimer (2017 [1930a], pp. 202–5) acutely criticized such strategy on the grounds of the constitutional distortion that it accomplished. Its title was “Article 48 – the false way” (*Artikel 48 – der falsche Weg*). As further spelt out in a journal essay the same year, the

continued pre-eminence of decrees over ordinary laws ended by sanctioning the *normality of the extraordinary* (Kirchheimer, 2017 [1930b], p. 352). Such exceptional empowerment of the Reich president, also overstretching the reach of government action, did reinterpret the notion of democratic sovereignty.

In a much-cited passage from his book *Politische Theologie*, made up of four chapters on the doctrine of sovereignty, Carl Schmitt presents an intricate account of the idea of sovereignty. Schmitt takes it as a border or limit concept (*Grenzbegriff*) because, unlike other political and legal concepts, he argues, its definition cannot be determined relying on a normal case but on a limit case; in other words, because its meaning cannot be grasped from a normal but from a limit situation. “The sovereign is the one who decides on the condition of exception” (*Souverän ist, wer über den Ausnahmestand entscheidet*), so reads the opening sentence of chapter one (Schmitt, 2009 [1922], p. 13), its last phrase usually, and somehow inaccurately, translated as “state of exception”. Later on, Schmitt (2003 [1928], p. 176) in an academic treatise exemplified this condition of exception with article 48 section 2 of the Weimar Constitution.

Sovereignty was for Schmitt a limit concept to the extent that its meaning arose from a limit situation challenging the exercise of political power, to use John Locke’s expression. The condition of exception(al)ity curiously illustrated this faculty in both autocratic and democratic regimes. However, in the former case to say that the sovereign, namely, the sovereign ruler, decides on the condition of exception(al)ity is a tautology, whereas in the latter case its mere enunciation, because a president of a democratic republic or its government are not their sovereigns but their representatives, turns problematic. So, it was in the 1920s and so it endures a century later.

When *Politische Theologie* was published, Schmitt’s ideas represented not only a scholarly contribution to an old inquiry of the history of legal and political thought.

They also resounded in the scholarly and public debates around presidential powers in a parliamentary regime. And more specifically, in the related debates about the effects of constitutionalizing the idea of popular sovereignty, with the recent memories of the social democratic Revolution of November 1918 in Bavaria and the counter-revolution of the following months (on the 1918–19 events, see Haffner, 2018 [1979], pp. 122–38). Both the preamble and article 1 of the Weimar Constitution of 1919 declared that sovereignty lay with the German people. Acknowledging, in the preamble, that the German people “has endowed itself with this Constitution,” article 1 further indicated that this was the legitimizing source of the state institutions, after establishing that “the German Empire is a republic”.

Such act of self-determination was meant as the founding moment of the republic, being a major step in the lengthy transformation, the parliamentarization, of the Reich into a republic started several decades earlier (Weber, 1988 [1917], pp. 258–75), and hence the legitimating signal to constitute a representative system. Article 178 formally established that the Constitution of the German Empire of 1871 was superseded by the new one. In the republic, the sovereign people act through their representatives – a condition that affected consequently the state’s highest office, the Reich president, outlining a delicate mechanism of constitutional checks and balances.

As mentioned above, paragraphs 1 and 2 of article 48 listed the exceptional powers that the Reich president, and paragraph 4 added the *Länder* governments in their territories, could assume in emergency situations, yet always subject to the *Reichstag*. Even though the Reich president could dissolve the *Reichstag* (article 25 section 1 WVerf), as a legislative chamber it had the authority to override the extraordinary executive but also legislative capacity, in emergency situations, of the Reich president and of the *Länder* governments (article 48 section 3 WVerf). Both democratically

elected representatives could act in emergency situations as sovereign rulers in their respective jurisdictions, and this concerned the possibility that adopting extraordinary measures, aimed at restoring “public security and order,” could entail the partial or whole temporary suspension of basic rights (article 48 section 2 in the case of the Reich president, and article 48 section 4 in the case of federated states governments).

The Weimar Constitution was in force until February 1933. Its conceptualization and wordings of emergency rule were thoroughly revised by the Basic Law of 1949 which introduced a novel understanding of emergency powers. Actually, the Basic Law regulates in a rather guaranteeing spirit the condition of exception(ality). The phrase is not mentioned, but the idea is mostly rendered by the concept of legislative emergency (*Gesetzgebungsnotstand*) in article 81.

There are two main differences between the Weimar Constitution and the Basic Law regarding emergency rule. One is that the Basic Law authorizes constraints on basic rights, but not their suspension. This is exemplified by the right to assembly (article 8 GG) or the confidentiality of correspondence (article 10 GG). Article 19 section 1 further clarifies that any basic right can be restricted (*eingeschränkt*), but the enforceable restrictions must be regulated by law, thus strengthening the general scope of such course of action by banning restrictions prompted by single cases. Regarding suspension, article 19 section 2 establishes that “[i]n no case may a basic right be affected in its essential content” (*In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden*).

The other relevant difference is that along with those cases, the first version of the Basic Law (May 23, 1949) only contemplated, in article 81, legislating under the emergency circumstances resulting from a chancellor’s failed confidence vote before a new chancellor was appointed (article 68 section 1 GG). Interestingly, article 37 section

1, considering the case that a *Land* is not fulfilling its federal duties, enables the federal government, with the authorization from the *Bundesrat*, “to adopt the necessary measures,” that is, having recourse to “federal coercion” (*Bundeszwang*), to make it comply with them. Explicit provisions for emergency rule were introduced by the constitutional amendment of 1968, the so-called Emergency Acts, *Notstandsgesetze*, that would be integrated into the constitutional text.

Only then were emergency situations (*Notsituationen*) surveyed extensively throughout the constitutional articles. The new clauses were enforceable in case of defence (*Verteidigungsfall*), as set out in articles 115a to 115l; of natural catastrophe, implying the restriction on freedom of movement (article 11 section 2 GG); or when “the free democratic basic order of the federation or of a *Land*” is at risk (article 91 section 2 GG). Article 80a considers the enforcement of basic rights restrictions in a case of tension (*Spannungsfall*), officially translated as “state of tension,” namely, a public situation of a lesser tensional degree than the case of defence, requiring a two-thirds majority vote in the *Bundestag* (article 80a section 1 GG) which can cancel it (article 80a section 2 GG), even in the case of obligations derived from international treaties (article 80a section 3 GG).

The many clauses of the 1968 constitutional amendment responded to the requirements the Allies demanded of the Federal Republic to retrieve its full sovereignty. Since then, no other constitutional amendments in matters of emergency rule have been made. Further provisions for emergencies were regulated by a law enacted in 2000, the Infection Protection Act (*Infektionsschutzgesetz*) which has been amended in 2020 and 2021. In all cases the constitutional checks were aimed at finding a pragmatic balance between authorizing emergency powers and containing within the constitutional order the consequences of this decisionist move. Its spell during the

Weimar years pervaded the debates of the legal profession and the public debates relying on the indemonstrable premise that a critical situation required inexorably the advent of emergency powers.

THE CONTENTIOUS RATIONALE OF EMERGENCY POWERS: SPAIN'S EXPERIENCE

In line with the Weimar Constitution, the Spanish Constitution of 1931 acknowledged in article 42 the recourse to emergency rule “in cases of clear and imminent graveness,” parliament authorizing government to enact a decree that, “when so required by the security of the state,” can suspend basic rights partially or wholly. A suspension like that could run on for a maximum of thirty days – any extension requiring a parliamentary agreement thereof. Under emergency rule a law of public order should be in force. Another similitude, not attaining the German presidential competences, has to do with the status of the president of the republic. The president was entitled to summon parliament ‘whenever he deems it appropriate’ and to dissolve it up to twice during the presidential six-year term (article 81 CE 1931). The president had the capacity to “[o]rdrain the urgent measures required by the defence of the integrity or the security of the nation, reporting at once to parliament (*Cortes*)” (article 76 section d CE 1931). Under emergency conditions the president could issue decrees whose lawfulness would have a provisional character until parliament either decides or legislates on the matters arousing them (article 80 CE 1931).

However, stronger similarities came with ordinary laws regulating emergency powers. A first one, the so-called Law in Defence of the Republic (*Ley de Defensa de la República*), entered into force on October 22, 1931, approved by the constituent

parliament (*Cortes Constituyentes*), since the Constitution of the Spanish Second Republic would be approved in December 1931. Drawing, to draft it, on the ongoing parliamentary debates about public order but also anticipating a rise of social upheavals, the provisional government gathered the required number of votes to pass it (see e.g., Bjork and Spohr, eds. 2016). The five-article law granted government the faculty to persecute “acts of aggression against the Republic” (article 1 LDR). What amounted to those acts could be decided, as stated in article 3, in a discretionary way by the minister of the interior (*Ministro de la Gobernación*), who assumed the enforcement of the law (article 4 LDR) in terms close to those of a state of siege, that is, with the capacity to suspend basic rights.

In the parliamentary session where the draft law was debated, held on October 20, the independent representative Santiago Alba pointed out that “it is almost a literal copy of the German law” (*DSCCRE*, No. 59, October 20, 1931, p. 1837). Indeed, it fairly reproduced the aims and contents of the two German laws for the protection of the Republic (*Gesetz zum Schutze der Republik*), the first one entering into force on July 23, 1922, and the second one on March 28, 1930. In his reply to criticisms about the paranoid and rushed tone of the project, the head of government (*Presidente del Gobierno*), Manuel Azaña, justified: “Government does not need this law, the Republic does,” to add later: “The Republic is not at risk, but to avoid that the danger rises, this law is needed” (*DSCCRE*, No. 59, October 20, 1931, p. 1842).

A law of public order (*Ley de Orden Público*) replaced it. Enacted on July 30, 1933, it graded emergency rule from “state of prevention” (articles 20 to 33 LOP) to “state of alarm” (articles 34 to 47 LOP) and “state of war” (articles 48 to 61 LOP). To defend public order or “public peace” (*paz pública*), as defined in articles 1 to 5, or to re-establish it, basic rights could be suspended in the two latter cases, while under the

first one their enjoyment could be only constrained. That way it revised the dubious constitutionality of the previous law, but its ceaseless invocations by successive governments from August 1933 until the outbreak of the Civil War in July 1936 made impossible a normal functioning of the constitutional order (Ballbé, 1983, pp. 359 ff.).

Besides, the law bolstered the surveillance role of civil governors (*gobernadores civiles*), a nineteenth-century figure following the French model of *préfets*, who bore the political authority delegated by government in each of the country's territorial units, provinces. There was no equivalence in the German laws at that time, and still later its analogue, the *Regierungspräsidenten*, are under the authority of the *Länder* governments, not the federal government. In so doing, it helped deploy nationwide a network of vigilance whose ominous effectiveness would be perfected by Franco's dictatorship since 1939.

In adapting emergency powers to a democratic legality, the Spanish Constitution of 1978 freely interpreted national and international precedents. Article 116 of the Constitution acknowledged emergency rule in correspondence with three levels of emergency, classified as "states of alarm, exception and siege" (*estados de alarma, de excepción y de sitio*). The three degrees of emergency rule were further regulated by an organic law in 1981. Unlike ordinary laws, in Spain organic laws regulate constitutional matters concerned with the exercise of basic rights. In this case, its guaranteeing spirit resembles that of the Basic Law after the amendment of 1968. Article 1 section 4 of the law establishes that "[t]he declaration of the states of alarm, exception and siege does not interrupt the normal functioning of the state constitutional powers." According to article 4 section b, government can declare the state of alarm in health crises by a decree, being its deadline of fifteen days, only extendable by authorization of the Congress of Deputies (article 6 LO 4/1981). While the decree remains in force,

government 'will be responsible to the Congress of Deputies' for that declaration and the ensuing norms (article 8 LO 4/1981).

The constraints on basic rights allowed in a state of alarm (article 11 LO 4/1981) are far away from the suspensions envisaged under a state of exception (articles 13ff. LO 4/1981), but the crucial difference lies in the scope of parliamentary oversight in each case. So, whereas under state of alarm government needs the authorization of the Congress of Deputies to rule by decree (article 6 section 2 LO 4/1981), a declaration of state of exception must be debated by Congress (article 13 section 3 LO 4/1981) which means that decisions about its agreement and reach require parliamentary deliberation and voting. And furthermore, whereas there is no time limit to extend state of alarm every fifteen days, beyond reason and Congress permitting, under state of exception emergency rule can only be lengthened an extra thirty days (article 15 section 3 LO 4/1981).

In all regards the Organic Law 4/1981, approved a few months after the failed coup d'état of February that year, restrained the chances of an abuse of emergency powers by the executive. And even if not so comprehensive as the German emergency legislation, the Spanish law reached a high regulatory level. Later, in terms of constitutional provisions it came close not just to Germany, but also to Greece, Hungary, Poland, or Portugal (see Khakee, 2009, pp. 9–17). Comparative experience shows that the risk of turning a restriction of basic rights into their suspension seems inescapable. The only reasonable treatment hints that more determining than the thoroughness of the legal regulation of emergency rule is the functioning of the state powers while this is in force and, among them, a government's performance of its extraordinary powers.

WHY EMERGENCY RULE? A COMPARATIVE GLOSS

A 1995 report prepared for the European Commission for Democracy through Law (the Venice Commission of the Council of Europe), based on comparative data from thirty-two countries, concluded that “there is always a potential for the abuse of state power, and experience has shown that the most serious violations of human rights tend to occur in emergency situations” (Özbudun and Turhan, 1995). Acknowledging the shortcomings of constitutionalism under emergency rule, the report recommended that constitutions delimit the margin of manoeuvre that governments attain upon declaring emergency rule.

As is well known, on January 30, 2020, the World Health Organization declared a “public health emergency of international concern.” Notifications from the European Centre for Disease Prevention and Control to EU governments had begun in early January (see e.g., Reusken et al., 2020). All of them were advices to adopt preventive measures assuming, as shown by a WHO-commissioned report, that “a global coordinated effort is needed to enhance preparedness in other [than China] regions of the world that may need additional support for that” (World Health Organization, 2020).

Most governments, and their public health advisers, expected the covid-19 impact would match that of previous pandemics and so be curbed like in the past. In Europe, they reacted belatedly. The national health systems have very dissimilar capacities, going from the robust Nordic welfare state institutions to the far less equipped health infrastructures from Eastern Europe. For any observer what made the difference over the first wave, roughly through the first half of 2020, was not so much their safety nets, as the governments’ reactions. That helps to understand, for example, the successful case of Romania, unmatched by countries such as Denmark, Finland, or Norway. Yet, the next waves have disproved a prolonged efficacy of the initial responses. By

demanding adaptative strategies, the shifting challenges of the pandemic have left clear another factor, namely, the comparative advantage of cooperative styles of ruling.

During the spring of 2020 many governments declared emergency rule. Germany was an exception (see e.g., Covid-19 Civic Freedom Tracker, 2022). To face a pandemic with an ordinary law might seem a reaction too conservative. The German government justified the validity of the 2000 Law for the prevention and control of infectious diseases in humans, known by its short name, Infection Protection Act (*Infektionsschutzgesetz*) which would be amended on March 27, 2020. Further, it opted for intensifying the coordination between the federal and the sixteen *Länder* governments in public health and security affairs (*Wissenschaftliche Dienste des Deutschen Bundestages*, 2020). Months later and after mounting disagreements between the minister presidents over chancellor Merkel's performance, new amendments to the law, approved on April 21, 2021 (*Deutscher Bundestag*, 2021), were aimed at better harmonizing the lifting of mobility restrictions and the triggering of federal emergency brakes (*Bundesnotbremse*) depending on the evolution of infection rates (Steffen, 2021). This has been the only national lockdown. Drawn on paragraph 5 of the Infection Protection Act, it lasted until the end of June 2021. Previous and later ones have been enacted by single federated states.

After declaring state of alarm on March 14, 2020 (Royal Decree 463/2020, of March 14), the Spanish government assumed a unified command which looked in principle a rational choice, though this happened in a much-decentralized country where health competencies had been on average since more than three decades transferred to its seventeen autonomous communities. By doing so, government saw itself unexpectedly taking on the role of a sovereign. Under emergency rule, this opened a path of legislative activism. Browsing the *Official Bulletin of the State* gives a fair idea:²

over the first month under state of alarm, government issued eleven royal decrees, fifty-nine orders developing those decrees, and some twenty-two resolutions further regulating specific aspects of the many legal changes enacted. They covered all areas directly hit by the pandemic, but a closer look revealed that aspects from ordinary laws not related to the public health crisis were also affected. Chances to revoke those legal amendments (for example, in the public pensions schemes) would presumably depend on Constitutional Court's rulings expected for the following years. A similar pattern continued steadily from the second month onwards.

This overarching legislative production prompted a series of accompanying normative changes in the regional administrations. That was a necessary step to keep the internal consistency between national and regional legislation, given the network structure of the constitutional order, formed by the Spanish Constitution and the Constitutions of the autonomous communities. However, this centripetal process typical of a multi-layered system of norms was immediately offset by its centrifugal turn. And so, in parallel, it sparked a manifold legislative activism in the regional governments, most of the times proceeding with diminished parliamentary oversight. That contributed to heightening their many regulatory differences in health care, education, public administration, and taxes. Along with government, their normative zeal advanced at a pace that soon began to ravel Spain's already complex regulatory landscape.

Under state of alarm parliamentary activity plummeted and the open-government internet portal was switched off. After ninety-nine days of national lockdown a devolution of those competences began, then trying out an experimental coordination between government and regions in the so-called Scaling down plan (*Plan de desescalada*) released on April 28 (*Presidencia del Gobierno, 2020*). The meetings of the Federation-*Länder* conference during the first wave had, seemingly, a replica in the

Spanish case. They were less in number but with a streamlined distribution of competences set up by the Basic Law and the Infection Protection Act (*Wissenschaftliche Dienste des Deutschen Bundestages*, 2021); they continued a long-established collaborative practice, full of internal debate indeed. In contrast, as stated in a response of September 18, 2020, to a series of parliamentary queries submitted in early July, although the Spanish ministry of health had for the previous six months convened the Interterritorial Council of the National Health System (*Consejo Interterritorial del Sistema Nacional de Salud*) more than forty times, and fifteen conferences of regional premiers were held (*Respuesta del Gobierno*, 2020), the coordination was focused on technical aspects of public health.

Unlike in Germany, the political cooperation produced meagre outcomes. Journalist Victoria Prego (2020) described government's attitude as a disclaimer of responsibility. For example, it did not accept the demands by the opposition in parliament and by many regional premiers to use, or to update, the Organic Law 3/1986, of special measures in matters of public health, or the General Law of Health 14/1986. Only at the end of March 2021 was approved the Law 2/2021 of urgent measures of prevention, containment, and coordination to face the health crisis caused by covid-19.

However, it did not solve the coordination puzzles, as government handed over the high court of each community (*Tribunales Superiores de Justicia*) the duty to inspect the legality of measures applied by regional governments – a government decision later declared unconstitutional (see Constitutional Court CI. 6283-2020, June 2, 2022). In the last instance this meant that the Supreme Court (*Tribunal Supremo*) had to decide for each autonomous community the validity of restrictions imposed on basic rights. The post-lockdown was a time of unease about what measures would come next. The opposition had its own share of responsibility for the stalemate created (Cacho, 2020)

and the Spanish society gave proof of its civic intelligence (Varela, 2020), though it was government that had the real capacity to seize the political initiative.

At that time, it became apparent that new waves of the pandemic would have a more devastating impact on public health, and the economy. An article by an economics professor in the *Neue Zürcher Zeitung* on 10 October cast serious doubt on the country's capacity to efficiently manage the Next Generation funds (Sell, 2020), aimed to boost the recovery of the European Union's economies from 2021 to 2023 (European Commission, 2021). Four days later, a chronicle in the *Frankfurter Allgemeine Zeitung* bore an eloquent title, "Spain has lost the controls" (Rössler, 2020), roughly in the same line as another article in *The Economist* (2020) with the title "Spain's poisonous politics have worsened the pandemic and the economy".

On October 25, 2020, emergency rule was again declared (Royal Decree 926/2020, of October 25), yet it was further extended since 9 November for a period of six months (Royal Decree 956/2020, of November 3). Even though restrictions on basic rights would be milder, it received parliamentary approval (Resolution of October 29, 2020, of the Congress of Deputies). In the months that followed the debate over the need and proportionality of such measure broadened and made clear that partial lockdowns could be regulated differently (see Cebada Romero & Domínguez Redondo, 2021), the state of alarm unfolding itself as a powerful protection not for the population but for the executive.

On July 14 the Constitutional Court (*Tribunal Constitucional*) made public its Ruling 148/2021 declaring unconstitutional several clauses of Royal Decree 463/2020, of March 14, by which the first state of alarm was established; in particular, a number of restrictions on basic rights were declared null because of state of alarm's inadequacy for such purpose (sections 1, 3 and 5 of article 7 of the decree; see e.g., Presno Linera and

García Majado, 2021). A few months later, the Court announced its Ruling 183/2021 of October 27. With similar arguments, it also established the partial unconstitutionality of Royal Decree 926/2020, of October 25, declaring the second state of alarm, and of Royal Decree 956/2020, of November 3, that prolonged it.

What especially draws attention in the Court's latter ruling is how it underlines the unconstitutionality not just of government's decision, but also of parliament's consent to extend emergency rule for six months bypassing its own debating and authorization procedures in emergency situations. Number 8 of its juridical grounds (*fundamentos jurídicos*) is a reminder of the nullity of their interpretations of both the Spanish Constitution and the 1981 emergency law (Constitutional Court, Ruling 183/2021, published in the *Official Bulletin of the State* of November 25, pp. 145308–23; see an early warning by emeritus judge of the Court Manuel Aragón, 2020).

The contrast with the German case is instructive. In a decision adopted on November 19, 2021, the Federal Constitutional Court (*Bundesverfassungsgericht*) established that the measures taken during the sole national lockdown enacted, in force from April 23 till June 30, 2021, were constitutional (*verfassungsgemäß*). They met the requirements of both formal and material constitutionality (*Verfassungsmäßigkeit*), the former regarding the effective approval of the decision, and the latter regarding the ensuing protection of basic rights, and lastly, they were proportional (*verhältnismäßig*) to the protection of health (BVerfG, Decision 1 BvR 971/21-, Rn. 1-222).

CONCLUDING REMARKS

Governments act under unbearable pressure in emergencies, but they count on legal instruments that, otherwise, could not be used. The effects produced by the covid-19

pandemic are deeper than those spawned by previous global crises. Comparing the responses of the German and the Spanish governments since March 2020 through early 2022 throws instructive results about their distinct understandings of emergency rule. This paper has argued that they draw on constitutional, political and parliamentary factors.

The German constitutional culture bears the stamp of the Weimar experience; the current constitutional provisions on emergency powers rely on that most determining influence to the point of largely explaining the choice of ordinary laws over emergency rule in facing the pandemic. Some seven decades of institution-building have created in the political class and the public a widespread trust in the constitutional resourcefulness of ordinary laws. In Spain, by contrast, the experience of the Second Republic and its emergency legislation, even if periodically remembered in scholarly and public debates, plays a less perceptible role in the constitutional culture. There was no appreciable controversiality in the Spanish government's choice of emergency rule in 2020, apart from scholars and journalists' warnings criticizing a political decision that twice found ample parliamentary endorsement.

Across the pandemic's successive waves each government has changed its way of ruling (from cooperative to more centralized the German, from centralized to decentralized the Spanish) in response, apart from public opinion concerns, to criticisms by minister presidents and by regional premiers, respectively. In other words, throughout the pandemic the cooperation between federal and *Länder* governments in Germany has gone in the opposite direction than the one described in Spain between the executive and the governments of autonomous communities. In office at both countries were coalition governments, yet backed by unequal assets: the German ones were

rooted in a long history of grand coalitions, whereas the Spanish proved internally less stable and relying on more uncertain parliamentary support.

Furthermore, the covid-19 response has not been just a matter of approaching a public health crisis. It tells something about ruling that in normal politics is missing, or dormant, which relates to parliamentary culture. Having both countries a lengthy parliamentary history, the role of parliament in the pandemic has been quite different. Whereas the activities of the *Bundestag* have followed their normal course (Bolleyer and Salát, 2021), the Congress of Deputies has remained for months almost an idle parliament. The performance of a democratic regime is measured, among other benchmarks, by the vitality of its parliament. In this regard, the Weimar lesson remains valid, namely, the longer the recourse to emergency rule, the more difficult becomes to get back to the normal functioning of a constitutional democracy.

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NOTES

¹ For reasons that become apparent in this paper, translations of German and Spanish terms and quotes are mine; they do not always match those of official or of widely circulated English versions.

² See <https://www.boe.es>