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Pandemic and Constitutional Degradation, a ‘Long Covid’ Effect. A Comparative Law Overview

Ferdinando LA PLACA^{*}

Extraordinary times call for extraordinary measures. In times of crisis, ordinary instruments could not be sufficient and emergency norms and actions could be required. Those actions, though, in a constitutional state must always respect the fundamental and indisputable principles and equilibria proper of constitutional democracies. During the pandemic, this fragile balance has been put under unprecedented pressure worldwide, and, in some countries, the leaders even exploited the emergency to further tilt it, triggering a new or hastening an ongoing process of constitutional degradation. The present article aims to investigate the impact of the pandemic in three contexts of constitutional degradation (Hungary, Tunisia, Turkey) by an analysis of the emergency measures enforced in those countries. The evaluation of those measures will be conducted relying on the framework and the principles the Venice Commission recommended its members to respect during a state of emergency. The article will attempt to show how the disrespect of those principles and the resulting abuse of the emergency measures hastened this existing process of constitutional degradation and, despite the end of the pandemic, still produce in these legal systems a ‘long covid’ effect.

Keywords: Constitutional degradation, Venice Commission, Covid-19 pandemic, Tunisia, Hungary, Turkey, emergency measures, long covid effect, fundamental rights, constitutional amendment

1 INTRODUCTION

The present article aims to investigate the impact of the pandemic in three contexts of constitutional degradation, attempting to show how the abuse of the emergency measures accelerated this undergoing process of constitutional erosion and, despite the end of the pandemic, still produce a ‘long covid’ effect in these legal systems. It could be said indeed that the consequences of Covid-19 do not seem to have affected only the health of some people who experienced a SARS-CoV-2 infection,¹

^{*} Doctoral Researcher University of Turku in cotutelle with the University of Palermo. I’d like to thank prof. Janne Salminen, prof. Laura Lorello and prof. Giuseppe Martinico for their valuable comments on this article. This article was supported by the Strategic Research Council at the Academy of Finland (grant number 345950). Email: ferdinando.flaplace@utu.fi.

¹ Bjørn Blomberg et al., *Long COVID in a Prospective Cohort of Home-Isolated Patients*, 27 Nat. Med. 1607 (2021), doi: 10.1038/s41591-021-01433-3; Don Goldenberg & Marc Dichter, *Unravelling Long COVID* (John Wiley & Sons, Incorporated 2022).

but also the legal system which underwent the pandemic, resulting in some cases in persistent traces of the emergency measures even after the fading of the health crisis. Certainly, since February 2020, the pandemic called many states to adopt extraordinary actions, temporarily tilting the delicate balance of principles and powers proper of the constitutional state. During the Covid-19 pandemic, and especially at the beginning of it, the role of the government has undoubtedly strengthened for the immediacy and the urgency of the decisions that had to be adopted and rights and freedoms were worldwide restricted. Yet, despite some initial moments to adjust the institutions to the new working modalities, parliamentary and court scrutiny over the acts of the executive have mostly been restored and guaranteed to safeguard the necessarily restrained human rights and protect the delicate checks and balances system.

Still, not all the countries were eager to re-establish this perfect equilibrium. Some of them saw the pandemic as an opportunity to further disturb it. Exploiting the sanitary crisis, several leaders worldwide handled the pandemic to trigger a new or hasten an ongoing process of constitutional degradation. Employing new and existing legal and constitutional instruments designed for emergencies, those politicians deprived the Parliament of its power, limited any judicial controls, and reduced certain citizens' freedoms beyond any reasonable justification. European and neighbouring countries were not spared. In Hungary, the executive was given the power to govern by decree without any oversight of the parliament for an emergency period whose duration would be determined by the government itself. In Turkey, limitations of freedom were arbitrarily imposed by the government with almost absent scrutiny of the judiciary or the parliament. In Tunisia, the President of the Republic, profiting from the sanitary crisis and the popular discontent against the government, suspended the parliament, lifted parliamentarians' immunity and removed the Prime Minister, rewriting the entire Constitution.

Following one of Hirschl's principles of case selection, the 'most different cases' logic,² the article will refer to three states: Hungary, Turkey and Tunisia. Three countries from three distinct continents, which, despite all the historical, legal and socio-economical differences, are all sharing an ongoing process of constitutional degradation. Moving from these cases, the article will analyse the measures there enforced to try to illustrate how the abuse of the emergency measures worsened these already degraded systems and still influence them. The emergency acts and their abuses will be evaluated by adopting as parameters the observations and the principles the European Commission for Democracy through Law (better known as the Venice

² Ran Hirschl, *The Question of Case Selection*, 53 Am. J. Comp. L. 125, 139 (2005), doi: 10.1093/ajcl/53.1.125.

Commission). In particular, it will rely on the recommendations the Commission prescribe to its members to guarantee the balance between the democratic contractions that extraordinary times impose and the respect of the fundamental incompressible values of contemporary democracy. The adoption of the Venice Commission's framework seems appropriate for two main reasons. On the one hand, for the purpose of a common yardstick. Due to the 'Venice Commission's geographical expansion',³ all the mentioned countries are members of the Commission, thus allowing to apply the same criteria to all of them. On the other hand, since the framework seeks to preserve the indisputable values of constitutional states and ensure a correct and lawful functioning of the states even in times of emergency, any substantial and recurring departure from it could be seen as symptomatic of a process of constitutional degradation.

On these premises, the article will proceed as follows. Firstly, the study will examine the widespread phenomenon of constitutional degradation, trying to understand what is intended with that expression and how it takes place. Then, the article will outline the guidelines the Venice Commission indicated to avoid any unjustified compression of the Rule of Law and fundamental rights during a state of emergency, pointing out five principles that will be used as parameters to gauge the legal responses that have been deployed in the aforementioned nations to tackle the pandemic. Finally, it will try to show how the disrespect of these principles and the resulting abuse of the emergency measures hastened the process of constitutional degradation.

2 CONSTITUTIONAL DEGRADATION, WINNING THE SYSTEM SLOWLY BUT STEADILY

Constitutional degradation⁴ and its analogous expressions (constitutional or democratic decay,⁵ backsliding,⁶ erosion,⁷ rot,⁸ retrogression,⁹ recession¹⁰ and so on¹¹) have

³ Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 Am. J. Comp. L. 963, 969 (2015), doi: 10.5131/AJCL.2015.0029.

⁴ *Ex multis*, Gary Peller, *The Discourse of Constitutional Degradation*, 81 Geo. L.J. 313 (1992); *Framing and Diagnosing Constitutional Degradation: A Comparative Perspective* (Tania Groppi, Valentina Carlino & Giammaria Milani eds, Editore Consulta OnLine 2022).

⁵ Tom G. Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 Hague J. Rule L. 9 (2019), doi: 10.1007/s40803-019-00086-2.

⁶ Nancy Bermeo, *On Democratic Backsliding*, 27 J. Democr. 5 (2016), doi: 10.1353/jod.2016.0012; Stephan Haggard & Robert Kaufman, *Backsliding. Democratic Regress in the Contemporary World* (Cambridge University Press 2021).

⁷ Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy* 43 (The University of Chicago Press 2018).

⁸ Jack M. Balkin, *Constitutional crisis and Constitutional Rot*, 77 Md. L. Rev. 147 (2017).

⁹ Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78 (2018).

¹⁰ Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. Democr. 141 (2015), doi: 10.1353/jod.2015.0009.

¹¹ *Constitutional Democracy in Crisis?* (Mark A. Graber, Sanford Levinson & Mark Tushnet eds, Oxford University Press 2018); Kim L. Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018); Angela

been, unfortunate though it may seem, of interest to legal scholars even before the beginning of the pandemic. The terms, in their various declinations, have been used to indicate a slow but steady deterioration of the structures and features of liberal constitutional democracy.¹² Unlike a constitutional *coup* or a constitutional collapse, this decay does not occur in a single moment through an evident crisis or military power, but it takes place in a more subtle and scheming way. This degradation follows the adoption, generally over long periods of time,¹³ of several different measures that are approved respecting the procedures provided by the constitutional framework, but that, progressively and incrementally, deprive the state of parts of those values and norms that represent the fundamentals on which a constitutional democracy is based. This process, indeed, consists of a series of distinct reforms, which, taken separately, could appear *prima facie* formally consistent within a democratic scope, but if considered all together prove to be detrimental to the whole constitutional system, gradually dismantling it, though preserving its formal *façade*.¹⁴

The targets of this degradation are thus the elements which represent the core of a constitutional state and guarantee its correct democratic functioning. These are, of course, the constitution itself, the democratic institutions, such as the courts or other independent bodies, the norms provided to assure the respect of individual freedoms and minority rights, and also the so-called rules of the game, such as the electoral law. Rules and guarantees, that once lawfully modified, would allow would-be authoritarian leaders, once in governmental positions, to consolidate and perpetuate their power, while maintaining the appearance of both legality and democracy of their countries.¹⁵ The instruments adopted to achieve this aim are indeed legal tools provided by the same legal system.¹⁶ The main ones usually involve the reform of the constitution, the weakening of the checks and balances system, the alteration of the electoral competition and the reduction of fundamental rights and freedoms protection. Analysing them more in detail would show how this process is practically accomplished.

Amending the constitution is certainly the most efficient device to pave the way to democratic regression. Since the constitution is set to guard the whole

Di Gregorio, *I fenomeni di degenerazione delle democrazie contemporanee: qualche spunto di riflessione sullo sfondo delle contrapposizioni dottrinali*, 1 *Nuovi autoritarismi e democrazie* 1 (2019), doi: 10.13130/2612-6672/12619; Johannes Gerschewski, *Erosion or Decay? Conceptualizing Causes and Mechanisms of Democratic Regression*, 28 *Democratization* 43 (2020), doi: 10.1080/13510347.2020.1826935.

¹² Daly, *supra* n. 5, at 17.

¹³ Gerschewski, *supra* n. 11, at 53.

¹⁴ Steven Levitsky & Daniel Ziblatt, *How Democracies Die. What History Reveals About Our Future* 77 (Viking 2018).

¹⁵ Scheppelle, *supra* n. 11, at 547.

¹⁶ As Levitsky & Ziblatt state: 'The tragic paradox of the electoral route to authoritarianism is that democracies assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it' in Levitsky & Ziblatt, *supra* n. 14, at 8.

system, even a slight alteration could indeed affect the entire constitutional order.¹⁷ Two types of constitutional alterations could be possible: a constitutional replacement or a constitutional amendment *stricto sensu*. In the first case, a new constitution is adopted, substituting the previous one and consequently rewriting the whole constitutional system. In the second one, instead, the modification intervenes on the existing constitution, editing and altering only a part of it. A reform of that sort appears more deceitful than a constitutional replacement. With the pretext of a modest update or renovation, a constitutional amendment, even if apparently insignificant, could indeed surgically manipulate the entire system, defusing it, while maintaining the general architecture.

Undermining the system of checks and balances represents another piece of the constitutional degradation puzzle.¹⁸ Tilting the equilibrium ensured by the separation of powers and the institutional checks is certainly an effective way to reshape the system, often even without the need of approving a constitutional reform. To do so, would-be authoritarians, generally controlling the executive power and leading the majority in the Parliament, focus on neutralizing possible opposition from the branch that usually enjoys greatest autonomy, the judicial one. This usually occurs by capturing both those organs, such as Councils for the Judiciary, which guarantee the self-government and the independence of the justices, and those that have the role of scrutinizing the law, i.e., the Constitutional Courts.¹⁹ As explained above, the weakening of the autonomy of these bodies could rely on instruments different from constitutional amendments. The practical devices may indeed employ some legislative or regulatory reforms concerning these organs' internal composition or functioning; reforms, which, although could apparently seem neutral procedural changes, are able to highly affect their activities and their independence. These are, for instance, those reforms which impose new procedures and requisites to appoint the justices, lower their retirement age, raise the number of the members of the organ, limit the scope of their power, remove their prerogatives or expand their accountability.

¹⁷ In this regard, Landau talks about “*abusive constitutionalism*” as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before’ in David Landau, *Abusive Constitutionalism*, 43 UC Davis L. Rev. 189, 195 (2013). See also Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

¹⁸ Miklós Bánkuti, Gábor Halmai & Kim L. Scheppele, *From Separation of Powers to Government Without Checks: Hungary's Old and New Constitutions*, in *Constitution for a Divided Nation: Hungary's Fundamental Law* 237 (Gábor A. Tóth ed., CEU Press 2012); Jan-Werner Müller, *Rising to the Challenge of Constitutional Capture*, Eurozine (21 Mar. 2014), <https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/> (accessed 24 Nov. 2025); Jakob Gijsbert de Hoop Scheffer et al., *The Will of the People? The Erosion of Democracy under the Rule of Law in Europe*, 104 Adviesraad Internationale Vraagstukken Report 1, 39 (2017).

¹⁹ Tom Ginsburg & Bojan Bugarič, *The Assault on Postcommunist Courts*, 27 J. Democr. 69 (2016), doi: 10.1353/jod.2016.0047.

Another instrument that could deprive democracy of one of its essential features is the alteration of the electoral competition. In every definition of democracy, even a minimalistic one, elections are seen as crucial.²⁰ These, however, must be free, fair and periodic and they must guarantee the possibility to have an actual alternation in power.²¹ Where the competition is compromised, democracy could no longer be considered to be a part of the constitutional system so affected. In democratic backsliding, the government acquires power by competing for the votes of the people, but, when obtained, it is uncommonly reluctant to surrender it. To maintain it, the executive would not impede the elections, but it would try to make more difficult a victory for political rivals, strategically manipulating the electoral procedures.²² Even in this case, the reforms do not appear as manifestly fraudulent, but are adopted and usually defended by the seemingly neutral and legitimate intent of eliminating electoral fraud or promoting political fairness and stability.²³ These measures could, for instance, involve new requirements for individuals and political parties to compete in elections or be elected, the adoption of more demanding regulations or procedures concerning registration of voters, changes in the composition of electoral districts or, more generally, in the electoral law.

The last signal of constitutional erosion is ultimately a reduction of fundamental rights protection.²⁴ Since the French Revolution, fundamental rights have always been inextricably connected to the notion of constitution, representing one of its constitutive elements. Recalling Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, to have a constitution – and so, a constitutional state – is required not only the respect of the principle of the separation of the powers, but also the guarantee of fundamental rights.²⁵ The loss of the latter would, consequently, endanger the very constitutionality of a democracy. Degradation would occur with a limitation of the rights often backed by purposely ambiguous reasons for avoiding constitutional violation, morality, public security or, more recently, public health. Rights that are usually constrained are freedom of association, freedom of assembly, freedom of speech, freedom of opinion, freedom of the press and the media and freedom of information.²⁶ The justifications

²⁰ Joseph Schumpeter, *Capitalism, Socialism and Democracy* 269 (Harper & Brothers 2d ed. 1947); Samuel P. Huntington, *After Twenty Years: The Future of the Third Wave*, 8 J. Democracy 3, 5 (1997), doi: 10.1353/jod.1997.0059.

²¹ Tom Ginsburg & Aziz Z. Huq, *Defining and Tracking the Trajectory of Liberal Constitutional Democracy*, in *Constitutional Democracy in Crisis?*, *supra* n. 11, at 34.

²² Bermeo, *supra* n. 6, at 13; Balkin, *supra* n. 8, at 153.

²³ Ozan O. Varol, *Stealth Authoritarianism*, 100 Iowa L. Rev. 1673, 1701 (2015).

²⁴ Landau, *supra* n. 17, at 200.

²⁵ Article 16 of the 1789 *Déclaration des droits de l'homme et du citoyen* states indeed that: 'Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution'.

²⁶ Haggard & Kaufman, *supra* n. 6, at 56; Huq & Ginsburg, *supra* n. 9, at 130.

assumed could be the most diverse: for guaranteeing transparency, new fiscal duties or registration procedures could be required, limiting foreign organizations or NGOs' activities; with the pretext of extremist or terrorist menaces, laws could be approved to intentionally silence or prosecute political groups; for moral or security reasons, ethnic and vulnerable minorities could be discriminated against or criminalized; in the name of public security, the validity of international agreements could be suspended or their withdrawal could be decided; for discrediting the honour of the nation or spreading false information, journalists and scholars could be dismissed or arrested.

The gradual and incremental adoption of these legal schemes for their being formally legitimate contributes to making this phenomenon even more subtle and dangerous. On the one hand, because the deployment of legal means implies that this degradation is not always immediately perceivable,²⁷ there is the risk that society and scholars start to notice it when it is already in progress or even accomplished.²⁸ On the other hand, because, of the way it is implemented, it could occur in every democracy, from the least consolidated ones to the longest-established ones.²⁹ The apprehension that this process raises appears to be more compelling if we consider that the loss of democratic quality has not been a limited phenomenon. A decline in democratic quality has indeed been registered worldwide for almost twenty years now and the outlook does not seem bright.³⁰ Last century's feeling that democratic history would have reached its end with the ineluctable and irreversible triumph of the Western liberal democracy model³¹ turned out, not surprisingly,³² to be misplaced and even the last promising *waves of democratisation*³³ receded before more threatening *reverse waves* of democratic regression.³⁴

²⁷ Varol, *supra* n. 23, at 1677.

²⁸ Ginsburg & Huq, *supra* n. 7, at 77.

²⁹ Haggard & Kaufman, *supra* n. 6, at 78; Diamond, *supra* n. 10, at 144.

³⁰ Sarah Repucci & Amy Slipowitz, *Freedom in the World 2022. The Global Expansion of Authoritarian Rule* (Freedom House 2022), https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf (accessed 24 Nov. 2025); Yana Gorokhovskaia, Adrian Shahbaz & Amy Slipowitz, *Freedom in the World 2023. Marking 50 Years in the Struggle for Democracy* (Freedom House 2023), https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf (accessed 24 Nov. 2025); Yana Gorokhovskaia & Cathryn Grothe, *Freedom in the World 2024: The Mounting Damage of Flawed Elections and Armed Conflict* (Freedom House 2024), https://freedomhouse.org/sites/default/files/2024-02/FIW_2024_DigitalBooklet.pdf (accessed 24 Nov. 2025); Yana Gorokhovskaia & Cathryn Grothe, *Freedom in the World 2025. The Uphill Battle to Safeguard Rights* (Freedom House 2025), https://freedomhouse.org/sites/default/files/2025-02/FITW_World_2025_Feb.2025.pdf (accessed 24 Nov. 2025).

³¹ Francis Fukuyama, *The End of History?*, 16 Nat'l Int. 3 (1989).

³² Zachary Elkins, *Is the Sky Falling? Constitutional Crises in Historical Perspective*, in *Constitutional Democracy in Crisis?*, *supra* n. 11, at 49.

³³ Samuel P. Huntington, *Democracy's Third Wave*, 2 J. Democr. 12 (1991), doi: 10.1353/jod.1991.0016; Larry Diamond, *A Fourth Wave or a False Start?*, Stanford Freeman Spogli Institute for International Studies (23 May 2011), https://fsi.stanford.edu/news/a_fourth_wave_or_a_false_start_20110523 (accessed 24 Nov. 2025).

³⁴ Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What is New About It?*, 26 *Democratization* 1095 (2019), doi: 10.1080/13510347.2019.1582029; Andrea Cassani & Luca

3 ON THE VENICE COMMISSION'S PRINCIPLES AND EMERGENCY MEASURES

These menacing waves swelled during the last few years and the concurrence of these counter-democratic trends with the Covid-19 pandemic promptly raised the concerns of legal scholars and international organizations. These bodies, aware of the legal risks related to the extraordinary situation,³⁵ immediately started to question the impact that the pandemic could have on the democratic system, publishing recommendations for governments and constantly monitoring the evolution of the adopted measures to tackle the emergency. Particularly rapid and prolific in proposing some suggestions and reporting the implemented emergency acts has been the Council of Europe and its advisory body on constitutional matters, the European Commission for Democracy through Law, better known as the Venice Commission.³⁶ The present paragraph, for the reasons already mentioned in the introduction, would mainly rely on the documents issued by these organs,³⁷ outlining the framework and the principles indicated to be respected in time of emergency in order to test their compliance in the selected countries.

It has to first be noticed that both the Council of Europe and the Commission recognize, also on the basis of Article 15 of the Convention, that certain derogations from the Conventions could be adopted ‘*in time of war or other public emergency*

Tomini, *Reversing Regimes and Concepts: From Democratization to Autocratization*, 19 Eur. Pol. Sci. 272 (2020), doi: 10.1057/s41304-018-0168-5.

³⁵ As the Venice Commission recurrently recalled in its documents: ‘Public emergency situations involve both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State. Derogations from fundamental human rights are an especially crucial problem since experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency’ in Ergun Özbudun & Mehmet Turhan, *Emergency Powers*, in *Emergency Powers* 1, 3 (No. 12 Science and Technique of Democracy, Venice Commission, CDL-STD(1995)012 1995), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012) (accessed 24 Nov. 2025).

³⁶ On the role of the Venice Commission, see Sergio Bartole, *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Hart Publishing 2020), and De Visser, *supra* n. 3, at 963.

³⁷ Council of Europe, SG/Inf(2020)11, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis A Toolkit for Member States* (7 Apr. 2020), <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40> (accessed 24 Nov. 2025); Venice Commission, CDL-PI(2020)003, *Compilation of Venice Commission Opinions and Reports on States of Emergency* (16 Apr. 2020), <https://rm.coe.int/16809e38a6> (accessed 24 Nov. 2025); Venice Commission, CDL-AD(2020)014, *Report – Respect for Democracy, Human Rights and the Rule of Law During States of Emergency: Reflections – Taken Note of by the Venice Commission on 19 June 2020 by a Written Procedure Replacing the 123rd Plenary Session* (19 Jun. 2020), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)014-e) (accessed 24 Nov. 2025). Findings by country and topics are available online respectively at the following links, https://www.venice.coe.int/files/EmergencyPowersObservatory/By_country-E.htm and, https://www.venice.coe.int/files/EmergencyPowersObservatory/By_topic-E.htm (accessed 24 Nov. 2025). See also Venice Commission, CDL-AD(2020)018, *Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights, Adopted by the Venice Commission at Its 124th Plenary Session (Online, 8–9 October 2020)* (8 Oct. 2020), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)018-e) (accessed 24 Nov. 2025).

threatening the life of the nation'.³⁸ In a time of emergency, as the pandemic demonstrated, a deviance from the normal functioning of the state or the ordinary exercise of fundamental rights could indeed be necessary to respond effectively to the extraordinary circumstances and avoid any further negative consequences on the countries' population.³⁹ Even in these situations, however, the Rule of Law must prevail⁴⁰ and fundamental principles must be respected to avoid the arbitrariness of the government and reduce the impact on the core elements of the democratic system and individual rights.

These principles are mainly the *proportionality* of the measures, their *necessity*, their *temporariness*, their *subjection to the principle of legality* and to *an effective scrutiny* by both the legislative and judicial organs.⁴¹ The emergency measures must thus be proportionate and justifiable according to the aim they serve, trying to have the least impact on the normal functioning of the state and citizens' rights. These must be strictly required to tackle the emergency and they must be in force only for the requested period, providing some specific time limit regarding their duration (the so-called 'sunset clauses'). Hence, they should not have effects once the emergency is over and, above all, they should not introduce permanent effects or changes in the legislative or constitutional system.⁴² Moreover, the new provisions adopted must be in accordance with the law.⁴³ In that sense, these must be consistent with the legal framework and the procedures prescribed for emergencies by the Constitution or other legislation, both concerning the declaration of the state of emergency and the adoption of the emergency acts. Although new measures could be introduced to face unprecedented and unpredictable situations, the legislation on the emergency regime should be promulgated outside of a time of emergency,⁴⁴ to ensure the most thorough debate on it, avoid the risks of abuse by the government at the time of

³⁸ According to the ECtHR, in *Lawless v. Ireland* [C], No. 332/57, §28, Eur. Ct. H.R. (1961), 'the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear' and 'they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'. For details on Art. 15 of the ECHR see European Court of Human Rights Registry, *Guide on Article 15 of the European Convention – Derogation in time of emergency* (31 Aug. 2025), https://ks.echr.coe.int/documents/d/echr-ks/guide_art_15_eng (accessed 24 Nov. 2025).

³⁹ Council of Europe, *supra* n. 37, at 2.

⁴⁰ Venice Commission, CDL-AD(2011)049, *Opinion on the Draft Law on the Legal Regime of the State of Emergency of Armenia, Adopted by the Venice Commission at its 89th Plenary Session (Venice 16–17 December 2011)* 9, para. 44 (19 Dec. 2011), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)049-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)049-e) (accessed 24 Nov. 2025).

⁴¹ Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 3.

⁴² Venice Commission, CDL-AD(2019)015-e, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist, Adopted by the Venice Commission at its 119th Plenary Session (Venice, 21–22 June 2019) and Endorsed by the Committee of Ministers on 5 February 2020* 25, para. 121 (24 Jun. 2019), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)015-e) (accessed 24 Nov. 2025).

⁴³ Council of Europe, *supra* n. 37, at 3.

⁴⁴ Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 7.

an emergency, and guarantee the principle of legal certainty. Finally, and maybe most importantly, the measures enacted by the governments must be subject to the oversight of both the Parliament and the judiciary.⁴⁵ During an emergency, the government, in order to rapidly tackle the situation, usually sees an expansion and a strengthening of its powers both at a vertical level, with the centralization of the competencies from the federal or regional entities to the central level, and at a horizontal level, with the delegation of certain powers normally granted to other bodies.⁴⁶ Constitutions or legislations could, indeed, establish special and simplified forms of the decision-making process, even attributing the government the power to issue decrees having the force of law. In these extraordinary circumstances, hence, executive power must be subject to continuous checks. On the one hand, Parliament should be involved in the declaration of the state of emergency and, while delegating the action to the executive, it should limit, as far as the situation permits, the scope, the content and objectives of governmental action to deal with the emergency.⁴⁷ The legislative should also maintain the power to scrutiny the decrees of the executive with the possibility to change or annul them.⁴⁸ Furthermore, the decision about terminating or prolonging the state of emergency must not be left to the discretion of the government but must lie with the Parliament, which must consider if an extension to the powers are necessary, or whether the state of emergency has ceased. For those reasons, the life of the legislature must continue during the emergency and its dissolution in these circumstances should not be allowed.⁴⁹ In case of emergency, the term of the Parliament could indeed be also extended, and the upcoming elections subsequently postponed.⁵⁰ On the other hand, however, the controls in the hands of the Parliament may not be sufficient, especially if the government benefits from a majority in the Houses, rendering them prone to approving every act without any objection. Consequently, parliamentary scrutiny must be accompanied and complemented by a concrete judicial one.⁵¹ The government must indeed always act within

⁴⁵ Venice Commission, CDL-AD(2020)018, *supra* n. 37, at 17–25.

⁴⁶ *Ibid.*, at 16.

⁴⁷ Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 14, para. 65.

⁴⁸ Council of Europe, *supra* n. 37, at 4.

⁴⁹ Venice Commission, CDL-AD(2016)006-e, *Opinion on the Draft Constitutional Law on 'Protection of the Nation' of France Adopted by the Venice Commission at Its 106th Plenary Session (Venice 11–12 March 2016)* 17, para. 62 (14 Mar. 2016), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)006-e) (accessed 24 Nov. 2025).

⁵⁰ The decision of postponing the elections, could, however, raise some political and practical issues, see Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 21–25, and Venice Commission, CDL-AD(2020)018, *supra* n. 37, 26–32.

⁵¹ Ergun Özbudun, *Emergency Powers and Judicial Review*, in *Human Rights and the Functioning of the Democratic Institutions in Emergency Situations* 1, 12 (No. 17 Science and technique of democracy, Venice Commission, CDL-STD(1996)017 1996), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1996\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1996)017-e) (accessed 24 Nov. 2025).

the legal framework and independent courts must always be able to check so, especially in extraordinary times, when people's rights could be particularly encroached upon. Access to justice and the right to a fair trial must, thus, be guaranteed so that courts could rule on the lawfulness, proportionality and necessity of the emergency measures,⁵² providing the citizens with a defence against abusive limitation or infringement of their rights, particularly the non-derogable ones.⁵³ Therefore, both Parliament and courts need to continue operating even in times of emergency. Their activities could be hindered by the general restrictions introduced, but their functioning must be assured even with specific and different modalities of work (i.e., social distancing, telematic meeting or distance voting),⁵⁴ according to the necessities imposed by the circumstances.

The above-expressed principles represent some canons that governments and emergency legislations should try to rely on to guarantee an efficient balance between the democratic contractions that extraordinary times impose and the respect of the fundamental values of contemporary democracy. In light of those, the following part would now describe the legal responses adopted in Hungary, Tunisia and Turkey, evaluating if these five principles of legality, proportionality, necessity, temporariness and scrutiny of the measures promoted by the Commission have been actually respected or remained only empty words.

3.1 HUNGARY

The analysis would start with the Hungarian case. Among the different special legal orders provided by the constitution to face emergencies,⁵⁵ the Hungarian government relied on the declaration of a 'state of danger' to respond to the pandemic.⁵⁶ Article 53 of the Hungarian Fundamental Law in force in 2020, indeed, recognized the

⁵² Venice Commission, CDL-PI(2020)003, *supra* n. 37, at 18–19.

⁵³ Venice Commission, CDL-AD(2008)004-e, *Report on the Democratic Control of the Armed Forces Adopted by the Venice Commission at Its 74th Plenary Session (Venice, 14–15 March 2008)* 59, para. 253 (23 Apr. 2008), [https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad\(2008\)004&lang=EN](https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2008)004&lang=EN) (accessed 24 Nov. 2025). Among fundamental rights, the Convention recognizes, indeed, a core of absolute rights, which are non-derogable even in times of emergency: the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, slavery, and the principle of non-retroactivity of criminal law. See Venice Commission, CDL-AD(2016)007, *Rule Of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016)* 13–14 (18 Mar. 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) (accessed 24 Nov. 2025).

⁵⁴ Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 16–17, paras 75–76.

⁵⁵ These were: a state of national crisis (former Arts 48–49); a state of emergency (former Arts 48–50); a state of preventive defence (former Art. 51); a state of terrorist threat (former Art. 51/A); unforeseen intrusion (former Art. 52); and a state of danger (former Art. 53). After the approval of the Ninth Amendment on 15 Dec. 2020, the provisions related to the special legal orders have been modified, providing, as of 1 Nov. 2022, only three special legal orders: a state of war (Art. 49), a state of emergency (Art. 50) and a state of danger (Art. 51).

⁵⁶ Government decree 40/2020.

government the power to declare a state of danger ‘*in the event of a natural or industrial disaster endangering life or property, or in order to relieve the consequences thereof*’. Among those circumstances, the Disaster Management Act⁵⁷ includes also an epidemic or a threat of an epidemic causing a mass illness. In these circumstances, the government is authorized to introduce through decrees extraordinary measures, which, on the basis of a cardinal law,⁵⁸ could also suspend or derogate from provisions of existing laws or limit some fundamental rights. Not considered sufficient, the framework provided by the 2011 cardinal law Disaster Management Act, the Parliament approved, on 30 March 2020, the Coronavirus Containment Act.⁵⁹ This new cardinal law, along with increasing the tools of measures available to the government, provided also the executive with the authorization to extend the effects of the decrees adopted during the state of danger until the end of the emergency. The duration of this period was not, though, set by the authorization act, but according to the Constitution was freely entrusted to the organ that declared it, namely, the government itself.⁶⁰ On 18 June 2020, the government ended the ‘state of danger’,⁶¹ while declaring a ‘state of medical crisis’ until 18 December 2020,⁶² and maintaining, through an act of the Parliament, the applicability of some measures beyond the end of the state of danger.⁶³ On 4 November 2020, the government declared a second ‘state of danger’⁶⁴ and on 10 November 2020, the Parliament gave the authorization to prolong the emergency measures for another ninety days.⁶⁵ In the impossibility of further prolongation of the authorization on the basis of the precedent one, in January 2021, the government ended the second state of danger⁶⁶ only to declare a new one on the same day and maintain the adopted measures.⁶⁷ With different authorizations given by the Parliament,⁶⁸ the applicability of the pandemic measures was extended until the

⁵⁷ Cardinal Law CXXVIII of 2011 on disaster management and amending certain related acts.

⁵⁸ An act adopted by the National Assembly by a two-thirds majority.

⁵⁹ Cardinal Law XII of 2020 on the containment of coronavirus.

⁶⁰ See former Art. 54 Fundamental Law of Hungary. It is relevant to notice that even in the new articles related to the common rules for special legal orders (now Arts 52–53), the decision on the termination of the special legal order is always on the body competent to introduce it.

⁶¹ Governmental decree 282/2020.

⁶² Governmental decree 283/2020. The state of medical crisis has been extended several times until Jun. 2022. See Hungarian Helsinki Committee, *Overview of Hungary's Emergency Regimes Introduced Due to the COVID-19 Pandemic* (Jun. 2022), https://helsinki.hu/en/wp-content/uploads/sites/2/2022/06/HHC_Hungary_emergency_measures_overview_01062022.pdf (accessed 24 Nov. 2025).

⁶³ Act LVIII of 2020. This act, named ‘Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness’, modified the rules of the state of medical crisis, widening the Government’s possibilities of applying extraordinary measures in case of a pandemic and making several provisions previously contained in governmental emergency decrees ordinary statutory norms. See Hungarian Helsinki Committee, *supra* n. 62, at 3–5.

⁶⁴ Government decree 431/2020.

⁶⁵ Act CIX of 2020.

⁶⁶ Government decree 26/2021.

⁶⁷ Government decree 27/2021.

⁶⁸ Act I of 2021, Act XL of 2021, Act CII of 2021 and Act CXXX of 2021.

undefined end of the state of danger. The end of that state of danger was declared on 24 May 2022, taking effect from 1 June 2022.⁶⁹ The state of danger in Hungary did not, however, come to an actual end. After the approval of the Tenth Amendment to the Hungarian Constitution on 24 May 2022, which introduced the possibility to declare a state of danger also in cases of armed conflict, war or a humanitarian catastrophe in a neighbouring country,⁷⁰ the government on the same day, even before terminating the one related to the pandemic, declared a new state of danger,⁷¹ this time justified by the Ukrainian conflict. In August 2022, the Parliament extended the applicability of the emergency measures until 1 November 2022,⁷² and, with an amendment introduced on 24 October 2022,⁷³ the government was granted the possibility to be authorized by the Parliament to extend, even more than once, the state of danger up to 180 days. The government promptly used this power, declaring a new state of danger from 1 November 2022 related to the war in Ukraine⁷⁴ and, authorized by the legislature,⁷⁵ continued with several acts⁷⁶ to extend the state of danger now valid until 13 May 2026.⁷⁷

Since the beginning of the pandemic, Hungary has been in a constant and permanent state of danger. The lack of strict time limit for these powers and the vagueness of their definitions, with the only reference to the fact that adopted measures should have been proportionate and necessary to combat the emergency,⁷⁸ left *carte blanche* to the government, which alone determined the line to follow.⁷⁹ The Parliament, which continued to work during the entire emergency period, could have indeed revoked the authorization given to the government, but the large majority enjoyed by the ruling party, made this scenario only theoretical.⁸⁰ Even the Constitutional Court, fully packed

⁶⁹ Government decree 181/2022.

⁷⁰ The state of danger is now regulated by Art. 51 Fundamental Law of Hungary.

⁷¹ It is interesting to notice indeed that the Government Decree ending the state of danger related to the pandemic is 181/2022, while the one declaring the state of danger related to the Ukrainian war is 180/2022 both of 24 May 2022.

⁷² Act VI of 2022.

⁷³ Act XXXII of 2022.

⁷⁴ Government Decree 424/2022.

⁷⁵ Act XLII of 2022, Act XI of 2023, Act LXXII of 2023, Act VIII of 2024, Act LIV of 2024, Act XXVI of 2025, Act LXXVII of 2025.

⁷⁶ Government Decree 479/2022, Government Decree 167/2023, Government Decree 515/2023, Government Decree 86/2024, Government Decree 330/2024, Government Decree 97/2025, Government Decree 343/2025.

⁷⁷ Government Decree 343/2025.

⁷⁸ Coronavirus Containment Act (Cardinal Law XII of 2020).

⁷⁹ Hungarian Helsinki Committee, *supra* n. 62, at 1.

⁸⁰ Tímea Drinóczi & Agnieszka Bieñ-Kacała, *COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism*, 8 Theory Pract. Legis. 171, 185 (2020), doi: 10.1080/20508840.2020.1782109. The large majority that the government enjoys in the Parliament makes almost ineffective also the new provision introduced on 15 Apr. 2025, by the Fifteenth Amendment to the Fundamental Law. This amendment, that modifying several parts of the constitution, intervenes also on the common rules for

during recent years, did not represent a bulwark against the government's decisions.⁸¹ On the contrary, the judges widely upheld the executive's emergency measures or refused to rule on them due to the inadmissibility of complaints, or the fact that the measures were no longer valid.⁸² The permanent state of danger and the absence of any checks allowed the executive to rule by decree introducing some controversial measures, which if not deemed unnecessary to tackle the emergency, are hard to be considered as proportionate. Those measures included the possibility for employers and employees to derogate from existing labour laws,⁸³ the imposition of state control on a listed company⁸⁴ and the regulation of fuel retail.⁸⁵ Other debatable decisions have been the extension of the time period granted to public authorities to respond to information requests⁸⁶ and the introduction of the crime of scare-mongering and spreading false information or distorted facts about the

special legal orders and in particular on those concerning the state of danger. The new formulation of Art. 53(1), which would enter into force on the 1 Jan. 2026, introduces, indeed, a differentiation for the requirements needed by the Government for both the suspension of the application of certain Acts and derogation from the provisions of Acts in the situation of a state of danger, from those required for the state of war and the state of emergency. While in state of war or emergency no authorization would be needed, for the state of danger an authorization granted for a definite period by the National Assembly with the votes of two thirds of the Members of the National Assembly would be requested. Despite the formulation could appear to increase the role of the parliament for the authorization of these acts, although incomprehensibly only for the state of danger, if the control of the governmental party on the legislature continues to be unchallenged, parliament's role would persist to be only nominal. For details on the Fifteenth Amendment to the Hungarian Fundamental Law, see Venice Commission, CDL-D(2025)043, *On the compatibility with International Human Rights standards of the Fifteenth Amendment to the Fundamental Law of Hungary, Adopted by the Venice Commission at its 144th Plenary Session (Venice, 9–10 October 2025)* (13 Oct. 2025), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2025\)043-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)043-e) (accessed 24 Nov. 2025).

⁸¹ Kriszta Kovács, *Hungary and the Pandemic: A Pretext for Expanding Power*, *Verfassungsblog* (11 Mar. 2021), <https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/> (accessed 24 Nov. 2025).

⁸² European Commission, *Commission Staff Working Document. 2022 Rule of Law Report. Country Chapter on the Rule of Law Situation in Hungary* 25 (13 Jul. 2022), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52022SC0517> (accessed 24 Nov. 2025); European Commission, *Commission Staff Working Document 2024 Rule of Law Report Country Chapter on the Rule of Law Situation in Hungary* 32 (24 Jul. 2024), https://commission.europa.eu/document/download/e90ed74c-7ae1-4bfb-8b6e-829008bd2cc6_en?filename=40_1_58071_coun_chap_hungary_en.pdf (accessed 24 Nov. 2025).

⁸³ Governmental decree 47/2020.

⁸⁴ Governmental decree 128/2020. See Council of the European Union, 2020/C 282/17, *Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and Delivering a Council Opinion on the 2020 Convergence Programme of Hungary* preamb. 27 (26 Aug. 2020), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H0826\(17\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H0826(17)&from=EN) (accessed 24 Nov. 2025).

⁸⁵ Government decrees 84/2022 and 94/2022.

⁸⁶ Governmental decree 521/2020 has restricted in practice freedom of information and immediate access to public data. The decree indeed establishes that the previous maximum term of thirty days within which public authorities performing public duties must provide access to data of public interest under their control is extended up to ninety days if providing the information could compromise the duties of the institution related to the state of emergency. See European Commission, *Commission Staff Working Document. 2021 Rule of Law Report. Country Chapter on the Rule of Law Situation in Hungary* 18 (20 Jul. 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0714&from=EN> (accessed 24 Nov. 2025).

pandemic punishable with imprisonment of up to eight years.⁸⁷ This last reform indeed not only introduced a permanent change in the Criminal Code, but, because the high penalties and the ambiguity of the text and the scope of the norm, it has been read as a way of promoting self-censorship on journalists to avoid the risk of persecution,⁸⁸ causing an indirect limit to freedom of expression.⁸⁹ Moreover, emergency governmental decrees, which in a state of danger could be used to derogate or suspend the application of certain acts, were also deployed to overrule some court judgments that were contrary to the interests of the executive, resulting in further limiting media freedom and the right to strike.⁹⁰ From the analysis of the Hungarian case, it emerges that the recommendations suggested by the Venice Commission have been barely followed. Notwithstanding the respect for the principle of legality, having the government formally followed the constitutional framework provided in the Fundamental Law to face the emergency, the same diligence could not be found with regard to the other principles. The starkest disregard could be noted towards the principle of temporariness of the measures. The applicability of part of them has indeed been repeatedly prolonged for almost five years as the states of danger and of medical crisis alternate, and the absence of definite sunset clauses made their own duration absolutely indeterminate. As seen, also the principle of necessity and proportionality have been more than once neglected, while the executive's control over both the Constitutional Court and the Parliament obliterates any trace of effective impartial scrutiny.

3.2 TUNISIA

In a semi-permanent state of state emergency since the terrorist attacks in 2015, the Tunisian government has always relied on decree No. 78-50 of January 1978 to tackle extraordinary situations.⁹¹ This decree, issued by President

⁸⁷ Csaba Győry, *Fighting Fake News or Fighting Inconvenient Truths?: On the Amended Hungarian Crime of Scaremongering*, Verfassungsblog (11 Apr. 2020), <https://verfassungsblog.de/fighting-fake-news-or-fighting-inconvenient-truths> (accessed 24 Nov. 2025).

⁸⁸ According to the Human Rights Watch by Jul. 2020, 'the police had launched 134 criminal investigations concerning "fear mongering". A majority of cases concern people who expressed critical comments on social media regarding the governments handling of the pandemic', in Human Rights Watch, *Hungary Events of 2020* (2021), <https://www.hrw.org/world-report/2021/country-chapters/hungary> (accessed 24 Nov. 2025).

⁸⁹ Krisztina Binder et al., PE 649.408, *States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States*, EPRS Briefings 7 (Jun. 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI\(2020\)649408_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf) (accessed 24 Nov. 2025).

⁹⁰ See European Commission, 2022, *supra* n. 82, at 25.

⁹¹ Antonio Manganella et al., *The Tunisian response to the Covid-19 Pandemic – When the State of Exception Overlaps With the State of Emergency*, Avocats Sans Frontières (1 Jul. 2021), <https://asf.be/the-tunisian-response-to-the-covid-19-pandemic-when-the-state-of-exception-overlaps-with-the-state-of-emergency> (accessed 24 Nov. 2025).

Habib Bourguiba under the previous 1959 Constitution, still regulates the state of emergency, establishing the possibility to declare it ‘*either in the event of imminent danger resulting from serious breaches of public order, or in case of events which, due to their severity, constitute a public calamity*’.⁹² The declaration extends the power of local governors and the Ministry of the Interior, authorizing them to promptly restrict fundamental rights, such as freedom of assembly, movement or strike, to combat the emergency. For a health emergency, along with the aforementioned decree, the Tunisian authorities decided for the first time to also activate two articles of the 2014 Constitution, namely Article 80 and Article 70. Article 80 recognized the President of the Republic, in case of an imminent danger threatening the nation’s institutions or the security or independence of the country, and hampering the normal functioning of the state, to take *any* measure required by the state of exception and so to guarantee the return to the regular functioning of the public authorities. Moreover, the article prescribed that during the state of exception, the Parliament cannot be dissolved and, on request of the Speaker of the Assembly or thirty members of parliament, the Constitutional Court could have ruled on the persistence of the state of exception. This control, though, could not be performed since the Constitutional Court is still not constituted.⁹³ Notwithstanding this evident absence, President Kaïs Saïed, on the basis of this provision, in March 2020 issued two decrees to proclaim a national curfew⁹⁴ and limit the movements and assembly of people,⁹⁵ without, however, specifying the scope or the duration of the restriction.⁹⁶ Meanwhile, on 12 April 2020, the Head of Government obtained the approval from the Parliament for an Enabling Act,⁹⁷ which under Article 70, paragraph 2, gave the Prime Minister the power to issue decree-laws with legislative character for a maximum period of two months and a specific aim, in that case, of course, tackling the pandemic. Differently from the power attributed to the President of the Republic, these decrees were limited in scope by the Enabling Act and needed the ratification of the Parliament after the period of authorization. These limits did not avoid the adoption of some measures considered disproportioned and unnecessary, such as those which allowed the arrest of people violating the

⁹² Article 1 Décret n° 78–50 du 26 janvier 1978, réglementant l’état d’urgence. The entire text could be found at <https://legislation-securite.tn/latest-laws/decret-n-78-50-du-26-janvier-1978-reglementant-letat-durgence/> (accessed 24 Nov. 2025).

⁹³ Venice Commission, *Tunisia, Observatory on Emergency Situations*, <https://www.venice.coe.int/files/EmergencyPowersObservatory/TUN-E.htm> (accessed 24 Nov. 2025).

⁹⁴ *Décret Présidentiel n° 2020-24*.

⁹⁵ *Décret Présidentiel n° 2020-28*.

⁹⁶ Both the decrees were repealed on the 8 Jun. by *Décret présidentiel n° 2020-58*.

⁹⁷ *Loi n° 2020-19*.

curfew, self-isolation or other sanitarian directives.⁹⁸ On 8 June 2020, the curfew was lifted, but the state of emergency persisted. Some days before indeed the President had extended the state of emergency.⁹⁹ From the beginning of 2020 to December 2022, the state of emergency has been renewed or prolonged nine times¹⁰⁰ to combat the pandemic, but, during the last two of those, something else was triggered. After having extended the state of emergency from 24 July 2021 to January 2022¹⁰¹ and after months of political deadlock with the government, President Saïed invoked Article 80 and, due to the incapacity of the government to efficiently tackle the country's economic difficulties and the pandemic situation, dismissed the government,¹⁰² suspended the activity of the Parliament and lifted Parliamentarians' immunity,¹⁰³ while stating to assume the executive authority with the aid of a new Prime Minister.¹⁰⁴ In September 2021, the President adopted a new presidential decree, which defined the organization of powers during a state of emergency,¹⁰⁵ primarily establishing that the legislative acts are taken in the form of decree-law promulgated by the President of the Republic after the deliberation of the Council of Ministers. Furthermore, the presidential decree indicated that these decree-laws are not subject to appeal for annulment and may regulate almost all public sectors, among which even the organization of constitutional bodies and the judiciary, the information and the press, freedoms and human rights, and the electoral law. Additionally, it also authorized the President to elaborate, with the assistance of a commission, revisional projects concerning political reforms to be submitted to a referendum for approval. On 13 December 2021, the President outlined a political roadmap, that included the announcement of a referendum on 22 July 2022 to approve a new

⁹⁸ *Décret-loi du Chef du gouvernement n° 2020-9*, and the *Arrêté du ministre de la santé du 21 août 2020, relatif à l'obligation de port de masques de protection dans les espaces et lieux publics*, for instance, explicitly recall Art. 315 of the Tunisian Penal Code which prescribes that: 'Est puni de six mois d'emprisonnement et de cent vingt dinars d'amende, quiconque aura contrevenu aux interdictions et mesures prophylactiques ou de contrôles ordonnés en temps d'épidémie'.

⁹⁹ *Décret présidentiel n° 2020-54*.

¹⁰⁰ *Décret présidentiel n° 2020-3*, *Décret présidentiel n° 2020-38* *Décret présidentiel n° 2020-54 du 29 mai 2020*, *Décret présidentiel n° 2020-134*, *Décret présidentiel n° 2020-164*, *Décret présidentiel n° 2021-59*, *Décret présidentiel n° 2021-67*, *Décret Présidentiel n° 2022-43*, *Décret Présidentiel n° 2022-73*, *Décret Présidentiel n° 2022-73*.

¹⁰¹ *Décret présidentiel n° 2021-67*.

¹⁰² *Décret présidentiel n° 2021-69*.

¹⁰³ *Décret présidentiel n° 2021-80*. The suspension of the Parliament, formally not forbidden by Art. 80, which precluded only the dissolution of the Assembly, has been then prolonged for an indefinite time by *Décret Présidentiel n° 2021-109*.

¹⁰⁴ See TUNISIA: PM Dismissed, 58 Afr. Res. Bull. Pol. 1 (1–31 Jul. 2021), doi: 10.1111/j.1467-825X.2021.10072.x.

¹⁰⁵ *Décret Présidentiel n° 2021-117*.

constitution and new elections on 17 December 2022.¹⁰⁶ On 30 March 2022, the President dissolved the Parliament¹⁰⁷ and on 22 July the draft of the Constitution, published in the Official Gazette only at the end of June, was approved by approximately 95% of the voters, but with a turnout of only 30% of the electorate.¹⁰⁸ The new Constitution, promulgated on 17 August 2022,¹⁰⁹ abandons the semi-presidential system to establish a hyper-presidential one, with the President controlling the government, exercising the legislative initiative and appointing the judges on the proposal of the Supreme Justice Council.¹¹⁰ As for now, Tunisia remains in a state of emergency (*état d'urgence*) prolonged until 31 December 2025.¹¹¹

For the sake of our analysis, the approach to the pandemic in Tunisia should be thus divided into two phases. In the first one, from the beginning of the pandemic to July 2021, the government and the President proved to be responsible, acting in a manner that respected, in most cases, the general legal framework and the limits and the prerogatives of the other organs provided for by the Constitution.¹¹² However, even in that phase, some criticisms could be moved. On the one hand, as has been done also in the second phase, the principle of temporariness of the measures has been jeopardized by the continuous introduction or prolongment of the state of emergency, using a norm, decree No. 78-50, which, additionally, appeared to be in contrast with Article 49 of the 2014 Constitution,¹¹³ which stated that limits on rights and freedoms must have been set by the law. On the other, as argued above, also the proportionality or the necessity of some measures is questionable. As for the second phase, after the President seized power, the violation of the Commission's principles seems to be more manifest. The measures President Saïed took to solve the crisis are beyond any reasonable principle of legality, proportionality or necessity. The determination to, firstly, suspend the Parliament, for the Constitution would have formally impeded a dissolution,¹¹⁴ to self-attribute the legislative function, and the decision to provide a new procedure by decree to alter the Constitution are all

¹⁰⁶ Umberto Profazio, *A Presidential Roadmap to Reset Tunisia's Politics*, NATO Defense College Foundation (27 Dec. 2021), <https://www.natofoundation.org/maghreb/a-presidential-roadmap-to-reset-tunisia-politics/> (accessed 24 Nov. 2025).

¹⁰⁷ *Décret présidentiel n°2022-309*.

¹⁰⁸ Frank Eardley, *Tunisian Constitutional Referendum and Reform*, House of Lord Library (29 Jul. 2022), <https://lordslibrary.parliament.uk/tunisian-constitutional-referendum-and-reform/> (accessed 24 Nov. 2025).

¹⁰⁹ *Décret Présidentiel n° 2022-691*.

¹¹⁰ Francesco Biagi, *Tunisia: la Costituzione di Kais Saïed, Diritti Comparati* (28 Jul. 2022), <https://www.diritticomparati.it/tunisia-la-costituzione-di-kais-saied/> (accessed 24 Nov. 2025). See also, Francesco Biagi, *Constitution-Building After the Arab Spring. A Comparative Perspective* (Cambridge University Press 2025).

¹¹¹ *Décret n° 2022-959, Décret n° 2023-47, Décret n° 2024-97, Décret n° 2024-713, Décret n° 2025-74*.

¹¹² Manganella et al., *supra* n. 91.

¹¹³ Aymen Briki, *Inherited Confusion: COVID-19, Tunisian Democracy, and the Adoption of the French Doctrine*, Verfassungsblog (18 Jun. 2020), <https://verfassungsblog.de/inherited-confusion/> (accessed 24 Nov. 2025).

¹¹⁴ Article 80 of the 2014 Tunisian Constitution.

indeed in stark violation of the principle of legality. Moreover, the choice to reshape the entire constitutional system is also against both principle of necessity and temporariness of the measures, since extraordinary measures should be used only to tackle the emergency and should cease once it is over. A permanent change, as a new constitution, will indeed persist and should have been avoided in emergency times,¹¹⁵ especially when political debate on it has not been guaranteed.¹¹⁶ The absence of a Constitutional Court and, lastly, the dissolution of the Parliament eliminated any possible, even only formal, scrutiny of the action of the President, who, under the new constitution reinforces his independency from other institutional controls. Not only does the new Constitution remove the possibility for the Parliament to impeach the President,¹¹⁷ but it also establishes that in case of imminent danger, the President could adopt extraordinary measures without the scrutiny of the Constitutional Court,¹¹⁸ as previously prescribed by the old Article 80, and, if this danger hinders the possibility of holding new presidential elections, the Presidential mandate is prolonged.¹¹⁹

3.3 TURKEY

Unlike the previously described cases, Turkey's authorities decided not to rely on the constitutional provisions to tackle the pandemic. Although Article 119 of the Turkish Constitution recognizes the President the power to declare a state of emergency also in case of an outbreak of dangerous epidemic diseases,¹²⁰ the Turkish government decided to rely mainly on other provisions to fight the pandemic, in particular circulars and administrative acts.¹²¹ The legal framework would have been supplied, according to the authorities, by two laws, namely, the Law on Protection of Public Health,¹²² and the Law on Provincial Administration.¹²³ The former, according to Article 27, grants Public Health Councils the power to adopt

¹¹⁵ Venice Commission, CDL-AD(2020)014, *supra* n. 37, at 5, para. 13.

¹¹⁶ Venice Commission, CDL-AD(2022)017, *Tunisia – Urgent Opinion 'on the constitutional and legislative framework on the referendum and elections announcements by the President of the Republic, and in particular on the decree-law n°22 of 21 April 2022 amending and completing the Organic law on the independent High Authority for Elections (ISIE)'* 16 (21 Jun. 2022), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)026-e) (accessed 24 Nov. 2025).

¹¹⁷ Former Art. 88.

¹¹⁸ New Art. 96.

¹¹⁹ New Art. 90, para. 6.

¹²⁰ The state of emergency is, in addition, thoroughly regulated by Law on State of Emergency of 25 Sep. 1983 (No. 2935).

¹²¹ Serdar Ünver, *Fighting COVID-19 – Legal Powers, Risks and the Rule of Law: Turkey*, Verfassungsblog (15 Apr. 2020), <https://verfassungsblog.de/fighting-covid-19-legal-powers-risks-and-the-rule-of-law-turkey> (accessed 24 Nov. 2025).

¹²² Law No. 1593 of 24 Apr. 1930.

¹²³ Law No. 5442 of 10 Jun. 1949.

all the measures deemed necessary to improve sanitary conditions and eliminate threats against public health, meanwhile indicating, in Article 57, the measures that could be adopted in case of a pandemic or epidemic (e.g., medical examination for travellers, quarantine for infected people, closure of infected public areas). The latter, under Article 11/C, authorizes the local authorities to take any measure to guarantee safety, peace, security, personal liberty and public welfare in their provinces, with the possibility to restrict, for instance, the entrance and exit to people suspected to disrupt public order or public safety to certain places, or limit gathering, driving or walking at certain times or in certain places.¹²⁴ Referring to these articles, the government, and in particular, the Ministry of Interior, issued, since the first reported Turkish Covid case, a series of circulars aiming at limiting the movements of the people and avoiding the spreading of the disease.¹²⁵ Since March 2020 and throughout the pandemic, circulars and administrative acts have been deployed to introduce and remove measures concerning every aspect of people's private and public life, imposing curfews and lockdowns,¹²⁶ introducing the obligation to wear face masks or requesting Covid tests,¹²⁷ restricting commercial activities,¹²⁸ gatherings and events,¹²⁹ and limiting internal and international travel.¹³⁰

The choice to rely on those acts, though, raises more than a few doubts, especially under the principle of legality. The state of *unofficial emergency*¹³¹ in which Turkish authorities have regulated the pandemic, caused, primarily, concerns with respect to freedoms and rights limitations. If during a declared state of emergency, the Constitution recognizes the power of the President to restrict them also by decree,¹³² in ordinary time, restrictions on fundamental rights can be

¹²⁴ Venice Commission, *Turkey, Observatory on Emergency Situations*, <https://www.venice.coe.int/files/EmergencyPowersObservatory/TUR-E.htm> (accessed 24 Nov. 2025).

¹²⁵ For a detailed analysis of the measures and circulars references, see Serkan Koybasi, Volkan Aslan & Naciye Betül Haliloğlu, *Turkey: Legal Response to Covid-19*, in *The Oxford Compendium of National Legal Responses to Covid-19* (J. King et al., eds, Oxford University Press 2021), doi: 10.1093/law-occ19/e33.013.33.

¹²⁶ Ministry of the Interiors Circular 21 Mar. 2020; Ministry of the Interiors Circular 5 Apr. 2020, Ministry of the Interiors Circular 10 Apr. 2020, Ministry of the Interiors Circular 10 Nov. 2020, Ministry of the Interiors Circular 1 Dec. 2020, Ministry of the Interiors Circular 30 Mar. 2021, Ministry of the Interiors Circular 14 Apr. 2021, Ministry of the Interiors Circular 26 Apr. 2021.

¹²⁷ Ministry of the Interiors Circular 3 Apr. 2020, Ministry of the Interiors Circular 8 Sep. 2020, Ministry of the Interiors Circular 4 Mar. 2022.

¹²⁸ Ministry of the Interiors Circular 16 Mar. 2020, Ministry of the Interiors Circular 18 Nov. 2020, Ministry of the Interiors Circular 30 Mar. 2021.

¹²⁹ Ministry of the Interiors Circular 16 Mar. 2020, Ministry of the Interiors Circular 13 Jun. 2020, Ministry of the Interiors Circular 30 Dec. 2020, Ministry of the Interiors Circular 2 Mar. 2021.

¹³⁰ Ministry of the Interiors Circular 13 Mar. 2020, Ministry of the Interiors Circular 28 Mar. 2020, Ministry of the Interiors Circular 26 Apr. 2021.

¹³¹ Volkan Aslan, *Turkeys Struggle Against COVID-19 and the New Reign-by-Administrative-Act*, IACL-IADC Blog (16 Jul. 2020), <https://blog-iacl-aidc.org/2020-posts/2020/7/16/turkeys-struggle-against-covid-19-and-the-new-reign-by-administrative-act> (accessed 24 Nov. 2025).

¹³² Articles 15 and 119 Turkish Constitution.

made, according to Article 13 of the Turkish Constitution, ‘*only by the law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence*’. Therefore, those limitations must be contained directly in an act of the Parliament or must be specifically authorized by it, respecting the constitutional prescriptions. The government invoked the two above-mentioned laws to justify its measures, but the cover provided by those does not appear to be sufficient, since they were not conceived to generally limit constitutional rights, but to deal only with specific situations.¹³³ The Law on Protection of Public Health allows the application of the restrictions only to infected people, suspected of being infected or determined to be contagious, and thus hardly provides a legal basis to undifferentiated or preventive restrictions on the entire non-infected population unless considering everyone as *suspected* of being infected.¹³⁴ Similarly, also the application of the Law on Provincial Administration needs a broad interpretation to be applicable to the current case.¹³⁵ The Law indeed does not specifically refer to public health or pandemic, but to public order or security. Moreover, when the norm attributes the power to limit entrance or exit in the provinces, it expressively applies to people suspected of having the potential to disrupt public order or public security. Also in that case, it would be questionable to consider everyone as a public danger to justify the application of the norm.¹³⁶ If thus, generally, the legal framework adopted could be deemed legally and constitutionally problematic to cover the measures taken, some measures would in any way be outside its scope, standing so without any legal basis. One of those would be the introduction of the prohibition to accept health workers’ resignations, which, despite being imposed with a circular, according to the sectorial law, could be enacted only under a state of emergency.¹³⁷ Another concern related to the principle of legality due to the use of administrative acts regards the publicity and accessibility of the legal texts. These acts are indeed not published in the Official Gazette, making it complex to consult their content and be aware of the exact approved restrictions.¹³⁸ Likewise, this lack of publicity, along with the absence of a proclaimed state of emergency, renders uncertain even knowing the precise duration of the measures, consequently threatening also the principle of

¹³³ Ünver, *supra* n. 121.

¹³⁴ Başak Çalı & Emre Turkut, *Year One: Reflections on Turkey's Legal Responses to the COVID-19 Pandemic*, Verfassungsblog (16 Mar. 2021), <https://verfassungsblog.de/year-one-reflections-on-turkeys-legal-responses-to-the-covid-19-pandemic> (accessed 24 Nov. 2025).

¹³⁵ Selin Esen, *Impacts of the COVID-19 Pandemic on the Constitutional Rights in Turkey*, in *Covid-19 and Constitutional Law* 215 (José M. Serna de la Garza coord., Instituto de Investigaciones Jurídicas de la UNAM 2020).

¹³⁶ Çalı & Turkut, *supra* n. 134.

¹³⁷ Ünver, *supra* n. 121.

¹³⁸ Esen, *supra* n. 135, at 216–217.

temporariness. As for the principle of proportionality or necessity, it has been noted that the application of certain measures had been quite arbitrary if not discriminatory. The most evident one pertains to the limitation on freedom of assembly. In many cases, with the excuse of avoiding the contagion, authorities have indeed inhibited peaceful rallies of oppositional parties, students or bar associations protesting against governing party's decisions, while allowing gatherings sponsored by the government.¹³⁹ Dubious appeared also the total prohibition for people over sixty-five, under twenty or suffering from chronic diseases during the first lockdown to leave their house even for a stroll, unless belonging to certain specified categories.¹⁴⁰ Furthermore, the use of decrees and circulars hindered the control of the Parliament and the courts. In a state of emergency, according to the Constitution, the measures adopted by the President must be sent to the Assembly which needs to approve them within three months. If they are not approved, they will be automatically annulled.¹⁴¹ On the contrary, circulars and other administrative acts do not need Parliamentary approval and so they are indeed outside the scope of its oversight.¹⁴² As for jurisdictional control, being administrative acts, they must be brought to the attention of the administrative courts. Even the Turkish Constitutional Court refrained from issuing a decision on a case concerning the legality and proportionality of the curfew, recognizing the administrative nature of the measure and thus the jurisdiction of the administrative judges.¹⁴³ The choice to adopt a formalistic approach, to refuse to decide in a case concerning human rights and personal freedom, when the legality of the measures is controversial, in a climate of not-declared emergency, weakens the role of the highest court, which seems to worryingly move towards undue deference to the executive.¹⁴⁴

4 A 'LONG COVID' EFFECT: THE WORSENING OF A DEGRADING PATH

The analysis of the reported cases conducted in this article shows a general disrespect by the countries' authorities to the recommendations and the principles proposed by the Commission and the Council of Europe. The disregard towards these parameters underlines the authoritarian and antidemocratic path that the

¹³⁹ Çalı & Turkut, *supra* n. 134.

¹⁴⁰ Köybaşı et al., *supra* n. 125.

¹⁴¹ Article 119 Turkish Constitution.

¹⁴² Ünver, *supra* n. 121.

¹⁴³ TCC, *Senih Ozay*, Individual App No 2020/13969, 9 Jun. 2020.

¹⁴⁴ Emre Turkut, *Emergency Powers, Constitutional (Self-)Restraint and Judicial Politics: The Turkish Constitutional Court During the COVID-19 Pandemic*, 4 *Jus Cogens* 263, 281–282 (2022), doi: 10.1007/s42439-022-00064-7.

international organizations would have hoped to prevent. Instead of guaranteeing the balance needed to preserve the constitutional values in times of emergency, the governments of these states exploited the pandemic to strengthen their power, tipping the democratic scale in their favour and undermining the fragile or already compromised constitutional equilibrium. The leaders in power while disrespecting the principles of the Commission – i.e., the principles of legality, proportionality, necessity, temporariness and scrutiny of the measures – even employed some of the typical instruments, above described – changing the Constitution, altering the checks and balances system, reducing fundamental rights’ protection – to degrade a constitutional system. In two countries, Hungary and Tunisia, the executive, indeed, intervened, to face contingent issues, with permanent constitutional changes either to amend or to rewrite the constitution. In both cases, these lasting changes reinforced the role of the government allowing it to preserve its power and exercise it with fewer constraints even beyond the end of the pandemic, and thus confounding the checks and balances system. Admittedly, the controls on the executive have been poor during the pandemic even without these constitutional changes. The role of the Parliament, which continued working during the whole pandemic, has been assertive to the government both in Hungary and in Turkey, letting the executive have absolute command of the measures to take. In Tunisia, until 2021, the Parliament limited the scope of the action of the Prime Minister but seemed to be impotent before the power of the President, who, as a result of the non-existence of the Constitutional Court, exercised its prerogatives (and more) with virtually no limit. Even in the other two countries, though, the judicial control proved not to be a proper safeguard. Although some ordinary judges challenged and annulled certain sanctions or measures imposed by the authorities, the highest courts, packed or submissive, upheld the decisions of the governments or simply avoided deciding on them deeming the cases as inadmissible for technical or formalistic reasons, even when human rights were at stake. The absence of almost any form of control, also for the choice to rely on administrative or other uncheckable acts, granted the political actors to introduce the most disparate and disproportional measures, even unrelated to the pandemic, providing a veil for targeted discrimination,¹⁴⁵ and contributing to further erode the constitutional system. Abusing their position, authorities issued sanctions against the media and the press for spreading false information¹⁴⁶ or limited for sanitary reasons the rights

¹⁴⁵ Joelle Grogan, *Power, Law and the COVID-19 Pandemic – Part II: Preparing for Future Emergencies*, Verfassungsblog (15 May 2021), <https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-ii/> (accessed 24 Nov. 2025).

¹⁴⁶ Even Tunisian and Turkish authorities adopted new acts to punish more severely *disinformation*. See Art. 24 of *Décret-loi n° 2022-54 du 13 septembre 2022, relatif à la lutte contre les infractions se rapportant aux systèmes d’information et de communication* and Ruth Michaelsonin, *Turkey: New Disinformation Law Could Jail Journalists for Three Years*, The Guardian (13 Oct. 2022), <https://www.theguardian.com/world/>

to manifest of activists and opposition leaders. Besides, as seen, some restrictions on personal freedoms were imposed beyond the limits and the scope provided by the law, and in some cases, even without any legal basis. The measures adopted during the pandemic in contrast with the framework proposed by the Commission manifest an evident degradation of the described countries undertaken by exploiting the lacks and weaknesses of the existing systems. The prospects of relinquishment of this path due to the leaders currently in charge do not seem realistic and the continuous persistency of a state emergency state, even now, contribute to a 'long covid' effect on the constitutional and legal frameworks. As for the covid patient with pre-existing diseases, the countries already experiencing a constitutional degradation seemed to have suffered more severe and persistent consequences. In addition, without secure limits to the actions of these leaders and the elimination of these effects, following the Venice Commission principles, the protraction of this trend could also potentially bring another detrimental long-term effect: the risk that people living in these countries will get accustomed to this less democratic status quo and begin to believe that persistent limitations to freedoms and rights represent the natural condition of a healthy democracy and not the symptom of its demise.

2022/oct/13/turkey-new-disinformation-law-could-jail-journalists-for-3-years (accessed 24 Nov. 2025). See also Venice Commission, CDL-AD(2022)034, *Türkiye – Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Penal Code regarding the provision on 'false or misleading information', issued pursuant to Art. 14a of the Venice Commission's Rule of Procedure, endorsed by the Venice Commission at its 132nd Plenary Session, (Venice 21–22 October 2022)* (21 Oct. 2022), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)034-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)034-e) (accessed 24 Nov. 2025).