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STATES OF EMERGENCY AND THE RULE OF LAW: A PRIMER



Further Reading

American Association for the International Commission of Jurists (1985). Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

Council of Europe (2020). Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states.

Democracy Reporting International and The Carter Center (2012). Strengthening International Law to Support Democratic Governance and Genuine Elections.

Organization for Security and Co-operation in Europe (2012). Human Dimensions Commitments, notably documents from the Moscow and Copenhagen meetings.

European Commission for Democracy Through Law (Venice Commission) (2006). Opinion on the Protection of Human Rights in Emergency Situations.

European Commission for Democracy Through Law (Venice Commission) (2020). Compilation of Venice Commission Opinions and Reports on States of Emergency.


United Nations Human Rights Committee (2001). CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency.

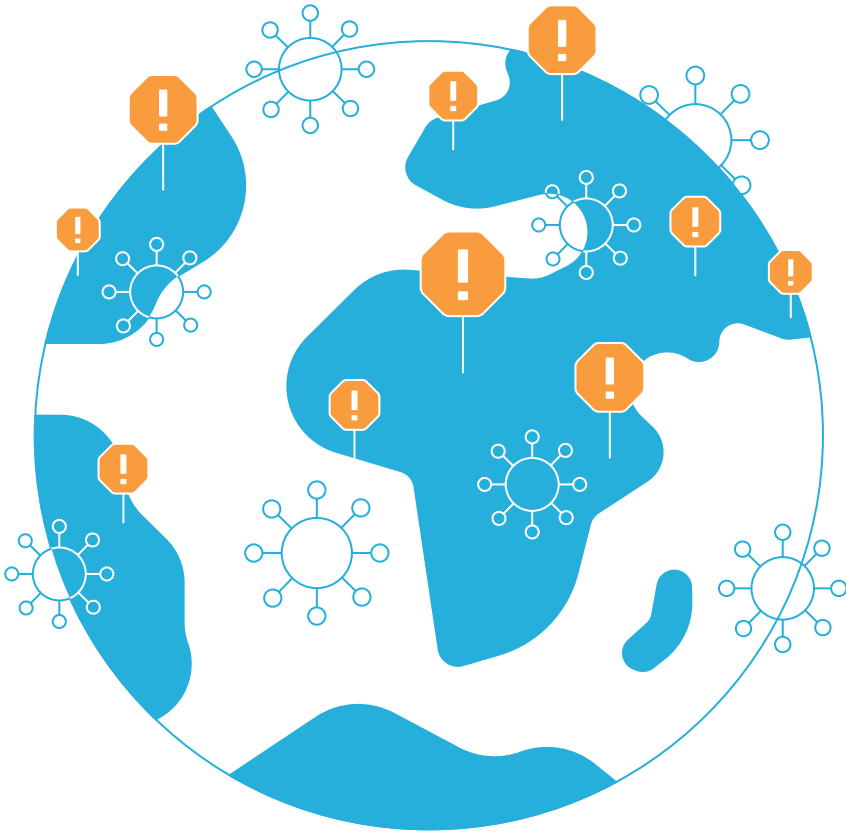
re:constitution Exchange and Analysis on Democracy and the Rule of Law in Europe

This publication was produced by Democracy Reporting International as part of the re:constitution programme, which is implemented with Forum Transregionale Studien and funded by Stiftung Mercator.

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April 2020

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Introduction: Why does this matter now?

As the covid-19 pandemic spreads, governments around the world have introduced strict measures to fight off the virus. Freedom of movement is significantly limited in many places while democratic and electoral processes, as well as rule of law guarantees, are altered.

Many of these measures represent states of emergency, whether they have been formally called so or not. In order to help assess the legitimacy of the actions taken by different states, DRI provides some background on the definition, benefits and dangers as well as international standards on the concept.

What is a state of emergency?

A state of emergency is a special legal regime designed for extraordinary circumstances, such as war, internal upheaval and natural disasters. It enables the government to act in ways that it could not under the ordinary legal framework. This may be

necessary for states to be able to react quickly and effectively to an imminent danger. While many legal systems across the world include state of emergency provisions, the specific powers they grant vary significantly.

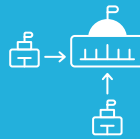
For example, states of emergency may allow



Derogation from human rights protection: in order to deal with the emergency, the state can derogate, i.e. limit more severely than usually possible, from the protection of some human rights such as freedom of movement. It is important to note that other rights, such as the prohibition of torture, can never be derogated from.



A shift of powers toward the executive: as emergencies tend to require swift action, these provisions often include strengthening the executive and weakening legislatures.



A shift of powers toward the central government in federal systems: competences at the regional or local level may be shifted toward the central government to safeguard a coordinated, efficient response to the threat.



Use of armed forces: a state of emergency may facilitate the mobilisation of the armed forces at home, for example to provide aid during a natural disaster.



Access to specific funds: a declaration of emergency may be necessary to tap special funds, for example for emergency relief.

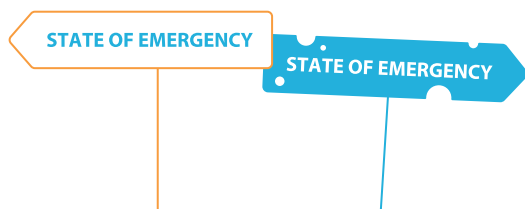
States of emergency can take different forms; they may be anchored in the constitution or in a dedicated law. While they are often officially proclaimed, countries sometimes adopt measures amounting

to a state of emergency, which significantly restrict human rights, democracy and the rule of law to counter a threat, without any declaration. This is a so-called *de facto* state of emergency.

Is a state of emergency a bad thing?

States of emergency have a bad name because they have often been abused by dictators to suspend democratic constitutions and human rights protections over long periods of time. However, the concept of state of emergency is commendable from a rule of law standpoint: it clearly signals that the normal functioning of the state cannot be maintained. It also indicates and provides a legal basis for the special regime put in its place, thus helping ensure legality and legal certainty.¹ In this regard, a formal declaration of a state of emergency is preferable to a *de facto* state of emergency.

However, all forms of states of emergency bear significant risks of abuse, as their historical track records show. Governments can exploit them to concentrate power and undermine the constitutional order in the long term. Therefore, for states of emergency to be justifiable in a democracy they must comply with the following standards which are set out in international and regional treaties and commitments.



What are the international standards for a legitimate state of emergency and how do they apply to the covid-19 pandemic?

International standards on states of emergency are clearest when it comes to human rights law. Almost all leading international and regional human rights treaties recognize that special situations require special responses and include provisions on states of emergency.² Commitments and toolkits issued by international organisations such as the Council of Europe and the Organization for Security and Co-operation in Europe provide appropriate standards on democratic governance and accountability during emergencies.

The following safeguards are based on this international framework and must be observed for a legitimate state of emergency. You can also compare these to how they might be applied during the covid-19 pandemic.

1. For more on the rule of law and its central components, see our publication *Components of the Rule of Law in the European Union: A Primer*.

2. Notably: Article 4 of the International Covenant on Civil and Political Rights, Article 4 of the International Covenant on Economic, Social and Cultural Rights, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights.

Requirements

Legality

Any measures taken must be foreseen by law and fall within the relevant constitutional or statutory regime, whether emerging from the legal text or the jurisprudence of constitutional courts. A common feature in many legal systems is the constitutional requirement for human rights derogations to be enshrined in a law approved by parliament or in an extraordinary decree issued by the government that is later subject to parliamentary confirmation.

Proportionality

This principle is a common feature of human rights law. During an emergency, any measures taken must be 'strictly required by the exigencies of the situation'. This means that they must be aimed at averting the threat and represent the least invasive, effective method to achieve this objective.

Time limit

A state of emergency should be limited in time and, where possible, in geographical reach. Historically, one of the biggest dangers concerning states of emergency has been their extension for decades based on vague reasons such as ensuring 'national security'. As a result, many emergency laws feature 'sunset clauses', which provide that the law automatically ceases to have effect after a certain period unless it is extended by parliament.

Non-derogable rights

Some rights may never be derogated from. While the list of non-derogable rights varies in different treaties, they all include the right to life, the prohibition of torture, the prohibition of slavery and the prohibition of retroactive punishment.

Compatibility with other international obligations

Even in the event of derogation, states continue to be bound by their other international obligations, such as international humanitarian law during armed conflict or the fundamental principles of fair trial.

Non-discrimination

No derogation from human rights protection may amount to discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Rule of law and the right to an effective remedy

Court activity may be affected by an emergency. While adjustments to the functioning of judicial and other procedures may be necessary, states continue to be under the obligation to provide an effective remedy for any human rights violation, as well as guarantee the right to go to court in urgent matters.

Parliamentary oversight

Parliaments should continue to work and be able to modify or annul decisions by the executive.



Governments must take swift actions to fight the virus, but all emergency measures must be constitutional and foreseen by law or a decree that is subject to parliamentary confirmation.

The fast spread of covid-19 is highly dangerous and the virus is not yet well known. Putting in place restrictive measures to prevent a catastrophic breakdown of health systems resulting in massive loss of life is justified. However, the measures taken must always be clearly related to suppressing the spread of the virus and as knowledge of the virus grows, responses should be better adapted. For example, rather than prohibiting demonstrations outright, social distancing conditions could be imposed.

The spread of the coronavirus does not justify very long or unlimited states of emergency. The effects of emergency measures can be assessed within the first few weeks, after which they must be regularly reviewed. Extensions need to be duly justified. For example, it may be justified to postpone elections, but a postponement well beyond the current emergency would violate the right to vote and stand in periodic elections.

While these non-derogable rights have presented less controversy in the covid-19 pandemic than during previous counter-terrorism related states of emergency, it is essential that states continue to uphold these core human rights during any crisis.

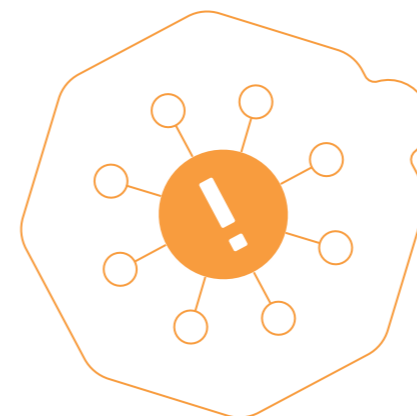
Emergency measures to counter covid-19 do not suspend a state's other international obligations, including in the realm of economic, social and cultural rights, which are heavily affected by the crisis.

In the design of any measures to combat the virus, states must be mindful that they do not discriminate against certain groups.

The right to an effective remedy is weakened where court proceedings have been slowed down or halted due to social distancing or staff being sick. However, states should ensure that essential court cases are dealt with, particularly challenges against emergency measures, urgent criminal cases or civil and administrative cases where the court must intervene to halt harmful actions. This might entail that courts quickly adopt the means to conducting hearings online or with remote participation, where appropriate.

Despite social distancing rules, parliaments should be able to meet, deliberate and vote. Countries have taken different steps to achieve this aim, for example by allowing virtual deliberations and voting or by lowering the quorum so that less members can pass laws in a valid manner while ensuring opposition rights.

Application to covid-19 pandemic



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