
EMERGENCY LAW RESPONSES AND THE COVID-19 PANDEMIC

Global State of Democracy Thematic Paper 2021



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Contents

Acknowledgements	iv
About the technical paper	v
Summary of key facts and findings	vii
Key facts and findings	viii
Introduction	x
Chapter 1	
Emergency powers and their legal basis	1
1.1 Constitutional emergency regimes	2
1.2 The legislative model of emergency governance	4
1.3 'Other' or ambiguous legal bases for emergency powers	5
Chapter 2	
Safeguards and constraints on abuse of emergency powers	6
2.1 International standards	6
2.2 Constitutional emergency regime safeguards	7
2.3 Safeguards under the legislative model	9
2.4 Safeguards and risks with 'other' emergency response approaches	10
2.5 Checks and constraints in multi-level governance systems	10
Chapter 3	
Why might a state apply a particular legal basis or combination?	11
3.1 Sufficiency of legal grounds and extant laws in place	11
3.2 History and experience with emergencies	11
3.3 The political environment	12
3.4 Legitimacy and legitimation issues	12
3.5 Institutional strengths and structures	12
3.6 Presence and levels of conflict	12
3.7 The prevalence and spread of Covid-19	13
3.8 Structure of the state (multi-level governance systems)	13
Chapter 4	
Risks to democracy related to the use of emergency law regimes	14
4.1 The risk of 'permanent' emergencies	14
4.2 The risk of securitization of emergency responses	14
4.3 The risk of abuse and opportunism	15
4.4 Potential risks facing states engaged in one or more types of transition	16
Chapter 5	
Conclusion	17

Chapter 6

Policy recommendations

18

Annex A. Legal bases for emergency powers, potential risks to democracy and common safeguards	21
Endnotes	22
About International IDEA	30

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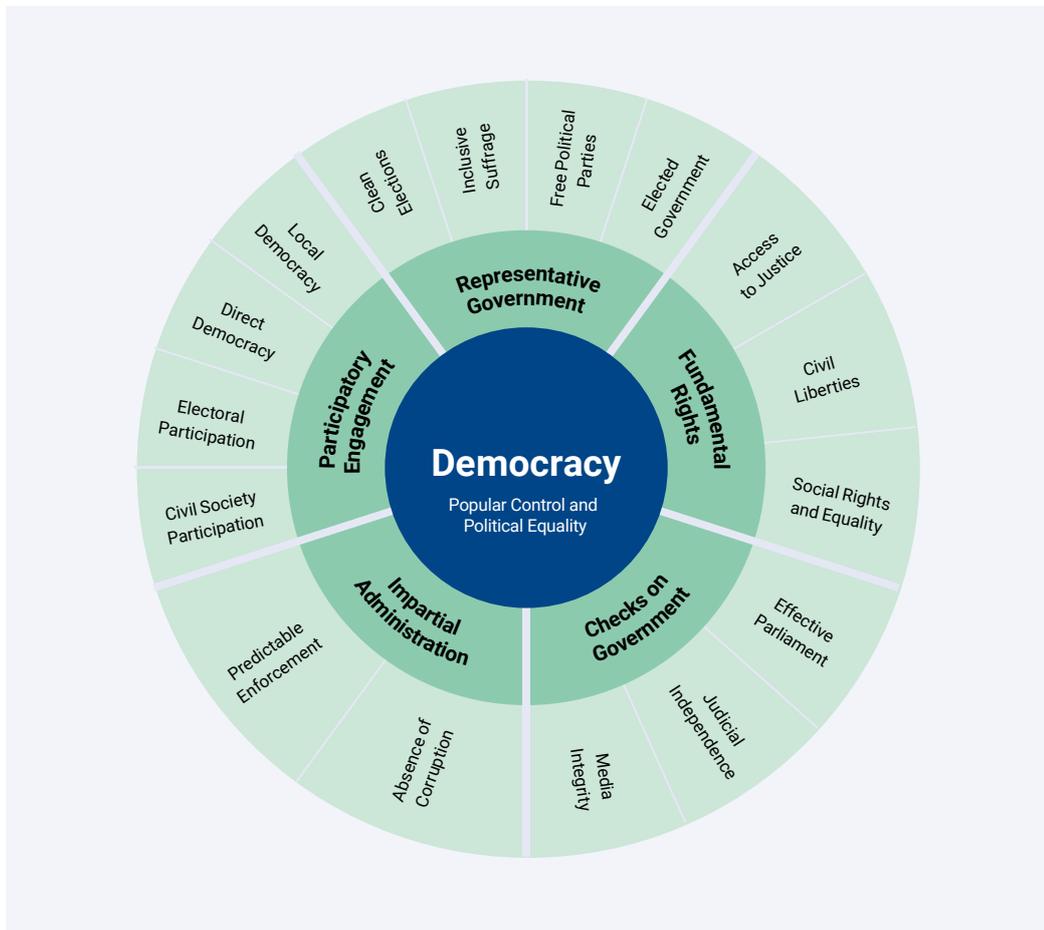
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About the technical paper

International IDEA's *The Global State of Democracy (GSoD) 2021* reviews the state of democracy around the world over the course of 2020 and 2021, with democratic trends since 2015 used as contextual reference. It is based on analysis of events that have impacted democratic governance globally since the start of the pandemic, based on various data sources, including International IDEA's [Global Monitor of Covid-19's Impact on Democracy and Human Rights](#), and International IDEA's [Global State of Democracy \(GSoD\) Indices](#). The Global Monitor provides monthly data on pandemic measures and their impact on democracy for 165 countries in the world. The GSoD Indices provide quantitative data on democratic quality for the same countries, based on 28 aspects of democracy up until the end of 2020. Both data sources are developed around a conceptual framework, which defines democracy as based on five core attributes: Representative Government, Fundamental Rights, Checks on Government, Impartial Administration, and Participatory Engagement (see Figure 1).

FIGURE 1

The GSoD conceptual framework



This thematic paper is part of a series on The Global State of Democracy, which complement and cross-reference each other. The report has a global focus, and it is accompanied by four regional reports that provide more in-depth analysis of trends and developments in **Africa and the Middle East**; the **Americas** (North, South and Central America, and the Caribbean); **Asia and the Pacific** and **Europe**. It is accompanied by two additional thematic papers that allow more in-depth analysis and recommendations on how to manage **electoral processes** and **how democracies and non-democracies fared** based on lessons learned from the pandemic.

CONCEPTS IN THE GLOBAL STATE OF DEMOCRACY 2021

- The reports refer to three main regime types: *democracies*, *hybrid* and *authoritarian regimes*. Hybrid and authoritarian regimes are both classified as non-democratic.
- *Democracies*, at a minimum, hold competitive elections in which the opposition stands a realistic chance of accessing power. This is not the case in *hybrid* and *authoritarian* regimes. However, *hybrid* regimes tend to have a somewhat more open – but still insufficient – space for civil society and the media than *authoritarian* regimes.
- *Democracies* can be *weak*, *mid-range performing* or *high-performing*, and this status changes from year to year, based on a country's annual democracy scores.
- *Democracies* in any of these categories can be backsliding, eroding and/or fragile, capturing changes in democratic performance over time.
 - Backsliding democracies are those that have experienced gradual but significant weakening of Checks on Government and Civil Liberties, such as Freedom of Expression and Freedom of Association and Assembly, over time. This is often through intentional policies and reforms aimed at weakening the rule of law and civic space. Backsliding can affect democracies at any level of performance.
 - Eroding democracies have experienced statistically significant declines in any of the democracy aspects over the past 5 or 10 years. The democracies with the highest levels of erosion tend also to be classified as backsliding.
 - Fragile democracies are those that have experienced an undemocratic interruption at any point since their first transition to democracy.
 - *Deepening authoritarianism* is a decline in any of the democracy aspects of non-democratic regimes.

For a full explanation of the concepts and how they are defined, see Table 6 on p. 8 of the [summary methodology](#).

Summary of key facts and findings

CHALLENGES

Some governments have not taken necessary steps to protect the health and life of the population in the context of Covid-19, constituting a failure to fulfil international human rights and potentially national legal obligations.

In many contexts, responses to Covid-19 have exposed gaps in emergency law frameworks. These gaps sometimes limit options for decision-makers, as well as leading to poorly drafted laws, or opening up opportunities for misuse or abuse.

In authoritarian regimes, some backsliding democracies and states undergoing political or post-conflict transitions, the institutional weakness of the courts and the legislature has often been exacerbated as emergency response measures further curtail oversight functions.

In some conflict-affected states, Covid-19 has contributed to reshaping incentives for state and non-state actors, as well as their relative positions, as they have both instrumentalized the pandemic to bolster claims to power or gain the upper hand.

OPPORTUNITIES

The use of an emergency legal regime and extraordinary powers in response to the Covid-19 pandemic in a constitutionally responsible way may be a sign of good governance. Responses in practice have included examples of both responsive and responsible leadership.

Particularly in democratic states, there is evidence that both the courts and legislatures are providing formal oversight within their respective roles, and that civil society and media are effectively contributing to monitoring and accountability.

Some states have developed innovative approaches to coordinating the pandemic response across institutions, including both horizontally and vertically among different levels of government.

In conflict-affected states, Covid-19 has presented an opportunity to shift relations between state and non-state actors, in some cases galvanizing coordination between the state and these parties.

Key facts and findings

1. The triggering of an emergency legal regime and the use of extraordinary powers in response to the Covid-19 pandemic does not inherently signal a threat to democracy. Rather, the use of emergency powers in a constitutionally responsible way may be a sign of good governance, while neglecting to take the necessary steps to protect public health may constitute a failure on the part of the state to fulfil its most basic obligations.
2. Responses to the Covid-19 pandemic have included examples of responsive and responsible governance, as well as both executive overreach and inaction, in addressing the threat and impacts of the virus. While some governments have used the pandemic to justify the use of extraordinary powers outside the bounds of national and international law, others have shown a reluctance to address the virus and thereby risked public health.
3. The pandemic has exposed gaps in many emergency law frameworks. At the constitutional level, while not all texts contemplate emergency rule, among those that do public health crises may not be a permissible ground for declaration; this can limit options for decision-makers. At the statutory level, new legislation developed in response to the pandemic has sometimes been hastily and poorly drafted, while in other cases countries have relied on older emergency laws that are inappropriately broad or open to opportunistic abuse. In other countries again, emergency measures have relied primarily on executive decrees, de facto powers or orders that exceed authorized powers; this can undermine the rule of law.
4. In countries with multi-level governance structures, issues of overlapping jurisdiction and unclear distribution of powers have sometimes complicated the emergency response where efforts are not effectively coordinated.
5. There is no clear relationship between the level of democracy at the start of the pandemic and the legal basis for emergency response measures applied by governments. While comparison is complicated by the wide variation in emergency law response types available across jurisdictions, studies indicate a slight preference by governments of all regime types to rely on statutory authorizations—mostly laws on public health or other types of disasters and emergencies—to address the crisis rather than declaring a constitutional emergency regime. Among countries that have declared constitutional emergencies, democracies have tended to do so at a slightly higher rate than non-democratic regimes.
6. Contextual factors appear to be more influential on the choice of emergency law response than regime type. Some key considerations include: the sufficiency of legal grounds and current laws in place; the history and past experience of constitutional emergencies; the political environment and levels of political contestation, legitimacy and legitimation issues; institutional capacities and structures; the presence of and levels of conflict; whether the country is in a political or conflict transition; the impact and prevalence of the pandemic domestically; and the structure of the state as unitary or decentralized.
7. The extent to which democratic norms and institutions are resilient in the face of an extended emergency legal regime depends significantly on political will and respect

for rule of law and democratic conventions, but built-in safeguards and constraints on abuse during emergencies provide an important foundation. Particularly in democratic countries, there is evidence that the kinds of institutional safeguards common to both constitutional and legislated emergency regimes are generally working, meaning that both the courts and the legislature are providing formal oversight within their respective roles. Civil society and media also continue to play important monitoring roles.

8. In backsliding democracies, authoritarian regimes and states undergoing transitions to peace and democracy, oversight by courts and parliaments has often been absent, limited or ineffective due to their lack of independence, authority and/or capacity. This institutional weakness has been exacerbated in many cases by the retrospective nature of judicial and legislative oversight, and by the government's approach to the pandemic. It is particularly challenging for courts—weak or strong—to provide oversight in situations where the government's response inadequately meets its legal obligations to protect the populace. Similarly, legislative inquiries into government actions have taken a long time and have often occurred only after the emergency and response measures have ended.
9. There has been an increasing militarization of emergency responses around the world, with some countries linking security and anti-terrorism frameworks to the health emergency. This presents long-term risks for the undermining of democratic transitions, the legitimization of security and counter-terrorism frameworks in response to health emergencies, the normalization of military power in civilian spheres, and the securitization of the state.
10. In conflict-affected states, and particularly those in which the right of identity-based groups to self-determination and freedom from state interference is essential to a negotiated transition, Covid-19 has contributed to reshaping incentives for state and non-state parties, as well as their relative positions. Both state and non-state actors have used the pandemic to bolster or legitimate claims to power, and in some cases insurgent groups have been able to opportunistically divide the limited attention and resources of the state to gain the upper hand in the conflict.
11. Under international law, some instruments contain a derogation clause permitting states to derogate from specified human rights obligations in emergencies, provided the state gives proper notification. While some states have abided by these obligations, others have not, and still others have questionably relied on national courts, rather than political representatives, to register derogation notifications. Such weak compliance and legal confusion raise questions about the adequacy of the current structure of the international system of monitoring and accountability for legal derogations from—and potentially for violations of—treaty obligations.

Introduction

In response to the Covid-19 pandemic, governments have implemented a variety of extraordinary legal and policy measures to protect lives, mitigate the spread of the virus within and beyond state borders, and prevent health systems from breaking down. These measures have often included curbing some human rights, restricting travel, shuttering up classrooms, suspending government services, ordering the temporary closure of businesses, controlling or curtailing news reporting, and sometimes delaying elections. To do this, many governments have activated emergency legal frameworks that provide for the assumption of substantial emergency powers by the executive and the weakening or setting aside of ordinary democratic checks and balances.¹

The threat to human health posed by the pandemic is undoubtedly significant. States have moral and legal obligations to protect their populations²—including under international human rights law³ and also often under domestic legal frameworks.⁴ Moreover, representative democracy means that elected leaders make decisions in emergencies. Restrictions on rights that are necessary, proportionate and applied without discrimination are not presumptively undemocratic. At all times in democratic societies, individual liberties must be balanced against the rights of others and the collective rights of the people as a whole. In some cases, the triggering of emergency legal response frameworks and the imposition of extraordinary measures may be a sign of good governance, rather than a failure of democratic safeguards. Moreover, where governments do not take the necessary steps to protect lives and curb the pandemic, this may signal a failure of governance.⁵ Accordingly, many of the emergency measures imposed in response to Covid-19 are potentially both necessary and justifiable in a democratic society; in many countries, such measures also appear to have broad public support.

However, the imposition—on a global scale and over a long time period—of extraordinary measures to combat the virus also raises well-founded concerns about democratic resilience. These relate primarily to:

- the legality of the various measures undertaken and the willingness and capacity of institutions to provide oversight;⁶
- their potential to erode a wide range of human rights and civil liberties beyond what is necessary and proportionate;⁷
- their capacity to be used in politically opportunistic ways;⁸
- their potential to exacerbate conflict and undermine fragile transitions;⁹ and
- their potential for longer-term impacts on the core features of democratic governance through the ‘normalization’ of both the measures themselves and executive aggrandizement.¹⁰

In order to assess whether or how the Covid-19 emergency has impacted democracy over both the short and longer term, it is helpful to understand the different types of emergency laws relied upon (or not) by governments to justify their assumption of emergency powers and their imposition of emergency measures. This thematic paper examines and

Restrictions on rights that are necessary, proportionate and applied without discrimination are not presumptively undemocratic. At all times in democratic societies, individual liberties must be balanced against the rights of others and the collective rights of the people as a whole.

compares different types of legal bases for emergency powers, built-in safeguards and constraints specific to each type of emergency regime, the factors that may influence choices about which emergency legal response to apply, and the associated advantages and risks. However, a few caveats are helpful. First, there is significant variation in the types of emergency law response options available in different states, and it is sometimes difficult for outsiders to determine which emergency regime is being applied at a given time. Second, each context has a unique set of circumstances that make it difficult to draw conclusions about why a particular legal response may have been selected over other available options. After unpacking emergency law response typologies, considerations, advantages and risks, this paper provides a brief conclusion and a set of recommendations targeting state-level actors and civil society, as well as the international community.

Chapter 1

Emergency powers and their legal basis

Emergency powers can rest on a number of different legal foundations, each of which: often involve distinct circumstantial preconditions; may require specific procedures to initiate, review and terminate; permit different executive actions, including to restrict rights; and have distinct implications for the operation of democratic checks and balances. The emergency law options available in a particular state differ by context, but the main modes include:

- declaring a constitutional ‘state of emergency’ of some form;¹¹
- applying existing or new legislation specific to crisis governance (a ‘legislative model’); and
- recourse to more ambiguous legal groundings, ranging from expansive interpretations of ordinary laws, via the exclusive use of executive decrees or orders in ways that may exceed the scope of powers provided under the constitution, to de facto exceptional powers.

For an overview of emergency law response types and their general characteristics, see Annex A.

In response to Covid-19, a number of governments (e.g. Armenia, Chile, Czechia, Hungary, Israel, Mali, Peru, Philippines, Senegal, Sierra Leone and Spain) have used emergency powers on the basis of declaring a constitutional state of emergency.¹² In other countries, the primary legal basis is the delegation of exceptional powers through ordinary legislation (e.g. the United States and Ireland). In a few states, the government has mainly relied on—or at least initially relied on—executive decrees, broad interpretations of ordinary executive power, or sometimes de facto exceptional powers that arguably exceed constitutional authorities (e.g. Belarus, Cambodia, Cameroon, Central African Republic, China, Cuba, Lao People’s Democratic Republic (PDR), Rwanda, Saudi Arabia, Somalia, Sri Lanka, Sudan and Tanzania). Many countries have used a combination of emergency legal response options, either sequentially or in parallel, sometimes following judicial intervention (e.g. Brazil, El Salvador, Kosovo and Romania).¹³ Notably, not all states have couched their legal response to the pandemic in emergency terms.

A 2020 survey of pandemic-related legal responses in 106 countries found that, in a slight majority of states, governments cited ordinary legislation rather than the constitution for emergency powers—despite most having the option of declaring a constitutional emergency—and that such legislation was often framed in terms of public health rather than emergency.¹⁴ In a handful of other states, the executive did not cite any legal basis at the time it instituted actions, although these have since clarified the legal basis, including through retroactive ordinary legislation subsequently adopted by the legislature. Of most concern for the rule of law are the relatively few states in which the legal basis for the assumption of emergency powers has never been made clear, although many of these states are generally already ‘authoritarian settings’.¹⁵

1.1 CONSTITUTIONAL EMERGENCY REGIMES

Most of the world's constitutions (around 90 per cent) include provisions that enable authorities—primarily, although not always, the executive¹⁶—to take the necessary actions in emergency situations.¹⁷ Permitted extraordinary measures vary greatly in scope, but often include limiting or suspending certain (but usually not all) constitutional rights, transferring authority from sub-states to the national level, granting administrators extraordinary powers, setting aside some institutional checks and balances that operate in normal times, and sometimes also postponing elections.¹⁸

When these provisions are triggered, it constitutes an 'emergency mode' of constitutional governance. If a constitution did not expressly or implicitly contain such provisions, the state would sometimes be either unable to take the urgent actions necessary to address an emergency, or it would need to act outside the bounds of the law. Either option would pose a more serious risk to democracy than that posed by a constitutionally framed and constrained emergency rule scheme.

Types of emergency rule

The term 'state of emergency' is commonly used to refer to a range of 'emergency modes', resting on different grounds or circumstances. There is great variation in the types of emergency that constitutions address, the procedures necessary to trigger an emergency mode, the actions the state of emergency permits the government to take, and the degree to which normal democratic checks and balances may be set aside. In some countries, there is only one type of emergency rule. In others, there may be different types of emergency regimes operating under different labels, conditions and procedures, which authorize the assumption of different types of powers.¹⁹ For example, a 'state of emergency', 'state of exception', 'state of siege', 'state of alarm', 'state of martial law', 'state of natural disaster' and even sometimes a 'state of financial emergency'.

Not all constitutions include all types of emergency rule modes and not all modes are alike. In Morocco, the Constitution has one emergency type, called a 'state of exception', which covers a range of situations (article 59). The Constitution of Timor-Leste, in comparison, uses the term 'state of exception' as a broad category that includes two different modes (article 25). The Constitution of Portugal distinguishes a 'state of emergency' as involving preconditions that are 'less serious' than those that would permit a 'state of siege' to be declared. Similarly in Spain, the Constitution distinguishes between states of alarm, exception and siege (article 116) but leaves it to legislation to define the preconditions for each type of declaration.

Elements of constitutional emergency modes

Broadly speaking, there are five common elements of constitutional states of emergency:

- conditions for its declaration;
- a delegation of power (usually to the executive);
- limitations on the use of emergency powers;
- temporal limitations on duration (and renewal); and
- provisions for oversight.²⁰

The most common conditions are war, external aggression or invasion, internal uprisings or rebellion, or circumstances that threaten life, the state and territory. Some constitutions also include natural disasters (e.g. Ecuador (article 164), Micronesia (article 10) and South Africa (article 37)). Notably, only a handful expressly recognize health emergencies (e.g. Ethiopia (article 93), Nepal (article 273) and Turkey (article 119)). While some constitutions list exhaustive preconditions under which an emergency (of some form) may be declared, others have been interpreted broadly to include a range of unspecified circumstances. An example is Liberia, where emergency provisions reference war and civil unrest but have been interpreted to include the current and past health crises.

If emergency conditions are met, most constitutions include further conditions to trigger the emergency regime, such as requiring that the legislature approve an emergency declaration within a certain time period. Sometimes, the executive must list the extraordinary measures that will be taken as part of the declaration and approval process. Further legislative approval is usually required for any renewal of the state of emergency, often by increasingly large majority votes. In South Africa, for example, initial approval of a declaration requires an absolute majority, but subsequent renewals require a three-fifths majority.

The state of emergency usually permits the executive to assume some powers normally held by other branches and levels of government, including those of provinces or regions.²¹ However, there is significant heterogeneity in the powers and competencies that may be conferred, and the degree to which sub-state powers may be centralized with the executive. The Constitution of India (1949), for example, permits the central government to assume ‘all or any of the functions’ of a state government (article 356); the president can also assume state law-making powers through delegation by the Union Parliament (article 357) (Table 1).

Constitutions may also enable the executive to exercise law-making powers through expanded decree competencies, to delay elections²² or to dissolve parliament. On the other hand, some constitutions expressly bar the executive from dissolving or suspending parliament, amending the constitution, or delaying elections during the emergency period. Additionally, once a state of emergency is invoked, the government can usually limit or derogate from some rights, meaning they become formally suspended as necessitated by the emergency. This usually takes place through the passage of emergency legislation—either statutes enacted by the legislature or via executive decrees authorized by the constitution as part of the emergency regime.²³

In framing emergency governance, many (but not all) constitutional states of emergency involve setting aside—to various degrees—some of the checks and balances that normally operate. In Spain and Portugal, for example, emergency rule does not change the normal functioning of constitutional organs and oversight institutions. In other states, such as Turkey, oversight institutions can be bypassed more easily. Constraints and safeguards against abuse are addressed in Chapter 2.

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TABLE 1

Normal and emergency constitutional rules in India

	Normal (non-emergency) rules	Emergency rules
Civil liberties	Judicially enforced rights: Extensive list of civil liberties that are protected against legislative interference and are judicially enforceable (article 19)	Legislatively limited rights: Union Parliament and state legislatures may enact laws restricting civil liberties that would otherwise be protected under article 19
Distribution of powers	Federal: Division of legislative and executive powers between the Union Parliament and Union Government, on the one hand, and the state legislatures and state government on the other States have policy autonomy with respect to matters on the 'State List' of legislative competencies	Unitary: No division of powers: the Union Parliament can enact laws for the whole or any part of India, even if such laws concern matters on the 'State List'
Elections	Elections held every 5 years	Elections may be delayed for up to 1 year

Source: International IDEA, *Emergency Powers*, International IDEA Constitution-Building Primer 18 (Stockholm: International IDEA, 2018), <<https://doi.org/10.31752/idea.2018.29>>, accessed 19 March 2021. Adapted from: Khosla, M., *The Indian Constitution* (Oxford: Oxford University Press, 2012).

1.2 THE LEGISLATIVE MODEL OF EMERGENCY GOVERNANCE

A legislative model may be used as an alternative to, or sometimes in sequential combination with, a constitutional state of emergency.²⁴ While a constitutional state of emergency provision would normally be accompanied by implementing legislation (sometimes an organic law), legislation may also be used as the primary basis for emergency powers without a constitutional emergency being declared. Under this model, the legislature delegates to the executive specified additional powers through the enactment of ordinary law. This enables the executive to apply powers it does not normally possess in ordinary circumstances, including to restrict some rights.²⁵ Because this model rests on ordinary legislation developed in the normal course of law-making, its defining feature and a key advantage is that the regular constitutional framework continues to operate.²⁶ Courts can review the delegating legislation and the actions of the executive in implementing it, and the legislature can pass further laws and perform its normal oversight functions. The executive remains bound by the ordinary constitutional limits imposed on executive power.

Ex ante (framework) legislation

In many states, the legislature has anticipated the need for the executive to have additional powers in the event of a crisis and enacted delegating legislation in advance of such a crisis arising (*ex ante*).²⁷ *Ex ante* legislation can be triggered by the executive if and when an emergency of the type contemplated by the legislature presents itself. Laws may be framed, for example, in terms of responding to a general emergency (e.g. the 2011 Emergency Powers Act in Finland), or specifically in terms of public health (e.g. the 2015 Biosecurity Act in Australia), natural disasters or other crises. Because this legislation is

passed in anticipation of some future crisis, the legislature is not usually involved in the process of triggering its use at the time of the emergency. However, in some states, a role for the legislature may be retained—for example, by including a requirement that the legislature declare an emergency in order to activate the legislation, or that the executive report plans to the legislature immediately after making a decision, as in Japan.²⁸

***Ad hoc or ex post* legislation**

Legislatures can also enact *ad hoc* or *ex post* legislation to delegate additional or extraordinary powers to the executive on an as-needed basis once an emergency arises.²⁹ Compared to the *ex ante* model, the legislature is directly engaged in decision-making about the emergency as it occurs and can tailor the law to the situation. On the other hand, an emergency—by definition—may challenge the normal deliberative legislative process, resulting in hastily drafted laws or laws that lack important safeguards, such as being time-bound.³⁰

1.3 'OTHER' OR AMBIGUOUS LEGAL BASES FOR EMERGENCY POWERS

Some governments may assume emergency powers without a clear legal basis. Executives sometimes exercise *de facto* extraordinary powers without grounding their orders in a specific legal framework. This has occurred during the current pandemic—for example, in Rwanda, Somalia and Sudan, and with Sri Lanka's island-wide lockdown.³¹ In other cases, governments stretch the interpretation of ordinary laws or their ordinary constitutional authorities to take extraordinary actions beyond the bounds of what is authorized. In Kosovo, the Constitutional Court ruled that a decreed restriction on freedom of movement was unconstitutional because the measure required an act of the legislature.³² Similarly, in the United Kingdom, the use of the Public Health (Control of Disease) Act to establish a nationwide lockdown has been seen as a potential legal overreach.³³

In some cases, constitutional frameworks contemplate *ex post* ratification of executive actions taken on an urgent basis without prior authorization.³⁴ Italy, Greece, Morocco, Portugal and Tunisia, for example, recognize a legal scheme of subsequent legislative review of executive decree law.³⁵ However, any act that goes beyond legal bounds or is taken without the necessary legal authority risks eroding the rule of law and undermining democracy.³⁶

Chapter 2

Safeguards and constraints on abuse of emergency powers

In most states, the assumption of emergency powers is subject to at least some safeguards. These include both substantive and procedural constraints, which may be built in to the emergency law or exist elsewhere in the state's political and legal system, as well as in international law.³⁷ Different levels of safeguards and oversight are associated with different legal basis models, and therefore contribute to the respective advantages and risks to democracy of particular emergency law response choices.

Safeguards common to both constitutional and legislative emergency regimes include:

- Emergency or extraordinary powers can only be exercised for a limited time period.
- There must be a specifically enumerated purpose for which emergency powers may be exercised.
- The exercise of emergency powers must be consistent with those purposes.
- The measures taken cannot exceed what is strictly necessary and proportionate to respond to the emergency and must be applied equally to all persons.
- The legislature must be kept informed of measures taken.
- The legislature must approve any extension of the emergency powers regime (sometimes by increasingly large supermajorities).
- A review of procedural rules and substantive actions must take place by the courts.

Of course, it is difficult to assess in the abstract the extent to which a government is likely or able to respect or flout international standards and constitutional rules. Similarly, it is challenging to predict in the abstract whether a legislature or court will effectively hold the government to account or be reluctant or powerless to provide oversight. Much depends, *inter alia*, on the content and type of emergency law relied upon (if any), the constitutional framework and legal system, the legality of the actions taken, and the broader political and social context, including the independence of oversight institutions.

2.1 INTERNATIONAL STANDARDS

Under international law, certain human rights are inviolable (absolute) and may not be subject to derogation even during an emergency, while others may be restricted for certain specified purposes—including to protect public health—provided measures taken meet standards of legality, evidence-based necessity, proportionality, non-discrimination and gradualism.³⁸ Key instruments include the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American

Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights. Whereas the ICCPR, ECHR and ACHR allow some derogations from rights in emergencies, the African Charter requires full compliance at all times. The Arab Charter on Human Rights does not comply with international standards for emergencies, and Asia does not yet have a treaty-based regional arrangement for human rights protection. The non-binding Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, and Venice Commission reports and studies, among other sources, provide guidance for states on interpreting and applying international standards and norms.³⁹

When states parties derogate from rights under treaty instruments due to a public emergency, they must officially notify the respective treaty regime and indicate the reasons for the derogation. The review of whether states have substantively violated their obligations falls to international courts and related oversight bodies, as well as other states parties to the relevant treaties. In practice, compliance with the derogation notification system under Covid-19 has been inconsistent. The international legal implications of non-compliance or incomplete compliance are unclear.⁴⁰

2.2 CONSTITUTIONAL EMERGENCY REGIME SAFEGUARDS

Key among the safeguards built into most (but not all) constitutions are:

- requirements for approving and renewing a state of emergency that involve the legislature;
- barring the dissolution of parliament during an emergency;
- barring the amendment of the constitution during an emergency;
- automatic expiration of emergency powers after a period of time;
- delineating the circumstances under which an emergency may be declared;
- explicitly or implicitly providing for judicial oversight of procedural and substantive actions; and
- specifying which rights are absolute and which may be derogated from in an emergency.⁴¹

Procedural and political safeguards

Declaring a constitutional emergency usually involves both the initial proposal or decision to declare, and then the approval of that decision. The proposal phase is constrained in several ways: as noted above, by specifying the circumstances under which an emergency can be declared, and also by delimiting who can declare it.⁴² Some 60 per cent of all constitutions in force that include emergency provisions (73 per cent of democratic constitutions) require the legislature to be involved.⁴³ Pre-declaration legislative approval requirements are common in Latin America, but post-declaration approval is more common elsewhere. This is usually required within some specified time period or else the declaration automatically lapses. In Fiji, the period is 24 hours; in Spain it is 30 days. Most countries fall somewhere in between. This provides a window for the government to act rapidly in a crisis, but ensures that the legislature reviews and finally decides the matter.⁴⁴

Other safeguards include limiting the duration of emergency powers and providing for termination procedures. By definition, emergency regimes should be temporary,⁴⁵ so most constitutions attach an automatic time limit (usually two to six months) after which both the powers and emergency measures undertaken automatically lapse. Because an emergency may in practice end before this period expires, many constitutions also provide for early termination by both the executive and the legislature.⁴⁶ Similar safeguards apply to any renewals of the emergency regime, which are often subject to parliamentary scrutiny and judicial review. Standards include limiting the time period of the renewal, sometimes delimiting the total number of renewals or other rules to prevent unlimited extensions and, as noted above, sometimes requiring increasingly large legislative majorities to approve subsequent renewals.

In many states, the lawfulness of the assumption, renewal, termination (and use) of emergency powers can be challenged before the courts under judicial review. This means courts can usually assess whether the proper procedures were followed to trigger the emergency regime.⁴⁷ Authoritarian or backsliding states are less likely to provide for legislative and judicial oversight within emergency legal frameworks. Laws in China, Thailand, Turkey and Zambia provide for neither legislative nor judicial oversight.⁴⁸ Moreover, even where formal oversight protections are provided, oversight institutions in authoritarian, transitioning or backsliding states are more likely to be weak or lack independence.

Substantive safeguards

As noted in Section 2.1, international law establishes an irreducible core of human rights that are non-derogable. Constitutions should therefore clearly specify which rights can be suspended in emergencies and which are absolute—but not all do. For example, South Africa's Constitution includes a Table of Non-Derogable Rights and mandates that any emergency law that derogates from other rights under the bill of rights may do so only to the extent that it is strictly required by the emergency and consistent with international obligations (article 37).

Courts can often review the permissibility of government actions, including whether rights restrictions meet balancing tests (i.e. that they are necessary, proportional, justified and applied to all persons on an equal basis). Some constitutions, such as those of Colombia (article 214(6)) and Ecuador (article 436(8)), expressly provide for judicial oversight of the use of emergency powers. Where this is not express, a general right of judicial review is often (though not always) exercisable in relation to any substantive measures taken (and any concerns of process).⁴⁹ In states with constitutions that include positive rights obligations (such as a right to healthcare), courts may also demand that both the state and private actors take action. In Brazil, a number of federal and state courts have stepped in to order lockdowns and ban government propaganda, finding President Bolsonaro to be violating the Constitution's positive rights obligations.⁵⁰ In many democratic states, judicial review seems to be working. In a 2020 study, courts were found to be involved in pandemic responses in 41 per cent of cases, including in 51 per cent of democracies and 27 per cent of non-democracies (based on a two-category regime classification).

Legislatures can also provide oversight of substantive government actions. Some constitutions require that the legislature review the manner in which emergency powers are applied (e.g. Portugal, article 161), while others link substantive oversight to the approval and renewal process. This happens most often through a requirement that the government detail the powers it plans to use in its declaration and renewal requests. This gives the legislature an advanced check on the measures the government plans to take as part of the

In many states, the lawfulness of the assumption, renewal, termination (and use) of emergency powers can be challenged before the courts. This means courts can usually assess whether the proper procedures were followed to trigger the emergency regime.

approval (and each renewal) process. In Poland, observers suggest that the legislature's power of substantive review under article 228 is a reason why the government relied on *ex ante* legislation for Covid-19 response, rather than invoking a constitutional state of emergency.⁵¹ Although a 2021 study found great variation in overall legislative functioning during the pandemic, it showed that most legislatures are partially working to varying degrees.⁵² This is a crucial prerequisite for legislatures to perform their law-making and oversight functions.⁵³

2.3 SAFEGUARDS UNDER THE LEGISLATIVE MODEL

The principal advantage of using ordinary legislation to address emergencies lies in the preservation of regular democratic checks and balances.⁵⁴ The government acts on the bases of delegated powers, and all actions are subject to normal judicial review and balancing tests in accordance with the constitution and legal system.⁵⁵ Subject to practical considerations, the legislature is supposed to continue to exercise oversight during the emergency.⁵⁶ Constitutional rights remain but may be subject to restrictions as necessary, under the generally applicable provisions of the constitution.⁵⁷

Beyond this, the in-built democratic safeguards common to constitutional emergency regimes are also considered good practice in respect of ordinary (emergency) legislation. This includes procedural and substantive limitations, such as preconditions for use, automatic expiration of the legislation itself, and requirements that any measures taken must be necessary, proportionate and equally applicable.⁵⁸ Other common safeguards include that the legislature must approve the executive's declaration of the emergency, that the executive must report measures taken to the legislature, and that legislative oversight committees are automatically engaged.⁵⁹ Most—but not all—of the newly adopted laws in response to the Covid-19 pandemic include such safeguards. New laws adopted in Hungary, Nigeria, Poland and Russia are notable for providing few such safeguards.⁶⁰

Relying on ordinary law for emergency response may give a false impression of normalcy and downplay the exceptional nature of the exercised powers.⁶¹ There may be no requirement, for example, for an executive to formally declare an emergency in order to use the legislation. Of particular concern is where governments use ordinary law to avoid safeguards commonly applicable to constitutional emergencies.⁶² In Sri Lanka, observers suggest that the government avoided declaring a constitutional emergency in part because doing so would have required the reconvening of parliament which had already been dissolved in order to hold elections.⁶³ Further, *ex ante* laws may not be sufficiently tailored to address the situation at hand, requiring governments to stretch their meaning or act beyond authorization. In other cases, *ex ante* laws may be from a pre-democracy period and authorize sweeping powers that far exceed what is necessary. This may be opportunistically abused. In Nepal, the Government opted to invoke the Infectious Disease Control Act of 1964, which predates the new Constitution and the country's transition to federalism, despite having the option to instead use the Disaster Risk Reduction and Management Act of 2017, which respected the federal structure.⁶⁴ On the other hand, *ad hoc* legislation may be sloppily or opportunistically drafted—for example, not including time limitations, as in Hungary.⁶⁵

2.4 SAFEGUARDS AND RISKS WITH 'OTHER' EMERGENCY RESPONSE APPROACHES

Emergency response actions that lack a clear legal grounding face few substantive or procedural constraints. However, where such actions are rooted primarily in recognized executive decree power, constitutions generally impose strict conditions. Most commonly these include temporal limitations and requirements for legislative approval. Under the Italian Constitution, for example, temporary measures taken by the government in cases of 'necessity and urgency' lose effect unless ratified by parliament within 60 days (article 77). The Constitution of Tunisia provides that the legislature may authorize the government to issue decree laws for a limited period not exceeding two months; these must 'be submitted for ratification to the Assembly immediately after the end of the period of authorization' (article 70(2)).

2.5 CHECKS AND CONSTRAINTS IN MULTI-LEVEL GOVERNANCE SYSTEMS

Where the constitution allocates authority between national and sub-state governments, authority for specific subject matters may be allocated exclusively to the central or sub-state level or shared between the two. Despite some notable exceptions (e.g. Australia, Germany and the USA), it is common for emergency powers to be exercised at the national level, while healthcare is decentralized to sub-state governments.⁶⁶ In unitary states, regional or local governments may have limited formal autonomy, but nevertheless play an important role in implementing emergency response rules and tailoring them to local circumstances.

In many countries, both federal and unitary, such overlapping responsibilities have enabled sub-state governments to play an important role both in implementing emergency measures and as a check against the national government.⁶⁷ In some countries—for example, Thailand—local governments have refused to implement measures deemed unnecessarily restrictive; in others, including Brazil and the USA, sub-state governments have adopted their own measures when the national government was seen as unresponsive. In contrast, some states, such as Belgium, Italy and Switzerland, have witnessed a centralization of executive power in response to the pandemic.⁶⁸ In other cases, the pandemic has fostered innovation. Australia established a National Cabinet as an intergovernmental forum to coordinate a national response and support collaboration across different levels of government, while enabling states to retain autonomy and decision-making authorities. The success of the project resulted in its transformation into a permanent structure.⁶⁹

Chapter 3

Why might a state apply a particular legal basis or combination?

Understanding why a government adopts a particular legal justification for its Covid-19 response depends on a range of contextual and legal factors. Without a detailed understanding of a country's legal framework and political process, it is not easy to identify what type of emergency legal response is being used (and why), and this can challenge comparative studies and the ability to draw insights across cases. In Brazil, for example, Congress approved a legislative decree under an *ex ante* law recognizing a 'state of public calamity', but this was not a legislated emergency regime in the conventional sense. Rather, the scope of powers was limited to enabling the Government to adjust fiscal balance targets and the budget in light of the emergency.⁷⁰

Broadly, there is no clear relationship between the pre-pandemic level of democracy and the type of legal response applied. Rather, there are often multiple reasons why a particular legal grounding (or combination) is adopted during the course of the pandemic.

3.1 SUFFICIENCY OF LEGAL GROUNDS AND EXTANT LAWS IN PLACE

In some states, constitutional emergency provisions may not include public health crises as grounds for declaration. This may push governments to rely on ordinary legislation or executive decrees.⁷¹ Conversely, legislated and decree powers alone may not permit the executive to take actions deemed necessary to combat the pandemic, such as closing borders. In these cases, governments may resort to a constitutional state of emergency, even if it is not otherwise needed. An example is the Solomon Islands where, in order to close national borders (prior to any cases being detected), only a constitutional emergency provided sufficient authority.⁷²

3.2 HISTORY AND EXPERIENCE WITH EMERGENCIES

In places where emergency rule has been historically abused, decision-makers may hesitate to declare a constitutional emergency and prefer to use legislated emergency powers, or emergency powers under the guise of a different (emergency) legal regime. In South Africa, where 'states of emergency' had been abused under apartheid, President Ramaphosa instead declared a 'state of disaster', but in practice introduced measures that amounted to a state of emergency.⁷³ In South Korea, in comparison, past experience with other epidemics (SARS and MERS) and disasters led to the development of *ex ante* legislation sufficient for Covid-19-related restrictions and assistance, so declaring a constitutional emergency has not been necessary.

3.3 THE POLITICAL ENVIRONMENT

Sometimes, governments may wish to avoid the legislative scrutiny required under a constitutional emergency. This may or may not be opportunistic.⁷⁴ Where issues of pandemic response reflect partisan divides, using *ex ante* statutory justifications may help to avoid delays. In other contexts, the executive may seek to avoid constitutional accountability mechanisms. Governments in Cambodia, South Sudan and Sri Lanka, for example, have all exercised emergency powers without a clear legal basis, and have likely done so to limit legislative and judicial oversight.⁷⁵ The choice also reflects political will and the willingness (or not) of leaders to acknowledge the severity of the pandemic.⁷⁶ Declaring a public emergency under the constitution highlights the seriousness of the crisis and the powers assumed.

3.4 LEGITIMACY AND LEGITIMATION ISSUES

Particularly in democracies but also in states undergoing transitions from authoritarianism to democracy and/or from conflict to peace, it is important that the government acts—and is seen to act—in a way that respects the constitution and rule of law.⁷⁷ This might make the prospect of a constitutional emergency declaration attractive, particularly because it (usually) comes with built-in safeguards. On the other hand, although for similar reasons, a legislative approach may be desirable because it retains ordinary constitutional checks and uses powers delegated under normal legislative procedures.

3.5 INSTITUTIONAL STRENGTHS AND STRUCTURES

In some transitional contexts, institutions may still be under development, and this can have an impact on emergency law approaches. In Sudan, the Government declared a constitutional state of health emergency, but the procedure could not be complied with; the Constitution requires the Legislative Council to ratify the declaration, but Sudan did not yet have a legislature.⁷⁸ In other cases, the legislature might not be able to physically meet (at least at the time) to undertake an approval vote. Institutional independence is also relevant.⁷⁹ Where the courts are not independent, they may not be able to provide a meaningful check on executive action under any type of emergency regime, which may make it easier for a government to operate without a clear basis in law. In the Democratic Republic of the Congo, the Constitutional Court has been criticized for not declaring unconstitutional the President's failure to obtain approval for a state of emergency from both the Senate and the National Assembly, as required by law.⁸⁰

3.6 PRESENCE AND LEVELS OF CONFLICT

In conflict-affected states, interactions between the conflict and the pandemic may influence emergency law response choices. Where there are high levels of conflict and low measurable impacts of the pandemic, this may deter the declaration of an emergency because it is seen as less pressing than other matters. In some places, such as Yemen and Syria, Covid-19 has not been a central factor in discussions about the conflict, political transition and key services. Dynamics may be further complicated where the government

does not control significant portions of the country, since declaring an emergency when measures cannot be enforced could undermine the government's credibility domestically and highlight capacity gaps. This context often interacts with choices to engage the military in pandemic response efforts, as militaries may be the only groups with access to areas controlled by non-state actors and to situations in which non-state actors (rather than the state) are de facto the primary service providers. In the same vein, where there is low trust among actors, declaring an emergency could undermine progress towards peace and shake the foundations of power-sharing agreements.⁸¹

3.7 THE PREVALENCE AND SPREAD OF COVID-19

As with any emergency, the choice and sequencing of legal responses may be dictated by the pandemic itself. From March to May 2020, for example, governments generally increased their policy responses as the number of confirmed Covid-19 cases rose—although with significant variations.⁸² As studies in early 2020 showed, many states with recourse to a constitutional state of emergency initially declared one shortly after the virus was detected within their borders. Over time, the state of emergency may have been renewed several times, and then replaced with legislative measures. This was the case, for example, in Angola. The President declared an emergency in March by decree, extended it three times through to May, and then terminated it. Following that, the Government triggered a state of calamity, which provides a different set of powers.⁸³

3.8 STRUCTURE OF THE STATE (MULTI-LEVEL GOVERNANCE SYSTEMS)

States with multi-level governance systems often have a more complex set of emergency response frameworks than unitary states. Multi-level governance systems involve both shared-rule and self-rule dynamics that influence the nature of emergency law regimes, the ways they are triggered, and their political and practical implications. Often, health services are decentralized to the sub-state level, making it necessary for the centre to work with the periphery (vertical cooperation), and also for the sub-states to work with one another (horizontal cooperation). Conflicts arise when preferences between the centre and the sub-units diverge. In Brazil, for example, the central executive wanted fewer restrictions than the federal states and tried to roll back state actions taken under federal framework legislation. A court ruling held that federal laws cannot reduce the constitutional power of states and municipalities to provide health services and preserved the authorities of governors and mayors.⁸⁴ Many (but not all) federal and quasi-federal constitutional frameworks facilitate the concentration of relevant powers at the central level in specified emergency situations. For example, in Spain, the state of alarm that the central government declared in response to Covid-19 enabled it to suspend some of the powers devolved to the autonomous regions for a renewable period of 15 days.⁸⁵ In most other cases, however, central governments did not make use of constitutional emergency powers (where they existed) but relied instead on legislative models. This was true, for example, in Argentina, Austria, Belgium, Brazil, Canada, Germany, India, Pakistan, Russia, Switzerland and several other countries.⁸⁶

Chapter 4

Risks to democracy related to the use of emergency law regimes

The global nature of the Covid-19 pandemic, and the endurance of the crisis over time, presents particular risks for the future of democracy.

A state of emergency is exceptional and temporary. International standards dictate that emergency rule must be time limited and extensions should not be indefinite.

4.1 THE RISK OF 'PERMANENT' EMERGENCIES

Observers of emergency law regimes have long been concerned about the normalization of emergency powers—so that they become part of 'ordinary' governance.⁸⁷ This relates in large part to the duration of emergency declarations permitted under national law, and is rooted in the use of emergency powers to combat terrorism and other enduring crises. A state of emergency is exceptional and temporary. International standards dictate that emergency rule must be time limited and extensions should not be indefinite. In some states, however, there are no express provisions in the constitution or relevant legislation establishing an expiry timeline or expiry mechanism with oversight by other branches. Similarly, laws are sometimes unclear as to whether the validity of emergency measures or emergency decrees lose their legal effect with the expiration of the (legislated or constitutional) state of emergency.⁸⁸ Given this, an important area of concern is the impact on democracy of the long-term expansion and concentration of power in the executive via an extended state of emergency or delegation by the legislature, including the use of permanent legislation with an emergency flavour.⁸⁹ Such normalized, long-term emergencies are evident from past experiences in Egypt and the USA, and may be extended to other places in response to Covid-19, such as the Philippines. It is increasingly apparent that Covid-19 will likely require long-term management, which opens the door for permanent emergencies and long-term limits on fundamental rights.

4.2 THE RISK OF SECURITIZATION OF EMERGENCY RESPONSES

In many places, the role of security forces in civilian governance has increased with the pandemic response. In some cases, this may be justified by the fact that the military have the necessary infrastructure for swift logistical and personnel response, such as with other natural disasters. In other cases, the increasing role of the military may be part of a pre-pandemic process of deteriorating human rights protections and increasing militarization of civilian functions as in the Philippines.⁹⁰ In still other contexts, it is linked to existing countering terrorism frameworks and rhetoric establishing a 'war' on Covid-19. Indeed, a securitized response is evidenced in some countries, including democracies, through the expedited enactment of new or repurposed counter-terrorism and national security legislation.⁹¹

Governments have enlisted the military for tasks such as enforcing rules and detaining civilians, and also to fill civilian government roles, particularly with regard to coordination across institutions, setting pandemic rules and managing supply chains.⁹² Militarization

and securitization is problematic from a democratic perspective for several reasons, which include the risks of excessive force, the fact that security forces operate at arm's length from democratic institutions and may be subject to fewer restrictions, oversight and scrutiny, and the potential to undermine the principle of civilian oversight. In some contexts, particularly where security forces are associated with past abuses, their incorporation into a pandemic response can undercut ongoing security sector reforms (as in Nepal), undermine public trust and the credibility of the government (as in Sudan), and result in gross human rights abuses (as in Nigeria and the Philippines). It is also important to note that, where security sector personnel dominate pandemic response efforts, this usually means that the response is led by and focused on men, who are over-represented in security forces. As a result, not only are women effectively excluded from decision-making spaces and processes, but also their specific needs in the pandemic—as well as the needs of sexual and gender minorities—are often ignored.⁹³

4.3 THE RISK OF ABUSE AND OPPORTUNISM

Emergency laws can easily be misappropriated to 'suppress legitimate opposition and to increase electoral security'.⁹⁴ While in most states this has not been the case, there have been a number of examples of 'autocratic opportunism'.⁹⁵ This practice has primarily occurred in authoritarian regimes, but also in a number of states that are at least nominally democratic if in a process of democratic decay. The risk of abuse can therefore exacerbate democratic backsliding. Key examples in both types of regimes include Bolivia, Cambodia, China (Hong Kong), Hungary, Morocco, Nicaragua, Serbia and Turkey.⁹⁶ In Hungary, the Philippines and South Africa (all classified as democracies according to the Global State of Democracy (GSoD) Indices, with the first two classified as severely backsliding), for example, restrictions on social media have been justified on the basis of preventing the spread of false news, but have reportedly been applied to prevent criticism of the government.⁹⁷ Measures related to digital technology also risk infringing rights privacy. In Hungary, an executive decree restricted individuals' data protection rights under European Union rules.⁹⁸ In South Korea, the authorities authorized extensive retention of historical location data as part of contact tracing efforts.⁹⁹

More obvious challenges have been attempts to use the suspension of ordinary democratic processes to achieve policy goals unrelated to the pandemic. In Poland, the Government used the period of reduced democratic scrutiny due to Covid-19-related bans on public protests to seek legislation prohibiting sexual education and criminalizing abortion.¹⁰⁰

There is also a risk that governments will ignore the authority of legislatures and courts as oversight institutions, thereby threatening democratic resilience. In El Salvador, Israel and Slovenia, governments have either openly defied or questioned the validity of court rulings that found emergency measures unlawful.¹⁰¹ While this has been more of a problem in non-democratic rather than democratic states, it has also been observed in backsliding democracies, such as Hungary and Poland,¹⁰² as well as in Malaysia (a mid-range democracy),¹⁰³ and the Democratic Republic of the Congo (a hybrid regime).¹⁰⁴

4.4 POTENTIAL RISKS FACING STATES ENGAGED IN ONE OR MORE TYPES OF TRANSITION

In states transitioning from authoritarianism to democracy, from conflict to peace, or both, processes are often fragile and complex. The impact of Covid-19 and the measures taken by governments could exacerbate existing fault lines, re-expose older fault lines, and make a regression from peace to conflict or democracy to authoritarianism more likely.¹⁰⁵ This may be linked, for example, to decisions on delaying elections, opportunistic abuse of emergency powers, creative avoidance of oversight mechanisms, shifts in public trust and credibility resulting from the pandemic response, and other issues. The civil war in Ethiopia, the military coup in Myanmar and regressive constitutional amendment in Sri Lanka are key examples linked to existing fault lines. The experiences highlight the particular risks that transitioning states face in response to exogenous shocks. Moreover, transitioning states often already have weaker institutional frameworks and less effective checks and balances, making it more difficult for co-equal branches (and sometimes also civil society) to provide effective oversight.

Beyond this, the role of non-state actors is often significant in transitioning societies. Covid-19 has presented an opportunity to shift incentives for actors and to increase leverage. In some cases, the pandemic response has galvanized coordination between the state and these parties, as in Myanmar before the coup. In other situations, non-state actors have been able to exploit the state's limited capacity. This has ranged from undermining the state's authority by providing competing (though sometimes necessary) services¹⁰⁶ to dividing attention and resources to gain the upper hand against the state. Examples include the provision of social services and pandemic response by Hezbollah in Lebanon, Popular Mobilization Forces in Iraq, and Al Shabab in Somalia.¹⁰⁷ Drug cartels in some areas of Mexico are similarly delivering health equipment in a bid to entrench authority and legitimation.¹⁰⁸

States have also instrumentalized the pandemic in 'predictably unpredictable ways' to gain an upper hand against both non-state actors and other states.¹⁰⁹ Observers suggest, for example, that Azerbaijan's leaders saw international preoccupation with the pandemic as an opportunity to launch a military campaign in the Nagorno Karabakh region,¹¹⁰ and that, in Venezuela, President Maduro's public health measures have been instrumentalized to strengthen social control and repression.¹¹¹

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Chapter 5

Conclusion

The Covid-19 pandemic has challenged much of what we thought we understood about emergency legal frameworks and the risks and advantages they present as governments respond to crises. The application of an emergency law regime and the use of extraordinary powers are not presumptively problematic for democracy. On the contrary, rapid and effective action within the bounds of the constitution can be a sign that the system is working, whereas inaction in the face of the threat is itself troubling for representative democracy. Emergency law regimes usually involve the assumption, often by the executive, of a range of extraordinary powers, including to limit some (but not all) rights. Where the assumption of such powers is time-bound and subject to legislative approval and judicial review, risks to democracy are relatively minimal.

At the same time, Covid-19 has presented a window for abuse and (predictable) opportunism. Even ‘good’ laws with appropriate democratic safeguards mean little in the face of a government willing to flout them, a legislature reluctant or powerless to oversee them, and a judiciary unwilling or unable to enforce them. In this respect, while courts and legislatures have remained surprisingly active in many states, the response to the Covid-19 pandemic has sadly seen several examples of the misuse of emergency powers for anti-democratic purposes.

In contrast, ‘bad’ laws with few democratic safeguards may do little long-term damage to democracy where institutional capacity and respect for law and democracy remain high. Whether or not the assumption of emergency powers and the imposition of emergency measures are likely to do lasting damage to democracy is therefore a complex question—the answer will depend not only on the laws themselves, but also, and probably more importantly, on the broader legal, political and socio-economic context in which those laws are applied. Strong democracies may suffer little long-term damage from the response to the Covid-19 pandemic, whereas states in which democracy has already begun to erode may well see that process accelerated.¹¹²

Perhaps the most relevant question, then, is not **whether** pandemic emergency measures have challenged democratic resilience, but **how** the emergency has interacted with the already ongoing processes of democratic erosion on a global scale.

The application of an emergency law regime and the use of extraordinary powers is not presumptively problematic for democracy. On the contrary, rapid and effective action within the bounds of the constitution can be a sign that the system is working.

Perhaps the most relevant question is not *whether* pandemic emergency measures have challenged democratic resilience, but *how* the emergency has interacted with the already ongoing processes of democratic erosion on a global scale.

Chapter 6

Policy recommendations

Recommendations for state-level actors

- 1. Formally and publicly specify the legal basis for emergency powers.** This should include direct reference to constitutional or legislated sources of authority, as the case may be, and clear communication of this to the public. Any emergency response actions or orders that are not clearly grounded in the law, or which exceed legal authorities, may undermine the rule of law and threaten democracy.
- 2. Comply with international legal obligations and human rights standards in all aspects of a pandemic response, and provide timely notification to respective treaty regimes for derogations from rights.** Measures taken to limit (derogable) human rights must be rooted in the law, necessary, proportionate, temporary and applied with equality.
- 3. Buttress the independence of the judiciary and the independence of judges** to both protect against executive overreach and ensure that the government upholds its positive obligations under constitutional and international law to protect the life and health of the people. Review the rules of standing (i.e. the capacity of a party to bring a suit in court) to ensure that they are sufficiently broad to enable individuals, civil society organizations, and independent oversight and integrity institutions to bring claims to address problems of both overreach and inaction.
- 4. Review constitutional frameworks to consider: first, whether grounds for emergency declarations should include public health emergencies; and second, whether constitutional emergency provisions (or implementing organic laws) adequately provide both procedural safeguards and substantive constraints to mitigate risks to democracy from abuse of emergency powers.** Good practice standards include: (a) emergency powers can only be exercised for a limited time period, authorization includes an automatic expiry, and extensions may not be indefinite; (b) emergency measures and emergency decrees cease to have legal validity upon the expiration of the state of emergency and no emergency decrees can have permanent effect; (c) there must be a specifically enumerated purpose to address an urgent need; (d) the use of powers must be consistent with those purposes; (e) the measures taken cannot exceed what is strictly necessary and proportionate to respond to the emergency and must be applied without discrimination; (f) non-derogable rights should be clearly specified; (g) the legislature must be kept informed of measures taken; (h) the legislature must approve any extension of the emergency regime; (i) any subsequent extension should be approved by increasingly large legislative majorities; and (j) the judiciary should be empowered to provide oversight of both procedural requirements and substantive actions.
- 5. Consider amending constitutions to ensure that emergency declaration and approval processes are automatically subject to judicial review.** Ensure also that the judiciary is empowered to review the substantive actions of the government in implementing emergency response measures. This may involve reviewing rules of standing and considering whether they are sufficiently broad to enable individual claims of constitutional rights violations.

6. **Review and update *ex ante* emergency legislation frameworks to harmonize outdated or suspect laws to ensure compliance with the constitution and democratic principles so that future emergencies can be met with a response based on the rule of law.** In some cases, this will mean updating older emergency legislation to respect ongoing federalization processes or constitutionalized power-sharing arrangements. In others, the focus may be on reviewing the scope of delegations of power to the executive, and/or on strengthening the role of the legislature and the courts in providing real-time oversight.
7. ***Ad hoc* emergency legislation should be carefully drafted and narrowly tailored, and should include key safeguards such as automatic expiration** (see Recommendation 4 above). Consider linking substantive oversight to the approval and renewal process through a requirement that the government detail the powers it plans to use in its declaration and renewal requests, which the legislature must approve. This will ensure the ongoing involvement of the legislature and help to limit the use of the law to the specific crisis at hand. All procedural and substantive actions should be subject to judicial review.
8. **Review constitutions to ensure that any powers of the government to delay elections during a state of emergency and/or in ordinary times are clearly specified and ideally include a role for the opposition in the decision—for example, through a requirement for broad political consensus and/or a high majority approval threshold** (e.g. of two-thirds). The constitution should clarify under what circumstances elections may be delayed, at which levels of government, by which authorities and according to which procedures and consensus rules. Such election delay decisions should be subject to judicial review. In determining whether a constitution should incorporate an election delay option, ensure that safeguards are sufficiently robust to serve as a bulwark against potential abuse and opportunism by incumbents, and also potential impacts on democracy or ongoing political and peace transitions. In some states, retaining rigidity in term limits and election cycles may be desirable.
9. **In countries with multi-level governance structures, review constitutional provisions on shared rule and self-rule matters to mitigate challenges related to overlapping jurisdiction, clarify distribution of powers, and strengthen both vertical and horizontal intergovernmental coordination.** There should also be an enhanced and urgent focus on building sub-state and local government capacities both to deliver health services more broadly (where this is decentralized) and to respond to external shocks specifically.
10. **Avoid the militarization of the Covid-19 response.** Deploying the military to enforce lockdown and curfew measures, the use of military surveillance technology to monitor media and political opponents, and the *ad hoc* appointment of active or former senior military officials to civilian administration roles increase the risk for disproportionate use of force and other human rights violations, and may undermine the principle of civilian control over the security sector. Particularly in conflict-affected and transitioning states, it also risks enabling the (re)emergence of the security state and undermining transitions.
11. **Civil society and the media should have an understanding of the various legal bases for the exercise of emergency powers within the country, as well as international standards on legality, evidence-based necessity, proportionality, non-discrimination and gradualism.** These actors should play a continuous role in monitoring, documenting and reporting on emergency response measures to support transparency and accountability. In parallel, the state should ensure that the preconditions for a free and robust civic space are protected and respected at all times.

Recommendations for the international community

1. **Ensure that policy decisions, recommendations and analyses related to the pandemic response look 'beyond the numbers'** and include a nuanced understanding of emergency law concepts. This should include consideration of the wide variation that exists across jurisdictions in terms of their structure and scope, as well as the operation and implications of contextual factors at a country level. **Organizations managing various Covid-19-related databases can complement these efforts by ensuring clarity in how emergency law and policy data is defined and categorized** to support ease of comparison of like cases and mitigate risks of comparing unlike cases.
2. **Pay attention to the potential for pandemic emergency law responses to be abused, both now and in the longer term, including through the normalization of emergency powers and the expansion of unchecked executive authority.** Consider ways to integrate and draw lessons between policy advising and planning on pandemic emergency response matters and democracy support frameworks.
3. **Be mindful of the increasing reliance on security forces in response to the pandemic at a domestic level, and the ways in which this links to the broader and longer-term securitization of emergency responses under existing counter-terrorism frameworks.** These practices should not be legitimized at the international policy level. Efforts should be made to ensure that the securitization of emergency responses to terrorism, which has been observed over the past two decades, is not conflated with or applied to pandemic response frameworks.
4. **Review and reconsider ways to strengthen safeguards under the current international human rights system, including but not limited to the system of derogations and notification under the ACHR, ECHR and ICCPR,** in light of the limited adherence to notification requirements and variations in notification approaches demonstrated during the pandemic. Further, in light of challenges with both executive overreach and underreach in pandemic response, review the robustness and sufficiency of the international human rights monitoring and accountability system as a safeguard against human rights abuses. Consider opportunities to reimagine international human rights governance schemes given the likelihood of future epidemics and pandemics.
5. **Redouble commitments to democracy protection and to understanding and inoculating against democratic backsliding,** not only by supporting state institutions in their commitment to respect and protect the rule of law, but also by building capacity in independent oversight and integrity institutions, civil society organizations and the media.

Annex A

Legal bases for emergency powers, potential risks to democracy and common safeguards

Legal basis	Common reasons for relying on	Potential risks to democracy	Common in-built democratic safeguards	Safeguards applicable to all legal bases
Constitutional emergency	Constitutional emergency regime exists that is applicable to type of emergency and which offers the necessary powers to respond	Executive enjoys significant powers with reduced checks and balances during period of emergency	Emergency must be publicly declared for specifically enumerated purpose Emergency powers can only be exercised for limited time Legislature must approve initial declaration as well as any extension of emergency period Emergency powers can only be used in order, and to the extent necessary, to respond to the emergency Judicial review (depending on legal system)	Under the constitution and international law, rights can be limited only to the extent strictly necessary to respond to the emergency Judicial review of lawfulness of assumption of emergency powers (including any declaration) as well as specific measures Sub-state governments may provide a check against national executive
Ordinary legislation	No constitutional emergency regime exists, or it does not apply to particular type of emergency Constitutional emergency regime exists but does not provide necessary powers Reluctance to declare emergency under constitution due to history of abuse of such regimes	Emergency regime may be tailor-made to avoid democratic safeguards May give false impression of normalcy of situation and measures, resulting in limited oversight and scrutiny (e.g. in the event laws relating to health rather than emergency are relied upon) Legislature may become complacent or 'implicated' in emergency response, resulting in reduced oversight May be significant political pressure on courts and parliament to defer to executive during emergency Emergency powers can be easily extended and/or repurposed	Emergency must be publicly declared for specifically enumerated purpose Emergency powers can only be exercised for limited time Legislature must approve initial declaration as well as any extension of emergency period Emergency powers can only be used in order, and to the extent necessary, to respond to the emergency	
Existing (ex ante) ordinary legislation	Suitable ordinary legislation already in place Difficult to adopt new legislation in time	Legislature may have limited involvement in relation to specific emergency Existing legislation may be overly general and permissive	Legislature considers in advance appropriate balance between emergency powers and democratic safeguards	
New (ad hoc) ordinary legislation	Need for flexible and tailor-made response Need to ensure popular support and trust for specific emergency measures	May be significant popular support and political pressure in favour of substantial unchecked powers	Legislature debates and approves proposed powers and measures in relation to specific emergency Automatic expiration of legislation (sunset clause)	

Endnotes

Note: All of the constitutions cited are available to read in full at the Constitute Project, <<https://www.constituteproject.org/>>.

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- ² Coco, A. and de Souza Dias, T., 'Part I: Due Diligence and Covid-19: States' Duties to Prevent and Halt the Coronavirus Outbreak', *EJIL:Talk! blog*, 24 March 2020a, <<https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>>, accessed 19 March 2021.
- ³ Article 25 of the non-binding Universal Declaration of Human Rights (1948), for example, specifies that 'everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services'. The subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR), which is binding on 170 states, stipulates that states parties 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (article 12). The ICESCR obligates states parties to take all steps necessary to progressively achieve the realization of this right. Further, the 1948 Constitution of the World Health Organization (WHO), which is binding on 190 states, declares that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'. Further and related rights and state duties are established under the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and under regional instruments in the Americas and Africa, and has been found through the jurisprudence of the European Court of Human Rights interpreting the right to life under the European Convention on Human Rights.
- ⁴ Some constitutions include an express obligation for the government to protect against challenges facing the state, and sometimes to protect public health and/or the right to life. India's Constitution, for example, obligates the central (Union) government to protect 'every state against external aggression and internal disturbance'. In South Africa, everyone has the right to healthcare and the 'state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights' (article 27), while an objective of local government is to 'promote a safe and healthy environment' (article 152). In a different construction, in North Macedonia, citizens 'have the right and duty to protect and promote their own health and the health of others' (article 39).
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- ⁷ United Nations Office of the High Commissioner for Human Rights (UN OHCHR), 'Covid-19 Guidance', <<https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>>, accessed 18 March 2021. United Nations, 'Protecting human rights amid Covid-19 crisis', 9 April 2020, <<https://www.>>

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Albert, R. and Roznai, Y., *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Cham: Springer Nature Switzerland, 2020).
- ¹¹ In some jurisdictions, the details of a constitutional emergency regime are set out in legislation, typically an organic law. Organic laws are themselves mandated in, and part of, the constitution, and are generally considered to be distinct from ordinary legislation. Accordingly, organic laws that implement constitutional emergency regimes are considered, under our framing, to be a type of constitutional emergency law response, rather than a legislative one.
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- ¹⁵ Ibid.
- ¹⁶ Occasionally, and depending on the type of emergency declared, emergency powers may be vested in the military (Myanmar 2008, articles 40(c), 417 and 418; arguably France 1958 under a 'state of siege'—see Rossiter, C., *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948)); or in a specially constituted body (Hungary 2011 during a 'state of war').
- ¹⁷ Ginsburg, T. and Versteeg, M., 'The bound executive: emergency powers during the pandemic', *International Journal of Constitutional Law* (2021), moab059, <<https://doi.org/10.1093/icon/moab059>>.
Not all constitutions include emergency provisions. A minority of countries either do not mention emergency circumstances at all, or do so only in a tangential way. The constitutions of Japan, Luxembourg and San Marino do not mention emergency rule at all. The Constitution of the USA provides only implicit emergency powers to the executive through a provision authorizing Congress to provide for the 'common defense and general welfare', which has been interpreted as permitting Congress to grant such powers to the president. In other countries (e.g. Austria, Denmark, Luxembourg, Norway, Sweden), there are no emergency provisions per se, but the constitutions include provisions to be applied in situations of war, threat of war or other emergency situations.
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- ²² State of emergency declarations also often impact elections. Sometimes, elections **cannot** be held during a state of emergency (e.g. Afghanistan (article 147) and Albania (article 170(6))). In other cases, at least some elections **must** proceed. Guyana's Constitution mandates that scheduled elections stemming from the dissolution of a parliament must take place even where a state of emergency has subsequently been declared (article 70(5)). The Central African Republic's Constitution imposes a two-term limit on the president without any possibility of extension, and bars constitutional amendment during an emergency, which means elections must proceed as scheduled, regardless of whether an emergency regime is in place (articles 35 and 153). In other cases, delaying elections is **permissible** during an emergency if it is deemed necessary (as in Turkey under a 'state of war' (article 78)), or may otherwise be somewhat unclear.
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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

WHAT DO WE DO?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

WHERE DO WE WORK?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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In response to the Covid-19 pandemic, governments have implemented a variety of extraordinary legal and policy measures to protect lives, mitigate the spread of the virus, and prevent health systems from breaking down. These measures have often included curbing some human rights, restricting travel, shuttering up classrooms, suspending government services, ordering the temporary closure of businesses, controlling or curtailing news reporting, and sometimes delaying elections. To do this, many governments have activated emergency legal frameworks that provide for the assumption of emergency powers by the executive and, in some cases the weakening or setting aside of ordinary democratic checks and balances.

It is helpful to understand the different types of laws relied upon (or not) by governments to justify their assumption of emergency powers and their imposition of emergency measures. This paper examines and compares different types of legal bases for emergency powers, built-in safeguards and constraints specific to each type of emergency regime, the factors that may influence choices about which emergency legal response to apply, and the associated advantages and risks.

International IDEA's Global State of Democracy (GSoD) Reports review the state of democracy around the world. The 2021 edition covers developments in 2020 and 2021, with democratic trends since 2015 used as a contextual reference. This paper on emergency law is one of three thematic papers which complement a global report and four regional reports. The GSoD reports draw on data from the Global State of Democracy Indices and lessons learned from International IDEA's on-the-ground technical assistance to understand the current democracy landscape. The 2021 reports also draw heavily on data collected by International IDEA's Global Monitor of COVID-19's Impact on Democracy and Human Rights.

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