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Summary

During the Covid-19 pandemic, numerous countries invoked different constitutional provisions and laws to respond to the unexpected health crisis. Constitutional *INSIGHTS* No. 6 examines the use and non-use of state of emergency powers by countries across Asia and the Pacific in response to the COVID 19 pandemic, and the implications for other democratic rights and processes.

About this series

The **Melbourne Forum on Constitution-Building in Asia and the Pacific** is a platform co-organized by the Constitution Transformation Network and International IDEA. It brings together scholars and practitioners of constitution-building from across the region to share their perspectives on critical issues as a contribution to enhancing global understanding of the field. This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

For more Constitutional *INSIGHTS*, and to learn more about the Melbourne Forum, visit the Constitution Transformation Network website: ‹http://law.unimelb.edu.au/constitutional-transformations/MF›.

About the author

This issue of Constitutional *INSIGHTS* was written by Charmaine Rodrigues. It draws on discussions at the fifth Melbourne Forum on Constitution-Building in Asia and the Pacific, held online on four consecutive Thursdays from 3 September to 24 September.

Legal Approaches to Responding to Emergencies: Covid-19 as a Case Study

Introduction

When the Covid-19 pandemic hit in early 2020, governments across Asia and the Pacific were required to respond quickly to address the unprecedented health emergency. As Covid-19 spread across the region, some countries were able to draw on previous experience with the SARS and MERS outbreaks, while the response of other countries evolved over time, as the full extent of the emergency and the scale of the crisis became clearer. In this context, whether and how to utilize legal emergency powers to implement both health and economic measures was critical to national efforts to slow the spread of the disease and protect communities. This issue of Constitutional *INSIGHTS* explores how and why decisions were made to invoke emergency powers, the basis of those powers, and the pros and cons of their utilization, with a view to learning lessons about what worked and what might have been done better. It draws on presentations to the 2020 Melbourne Forum focused on government responses to the pandemic from Asia and the Pacific, but the issues governments had to contend with are relevant across the world.

This issue of Constitutional *INSIGHTS* discusses the following questions:

- What different forms of emergency powers were available and used to address Covid-19?
- Were there any legal issues of concern regarding the use of states of emergency during the pandemic?
- What insights for the future can be drawn from these experiences?

Across the world and across the Asia and the Pacific region, governments used a variety of different tools to respond to Covid-19 and give themselves sufficient legal powers to justify the measures they chose to deploy. As the scale of the Covid-19 pandemic started to become apparent, many governments declared a ‘state of emergency’ (SOE), although this terminology did not always accurately reflect the legal basis for such declarations: in some cases, constitutionally based emergency powers were invoked; in other cases, declarations were issued under national disaster or public health laws.

The decision to classify the Covid-19 response as an 'emergency' in legal terms has the potential for serious implications. A formal declaration of 'emergency'—or, in some countries, of 'disaster'—usually allows a government to suspend some legal rights, to the extent necessary to respond to the crisis.

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1. What different forms of emergency powers were available and used to address Covid-19?

In Asia and the Pacific, there were a number of different legal bases on which countries could declare an SOE in relation to Covid-19, and each brought with it different powers. Some countries drew on existing constitutional provisions, while others found that they had sufficient powers in existing legislation to respond to the pandemic. The three different legal approaches most commonly used to respond to Covid-19 across the region are discussed below.

1.1. Constitution-based emergency powers

Some constitutions specifically include the power to declare an SOE. Usually, these provisions specify the ground on which an SOE can be declared, most commonly to protect national security and/or in times of war, although some constitutions also specifically permit SOEs to be declared in response to an economic crisis, public health crisis, natural disaster or other bases. Such a declaration usually empowers the government to suspend some constitutional rights, although most constitutions do not allow the right to due process or to be free from torture to be suspended. Although such declarations are issued by the executive branch, they must usually be brought before parliament for approval or disallowance within a *certain period of time* and will usually have a set expiry time.

In the Philippines, the constitutional approach to emergencies requires Congress to pass a law to grant the executive emergency powers. Specifically, article VI, section 23 of the 1987 Constitution (Philippines 1987) states: 'In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy.' On the basis of this provision, in March 2020, the Philippines Congress passed the Heal As One Act (Republic Act [RA] 11469) (known as the Bayanihan Act), which gave the President emergency powers to respond to the pandemic (Atienza 2020). The Bayanihan Act expired in June 2020, and the Congress subsequently passed the Recover As One Act (known as

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Bayanihan 2) to empower the President to manage emergency stimulus funding (ibid.).

Timor-Leste used a similar process to the Philippines. On 23 March 2020, the Council of Ministers requested the President of the Republic to declare an SOE; he then requested authorization from the National Parliament in accordance with article 85(g) of the Constitution (Sousa da Cunha 2020). After substantial debate, Parliament unanimously passed authorization Law No.1/2020, on 27 March, after which the President issued Decree 29/2020, which declared a 30-day state of emergency (ibid.). Rolling 30-day parliamentary authorizations followed by presidential decrees were issued for the period up to June and then again in August when cases spiked, with the President then managing the Government's Covid-19 response under those decrees (ibid.) This included promulgating Decree-Law (DL) 12/2020 on 17 April, which regulated the USD250 million Covid-19 Fund used to respond to the pandemic, and developing regulations for the Covid-19 Fund by Decree-Law 19/2020 of 27 May.

In the Pacific region, Solomon Islands and Papua New Guinea provide interesting contrasts in how constitutional emergency provisions have been drafted and used. Solomon Islands has a very simple provision in its Constitution (Solomon Islands 1978), empowering the Governor-General (the ceremonial head of state, who is usually required by convention to act on the advice of the Prime Minister of the country) to declare 'at any time' (section 16) that a state of public emergency exists and to publish that proclamation in the Gazette. The SOE must be reviewed by the National Parliament within 14 days, and will then go into effect for four months, unless revoked earlier. The proclamation of an SOE triggers the country's Emergency Powers Act, under which the Prime Minister is empowered to then make more detailed orders (Kekea 2020). Solomon Islands (which had no cases of Covid-19, until a single case in quarantine in November 2020) entered rolling SOEs in March 2020, with another four-month extension approved in November 2020 (*Solomon Times* 2020). The constitutional SOE has been critiqued as a blunt instrument, which gives substantial powers to the executive and can accordingly be used to suspend fundamental rights for purposes beyond the immediate health crisis with almost no parliamentary oversight once the SOE has been approved (RNZ 2020a). That said, it was argued that, without sufficient public health emergency powers, no other legal mechanism was available to close the country's borders. Some discussion was had within the National Parliament regarding amending the existing Public Health Act to provide more flexible legal grounds for the Government to respond to a pandemic but no amendments have yet been enacted (Solomon Star 2020).

In contrast, Part X of the Papua New Guinea Constitution provides detailed guidance on the declaration of an SOE (Kama 2020), explicitly permitting an SOE to be declared in the event of 'an earthquake, volcanic eruption, storm, tempest, flood, fire or outbreak of pestilence or infectious disease, or any other natural calamity' (emphasis added; Papua New Guinea 1975, section 226(b)). To declare an SOE, the National Executive Committee (the Cabinet) is required to consult with a seven-

member Emergency Committee appointed by Parliament (Emergency Committees Act 1979, section 2), before advising the Governor-General to declare an SOE (Papua New Guinea 1975, section 228(2)). Any extension of the SOE can only be made through 'an absolute majority' vote of the Parliament, for up to two months at a time (ibid., section 238), on the basis of a recommendation from the Emergency Committee (ibid., section 242(2)). The Constitution has specific provisions on 'parliamentary control and supervision', including requiring that the Prime Minister and Emergency Committee present reports on the SOE's implementation whenever Parliament is recalled during an SOE or at the end of the two-month period of an SOE (ibid., sections 239–43). This detailed provision provides much stronger parliamentary safeguards for the invocation and implementation of an SOE by a government than many other simpler constitutional provisions. In response to Covid-19, an SOE was declared on 24 March 2020 and the Permanent Parliamentary Emergency Committee submitted a report to Parliament on 2 June 2020 (Papua New Guinea Parliament 2020), which was discussed before Parliament voted to extend the SOE by two weeks (RNZ 2020b).

1.2. Emergency powers in legislation

In some countries in the region, rather than relying on constitutional SOE powers, governments were able to draw on powers to declare an emergency contained in existing legislation. While these powers were found in some existing public health laws, many countries relied on national disaster management laws.

In other countries in the region, rather than relying on constitutional SOE powers, governments were able to draw on powers to declare an emergency contained in existing legislation. Interestingly, while these powers were found in some existing public health laws, many countries relied on national disaster management laws. For example, Myanmar and Vanuatu both used national disaster laws to respond to Covid-19. Such laws are more likely to include provisions permitting governments to limit people's movement and set up hot zones (presumably because many disasters affect only parts of a country), although some public health laws did contain useful quarantine provisions.

Singapore and the Republic of Korea also provide interesting examples, as they both had prior experience responding to the SARS health crisis, which meant that they already had robust emergency and public health frameworks in place to respond to Covid-19. In Singapore, the Government used the existing Immigration Act to deal with travel restrictions, while the Infectious Diseases Act (which had earlier been strengthened and expanded to deal with the SARS outbreak in 2003) was used to impose quarantines and declare certain areas isolation zones (Neo 2020). As the crisis deepened, the Covid-19 (Temporary Provisions) Bill was fast-tracked (Lam 2020) to empower the Ministry of Health to promulgate regulations restricting movement, prohibiting gatherings and criminalizing certain acts in violation of social distancing requirements (Neo 2020).

The Republic of Korea was also well prepared to respond, with a strong legal framework based on lessons from previous SARS and MERS outbreaks, as well as the Sewol ferry disaster in 2014. Early on, Covid-19 was categorized as a Class 1 disease, according to the Infectious Disease Control and Prevention Act, and was treated as a disaster according to article 3 of the Framework Act on Disaster and Safety Control (the Disaster Act) (Yun 2020). The Disaster Act authorizes the Minister of the Interior and Safety to take charge of managing a national disaster;

experience with previous pandemics meant the Republic of Korea invoked these powers quickly to enable a government-wide response to confine the spread of infection (ibid.). Notably, following the Sewol ferry disaster in 2014, the Disaster Act had already been amended to enable the Prime Minister to manage a larger-scale disaster by facilitating better intergovernmental cooperation (ibid.).

The Japanese Government also relied upon ordinary legislation. On 1 February 2020, Covid-19 was designated an infectious disease, under the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases (IDCA), which enabled municipal governments to recommend that infected people be hospitalized and to enforce that if their recommendation was not followed (Yabuki 2020). On 13 March 2020, the IDCA was amended to enable the national government to declare an emergency once an infectious disease was designated as a pandemic.[1] Interestingly, even under the amended Act, the Government is not allowed to issue a lockdown order, a violation of which by a member of the public will be publishable: if the Government requests people stay at home, it is totally on a request basis, not an order which could attract a punishment (Yabuki 2020).

A common insight across the cases of Japan, the Republic of Korea and Singapore was that, although they all used laws to underpin their response, the need for enforcement mechanisms was low, because their populations seemed more aware of the laws and their intent and were generally more willing to accept that such declarations were made in good faith and were willing to comply. This was also generally the case in Australia, New Zealand and Pacific Island countries, where the majority of countries' populations generally accepted what, in some cases, were quite strict lockdowns (for example, the Australian state of Victoria, which endured a three-month hard lockdown from July 2020), with only small pockets of resistance.

1.3. Other legislation-based powers

While most countries relied on some form of constitution-based SOE power or emergency powers contained in ordinary legislation, the Thailand experience was more complicated, with executive decree powers that were used for national security issues being repurposed to address the pandemic. The Thai Constitution does not grant the Prime Minister an emergency power that may be used to suspend laws or limit rights and liberties of subjects, although some form of SOE power is found in interim charters imposed during periods of authoritarianism to enable military juntas to override the legislative, executive, administrative and even judicial powers, without legal liability (Tonsakulrungruang 2020).

[1] The basis for declaring a pandemic was to be guided by criteria designated in a Cabinet Ordinance. Such a declaration is to specify the term of its application and can be limited to certain geographical areas. It also needs to designate the types of measures to be implemented. The term can be up to two years, with the possibility of extending for up to one year.

In Thailand, however, an emergency legislative power exists that allows the Cabinet to issue an emergency decree, which would have the force of a parliamentary statute, in times of crisis, for the purpose of maintaining national security, public safety and economic interests (ibid.). The Cabinet must introduce that emergency decree to the House for approval as soon as possible. The most well-known and controversial case of the use of the emergency power is the Emergency Decree on Public Administration in an Emergency Situation B.E. 2548 (2005), which remains in force and was the basis for the Covid-19 Emergency Decree 2020 (ibid.). That decree was promulgated by the Prime Minister in 2005 in response to local violence. The decree was approved by the House in 2005, but its invocation and use now rest solely on the Prime Minister's discretion, and the House cannot review or scrutinize his or her decisions under the decree, leaving only judicial review as some measure of legal recourse (ibid.). It was observed that Thailand's repeated use of these powers has resulted in Thais become increasingly accepting of their regular use at the discretion of the President.

2. Were there any legal issues of concern regarding the use of states of emergency during the pandemic?

The swift and severe impact of Covid-19 meant that many governments were caught somewhat unprepared, which resulted, in some countries, in responses being developed and implemented at speed but with limited time for sober reflection. Critiques of actions taken should be understood in this context; mistakes were sometimes made, but these were often the result of genuine oversights or misunderstandings and, once identified, were often rectified.

Take, for example, the case of New Zealand, which was noteworthy for being an early adopter of strong lockdown measures. A complete national lockdown was ordered in March 2020 using powers under the Health Act 1956. A case was taken to court arguing that the measures were beyond power (Baigent and McKechnie 2020). The court found that the lockdown orders, once made, were validly and properly made, but also found that during the first nine days of lockdown, the orders were not prescribed by law because no official written order was issued—which meant that the lockdown technically constituted an unlawful curtailment of rights as set out in the New Zealand Bill of Rights Act 1990 (Knight 2020). Notably, New Zealand subsequently enacted a bespoke (and temporary) legal framework, the Covid-19 Public Health Response Act 2020, to strengthen the power to grant health orders (ibid.). The Government also declared a state of national emergency under the Civil Defence Emergency Management Act 2002, which empowered the national civil defence director to act and gave the police an enforceable directive power. They also issued an epidemic notice under the Epidemic Preparedness Act 2006, which allowed ministers to activate dormant emergency provisions dotted throughout social security, immigration, penal and parole legislation (ibid.).

While some countries enacted amendments to strengthen their legal frameworks, in other countries, concerns were raised that governments

While some countries enacted amendments to strengthen their legal frameworks, in other countries, concerns were raised that governments pursued amendments that may have served to weaken oversight over their emergency powers. Responses to the pandemic also exposed deeper problems regarding how legal emergency powers can be stretched or repurposed to serve other means.

pursued amendments that may have served to weaken oversight over their emergency powers. In Papua New Guinea, for example, which has strong emergency oversight powers as discussed earlier, the Government legislated in July 2020 to introduce a new National Pandemic Act, which 'essentially replicates the SOE scheme under the Constitution but without the elaborate parliamentary oversight over the operations of Government and key emergency personnel during the emergency period' (Kama 2020). The Opposition has taken the issue to court, arguing that ordinary legislation cannot lessen the constitutional duties of the executive.

Along similar lines, in Vanuatu, the Government initially issued an SOE that was stated to be based on the Constitution, but then issued subsequent SOEs under the Disaster Risk Management (DRM) Act, which was amended in April 2020 to allow for SOEs lasting up to six months and was passed when the Opposition was boycotting Parliament. The Leader of the Opposition argued that by removing the existing 30-day maximum duration of a state of emergency, the DRM Act was in conflict with the Constitution (article 70(3)). It is also notable that the DRM Act allows the President to declare an SOE on the advice of the Cabinet but makes no reference to the need for Parliament to endorse such an SOE.

In Sri Lanka, the Government avoided declaring a state of emergency at all. Instead, the Government chose to issue a curfew and to manage its response to the pandemic in a different way. In the absence of a declaration of emergency, the legal basis and the constitutionality of the extended curfew was unclear. The Government also relied on the Quarantine and Prevention of Diseases Ordinance 1897 (as amended). Regulations issued under that Ordinance have guided public health authorities and law enforcement authorities in designing responses to the control of the pandemic.

In other countries, responses to the pandemic also exposed deeper problems regarding how legal emergency powers can be stretched or repurposed to serve other means. Take, for example, the case of Samoa, which—up to December 2020—had had only two Covid-19 cases. Samoa's Government nonetheless declared a constitutional SOE in March 2020, which has been extended for months and was still in place in December 2020. In response, the Samoa Law Society issued a press release on 15 August 2020, which called on the Government to 'take a measured response to the Covid-19 pandemic, to respect the rule of law, and to provide scientific evidence of why some State of Emergency (SOE) restrictions are necessary … [because] without a case of the virus, emergency orders should match the severity of the threat, and not go beyond the purpose of the SOE' (Mayron 2020). Another senior lawyer noted that 'orders which: limit customary observances like funerals and celebrations; impose a Sunday ban on trading and commerce; impose a Sunday ban on swimming and impose restrictions upon shops, businesses and sole traders to trade during specific times and days do not come within the purpose and authority of the Proclamation' (ibid.).

The instinct to declare an emergency seems an obvious and necessary one, but in hindsight there are perhaps different or better ways that such powers could have been designed or deployed.

3. What insights for the future can be drawn from these experiences?

Covid-19 shocked the world with the speed of its spread, and the size of the economic and health crises it precipitated. Governments were forced to respond quickly and on a scale rarely seen. Some countries found their legal and institutional frameworks fit for purpose and ready to respond; others, however, had to craft their responses on the run, as public officials sought to marshal the powers and resources at their disposal for best effect, on a very tight timescale. Lessons can be learned.

One of the first and most substantial responses seen was the declaration of SOEs—which many countries issued as the crisis first hit. The instinct to declare an emergency seems an obvious and necessary one, but in hindsight there are perhaps different or better ways that such powers could have been designed or deployed as well as good practice that can be built upon. Three such areas for further consideration are discussed below.

The importance of parliamentary oversight when emergency powers are invoked cannot be overstated.

- SOEs grant the executive branch considerable powers over people's lives and often come during conflict or require the curtailing of civil liberties and human rights; such powers must be accountable and transparently utilized. Experience has shown that, in some countries, parliaments were not given space in practice to undertake proper oversight, as—once approved by the legislature—SOEs then gave governments broad discretion to take action without having to refer back to parliaments. Two country exceptions can be learnt from, however. In Papua New Guinea, as described above, the constitutional SOE provisions specifically require the executive to report back to Parliament on how SOE powers are used. In New Zealand, the Government innovated by setting up a parliamentary Covid-19 Epidemic Response Committee, which was given plenary powers to inquire into the Government's ongoing response to Covid-19 (New Zealand Parliament 2020). Chaired by the Leader of the Opposition and with an Opposition majority, the Committee met three mornings a week during the lockdown, questioning key ministers and officials, as well as hearing from experts and those adversely affected (Knight 2020). This kind of parliamentary oversight was important to ensure that the executive branch was not exceeding its authority.

SOEs to respond to the pandemic should be used for a limited duration and for clear and strictly defined purposes.

- Where SOEs were declared on the basis of existing legislation, they were more likely to be constrained, as public health and natural disaster laws were usually drafted within quite specific parameters. However, where constitutional SOEs were used, there was much greater room for executive governments to issue and implement broad rules and strategies. In Solomon Islands, three rolling four-month SOE declarations have been issued to extend the SOE, which is still in place as at April 2021, there only ever having been a handful of positive Covid-19 cases in the country. This begs the question, even if

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the initial Covid-19 crisis warranted an SOE, could the Government not by now have developed a more appropriate public health framework, debated and enacted in law by the National Parliament, instead of relying on a constitutional SOE, which will in effect have allowed the Government to suspend fundamental human rights for an entire year? In Samoa, the Government has also been critiqued for using its SOE powers (Braddock 2020) to achieve public policy objectives beyond those related to Covid-19. For example, under the Covid-19 SOE, the Government has banned Sunday trading; more seriously, the Government has also avoided public consultations in relation to major constitutional reforms, on the basis that Covid-19 does not allow for such public dialogue. Arguably, these government actions go beyond those immediately necessary to respond to the public health threat and/or could be better achieved through the passage of ordinary legislation, properly debated in the parliament during the months following the immediate Covid-19 crisis.

Context is relevant, even regarding the use of such legal powers as an SOE.

- In Japan, even though an SOE was declared to respond to Covid-19, the country's cultural reluctance to utilize coercive state powers meant that the SOE could still not be used to enforce a mandatory lockdown; instead, people were simply strongly encouraged to do the right thing (Yabuki 2020) . This approach seemed to work (although there were some concerns in Japan raised regarding restricting the right to property), in comparison with other countries where law-based lockdowns were imposed, including with new penalties to force people to follow the new Covid-19 rules. Culture and context affect whether and how SOEs can be deployed for most effect and should be a key factor in designing such approaches in future.

Finally, as the Covid-19 crisis begins to subside with the roll-out of vaccines, it will be useful for governments across the region to engage in some form of after-action review, whether undertaken by parliament, an official independent inquiry body or a government department, to identify what worked and what did not—including in relation to the design and application of laws, particularly SOEs. SOEs allow for the use of strong, coercive state powers; their much greater use during the pandemic justifies a proper reflection on their utility but also how they can best be designed and deployed to protect and promote people's constitutional rights.

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