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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
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**RESPECT FOR DEMOCRACY,  
HUMAN RIGHTS AND THE RULE OF LAW  
DURING STATES OF EMERGENCY -  
REFLECTIONS**

by

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## **I. Introduction**

1. The fight against the Covid-19 pandemic has led many countries to resort to emergency powers. The enormous extent of the challenge posed by the pandemic requires great democratic resilience in order to avoid that emergency powers curtail fundamental rights and conflict with the rule of law. On the other hand, States are expected to anticipate the relevant dangers, be proactive and take any measures they deem appropriate in advance, by application of the “precautionary principle”.<sup>1</sup>

2. The Venice Commission has previously studied states of emergency and has produced both general reports and country-specific opinions on both constitutional provisions and emergency legislation. A compilation of the Commission’s works in this area provides guidance into the Commission’s specific findings (CDL-PI(2020)003). The Commission has also launched an Observatory of the state of implementation of declarations of states of emergency and of emergency legislation in Venice Commission member-states.

3. Reflection on the challenges posed by states of emergency continues. This report should be seen as a contribution to such reflection. It is based on the observation of the current states of emergency but can be applicable mutatis mutandis to any situation of emergency.

4. It should be said at the outset that identifying best practices in this area is not simple: the current experience shows that even states with very similar constitutional models, such as Sweden and Finland, can have quite different ways of dealing with emergencies. It seems evident that history and cultural factors play an important role in this context.<sup>2</sup>

## **II. Reflections**

### **A. State of emergency: definition and substantive requirements**

5. A state of emergency is a - temporary - situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary situation posing a fundamental threat to a country. Examples include natural disasters, civil unrest, epidemics, massive terrorist attacks, economic crisis, war and military threats. The existence of the state of emergency is premised on the dichotomy between the norm(alcy) and the exception. A necessary precondition for declaring a state of emergency should therefore be that the powers provided by normal legislation do not suffice for overcoming the emergency. The ultimate goal of any state of emergency should be for the State to overcome the emergency and return to a situation of normalcy.

### **B. Principles governing the state of emergency**

6. The only legitimate aim and legitimate ground for adoption of emergency measures is to help the State overcome an exceptional situation. It is the nature, severity and duration of this exceptional situation which determines the type, extent and duration of the measures that the State may lawfully resort to. Emergency measures should respect certain general principles which aim to minimize the damage to fundamental rights, democracy and rule of law. The

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<sup>1</sup> See e.g. the order given by the French Conseil d’Etat to the Prime minister and to the Minister of Health in respect of the extent of the emergency measures: <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-22-mars-2020-demande-de-confinement-total>.

<sup>2</sup> See, e.g. Jonsson Cornell, Anna, Salminen, Emergency laws in comparative constitutional law, German Law Journal, 2019, 233-249. For national examples, see amongst others <https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/>.

measures are thus subject to the triple, general conditions of necessity, proportionality and temporariness.

7. The assessment of the three conditions is not a once-for-ever issue. As the situation changes over time, the measures should reflect these changes (they may become stricter, if the situation gets worse, they have to become less strict, if the situation gets better).<sup>3</sup>

a. Overarching principle of the Rule of law

8. The existence of the state of emergency is premised on the dichotomous view between the norm(alcy) and the exception. According to the so-called sovereignty approach, the state of emergency lies outside the legal regulation and is not subject to it. According to the so-called rule of law approach, the state of emergency is itself a legal institution, which is subject to legal regulation, though the rules applicable to it might be somewhat different from those applicable in times of normalcy. Current international law as well as virtually all national legal orders adhere to the latter approach.

9. The Venice Commission has stated in this respect that “[t]he concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail.<sup>4</sup> The rule of law consists of several aspects which are all of eminent importance and have to be maintained in an integral way. These elements are the legality principle, separation of powers, division of powers, human rights, the State monopoly of force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation in and supervision on public decision making, transparency of government, freedom of expression, association and assembly, rights of minorities as well as the majority rule in political decision making.<sup>5</sup> The rule of law further means that governmental agencies must operate within the framework of law, and their actions must be subject to review by independent courts. The legal security of individuals must be guaranteed.<sup>6</sup>

b. Necessity

10. Under the condition of necessity (direct link), only measures which are necessary to help the State overcome the exceptional situation may be justified. The general purpose of emergency measures is overcoming the emergency and returning to ‘normalcy’. This entails that the state of emergency must be terminated immediately after the emergency has passed and the powers established by normal legislation suffice for coping with the situation.

c. Proportionality

11. Under the condition of proportionality, States may not resort to measures that would be obviously disproportionate to the legitimate aim (in terms of their severity or the geographical

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<sup>3</sup> Srov. “Las autoridades deben evaluar permanentemente la necesidad de mantener la vigencia de cada una de las medidas temporales de suspensión o restricción adoptadas.” CIDH, Resolución No. 1/2020, *Pandemia y Derechos Humanos en Las Américas*, el 10 de abril de 2020, para 29.

<sup>4</sup> CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44.

<sup>5</sup> CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations, § 34.

<sup>6</sup> CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44.

area covered by the emergency measures). If they have a choice between several measures, they should choose the ones which are less radical.

12. The principles of necessity and proportionality are relevant not only to the extent that emergency measures limit and may even derogate from not only constitutional fundamental rights, but also human rights enshrined in the European Convention on Human Rights (hereinafter ECHR) and the UN International Covenant on Civil and Political Rights (hereinafter ICCPR.) They are pertinent even as restrictions on emergency measures which do not have such effects.

d. Temporariness

13. Under the condition of temporariness, emergency measures may only be in place for the time the State experiences the exceptional situation. They must be terminated once the exceptional situation is over. They should therefore not have permanent effects. Emergency decrees or other emergency measures should not be (ab)used to introduce permanent changes in legislation or administration. In principle, amendments to the constitution should not be made during states of emergency.

e. Effective (parliamentary and judicial) scrutiny

14. It is essential that both the declaration and possible prolongation of the state of emergency, on the one hand, and the activation and application of emergency powers on the other hand be subject to effective parliamentary and judicial control.

f. Predictability of emergency legislation

15. The emergency regime should preferably be laid down in the Constitution, and in more detail in a separate law, preferably an organic or constitutional law. The latter should be adopted by parliament in advance, during normal times, in the ordinary procedure. In order to avoid excesses and time-pressures, even emergency decrees and other emergency measures should, to the extent possible, be drafted in advance.

g. Loyal co-operation among state institutions

16. As a state of emergency involves derogations from the ordinary rules on distribution of powers, it is important, for the crisis management to be effective and coordinated and for the sake of equality and fairness of treatment of all citizens, that all state, regional and local institutions and bodies respect the principle of loyal cooperation and mutual respect between them.

**C. Grounds for declaring a state of emergency**

17. A necessary precondition for declaring a state of emergency should be that the powers provided by normal legislation do not suffice for handling the situation.

18. The regulation of the grounds for declaring a state of emergency is primarily the task of domestic law. Each country has its own definition of the circumstances that might give rise to a state of emergency. International law, however, imposes certain limits on this regulation. These limits stem from international treaties, especially human rights treaties, international customary law and general principles of international law (common legal institutions present in legal orders across the world). Although relatively wide discretion (margin of appreciation) is left to States in

this area, this discretion is not unfettered. There is no close list of exceptional situations, which may trigger the declaration of the state of emergency. If, however, emergency measures entail derogation from human rights, then the exceptional situation needs to meet the definition of “*public emergency which threatens the life of a nation*” (Article 4 ICCPR and Article 15 ECHR).

19. So far, States have mostly invoked ongoing armed conflicts, massive terrorist attacks, natural disasters and, more recently, pandemics, to justify such derogatory measures.

20. Since the state of emergency is designed for exceptional situations, it should only be applied in case of threats which are truly exceptional (and short-term). It should not, conversely, be applied in case of threats that, however unfortunate and dramatic, are endemic to modern societies and can never be fully eradicated (common crime, sporadic terrorist attacks etc.). The line between the two scenarios, however, cannot be drawn *in abstracto*.

21. While the idea behind the declaration of a state of emergency is a dichotomy between normalcy and the exception, in practice there can be a spectrum between the powers used in the ordinary situation and those used in an emergency. All states can be assumed to already have statutes dealing with public health and epidemics, which grant extensive powers to the government, which may or may not be further delegated to health authorities, to take drastic measures of containment (issue quarantines etc.). Ordinary disease containment powers in some states can be extensive, so that the need for declaring a state of emergency may be lower. The distinction between ordinary and emergency legislation, however, should not be watered down (see para. 33 below).

#### **D. Declaration of state of emergency**

22. Two types of emergency powers exist: constitutional and extra-constitutional. In the first case emergency powers are based on the (written) constitution or on an organic or ordinary law enacted with accordance with the constitution; the state officially proclaims a state of emergency (in one of the forms foreseen by national law) and, usually, enacts emergency measures. In the latter case, executive authorities act – and are considered to be entitled to act – in an emergency on the basis of unwritten (constitutional) principles in order to overcome the emergency; the state enacts emergency measures without officially proclaiming a state of emergency.

23. The first form of state of emergency may be considered a *de jure* one, the second a *de facto* one. The latter form does not necessarily constitute a violation of international law. The absence of a formal declaration may however preclude States from resorting to certain measures (e.g. under the ICCPR, a derogation from human rights can only take place “*i/n time of public emergency /.../ the existence of which is officially proclaimed*”, Article 4(1)).

24. A system of de jure constitutional emergency powers can provide better guarantees for fundamental rights, democracy and the rule of law, and better serve the principle of legal certainty, deriving therefrom. In its 1995 Report on *Emergency Powers*, the Venice Commission expressed a preference for the de jure form, recommending that “*d/e facto state of emergency should be avoided, and emergency rule should be officially declared*”.<sup>7</sup>

25. The declaration of state of emergency is subject to the rules enshrined in the domestic legal order. The rules must be clear, accessible and prospective (available in advance).

26. Within the system of written emergency powers, the basic provisions on the state of emergency and on emergency powers should be included in the Constitution, including a clear

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<sup>7</sup> Venice Commission, CDL-STD(1995)012, *Emergency Powers*, 1995, p. 30.

indication of which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances.<sup>8</sup> The Venice Commission has previously indicated that “*t/he emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution*”.<sup>9</sup> This is necessary because emergency powers usually restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law. It is up to each State to decide whether one or several emergency regimes will be recognized. If several emergency regimes exist, the differences between them (causes, levels of parliamentary oversight, levels of powers to the government, available emergency measures) should be clearly set in the legal rule. The State should always opt for the least radical regime available in the given circumstances.

27. If the emergency concerns only a particular territory, the declaration should include a territorial limitation.

28. The declaration should indicate the grounds for the state of emergency and enlist the exceptional powers which can be resorted to. The measures which will subsequently be authorized do not need to be enlisted in a single legal act and, obviously, they may change over time. There should be an explanatory report attached to the original declaration as well as to any legal act introducing emergency measure, that should specify the factual and legal grounds on which the measures are enacted.

29. The emergency regime should be laid down in more detail in a separate law, preferably an organic law, if the constitutional system includes such a level.<sup>10</sup> The law should include provisions on the exceptional circumstances where a state of emergency can be declared; proclamation of a state of emergency; activation of the use of emergency powers; application of emergency powers; parliamentary control of proclaiming and terminating a state of emergency and of legal regulations issued by the executive during such a state; judicial control of specific emergency measures.

30. It is important that the law on the regime of a state of emergency is adopted in advance, during normal times. Such a law usually covers various kinds of emergency and includes provisions on powers which are relevant only in certain kinds of emergency. Therefore, it is crucial that in the declaration of the state of emergency or in a separate decree, also to be submitted to Parliament for approval, the powers are enumerated which can be applied in the emergency. The same goes for their territorial scope of application. Again, the principle of necessity requires that emergency powers can only be activated for such measures which are considered necessary for overcoming the emergency but fall outside the powers established by normal legislation.

31. Not only should the law on the regime of emergency states be adopted under normal conditions. In order to avoid excesses and time-pressures, even emergency decrees and other emergency measures should, to the extent possible, be drafted in advance. This allows for a proper, unhurried, discussion of the balances which should be drawn between competing interests.

32. Nonetheless, it may not be excluded that an emergency presents unpredictable challenges. For example, many states have felt the need and chosen to legislate especially for the situation caused by the Corona-virus epidemic, including several states which provide, either

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<sup>8</sup> Venice Commission, CDL-STD(1995)012, *Emergency Powers*, 1995.

<sup>9</sup> Venice Commission, CDL-STD(1995)012, *Emergency Powers*, 1995, p. 30.

<sup>10</sup> CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 93.

in their constitution or in ordinary legislation, for wide-ranging emergency measures.<sup>11</sup> This seems to indicate that few, if any states, have felt that their existing emergency laws are adequate for the present emergency, and have chosen to create a new type of special emergency law, or have complemented their existing laws dealing with infectious diseases with additional powers. The peacetime threat to the nation which can be assumed to be the “standard” trigger for emergency powers is “widespread civil unrest”. One shared feature between this threat and the present epidemic is the need to restrict public assemblies. However, the present epidemic poses different threats, and so requires different powers.<sup>12</sup> In the majority of European states drastic measures have been taken, aimed at limiting the spread of the disease, such as quarantine of large areas where the infection is presumed to be widespread, restricting access to localities where sections of the population are known to be at special risk (old people’s care homes etc.), closure of schools and universities, closing parks and other public areas, closing private businesses or limiting their opening hours. These drastic measures have in turn triggered an economic crisis, which in turn has required other emergency powers (financial measures etc.). The normal method for dealing with an economic crisis – various ways to stimulate the economy – is not available because such measures would tend to undermine the health and safety measures aimed at limiting the spread of the disease. The emergency is thus a “complex” emergency (consisting of different threats) and so requiring additional types of measures not usual in the civil unrest situation.

33. Framing ordinary legislation on infectious diseases (or other emergencies) so flexibly as to be able to cover all the possible measures necessary to deal with a pandemic (or threat) on the scale of the present Corona-pandemic carries the danger of bringing about a long-lasting or even permanent emergency. The Venice Commission has warned against this danger.<sup>13</sup>

#### **E. Declaration, activation and application of emergency powers**

34. The legal regime of a state of emergency should make a distinction between the activation and the application of emergency powers. Activation only entails that certain emergency measures can in general be taken if the concrete situation so necessarily requires, and application, in turn, means that the measure is taken. The distinction is important because the principles of necessity and proportionality are specified differently in these two stages. If declaration of a state of emergency and activation of emergency powers are separated, these principles should be respected in three contexts: first, in declaring, prolonging and terminating the state of emergency; secondly, in activating particular emergency powers; and thirdly, in applying these powers.

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<sup>11</sup> Eg, on March 23, 2020, the French legislature adopted a law allowing the executive branch to declare a state of emergency for health-related crises. This law adds several provisions to the nation’s Public Health Code, allowing the executive to declare a “state of health emergency” (état d’urgence sanitaire). The Norwegian parliament chose not to trigger a state of emergency, but instead adopted a special law allowing the government to derogate, by means of ordinances, from the requirements of a large number of other laws.

<sup>12</sup> CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 73: “The differentiation of different kinds of states of emergency is a common solution in many countries, and a positive one: different types of states of emergency need the utilisation of different means.”

<sup>13</sup> Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, CDL-AD(2016)037, “the longer the emergency regime lasts, the further the state is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools” (para. 41).

35. A declaration of a state of emergency should precede the activation and use of emergency powers. This holds also for emergencies which fall outside the scope of Art. 15 ECHR and Art. 4 ICCPR.

#### **F. Competence to declare**

36. The declaration of the state of emergency may be issued by parliament or by the executive. In the latter case, it should be subject to immediate parliamentary approval. The primary option should be declaration by parliament or a declaration by the Executive which does not enter into force before approval by Parliament. However, in particularly urgent cases, immediate entry into force could be allowed. Yet, even then, the declaration should be immediately submitted to parliament which can repeal it. It should not be possible for the Executive to extend the state of emergency beyond a certain time period without the involvement of the parliament.

#### **G. Kinds and scope of the emergency measures**

37. Public emergency situations involve both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State.

##### **a. Human Rights protection**

##### **i. Exceptions**

38. The state of emergency may involve restrictions upon human rights. Such restrictions are foreseen in human rights treaties and, since most States have their own internal bills of rights, shall also be enshrined in the domestic legal order.<sup>14</sup> There are three main instruments that human rights law uses, to accommodate exceptional situations.

39. The first instrument is *exception* to human rights. The exceptions exclude from the scope of human rights certain actions taken in time of emergency. For instance, Article 4(3) ECHR stipulates that the prohibition of forced and compulsory labour, enshrined in Article 4(2) does not extend to “*any service exacted in case of an emergency or calamity threatening the life or well-being of the community*” (par. c)).

40. The second instrument is *limitation* to human rights. Limitations are restrictions imposed on non-absolute human rights, such as the right to freedom of expression, the right to freedom of association or the right to private and family life. The legitimate aim of protection of health is contained in Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 ECHR and Article 2 paragraph 3 of Protocol No 4 to the ECHR. These limitations are subject to a triple test of legality (are prescribed by law), legitimacy (pursue a legitimate aim) and necessity (are needed to reach the aim and proportionate to it).

41. The third instrument is *derogation*. Derogations are temporary suspensions of certain human rights guarantees.<sup>15</sup> The possibility to derogate is conditioned on the situation of “*public emergency which threatens the life of the nation*” (Article 4(1) ICCPR) or a similar extremely

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<sup>14</sup> See also CDL-AD(2006)015, *Opinion on the Protection of Human Rights in Emergency Situations*, Opinion No. 359/2005, 4 April 2006.

<sup>15</sup> See also Higgins, Rosalyn, *Derogations Under Human Rights Treaties*, *British Yearbook of International Law*, Vol. 48, 1976-77, pp. 281-320; Cowell, Frederick, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, *Birbeck Law Review*, Vol. 1, 2013, pp. 135-162.

serious situation.<sup>16</sup> Implied derogation is not possible.<sup>17</sup> Measures of derogation have to meet the condition of proportionality. States may thus only derogate “*to the extent strictly required by the exigencies of the situation*” (Article 4(1) ICCPR). The ‘extent’ refers to the severity of measures, the geographical area they cover and the period for which they stay in place.<sup>18</sup> The measures, moreover, must not involve discrimination<sup>19</sup> and/or be inconsistent with other obligations arising under international law, e.g. obligation under international humanitarian law or international refugee law. Derogation may be used with respect any human rights except for those that are considered non-derogable. The common core of non-derogable right comprises the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws.<sup>20</sup> Fundamental judicial guarantees are also increasingly seen as non-derogable.<sup>21</sup> Derogations also entail procedural obligations (notification to the depository of the relevant human rights treaties) that should make external oversight easier.<sup>22</sup>

42. Derogation is not always necessary. As indicated above, the ECHR provides for the possibility to restrict several rights on account of protection of health (Article 5 provides for an explicit ground to detain people due to infectious diseases). Other rights contain more general grounds for restriction, and the European Court of Human Rights (hereinafter ECtHR) takes account of the context when interpreting the extent of rights.<sup>23</sup> Refraining from making a derogation may convey the message that a crisis may be handled without resorting to exceptional powers; on the other hand, a derogation may give a clear indication that certain exceptional measures are truly exceptional and do not “make the law”. As the Secretary General of the Council of Europe has stressed, “[i]t is for each state to assess whether the measures it adopts warrant such a derogation, depending on the nature and extent of restrictions applied to the rights and freedoms protected by the Convention. The possibility for states to do so is an important feature of the system, permitting the continued application of the Convention and its supervisory machinery even in the most critical times.”<sup>24</sup>

43. States have a margin of discretion to assess whether a public emergency exists and whether derogations are needed. It is for the national authorities to assess, in view of the seriousness of the situation and taking account of all the relevant factors, if and when there is a

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<sup>16</sup> The ECHR speaks about “*war or other public emergency threatening the life of the nation*” (Article 15(1)).

<sup>17</sup> See *Cyprus v. Turkey*, 4 October 1983, Report of the European Commission on Human Rights.

<sup>18</sup> The UN Human Rights Committee specifies that “*t/his requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency*”. UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), *General Comment 29, States of Emergency (article 4)*, 31 August 2001, para 4.

<sup>19</sup> The prohibition of discrimination features explicitly in the ICCPR. It is not mentioned in Article 15 of the ECHR but has been read into it by the ECtHR (see ECtHR, *A. and Others v. the United Kingdom*, Application No. 3455/05, Grand Chamber, 19 February 2009, para 190).

<sup>20</sup> The catalogue in the ECHR is limited to these four rights. The catalogue in the ICCPR adds the right not to be imprisoned on the grounds of inability to fulfil a contractual obligation, the right to recognition as a person before the law, the right to freedom of thought, conscience and religion and, for State Parties to the 1989 Second Protocol to the ICCPR, the prohibition of the death penalty.

<sup>21</sup> In its General Comment No. 32, the UN Human Rights Committee held that “*t/he guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of nonderogable rights*”. UN Doc. CCPR/C/GC/32 (2007), *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, para 6.

<sup>22</sup> Notifications under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

<sup>23</sup> *Hassan v. the United Kingdom*, 16 September 2014 (Grand Chamber).

<sup>24</sup> Secretary General, Information Document: Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, SG/Inf(2020)11

public emergency threatening the existence of the nation and if a state of emergency needs to be declared to combat it. Likewise, it is for the state authorities to decide on the nature and extent of the derogations needed to overcome the emergency. However, although states have a wide margin of discretion in this area, their powers are not unlimited, and the European Court of Human Rights exercises some supervision over these powers.<sup>25</sup>

44. Certain groups of individuals might be particularly vulnerable to human rights abuses in times of emergency. These include journalists or bloggers, minorities (particularly those that might be somehow associated with the exceptional situation), human rights defenders and whistle-blowers and members of political opposition. It is important to make sure that members of these vulnerable groups are not specially targeted (*de jure* or *de facto*) by emergency measures. At the same time, proactive measures should be taken to grant access to information to the population.

45. In addition to providing for grounds for restrictions of human rights in order to protect public health, it should be recalled that “Article 2 [ECHR] requires the State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, cited above, § 36, and the decision in *Powell*, cited above); in the public-health sphere, these positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients’ lives.”<sup>26</sup>

ii. Human Rights likely to be affected by the state of emergency

46. Under states of emergency, and in particular during a pandemic like the present one, the enjoyment of human rights may be affected in numerous areas of law.

47. The rights of freedom of assembly, freedom of movement and detention are on a sliding scale.<sup>27</sup> Property rights will be affected in a number of ways. Central or local government may have powers to take over and use public or private land to provide for emergency housing, field hospitals etc.<sup>28</sup> As noted, temporary expropriations of essential resources may have to occur and temporary blockages on export/import.<sup>29</sup> Powers may be taken to close privately owned areas (shopping centres, sporting facilities) to discourage people congregating.<sup>30</sup>

48. As regards the most common human rights restriction, that is, on freedom of movement, in a quarantine the focus is usually on keeping infected, or possibly infected, people in a small area; certain territorial areas or regions may be temporarily closed down. Covid-19 is a high threat to older people, and certain other risk groups, and the focus has partially shifted to keeping these non-infected people isolated from potentially infected people. The demographics in states varies,

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<sup>25</sup> CDL-AD(2016)010, Turkey - Opinion on the Legal Framework governing Curfews, § 67.

<sup>26</sup> ECtHR, *Lambert v. France* judgment of the ECtHR (5.6.2015) with further references.

<sup>27</sup> ECtHR, *Austin and others v UK*, [GC], Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012. The applicants had been “kettled” in small street, without access to toilets, for between 4–7 hours.

<sup>28</sup> Eg in the US, upon a governor’s request, the president may—for a ten-day period before a major disaster or emergency declaration—direct the Department of Defense (DoD) to use its resources “for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property” (42 U.S.C. 5170b (c)(1)). After a major disaster, the president may call upon the DoD as a “federal agency” to provide “general federal assistance” under Sec. 5170a or “essential assistance” under Sec. 5170b.

<sup>29</sup> For EU states, there are important issues here relating to free movement of goods.

<sup>30</sup> Such powers have been taken in eg Sweden and France. In Norway, to avoid overloading health care in rural areas, the government prohibited (with certain exceptions) people from using their one’s own holiday homes, where these were situated in another local authority area than the one where the person was legally resident (which obviously raises an issue under ECHR Article 8, even if it can be justified).

but all European states have a relatively large populations of old people. « Old people curfews » are conceivable, although whatever age is taken as the threshold is likely to be arbitrary. Introducing such a curfew will be politically very difficult of course (compared to curfews for younger teenagers, who do not have the vote).

49. The historical evidence is that during emergencies the abuse of human rights is the greatest.<sup>31</sup> The question arises as to whether there is *any* basis at all for limiting freedom of expression. This concerns in particular the problem of spreading of (false) rumours on social media.<sup>32</sup> It can be that offences which might apply in ordinary times, or during the declaration of a state of emergency, can be used in such circumstances, e.g. deliberately inducing panic in the public. An argument could be that if making a bomb hoax is punishable, even to be seen as terrorism, then deliberately spreading an « epidemic » hoax can also be. Existing powers to require internet service providers to remove « offensive » content might also be employed to restrict access to grossly misleading information. Obviously, such powers and offences have a great potential for abuse by authoritarian governments, a point recognised by the governments of 16 EU member states in the statement they have issued on the rule of law during the crisis.<sup>33</sup>

50. In an emergency context, however, restricting freedom of expression would deprive the public of an essential check on the increased executive powers. The need to gather, circulate and discuss information on the threat (the virus) and to enable public debates on legitimate differences of expert opinions, for example on the best containment strategies,<sup>34</sup> strengthens the need for a free “market place of ideas”. Free, accurate, responsible and timely reports on all aspects of the crisis cannot but help the public decide for itself and monitor the actions of the government. Responsible journalism may counter fake news that aim at spreading panic.

51. Requirements of public service may be introduced (see A4 ECHR); the increased needs of the health services can probably be met by volunteers, but there may in very extreme situations be a need to require citizens to perform public service.

52. As concerns data protection/surveillance (Article 8 ECHR), it has been pointed out that “data protection can in no manner be an obstacle to saving lives and that the applicable principles always allow for a balancing of the interests at stake. In accordance with Convention 108+ it is crucial, that even in particularly difficult situations, data protection principles are respected and therefore it is ensured that data subjects are made aware of the processing of personal data related to them; processing of personal data is carried out only if necessary and proportionate to the explicit, specified and legitimate purpose pursued; an impact assessment is carried out before the processing is started; privacy by design is ensured and appropriate measures are adopted to protect the security of data, in particular when related to special categories of data such as health related data; data subjects are entitled to exercise their rights.”<sup>35</sup> Metadata has been used to

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<sup>31</sup> Emergency Powers, Science and technique of democracy, No. 12, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e)

<sup>32</sup> On Sunday, (22 March), Bulgarian President Rumen Radev vetoed proposed amendments to the penal code that would have imposed a fine of more than €5,000 and jail terms of up to three years for spreading “false information” about an epidemic, fearing the consequences for free speech. (<https://www.euractiv.com/section/justice-home-affairs/news/coronavirus-derogations-from-human-rights-send-wrong-signal-say>).

<sup>33</sup> <https://www.regeringen.se/artiklar/2020/04/gemensamt-uttalande--rule-of-law-in-the-context-of-the-covid-19-crisis/>

<sup>34</sup> The Swedish and Dutch governments, for example, have chosen quite different containment strategies than other governments in Europe.

<sup>35</sup> See Joint Statement on the right to data protection in the context of the COVID-19 pandemic by Alessandra Pierucci, Chair of the Committee of Convention 108 and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, 30 March 2020, <https://www.coe.int/en/web/data-protection/statement-by-alessandra-pierucci-and-jean-philippe-walter>

follow people on a general, i.e. aggregated level.<sup>36</sup> Where the data is aggregated and anonymized this will not raise a personal data issue. However, use of metadata on an individual level will, e.g. use of metadata to catch quarantine/isolation evaders.

53. In respect of employment law, it may be necessary to change the conditions of work, for example by relaxing some conditions (such as the requirements to produce medical certificates in order to receive unemployment or sick leave benefits). Exceptions from maximum working hours may be allowed. Governments may decide temporary subsidization of businesses.

54. Similarly, governments may decide to relax conditions under social security law, such as the requirements to report for work, to produce medical certificates in order to receive benefits, under health and safety law, relaxing controls on working practices, equipment and premises approval procedures. Regulations regarding the storage of dead bodies and burial requirements may have to be relaxed as well (e.g. UK Coronavirus Act 2020).

55. Civil law, and particularly tort law, will require derogations, for example for indemnifying people for acting outside of their authority, when this was necessary for the public good, suspending the duty to fulfil certain contracts (e.g. to export medical technology to other states).

56. In the area of financial/tax law, temporary tax relief may be provided for businesses.

57. In the area of education, important measures are likely to be necessary: closure of schools, colleges and universities; requirements to switch to remote teaching; provision of education for children of essential workers.

58. Governments may also decide to prohibit religious ceremonies or impose limitations or conditions on their celebration.

b. Distribution of powers

59. The declaration of the state of emergency often entails horizontal and vertical transfers of competences and powers.

60. The types of measure likely to be necessary in a pandemic emergency will depend upon a number of factors. Totally new powers are unlikely to be necessary. Rather the issue is which organ of the state should have competence to issue such measures. Most states provide basic rules in their constitutions, or as a result of case law of constitutional courts, dealing with delegation of norm-issuing competence, as well as the division of power between central, regional and local authorities. Of course, relevant here is not simply the formal legal division of power but the question of the practical control over resources. Another factor is what flexibility is built into the normal legislation. The larger the area which is regulated in a state (public sector, regulated private sector) and the more detailed the level of regulation, the more regulations which will probably need to be relaxed or changed. For example, de-regulation processes in many states have led to health services now partly being provided by private companies. Powers may thus have to be taken over such companies, expropriating equipment or allocating the use of their resources (personnel etc) in public hospitals.

61. Dealing with a state of emergency necessitates, perhaps even more than in ordinary times, respect by all state, regional and local institutions and bodies of the principle of loyal cooperation and mutual respect between them.

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<sup>36</sup> <https://www.google.com/covid19/mobility/>

i. Delegation of legislative power from the legislature to the executive

62. During the state of emergency, the executive may, temporarily, exercise certain powers that would be otherwise reserved to the legislature. The exercise has to have a clear and prospective legal basis.

63. Rules setting out limits on delegation of norm-giving competence are commonplace in constitutions. These can be federal-state, presidential-parliamentary, but also governmental-administrative, governmental-local/regional authority. The Rule of law Checklist, 1.4.i, provides for the supremacy of the legislature. The constitutions of certain states permit, under relatively narrowly defined circumstances, the government to legislate by governmental decree.<sup>37</sup> Other states constitutions explicitly forbid this.<sup>38</sup> In its 2019 *Checklist on the Relationship Between The Parliamentary Majority and the Opposition In A Democracy*, the Venice Commission expressed scepticism with respect to the idea a general legislative power being given to the executive directly by the Constitution. It stressed that *“a/t the least, such powers should be limited in time and in scope /.../ and may only be used for good reasons, such as a state of emergency /.../, and should be phased out as quickly as possible”*.<sup>39</sup>

64. The power of the executive to issue legislative acts in times of emergency should be limited both in terms of content and of time: such acts should only relate to issues related to the exceptional situation and they should not remain in force beyond the state of emergency (unless confirmed and prolonged by the legislative). Appropriate “sunset clauses” should also include clear time limits on the duration of these exceptional measures. The Commission has also criticized the excessive resort to legislative decrees which have the force of law, when this becomes, in practice, a means of circumventing the legislature.<sup>40</sup>

65. The benchmark of the Rule of Law checklist on supremacy of the legislature further provides that when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of power should be explicitly defined in a legislative act (RoL checklist 1.4.iii). As is noted in the commentary (para 49), “[u]nlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures the supremacy of the legislature”.

66. In devising its rules on delegation of power, each state balances different factors. The most important of these is democratic legitimacy (of the parliament, but also of elected local authorities). In a democratic state, general norms which cause a significant impingement on human freedom, and which affect large groups of people or the whole population, require the imprimatur of the people’s representatives, the legislature. For a “deliberative democracy” the legitimation process is in the discussion in itself, not simply the authoritative “stamping” that the legislature provides when it transforms a government legislative proposal into a law. A legislative proposal should provide a well-prepared basis for the parliament to adopt a law. The proposal should be well drafted (technically speaking). The procedure in parliament should follow a clear and predictable pattern (no unexpected procedural manoeuvres etc).

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<sup>37</sup> E.g. Estonia, Italy and Georgia. See Tímea Drinóczi, Legislative Process, in U. Karpen, H. Xanthaki (eds) *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners*, Portland, Hart Publishing, 2017, p. 38.

<sup>38</sup> *Ibid.*, Drinóczi mentions the Czech republic and Bulgaria.

<sup>39</sup> CDL-AD(2019)019, *Parameters On The Relationship Between The Parliamentary Majority And The Opposition In A Democracy: A Checklist*, Opinion No. 845/2016, 24 June 2019, paras 119-121.

<sup>40</sup> See e.g. CDL-AD(2019)014, Opinion on Romanian Emergency Ordinances Geo No. 7 And Geo No. 12 Amending the Laws of Justice.

67. To maintain the technical legal quality, but also to examine the question whether the proposal will, in fact, help solve the problem it is supposed to deal with, certain states provide for the possibility to trigger abstract constitutional review before the constitutional court. Other states provide for independent, expert legal input to the legislative process in the form of a non-binding opinion from a group of judges.<sup>41</sup> Whether or not a state has such a mechanism, all states should, at some point in the legislative process, have a stage where the question is posed whether the proposed norms are likely to solve, ameliorate or at the very least not exacerbate the problem which they are designed to solve. Thus, if there is not a dedicated mechanism in the legislative process, then the parliament at least should have available to it, or the possibility of commissioning, an expert objective analysis of the problem and the possible solutions.<sup>42</sup>

68. Where such an independent mechanism exists as part of the legislative process it tends to apply only for laws, not government ordinances. Delegating norm-issuing power to the government means that these quality-control mechanisms no longer apply.

69. Expert competence is an important factor which affects the delegation issue and this can argue against an issue only being capable of being regulated by the legislature. Expert competence is usually to be found in the administrative agencies of the state, although in states with large government departments, it can also exist there. Thus, where expert competence is particularly important, delegation to government departments, or sub-delegation to administrative agencies, can be justified. Obviously, the views of medical experts should weigh very heavily when it comes to issuing norms designed to deal with a pandemic. Expert advice is, or should be, formulated on the basis of scientific knowledge, and proven experience. Another related factor is the need for speed. This too can argue against an issue only being capable of being regulated by the legislature which applies, or at least should apply, a relatively slow deliberative process.

70. A pandemic which risks great loss of life requires good decision-making (rational, capable of dealing with the problem, providing for a rational use of available resources), but also *quick* decision-making. The speed factor thus applies with greater, or much greater force, in an emergency where the situation can change rapidly. Concentration of decision-making power in the government, or a single government minister, usually creates a greater potential for speed; there is obviously less, or even no, need to consult, to debate, to build a consensus.

71. The dangers of this power concentration are equally obvious. The values behind the other factors set out above (democratic legitimacy etc.) risk being damaged. There are various implications. A solution which combines respect for the supremacy of the legislature with the need for speed and decisive action is to provide that all government ordinances issued under delegated powers are speedily (or within a specified period of days) put before the legislature either for approval, or to give it an opportunity to disapprove these. Such a parliamentary power must be framed to allow it not to approve, or disapprove of, specific provisions of an ordinance, rather than an «all or nothing » approach to the ordinance as a whole. This in turn means that the parliament must obviously continue to sit: dissolution of the parliament should not be possible during the state of emergency. If the mandate of the parliament expires in the course of the state of emergency and if it is not possible to hold regular elections, the mandate should be extended till the end of the state of emergency.<sup>43</sup> The legal consequences of disapproval/refusal to approve

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<sup>41</sup> E.g. the Dutch Raad van state, <https://www.raadvanstate.nl> or the Swedish lagrådet.

<sup>42</sup> RoL Checklist 1.5.v. « Where appropriate, are impact assessments made before adopting legislation (e.g. on the human rights and budgetary impact of laws » See also OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264238770-en> which requires inter alia that regulations serve clearly identified policy goals, and are effective in achieving those goals.

<sup>43</sup> CDL-STD(1995)012, Emergency Powers “This implies a continuity of parliamentary life during the period of emergency. For that reason, some constitutions explicitly state that the legislature cannot be dissolved during the exercise of emergency powers.”

must also be spelled out.<sup>44</sup> Where the government relies heavily on its medical experts in issuing measures, which will usually be the rational approach in a pandemic, the parliament might consider organizing hearings with these, and other independent experts, to obtain as full a picture as possible of the problems and their possible solutions.

ii. Other institutional changes

72. Other institutional changes may also take place during a state of emergency, for instance the transfer of certain police powers to the military authorities or the establishment of military tribunals and the transfer of certain competences from ordinary courts to these tribunals. Such institutional changes should be foreseen by the domestic legislation but should be limited to military crisis and to the armed forces; if the military is involved in enforcing curfews or quarantine measures, it should be subordinated to civilian authorities.

73. The central government will usually have control over the military, usually including the power to “federalize” local defence units. Such rules fall within the subject of military aid of the civil power and/or legislation on natural disasters.<sup>45</sup>

74. Central control over regional or local public health care may be asserted in order to redistribute resources. This is controversial where the central resources are less than the local resources, and so bottlenecks arise, or decisions are not made on an expert basis.

c. Restrictions imposed by the Executive on the functioning of elected bodies and courts

75. In the state of emergency, the functioning of parliament,<sup>46</sup> local self-governing bodies and also courts, including constitutional courts may be hampered by the general restrictions imposed during the state of emergency by the executive.<sup>47</sup> Such restrictions need to meet the criteria of

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<sup>44</sup> CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, “The Verkhovna Rada has to approve the decrees introducing martial law or a state of emergency. But it is not explained what are the consequences if the Verkhovna Rada declines to approve them. It seems advisable to grant to the President only a power of “first reaction” and to clarify that such a decree loses its validity if it is not approved by the Verkhovna Rada” (para 72).

<sup>45</sup> E.g. the US Congress, after wide spreading looting in the wake of Hurricane Katarina in September 2006 modified Section 334 of the Insurrection Act of 1807 to authorize the president to use armed forces to disperse “to restore public order and enforce the laws of the United States when, as a result of natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, . . . the president determines that domestic violence has occurred to such an extent that the constituted authorities of the state or possession are incapable of maintaining public order to suppress in any state, any insurrection, domestic violence, unlawful combination or conspiracy”.

<sup>46</sup> In France, for example, the Conference of presidents of the National Assembly, in agreement with the government, decided to reduce the parliamentary activity to the control of the urgent and essential texts linked with the Coronavirus-COVID19 crisis and to the control of the acts of the executive through the questions on current issues (QAG): [http://www2.assemblee-nationale.fr/static/presse/communiqu\\_e\\_presse\\_presidence\\_170320.pdf](http://www2.assemblee-nationale.fr/static/presse/communiqu_e_presse_presidence_170320.pdf). Article 115e of the German Basic Law [Joint Committee] provides: (1) If, during a state of defence, the Joint Committee by a two-thirds majority of the votes cast, which shall include at least a majority of its members, determines that insurmountable obstacles prevent the timely convening of the Bundestag or that the Bundestag cannot muster a quorum, the Joint Committee shall occupy the position of both the Bundestag and the Bundesrat and shall exercise their powers as a single body. (2) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted by the Joint Committee. The Joint Committee shall have no power to enact laws pursuant to the second sentence of paragraph (1) of Article 23, paragraph (1) of Article 24 or Article 29.

<sup>47</sup> In France, for example, the Prime Minister tabled on 18 March 2020 a draft “organic law to face the Covid-19 epidemic”, proposing to suspend until 30 June 2020 the three-month deadline for the Council of State and the Court of Cassation to submit priority issues of constitutionality (“questions prioritaires

necessity, proportionality and temporariness and they should never completely prevent the relevant organs from exercising their constitutional functions.

76. Parliament should by all means continue to meet and function during the emergency, if necessary under previously adopted special rules, which could provide, for instance, that only a small number of MPs should be physically present (selected from every party, voting on behalf of the entire parliamentary group); voting over the internet could also be provided.<sup>48</sup>

#### H. Procedure of adoption of emergency measures

77. The procedure of adoption of emergency measures should be inclusive for civil society, either before the proposal reaches the parliament or simultaneously as the proposal is discussed in the parliament. In both cases, sufficient time has to be made available.<sup>49</sup> The Commission has criticized on several occasions the adoption of legislation without a proper opportunity for discussion in either the parliament or civil society.<sup>50</sup>

#### I. Duration of the state of emergency

78. The declaration of the state of emergency should be always issued for a specific period of time, which moreover should not be excessively long, and should be terminated before the expiry of the period if the emergency has been overcome and exceptional measures are no longer necessary. Declarations with no specific time limit, including those whose suspension is made conditional upon overcoming the exceptional situation, should not be considered as lawful.<sup>51</sup> At the same time, it is possible to prolong the declaration for so long as it is necessary to overcome the exceptional situation. However, as the Venice Commission has previously held *“the longer the emergency regime lasts, the further the state is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools”*.<sup>52</sup> The prolongation of the state of emergency should not enter into force before parliamentary approval. In addition, there should be an obligation to terminate the state of emergency immediately upon overcoming the *emergency*; this means that the state of emergency has to be terminated as soon as the emergency can be addressed by the ordinary legal mechanisms, even though at that moment some restrictions might still be necessary, on a smaller scale.

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de constitutionnalité”) to the Conseil Constitutionnel, and the three-month deadline for the latter to decide it, on account of the impossibility for these courts to hold collegiate meetings. The Prime Minister sought the opinion of the Conseil Constitutionnel which by decision n° 2020-799 DC of 26 Mars 2020 ruled that the organic law is constitutional, noting in particular that it “does not call into question the exercise of this remedy, nor does it prohibit the ruling on a priority issue of constitutionality during this period”. Organic law no. 2020-365 was promulgated on 30 March 2020.

<sup>48</sup> In France for example the number of MPs, government representatives and staff allowed to be present in the hemicycle has been limited (“format restraint”) by decision of the National Assembly in a manner allowing for respect for sanitary requirements and representation of political sensitivities. Seats for MPs are allocated in a proportional manner to the number of members of each group.

<sup>49</sup> See RoL Checklist 1.5.iv.

<sup>50</sup> see e.g. Venice Commission/ODIHR, CDL-AD(2018)013, Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which directly affect NGOs (Hungary), Venice Commission CDL-AD(2016)026 Opinion on the Act on the Constitutional Tribunal (Poland).

<sup>51</sup> See also SG/Inf(2020)11, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, 7 April 2020, para 2.2.

<sup>52</sup> CDL-AD(2016)037-e, *Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016*, Opinion No. 865/2016, 12 December 2016, par 41.

## J. Control of the declaration and prolongation of the state of emergency and of emergency measures

79. Because the regime of emergency powers affects democracy, fundamental and human rights, as well as the rule of law, control of the declaration and prolongation of the state of emergency, as well as of activation and application of emergency powers is vital. Both parliamentary and judicial control should be possible: parliamentary scrutiny if the decision is issued by the executive and judicial review if it is issued by the parliament or the executive.

### a. Parliamentary oversight

80. Legislative control over the acts and actions of emergency rule authorities and special procedures for such control are important for the realisation of the rule of law and democracy.

81. Parliament should be able to exercise control in different stages: declaration, prolongation and termination of a state of emergency; activation of emergency powers; application of emergency powers. As regards the latter, emergency decrees where the executive has used legislative powers which under normal conditions belong to parliamentary legislator, should be immediately submitted to Parliament which should be able to repeal them.

82. Parliaments should have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the *post hoc* general accountability powers of Parliament, i.e. the right to conduct inquiries and investigations on the execution of Emergency Powers, are extremely important for assessing government behaviour.<sup>53</sup>

83. The legislature could also make plain its intention, after the emergency has come to an end, to subject all government measures adopted to deal with the pandemic to deep scrutiny, in order to see whether there has been compliance with the principles of necessity and proportionality. This scrutiny, and possible criticism or other more-far reaching parliamentary measures of accountability should bear in mind the state of medical and other knowledge at the time.<sup>54</sup> Granting a type of national “margin of appreciation” in this way, means that the legislature is not being “wise after the fact” at the same time as it maintains its supremacy over government. An open declaration that post-hoc scrutiny will happen can hopefully have the effect of deterring major overreactions on the part of government.

84. Participation of the opposition in the approval of the declaration of the state of emergency, and/or through ex post scrutiny of the emergency decrees or any extension of the period of emergency should be ensured. A qualified majority could be required for the prolongation of the state of emergency beyond the original period. All political parties should be involved in the discussion before a possible decision to postpone elections (see below).

### b. Judicial power

85. Next to Parliament, the judicial system plays a crucial role in the control of the executive’s prerogatives during states of emergencies, taking decisions on the legality of a declaration of a state of emergency as well as reviewing the legality of specific emergency measures.

86. Judicial control of the declaration of state of emergency may be limited to the control of the procedural aspects of the declaration. If, however, emergency measures involve derogations from human rights, the substantive grounds for the state of emergency shall be subject to judicial review as well.

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<sup>53</sup> CDL-AD(2008)004, Report on the Democratic Control of the Armed Forces, § 252.

<sup>54</sup> CDL-AD(2008)004, Report on the Democratic Control of the Armed Forces: “the post hoc general accountability powers of Parliament, i.e. the right to conduct inquiries and investigations on the execution of Emergency Powers are extremely important for assessing government behaviour”.

87. Judicial review over the acts of the emergency rule authorities, notably decisions on application of emergency powers, as opposed to the declaration itself, should always be possible. Decisions taken by the emergency rule authorities are typical unilateral administrative acts and actions and for this reason they should be reviewed by courts.<sup>55</sup> Even if certain decisions were immediately executable, ex post judicial review should be allowed. The judicial system must provide individuals with effective recourse in the event that government officials violate their human rights. Courts should exercise control so that the derogatory measures do not – either in general or in specific cases – exceed the boundaries of legality and the limits of what is strictly required to deal with the emergency situation,<sup>56</sup> and do not infringe non-derogable rights. The right to take proceedings before a court on questions related to the lawfulness of emergency measures must be safeguarded through the independence of the judiciary.<sup>57</sup> Meaningful judicial review of emergency measures by independent courts renders it necessary for the government to provide convincing justification of how these measures comply with the necessity and proportionality principles.

88. Judicial review should be carried out preferably by the Constitutional Court, in countries where it exists, or the Supreme Court, a special Chamber of which must have the power to order interim measures, upon request of either a substantial number of minority MPs or the Head of State. Ordinary courts and administrative courts should review relevant decisions.<sup>58</sup>

89. Moreover, the judicial system must continue to ensure the right to fair trial. The functioning of the judiciary should not be restricted except when absolutely necessary or when the functioning is factually impossible.

c. Oversight by the Ombudsman or National Human Rights Institutions

90. Through their mandate to promote and protect human rights,<sup>59</sup> Ombudsman institutions, in countries where they exist, and National Human Rights institutions<sup>60</sup> may contribute crucially to flag human rights issues during emergency times and assist citizens affected by emergency measures. They may therefore effectively complement parliamentary and judicial control.

d. Monitoring by the media

91. In addition to parliamentary and judicial control, control by free media is essential. The principles of necessity and proportionality require special attention in activating and applying measures which affect the freedom of media (see above).

## K. Elections under states of emergency

92. In ordinary circumstances, elections must be held periodically. Article 3 of the First Additional Protocol to the ECHR provides for a fundamental right to participate in free elections at reasonable intervals in the choice of the legislature. Article 25 (b) ICCPR provides for a fundamental right to take part in periodic elections. Postponement is a restriction to the periodicity

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<sup>55</sup> CDL-STD(1995)012, Emergency Powers - Science and technique of democracy No. 12 (1995), p. 29.

<sup>56</sup> See as examples:

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-025.html>

<https://gjk-ks.org/en/decisions-from-the-review-sessions-held-on-30-and-31-of-march-2020/>

<http://www.raadvanstate.be/?page=news&lang=fr>

<https://prishtinainsight.com/government-decision-restricting-movement-ruled-unconstitutional/>

<sup>57</sup> CDL-AD(2008)004, Report on the Democratic Control of the Armed Forces, § 253.

<sup>58</sup> CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 118.

<sup>59</sup> CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles").

<sup>60</sup> <http://ennhri.org/news-and-blog/covid-19-how-are-nhris-in-europe-responding/>

of elections and has to be foreseen in the law, be necessary in the concrete circumstances and be proportionate.

93. According to the ECtHR case-law, Article 3 of the First Additional Protocol to the ECHR is in principle not applicable to elections for local authorities.<sup>61</sup> The right to participate in periodic local or regional elections is protected by the European Charter for Local Self-Government as well by national constitutions. A restriction of that right must be in accordance with the principles of legality, proportionality and necessity, as well.

94. In addition to elections held due to the end of legislative period, some situation can lead to early elections. In some countries, early elections have to be held in case the parliament is unable to establish a government or adopt the state budget for a longer period. There are possibilities to hold early elections in other cases such as request by the government or by the president. Thus, the decision to hold early elections may be due to the inability of cooperation between parliamentary parties or on a wider margin of appreciation containing political motives. The aforementioned fundamental right to request the elections to be held periodically is not restricted in case of early elections. Still, the necessity to have early elections may result from the inability of the parliament to fulfil its tasks, including the absence of government.

95. Article 15 ECHR as well as Article 4 ICCPR allow a derogation from the obligations to guarantee most of the fundamental rights, including electoral rights, in time of war or other public emergency threatening the life of the nation“ or “in time of public emergency which threatens the life of the nation“. Such circumstances may relate to war or other ongoing armed conflicts, high level terrorist attacks, natural disasters or epidemic.

96. In these circumstances, the fairness of the elections might be doubtful. In order for the elections to be in accordance with the main principles stated in the Code of Good Practice in Electoral Matters<sup>62</sup> – universal, equal, free, secret and direct suffrage –, it must be possible not only to give a vote, but also to have open and fair electoral campaigning. A genuine campaign and real public debate are just as important for democratic elections as the opportunity to vote. The Venice Commission has previously stressed that “[t]he holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality”.<sup>63</sup> There is a risk that fundamental electoral principles will be undermined during a state of emergency, in particular the principle of equality of opportunity and freedom of voters to form an opinion. Similarly, it is axiomatic that derogation from individuals’ civil and political rights creates a risk that the results are not democratic.<sup>64</sup>

97. There is no general principle to avoid elections during the state of emergency and postpone them until the situation is ordinary, normal again.<sup>65</sup> In many states, the Constitution explicitly forbids dissolution of parliament during a state of war (state of martial law) or a state of

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<sup>61</sup> ECtHR, *Cherepkov v. Russia* (dec.), no. 51501/99, 25 January 2000.

<sup>62</sup> CDL-AD(2002)023-rev2-cor., Code of Good Practice in Electoral Matters: Guidelines (19 October 2002).

<sup>63</sup> CDL-AD(2002)023-rev2-cor., Code of Good Practice in Electoral Matters: Guidelines (19 October 2002), § 60.

<sup>64</sup> CDL-AD(2017)005, § 34.

<sup>65</sup> Elections have been held in several States during the Covid-19 pandemic: <http://www.electionguide.org/>.

emergency.<sup>66</sup> Under several constitutions an extraordinary situation will postpone, or provide an opportunity to postpone upcoming elections, for example by extending the term of parliament (Croatia, Italy, Germany, Greece, Poland, Lithuania, Slovenia, Spain, Hungary and Canada). Similarly, a situation of emergency may prohibit the dissolution of parliament (Germany, Spain, Portugal, Poland, Hungary, Russia). In Turkey, a declared state of war causes elections to be postponed (Article 78 of the Constitution).<sup>67</sup> In Estonia, the parliament, the President, and representative bodies of local authorities may not be elected, nor may their authority be terminated during a state of emergency or a state of war. If the term of office of the parliament, the President or representative bodies of local authorities should expire during a state of emergency or a state of war or within three months after the termination of a state of emergency or a state of war, that term is extended. In these cases, new elections are called within three months following the termination of the state of emergency or the state of war.<sup>68</sup>

98. The postponement of elections should be provided in law. In case an emergency law is missing, and the postponement is not provided, the factual situation may require postponement of elections, especially if the free movement or access to information is widely limited. The Code of Good Practice in Electoral Matters suggests that the electoral law should not be amended one year prior to the elections, except in technical matters. This principle should not be interpreted in a way forbidding the parliament to provide even during the state of emergency a legal ground for the postponement of elections, if this provision is missing. One cannot ask for elections to be organised in a situation where it is impossible in practice only due to the fact that the law has not foreseen the possibility for the postponement early enough.

99. As the emergency situation is exceptional, it can be assumed that the main concerns among the society may significantly differ from those issues the discussions should be concentrated to in order to elect the legislative body for the whole legislative period. Thus, even if the campaigning may be possible during the state of emergency, the postponement of elections can lead to a more thorough debate necessary to have free and fair elections later.

100. Suspension of electoral rights is only permitted to the extent required by the situation and the suspension must therefore meet a proportionality test.<sup>69</sup> The decision on the postponement of elections has to be based on specific circumstances and may lead to different outcomes depending on the exceptional circumstances (either armed or other high level violent conflicts between groups of society; epidemic or pandemic; natural disasters). Different circumstances have different impact on other fundamental rights and freedoms, level of fear and the extent of factual plurality in the society. A pluralistic and democratic discussion is more easily possible in case of natural disasters or pandemic; as a rule, democratic elections are excluded in case of armed conflict.

101. A wide list of issues has to be taken into account when deciding on the postponement of elections. The first of these issues is that, as indicated earlier, there is a large scope for abuse. A state of emergency may be promulgated or prolonged, and even not declared, based on partisan political reasons, rather than the objective needs of the situation. This may be due to the concentration of power in the hands of the government in general, but also to avoid predictable election results not supporting the outgoing government or incumbent candidates. In case the upcoming elections could change the balance in the parliament, the political parties in power may be motivated to call the situation an emergency and postpone the elections only to avoid the loss of power.

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<sup>66</sup> CDL-AD(2007)037, § 14.

<sup>67</sup> CDL-AD(2017)005, § 31.

<sup>68</sup> Article 131 of Estonian Constitution.

<sup>69</sup> See, e.g. CDL-AD(2015)036, referring to the Congress' Recommendation 375 (2015), paragraph 19(vi). See also Congress' Report on Criteria for standing in local and regional elections, G/2015(28)7FINAL, 26 March 2015.

102. A list of measures against such abuse has to be provided.<sup>70</sup>
- a. There should be judicial control by a national independent and impartial court, ideally by the constitutional court, if such exists. In case of derogation from the ECHR based on Article 15 of the Convention, the ECtHR is empowered to assess the situation in the country and necessity to make a declaration on the derogation of the human rights, including electoral rights. The proportionality test would guarantee that the restrictions on electoral rights are in accordance with Rule of Law. However, the ECtHR, because of the local remedies rule, is likely to be seized of a relevant case only many months or even years after the event.
  - b. All political parties and other stakeholders should be involved in the discussion before the postponement of elections or, if the circumstances allow, also before the promulgation of state of emergency.
  - c. The postponement of elections may be limited in time by law, providing for the elections taking place even during the state of emergency if it lasts for long time, e.g. over a year.
  - d. A qualified majority in the parliament may be required to decide on the postponement of elections, to guarantee that there is at least a wide agreement on the postponement in the society, if not a consensus.

103. The second issue concerns how the factual situation impacts upon campaign possibilities and the means for campaigning used commonly in the country in question for this type of elections. During a state of emergency, door-to-door campaigning or public rallies may be subject to severe limitations. It has to be assessed for how far it is possible to compensate for this by means of public or private media or the use of Internet, including social media. If the campaigning in the country in question is done mainly through social media, TV, radio and newspapers, the limitation of campaigning in the form of rallies or demonstrations may be less important. The role of traditional electronic media (radio and television) is also increased in this type of situation: special attention should be paid to the duty of neutrality of the authorities, as well as to the obligation of broadcasters to cover election campaigns in a fair, balanced and impartial manner in their overall programme services, in conformity with CM/Rec(2007)15 Recommendation of the Committee of Ministers to member states on measures concerning media coverage of election campaigns. A particular issue indeed arises if government-controlled public media are in a dominant position. Especially in nationwide elections the use of new technologies is becoming more and more prevalent compared to rallies.

104. The third issue concerns campaign costs. If the electoral campaign had already started before the extraordinary circumstances occurred, the candidates and political parties may already have spent considerable sums on their campaign activities. If this is so, then, rather than postponing the elections, and so requiring the candidates to begin campaigning from the beginning again, it might be better to continue the electoral processes (if possible) to avoid further negative effects and monetary duties for the stakeholders.

105. Fourth, if the first round of elections is already held and the extraordinary circumstances occur before the second round of elections, it may mean that the candidates have already finished their campaigning or paid for it. Support for politicians, particularly those in office, may rise or fall dramatically depending on how well they are seen as dealing with the crisis. The postponement of second round of the elections could thus mean – if the second round would be postponed for many months – that the candidates in the second round would have less public support compared to other politicians. In such circumstances, the legitimacy of the second round held months after the first-round elections could be discredited with a need to repeat a large part of the campaign activities. Other, upcoming politicians would be excluded from these electoral processes even if the opinion polls showed a higher level of support for them. The legitimacy of such electoral processes would be undermined. The same can be the case for electoral

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<sup>70</sup> CDL-AD(2007)007, § 42.

processes such as the presidential elections in the United States, where the candidates are elected in different states during a relatively short time and a stop in the process for months would undermine the results in general.

106. A fifth issue concerns security of election management staff and members of election commissions, including during election day and vote counting.<sup>71</sup> The exceptional circumstances may put the EMBs in danger. It has to be taken into account how far the electoral procedures can be automated, e.g. by use of machine counting of ballot papers or voting by voting machines. Internet voting, if provided, would lead to the presence of election management bodies' staff in a much lesser extent. If the exceptional circumstances are related to only a small part of the country, the dangers to the electoral management's well-being is limited.

107. Sixth, different voting modalities like postal voting, mobile ballot boxes and voting by Internet have to be taken into account. Where voters are able to vote without going to the polling stations, elections can be held without high risks in election day.<sup>72</sup> It is possible to prolong the voting time from one election day to several days, if the risks can thereby be reduced. However, this may cause problems for the security of the ballot boxes and higher level of risks for the election management bodies.

108. If Internet voting has been only one of many possible means for voting, the exclusion of other means can lead to an active participation in elections by those who are used to voting by the Internet but not for people who are not so used to voting by internet, mainly elderly voters. This may have an impact on the election results. In practice, during ordinary circumstances the political preferences of those voting by Internet and by other means tends to differ, even if providing Internet voting as one voting option does not change the election results.<sup>73</sup> However, if only voting by Internet would be allowed, voters from vulnerable groups and elderly people are not as likely to participate and so the election results would tend towards political parties supported by higher and upper middle class voters.

109. Proxy voting within a clear legal framework could offer a further option for older people and vulnerable groups to participate in an election without being required to visit a polling station.

110. It is possible to provide for exceptional voting modalities during a state of emergency. Once again, the best solution would be to provide these modalities in the electoral law in advance, during ordinary circumstances. Usually, voting modalities do not have a strong impact on the election results. Thus, making a change of the election code as regards voting modalities less than one year before elections may possibly be in accordance with the Code of Good Practice in Electoral Matters if it is necessary for, or contributes to, fair elections. All the principles governing elections cannot be followed at the same level as in normal times (e.g. free elections and periodicity of elections). However, such late amendments may only be in accordance with best European practices if the principle of free suffrage is guaranteed in its core elements and such special means are in accordance with the requirements stipulated in the Code of Good Practice in Electoral Matters, I.3.2 and other documents, e.g. Recommendation CM/Rec(2017)5 of the Committee of Ministers to member States on standards for e-voting.

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<sup>71</sup> See for example IFES, "Guidelines and Recommendations for Electoral Activities During the COVID-19 Pandemic", listing some possible mitigating actions to counter the Risks of Holding in-Person Electoral Activities, [https://www.ifes.org/sites/default/files/guidelines\\_and\\_recommendations\\_for\\_electoral\\_activities\\_during\\_the\\_covid-19\\_pandemic\\_march\\_2020.pdf](https://www.ifes.org/sites/default/files/guidelines_and_recommendations_for_electoral_activities_during_the_covid-19_pandemic_march_2020.pdf)

<sup>72</sup> See Robert Krimmer, David Duenas-Cid and Iuliia Krivonosova (2020), New methodology for calculating cost-efficiency of different ways of voting: is internet voting cheaper?, Public Money & Management.

<sup>73</sup> See Mihkel Solvak, Kristjan Vassil (2016), E-voting in Estonia: Technological Diffusion and Other Developments over Ten Years (2005-2015).

111. If exceptional or limited means of voting are provided, the state institutions have to arrange voters' training in the media and the social media in order for the voters to know how to take up the options they otherwise do not use.

112. Seventh, turnout is likely to be lower where the elections are held during an emergency situation.<sup>74</sup> Most often, elderly people or most vulnerable groups of voters (either in the armed conflicts or emergencies due to pandemics or natural disasters) are the groups of voters who do not participate as actively as otherwise. Thus, the EMBs have to arrange special means of participation for those vulnerable groups such as mobile ballot boxes, drive-in polling stations or Internet voting via most widely used hardware.

113. If there are turnout requirements, factual or legal limitations on the free movement within the country or on the possibilities for out-of-country voting have to be taken into account, as the situation may lead to invalidity of the election results.

114. Eighth, organizing elections during a state of emergency may be financially more difficult for the state institutions than postponing the elections, as some special arrangements are probably necessary due to security reasons. During a state of emergency, state finances have to be used to the maximum extent to combat the extraordinary circumstances and administration of elections might be a luxury.

115. Where elections are held during the state of emergency, some procedural modifications may be necessary, such as prolongation of different deadlines, including for vote counting, or waiving the requirements for candidate nomination such as the requirement to collect support signatures (if this is not possible online). As explained earlier, the best option would be to provide such procedural modifications in election code *in abstracto* beforehand, but late amendments to the electoral legislation applicable only for concrete elections do not necessarily go against the European principles of electoral law.

116. Where the elections are not postponed, it will probably lead not only to a lower turnout, but also entail difficulties to monitor the conduct of the election, especially by the international community. There is a high risk that without transparent procedures and observers present, the level of possible fraud and manipulation of election results can increase greatly. However, where the election management bodies have a long tradition of independence and online observation possibilities are available, the fairness of the election is easier to guarantee.

117. The government and other electoral stakeholders may encounter a number of difficulties in combatting misinformation or fake news. Such misinformation and fake news often spread at a higher level during state of emergency compared to the extent during ordinary situations. Special attention has to be paid to this problem when the elections are held during a state of emergency.

118. There is no general rule which state institution should be competent to decide the postponement of elections. In many countries, it is constitutionally provided that elections are not held during a state of emergency. Where this is left to the discretion of an institution, the decision whether or not to hold elections may be either for the parliament, the president, the government or a higher level election commission. Due to the importance of the issue, it is recommended that such a decision be taken by the parliament. In any case, a provision either in the constitution or organic law (e.g. electoral law) foreseeing a postponement should be included. If the postponement concerns only part of the country or if the elections are to be postponed only for a short period (less than two months), a decision can be made by the election administration or the government. Where, by contrast, a postponement is for more than six months, this should be

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<sup>74</sup> See Elections and COVID-19, International IDEA Technical Paper 1/2020, <https://www.idea.int/sites/default/files/publications/elections-and-covid-19.pdf>.

decided by the legislative body. One option is to require a qualified majority in the parliament for the longer postponements of elections. However a state may choose to deal with the issue, only one institution should be competent to decide on the matter. Different stakeholders, including political parties, election management bodies and experts (e.g. in pandemic, health authorities) have to be consulted beforehand.

119. If the elections are postponed, the legitimacy of the parliament is to some extent limited. Thus, the parliament should abstain from adopting amendments to the constitution, organic laws or other important reforms under political debate which are not necessary to return to the normal situation.

120. Due to the difficulties to guarantee free campaigning and public debate on reforms with a longer effect, referendums, especially constitutional referendums, should be postponed until the end of the state of emergency. Holding referendums would go against European standards enshrined in the Code of Good Practice on Referendums.<sup>75</sup>

### **III. Conclusion**

121. Rule of law-compliant emergency powers have important in-built guarantees against abuse: the principles of necessity, of proportionality and of temporariness. Respect of these principles must be subject to effective, non-partisan parliamentary control and to meaningful judicial control by independent courts.

122. The dichotomy between normalcy and exception which is at the basis of a declaration of the state of emergency does not necessarily entail and does not need to entail a dichotomy between effective action against the emergency and democratic constitutionalism, or between protection of public health and the rule of law.

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<sup>75</sup> CDL-AD(2007)008rev-cor.