



Emergency Powers

International IDEA Constitution-Building Primer 18





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1. Introduction



Any country can experience public emergencies arising from war, invasion, armed uprisings, terrorist attacks, natural disasters, epidemics, or other types of crisis or catastrophe. Democratic states, however, may face particular challenges in dealing with emergencies because the legally guaranteed rights and institutional checks and balances associated with a democratic constitutional order can be obstacles to swift decision-making and might hinder effective action.

Most of the world's democratic constitutions therefore include emergency provisions that allow the authorities, in times of urgent necessity, to take actions necessary to safeguard national security, maintain law and order, protect citizens' lives and property, keep essential public services working, concentrate relief resources and direct them to the areas of greatest need, and in general to restore normality. These emergency provisions may permit the government to limit or suspend certain (although usually not all) constitutional rights, to set aside some institutional checks and balances so as to concentrate decision-making power in the central executive, and even to delay elections.

Advantages and risks

Emergency provisions are necessary because they enable the state to respond effectively to crises while keeping the exercise of emergency powers within the rule of law. If they are well designed and properly applied, emergency provisions are a self-defence mechanism for democracy—a way of ensuring democratic resilience by providing the power needed to deal with serious threats and challenges within the framework of a democratic constitution. If a constitution did not contain such emergency provisions, then the state would have to either: (a) stand with its hands tied, unable to undertake urgent actions necessary to deal

with the emergency or (b) exercise such powers outside the law. Either of these outcomes could be very dangerous for democracy.

However, many governments have used emergency powers inappropriately—needlessly prolonging or renewing states of emergency, and using emergency powers not to restore democratic normality but to bypass normal channels of democratic accountability, harass dissidents, rig elections, restrict the press, and ultimately to set aside a nominally democratic constitution and impose a dictatorial regime. Notorious examples include Paraguay under Stroessner and Egypt under Mubarak, where emergency powers were repeatedly renewed and routinely used to crush peaceful dissent. Great care therefore needs to be taken in designing a constitution's emergency powers provisions. The challenge is to find a way that allows the state to respond effectively to real emergencies, but that prevents emergency powers from being misused in authoritarian ways. This means that emergency powers must be subject to proper constitutional guarantees and procedural safeguards.

Think point 1

How have emergency powers been used historically, under the existing or former constitution? Have they been used with restraint, and only when strictly needed, in order to protect democracy from extraordinary threats? Or have emergency powers been used in repressive ways? To what extent has the constitution been responsible for that?

2. What is the issue?



The ‘emergency mode’ of democratic constitutionalism

When designing a constitution, a delicate balance must be struck between the need for inclusive deliberation in decision-making, on the one hand, and the need for decisive and effective action on the other hand. Likewise, the requirement to protect civil liberties and human rights must be balanced against the obligation to protect the public and vital national interests, which may sometimes involve limiting those rights. Demands for local autonomy must be balanced against the need for unity, efficient administration and the sharing of resources. The optimal balance between these objectives is not fixed. It can shift, with different priorities prevailing at different times and in different circumstances. In normal times, a democratic constitution might emphasize inclusion and deliberation in decision-making, but in times of emergency swift and decisive executive action might have greater priority. Likewise, a constitution may in times of peace place the highest value on the protection of private property rights and the rule of law, but in a major war might prioritize the power of the state to direct national resources in the interests of national survival.

This need for flexibility, if a democratic constitution is to respond to emergency situations without a catastrophic collapse, is the traditional argument in favour of emergency powers. In this context, citing a well-known proverb, respected US judge Richard Posner asserted: ‘A constitution that will not bend will break’ (Posner 2006: 1). For example, an earthquake affecting part of the country may catastrophically diminish the capacity of civilian local authorities to deliver essential services, and intervention by the national military in an ‘aid to civil power’ capacity may be required in order to save lives, even if this means exceeding the usual constitutional limits of their powers. The outbreak of an

epidemic disease may likewise call for the application of strict quarantine regulations that limit freedom of movement, even though these measures would violate rights that would normally be constitutionally guaranteed.

Most modern constitutions therefore include emergency provisions that may allow a temporary deviation from normal constitutional safeguards. The declaration of a state of emergency usually grants additional authority in three main areas: (a) the temporary restriction or suspension of some (but usually not all) constitutional rights; (b) the temporary concentration of power in the executive branch at the expense of the legislature, and centralization of power in the central government at the expense of sub-national authorities; and (c) in some cases, the postponement of elections.

Table 2.1 illustrates how this shift between two constitutional modes of operation works in India. The declaration and subsequent termination of a state of emergency acts as a switch between the two modes. In the normal mode, the Indian Constitution prioritizes parliamentary deliberation, human rights and state autonomy. In the emergency mode, it emphasizes strong government, concentrated power and efficient decision-making (see Khosla 2012: 23–25; Sagar 2016). Emergency provisions help prevent a constitutional rupture. The constitution is not suspended: at all times, and in both modes, it remains in effect. Its operative content changes, but it continues to regulate citizens’ rights and the distribution of public power. Public officials must continue to act within constitutional bounds at all times. Time limits and renewal procedures are constitutionally regulated, and when the state of emergency lapses or is terminated, the constitution reverts to its normal mode of operation.

Table 2.1. Normal and emergency constitutional rules in India

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

Source: Adapted from Khosla (2012).

Legislative versus constitutional approaches

Constitutions can use several approaches to address emergency provisions. Some constitutions do not mention emergency provisions in the constitutional text (e.g. Norway and Canada), or mention emergencies only in passing—for example, the US Constitution permits the suspension of *habeas corpus* ‘when in cases of rebellion or invasion public safety shall require it’ (article 1, section 9). In these countries, the legislature rather than the constitution determines emergency powers.

- The US National Emergencies Act of 1976 regulates the president’s authority to declare emergencies. It requires that Congress must be notified, that emergencies lapse after one year unless renewed and that Congress may terminate an emergency by joint resolution.
- Canada’s Emergencies Act of 1988 provides a statutory basis for various types of states of emergency, for example in response to natural disasters, public disorder, international tension or war. The act principally regulates the circumstances in which these emergency conditions can be declared, the means of parliamentary approval, the duration of the emergency, and the degree to which powers are delegated to the executive.

Other constitutions provide only a loose framework of general principles concerning emergency provisions, and leave the details to ordinary laws. Article 103 of the Constitution of the Netherlands, for example, allows Parliament, using ordinary statutes, to define a state of emergency, to declare the legal consequences of an emergency in terms of the restrictions on rights and the concentration of powers, and to determine in which cases a state of emergency may be declared. It also allows a joint session of Parliament to decide the duration of a state of emergency.

Arrangements that give legislatures such broad discretion over how to regulate emergency provisions may be acceptable where there is a strong tradition of constitutionalism and deeply rooted democratic values. However, where legislatures and judiciaries are weak, or where human rights and democratic values are more fragile, this approach could be very perilous. In most contemporary constitution-building processes, there is a strong case for directly regulating states of emergency and emergency powers in the constitution. Since constitutions are supposed to provide procedural certainty, especially in times of crisis, it is prudent to be precise on these points. Moreover, rules on emergency powers are inherently constitutional in nature, since they affect citizens’ rights and can influence a political system’s entire balance of power.

Think point 2

Can legislatures be trusted to frame emergency laws in ways that protect core rights and prevent the abuse of power, or should these protections be written into the constitution? Would the potential advantages (in terms of certainty, clarity) of specifying the terms and conditions of states of emergency in the constitution outweigh the disadvantages (in terms of flexibility)?

3. Declaring, terminating and renewing states of emergency



General considerations

Bringing a state of emergency into effect usually involves: (a) a proposal or initial decision to declare a state of emergency; and (b) approval or confirmation. These stages are often shared between the executive branch and the legislature, although in some cases elements of the process may also be subject to judicial review.

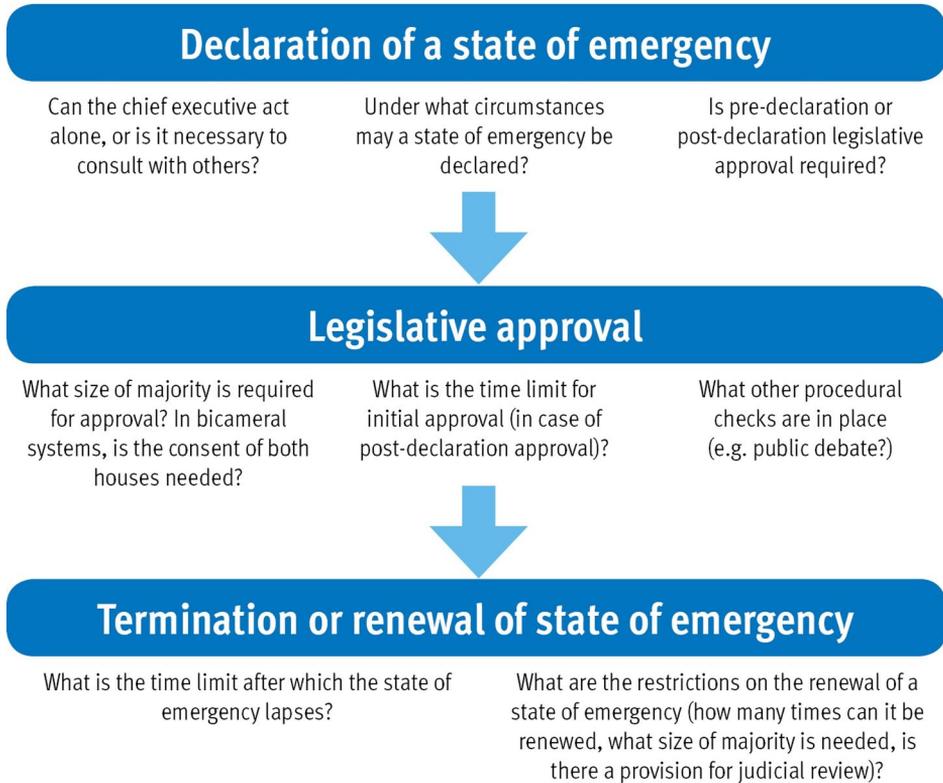
Since the declaration of a state of emergency switches between the ‘normal’ and ‘emergency’ modes of a constitution’s operation, the process has to be swift enough to enable the authorities to respond to urgently arising needs. However, it must also provide adequate safeguards against attempts to invoke or prolong a state of emergency for partisan, repressive or otherwise inappropriate reasons. With these ends in view, a number of constitutional design choices must be made in relation to the declaration, approval, termination and renewal of states of emergencies (see Figure 3.1).

Clear communication is important at all stages of the emergency process. It must be obvious to all involved—the administration, the judiciary, the legislature and the general public—when a state of emergency is in place, who has declared it and why. This might be achieved by, for example, requiring any declaration of a state of emergency to be announced in public and accompanied by a statement from the head of state or head of government. In itself, this publicity does not prevent the state from taking action; it simply forces leaders to announce and



justify their actions, and may provide opportunities for the opposition, media and civil society to debate them.

Figure 3.1. Summary of declaration process and design options



Initiative in the executive

The authority to initiate or propose a state of emergency normally rests with the executive. This is because the chief executive has a general and ongoing responsibility, implicit in the nature of the executive power even if not explicit in the constitution, to protect the public and the state from harm. The executive branch also has the resources needed to respond to an emergency, including access to intelligence information, discretionary funds and control of military, police and civil defence assets.

The exact mechanism by which the executive proposes or declares a state of emergency largely depends on the overall system of government and the internal organization of the executive branch. In countries with a parliamentary system, the prime minister and Cabinet are likely to play the major role.

- The Constitution of India (article 352) provides that a declaration of a state of emergency is formally made by the president, who acts solely on the written advice of the cabinet.
- In Fiji, the decision is formally made by the prime minister (section 154), but only after consultation with the chief of police and the commander of the armed forces.

In countries where the president is the effective chief executive, the initiative is likely to be vested in the presidency, although this might be balanced by a need to consult with other leaders.

- The Constitution of Brazil (articles 90 and 91) allows the Council of the Republic (an advisory body that includes the presidents of the two houses of Congress, as well as the minority and majority leaders, and others) and the National Defence Council to give their opinion on any declaration of a state of emergency.
- The Constitution of France (article 16) stipulates that only the president can declare a state of emergency, but that this power may be exercised only after having consulted the prime minister, the speakers of both houses of parliament and the Constitutional Council.
- The Constitution of Liberia (article 86) requires the president, before declaring an emergency, to consult with the speaker of the House of Representatives and the president pro-tempore of the Senate.

Legislative approval

The role of the legislature is usually to debate, review, and approve or confirm the executive's decision. In some cases, legislative approval must be granted before the state of emergency can come into effect (pre-declaration approval). This arrangement is common in Latin America, where attempts have been made to overcome historical legacies of the authoritarian abuse of emergency powers.

In other cases, a state of emergency can come into effect immediately after an executive decision, but will lapse after a period of time if it is not confirmed by the legislature (post-declaration approval). Post-declaration approval enables the

executive to declare an emergency and undertake the initial actions necessary to protect public safety without waiting for the legislature to meet, debate and decide on the issue—while also ensuring that the emergency cannot be prolonged beyond its initial period without legislative approval.

The time limit for securing post-declaration approval may be as short as 24 hours (Fiji), but it is usually longer: 5 days in Romania, 14 days in the Bahamas and Kenya, 21 days in South Africa and 30 days in Spain. Some countries allow much longer periods before legislative approval must be given (e.g. 120 days in Bangladesh). However, this can be harmful to democracy, since it decreases the power and effectiveness of parliamentary oversight and increases the risk that emergency powers will be misused.

Often, an extended period is allowed if Parliament is not in session at the time of the declaration, in order to give members of Parliament time to be notified and to assemble. For example, in Namibia, the period for post-declaration approval is 7 days if Parliament is in session, but 21 days if Parliament is not in session.

Constitutions may prescribe various constitutional thresholds for the legislature's approval or confirmation of a state of emergency: a simple majority (more votes in favour than against), an absolute majority (approval by 50 per cent +1 of the total membership) or a supermajority (typically, three-fifths, two-thirds or three-fourths—either of the votes cast or of the total membership). Although much depends on the electoral rules and the party system, a higher threshold will usually require a broader consensus for approval or confirmation of a state of emergency; this may increase the power of the opposition and may help to prevent the misuse of emergency powers for repressive or partisan ends, although there is a possible risk of delay and obstructionism. Countries requiring a supermajority to approve a state of emergency include Croatia, Guatemala, Mauritius, Nigeria and many others.

In countries with a bicameral legislature, requiring the consent of both houses to approve a state of emergency may provide an additional check against the partisan misuse of emergency provisions, although the effectiveness of this check will depend on the composition of the two houses, and in particular on whether they are controlled by the same party (International IDEA 2017).

Under what circumstances can an emergency be declared?

Specifying the grounds on which a state of emergency can be declared in the constitution may help to ensure that emergency powers are not used inappropriately. Such provisions can shape the norms and public expectations according to which the person declaring the emergency is required to act. In some cases, such provisions might even enable the judicial review of any inappropriate declaration of a state of emergency, thereby introducing an additional check against the misuse of these powers.

The most common reasons for allowing the declaration of a state of emergency include war, invasion, unrest, insurrection, natural disaster, or a threat to national independence or the functioning of public institutions.

- The Constitution of Belize (section 18) allows a state of emergency to be proclaimed only if (a) ‘a state of war between Belize and another State is imminent’; (b) ‘a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other similar calamity’; or (c) ‘action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life’.
- The Constitution of India (article 352) is narrower, allowing a state of emergency to be declared only when ‘the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion’. The Indian formulation does not allow for the declaration of a state of emergency in response to natural disasters.
- Situations that governments could exploit in a repressive way can be specifically excluded as grounds for a state of emergency: the Czech Constitution, for example, forbids the use of a state of emergency to oppose labour strikes (App. B, article 5.)

However, because emergencies are necessarily unpredictable, there are risks associated with being too specific (see the example of Liberia in Box 3.1). Strong mechanisms of political oversight, such as super-majoritarian legislative approval mechanisms, may be a more effective means of preventing the misuse of emergency powers than a narrowly prescribed list of allowable circumstances.

Different types of emergency

The term ‘state of emergency’ is used in this Primer in a generic way, which includes any constitutionally mandated period in which emergency powers may be exercised. However, some constitutions distinguish between different types of emergencies, which may be denoted ‘states of exception’, ‘states of siege’, ‘states alarm’ and so forth. These terms may correspond to different types of emergency provisions, and may have different rules regarding when and how they can be invoked, and different effects on citizens’ rights and the distribution of powers.



- The Constitution of Portugal (article 19), for example, distinguishes between a ‘state of siege’ and ‘state of emergency’. The latter is ‘less serious’ and ‘shall only cause the suspension of some of the rights, freedoms and guarantees that are capable of being suspended’; the choice between them must be made ‘respecting the principle of proportionality’.
- The Constitution of Poland distinguishes between: (a) a ‘state of martial law’ (article 229), which can be invoked in response to ‘external threats to the State, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreement’; (b) a ‘state of emergency’ (article 230), which may be invoked in response to ‘threats to the constitutional order of the State, to security of the citizenry or public order’; and (c) a ‘state of natural disaster’, which may be invoked ‘to prevent or remove the consequences of a natural catastrophe or a technological accident’ (article 232).

Another type of crisis occurs in situations such as a severe economic recession or stock market crash. These economic emergencies are qualitatively different from typical emergencies arising from wars or disasters. Human life and the security and functioning of the state are in no immediate danger, and there is usually no need to limit civil liberties. Nevertheless, economic emergencies may demand a firm and decisive policy response—for example to prevent a run on the banks, stabilize the currency or reassure foreign creditors—which may require a temporary concentration of power in the hands of the central executive.

- India (article 360) permits the president (on the advice of the Council of Ministers) to declare a ‘financial emergency’, which enables the union government to issue commands to the state governments in matters relating to financial propriety, to cut the salaries of state employees and to review state budgets before they are enacted. A financial emergency may remain in effect for up to two months, after which parliamentary approval is required for prolongation.

However, while specifying different types of emergencies in the constitution might in principle enable the authorities to offer a tailored and balanced response to different situations, there is also a risk that attempting to categorize different types of emergency could be artificially constraining. A general state of emergency provision, which allows the political institutions to exercise discretion in their response, may provide a more flexible response.

Box 3.1. Constitutional design in action: Liberia's 2014 Ebola outbreak

The Constitution of Liberia allows a state of emergency to be declared only 'where there is a threat or outbreak of war or where there is civil unrest affecting the existence, security or well-being of the Republic amounting to a clear and present danger' (article 86). As in India, this provides no lawful means of declaring a state of emergency in response to natural disasters.

In 2014 Liberia faced an epidemic outbreak of the Ebola virus. This was a serious public emergency that demanded a coordinated response from the government, including the imposition of restrictions on freedom of movement and assembly. However, since it was neither 'war' nor 'unrest', it was not technically grounds for declaring a state of emergency. There was some debate about whether it would be lawful to delay elections. One lesson learned from Liberia's experience is that constitutional provisions listing the grounds on which a state of emergency can be declared should be sufficiently broad to prevent hindering the state from taking necessary action.

Geographical limits

Some constitutions allow a state of emergency to be declared only in certain parts of the country's territory. This may be useful, for example, if there is an ongoing border conflict or an armed uprising in one part of the country, or if only one area is affected by a disaster. It allows special measures to be taken where needed without undermining the rights, liberties or democratic government in other parts of the country.

Duration and termination of a state of emergency

A state of emergency is supposed to be a temporary response to a particular urgent need. The intention should be to use the powers conferred by a state of emergency only to address that urgent need and then restore constitutional normality as soon as possible. Most constitutions therefore attach a time limit to any declaration of a state of emergency (typically two to six months) after which it automatically lapses unless it is renewed.

In many cases, a state of emergency may be terminated before the date upon which it is due to lapse if there is no longer a need for the state of emergency to continue. Usually, this decision can be taken by the executive at its own discretion, although some Constitutions give the legislature the right to end a state of emergency at its own initiative, typically by passing a resolution to this effect. For example, the Constitution of Namibia (article 26.4) states: 'The

National Assembly may by resolution at any time revoke a declaration [of a state of emergency] approved by it.’

Renewal of a state of emergency

Since it is rarely possible to predict the length of an emergency situation, it might be necessary to renew a state of emergency that is about to expire. The difficulty, however, is finding a mechanism that enables a state of emergency to be prolonged if needed, but only when strictly necessary and only for as long as is necessary. One option is to allow a limited number of renewals. For example, the constitution could stipulate that the legislature may authorize a state of emergency for 6 months at a time, up to a maximum of 24 months. However, this is an inflexible solution. It is impossible to tell in advance whether any constitutionally prescribed maximum number of renewals would be sufficient or excessive.

An alternative is to require that subsequent renewals of a state of emergency be approved by increasingly large legislative supermajorities. This ensures that a broader consensus is required for each prolongation of an emergency, incrementally increasing the power of the opposition to end the emergency if required.

- In South Africa (article 37), initial approval of a state of emergency requires an absolute majority, but subsequent renewal requires a three-fifths majority.
- In Kenya (article 58) the first extension of a state of emergency requires a two-thirds majority, but any subsequent extensions require a three-fourths majority.
- In Trinidad and Tobago, the initial approval of a state of emergency and its extension for up to six months can be authorized by a simple majority of the House of Representatives, but further extensions require a three-fifths majority in both Houses.

4. Limitation of rights in emergencies



How are rights limited?

Declaring a state of emergency normally involves suspending or restricting certain rights and liberties that are otherwise constitutionally protected. In some countries, the declaration of the state of emergency may have a direct effect on rights even without further legislative action. The Constitution of Myanmar (article 296), for example, states that the Supreme Court's authority to issue prerogative writs—including the writ of *habeas corpus*, which protects citizens' freedom from unlawful detention—is automatically suspended during a state of emergency. It is more common for a state of emergency to allow the passage of emergency legislation to suspend or restrict rights through either (a) statutes enacted by the legislature during the emergency or (b) executive orders authorized by the constitution or by law. In some cases, the legislature may have enacted a general emergency law in advance, the provisions of which normally lie dormant, but which may be brought into effect following the declaration of the state of emergency.

Which rights may be limited?

Some constitutions give the legislature very broad discretion to limit rights, in effect suspending the rights provisions of the constitution during the emergency in favour of a system of legislative supremacy. The Constitution of Ireland (article 28.3.3°), for example, provides that 'Nothing in this Constitution other than Article 15.5.2° [which relates to the prohibition of the death penalty] shall be

invoked to invalidate any law enacted by Parliament which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law.’ This provision enables Parliament to nullify almost all guarantees of constitutional rights, provided that the law limiting such rights purports to be ‘for the purpose of securing the public peace and the preservation of the State in time of war or armed rebellion’.

Such sweeping provisions are unusual in modern democratic constitutions. The usual practice is to recognize that some rights and freedoms are more sacred or fundamental than others, and that a state of emergency, in seeking to find a balance between the rights of individuals and the good of the community, may therefore treat different rights and freedoms in different ways. For example, freedoms of movement and assembly are usually subject to extensive limitations during a state of emergency, since the balance between these freedoms and the need to maintain public order and safety shifts strongly in favour of the latter. However, other rights, such as prohibitions against slavery or torture, may be immune from limitation or suspension, even in emergencies. These are sometimes called ‘absolute’ rights, because they are deemed to be of such fundamental importance, and the consequences of violating them are so inhumane, that their preservation always outweighs other considerations and must be absolutely sacrosanct.

- The Constitution of The Bahamas (article 29) provides a more typical example. During an emergency, certain rights can be restricted or suspended, including freedom from arbitrary arrest or detention, rights to a fair and public trial, privacy rights, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and freedom from discrimination. However, other rights cannot be limited, including the right to life and freedom, freedom from torture and freedom from slavery. Moreover, limitations on rights are only lawful to the extent that they are ‘reasonably justifiable in the circumstances’ and are ‘for the purpose of dealing with that situation [i.e. the emergency]’. This leaves open the possibility of judicial review of emergency legislation; even in an emergency, the legislature does not have licence to be arbitrary or oppressive.
- The Constitution of Estonia (article 130) stipulates that certain rights are always protected, even during an emergency, including citizenship rights, procedural rights and guarantees of the rule of law, the right to life, and the prohibition of torture, prohibition of imprisonment for debt, the right

to a fair trial and presumption of innocence, no punishment without law and no retroactive laws, right to compensation for unlawful actions, familial rights, various socio-economic rights, prohibition of arbitrary extradition, and freedom of thought and religion.

- The Constitution of Poland (article 233) provides that ‘the statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit’ the dignity of the person, citizenship, protection of life, humane treatment, ascription of criminal responsibility, access to a court, personal rights, freedom of conscience and religion, the right to petition, or the rights of the family and children. Poland also prohibits ‘limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property’.

Think point 3

Which rights might need to be compromised to deal with emergencies? Which rights are so fundamental that they need to be protected even in emergency situations? Are these distinctions clear and robust in the constitutional text under consideration? How does the constitutional text comply with the country’s international obligations?

International human rights law

The examples noted above are typical for modern constitutions shaped by the European Convention on Human Rights (ECHR), which has been influential not only in Europe, but also in much of Africa, the Caribbean and the South Pacific. The ECHR’s ‘absolute’ rights—those which cannot be restricted even during an emergency—include freedom from torture and cruel, inhuman or degrading treatment (article 3), the prohibition of slavery (article 4), and the principle that one cannot be punished except in accordance with the law (article 7).

The International Covenant on Civil and Political Rights (ICCPR) similarly provides that certain rights are ‘non-derogable’ (i.e. cannot be suspended or restricted) even in emergencies. These include the right to life (article 6), freedom from torture (article 7), prohibition of slavery (article 8), no imprisonment for debt (article 11), no punishment without law or retrospective penalties (article 15), recognition as a person in law (article 16) and freedom of religion (article 18).

These international law standards may be incorporated into national constitutions. The Constitution of South Africa (article 37), for example, states that ‘legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency; and the legislation is consistent with the Republic’s obligations under international law applicable to states of emergency’.

The ‘Paris Minimum Standards of Human Rights Norms in a State of Emergency’ (see Box 4.1), adopted by the International Law Association in 1984, provide a set of minimum ‘soft law’ standards governing states of emergency. These are designed to ensure that ‘even in situations where a bona fide declaration of a state of emergency has been made, the state concerned will refrain from suspending those basic human rights which are regarded as non-derogable’ (Lillich 1985).

Box 4.1. Paris Minimum Standards of Human Rights Norms in a State of Emergency

The Paris Minimum Standards provide that the courts should have the power and jurisdiction to decide:

1. Whether emergency legislation is in violation of the constitution: do the material conditions specified for this state of exception exist? Does the situation meet the constitution’s requirement of necessity, meaning that the exercise of emergency powers is strictly necessary to meet the demands of the situation?
2. Whether any particular exercise of power is in violation of the emergency provisions: have all the required procedures been followed? Has the use of emergency powers met the requirements of necessity and proportionality?
3. Whether there is a breach of constitutional provisions protecting rights and freedoms even under a state of emergency. Have non-derogable rights been violated?
4. Whether specific measures violating rights that allow derogation are proportional.
5. Whether emergency measures are in violation of local laws, which are to be regarded as remaining in effect unless explicitly repealed.

Source: Adapted from Lillich (1985).

5. Further effects of a state of emergency



Concentration of power in the executive branch

Emergency situations may require concentrated and decisive action, for which the executive is better suited than the legislature. Many constitutions therefore enable the executive, during an emergency, to take actions—including issuing orders having the force of law—which might otherwise be the legislature's responsibility.

- The Constitution of Namibia (article 26) provides that during a state of emergency the president 'shall have the power by proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order'.
- The Constitution of Ecuador (article 165) allows the president to issue decrees for certain purposes, including the advance collection of taxes, the reallocation of public funds, the imposition of censorship, the mobilization of the armed forces and police, and the closing of ports, airports and borders.

Such concentration of lawmaking power in the executive branch disturbs the usual balance of powers in a democratic constitution, and may tempt the government to over-use these powers. Therefore great care must be taken to design appropriate constitutional safeguards such as legislative and judicial oversight, concerning both the substance of such executive orders and the process of enacting them. For example, the Constitution of Argentina (article 99.3)

allows the president to issue decrees of necessity and urgency ‘when exceptional circumstances make it impossible to follow the regular procedures provided by this Constitution for the passing of laws’. However, these cannot ‘involve rules that regulate criminal, tax, or electoral matters or the regime governing political parties’, and they must be issued not by the president acting alone, but by a general meeting of the Cabinet of Ministers. The decrees have to be submitted to a standing bicameral committee of Congress, the membership of which reflects the partisan balance of Congress, and the committee must then forward a report to Congress within 10 days.

However, one might consider whether such a constitutionally mandated transfer of lawmaking power to the executive branch is really necessary. In emergencies, legislatures can pass bills very quickly (particularly in parliamentary systems, where the cabinet normally enjoys the support of a parliamentary majority), and it might be better to adopt rules of procedure which facilitate the rapid passage of emergency legislation, rather than to delegate wide legislative discretion to the executive branch alone.

Centralization of power at the national level

In many countries subnational governments (such as states, provinces, regions, or even cities) enjoy autonomous fiscal, administrative and policymaking authority over matters such as policing, public safety, fire and rescue services, medical services, housing and planning, and the upkeep of public infrastructure. In normal circumstances this autonomy may promote good governance, encourage responsive policymaking that is sensitive to local needs, and meet the aspirations of local people for a say in matters affecting their own communities. However, a major disaster may exhaust the limited resources of local authorities and overwhelm their ability to respond. National authorities, which have the ability to coordinate responses across subnational boundaries and to compel the pooling and sharing of resources, may therefore have to intervene. Likewise, a foreign invasion, insurrection or collapse of public order, even if it only directly affects part of the country, may require a united response by the national authorities to protect life, property, public order and territorial integrity.

Therefore, during an emergency, sub-national powers may be temporarily transferred to the central government. In federal systems, such provisions may entail a temporary shift to a more unitary mode of governance.

- The Constitution of Argentina (article 6) enables the federal government to intervene in the territory of a province ‘in order to guarantee the republican form of government or to repel foreign invasions, and upon request of its authorities created to sustain or re-establish them, if they have been deposed by sedition or by the invasion of another province’. A

federal intervention involves the temporary replacement of the provincial government with a federal appointee. Article 75 allows Congress to order such a 'federal intervention', or to approve or disallow an intervention that has been ordered by the president when Congress is not in session. There are a number of safeguards in this arrangement: the circumstances under which federal intervention can be authorized are constitutionally prescribed, congressional approval is required, and in certain cases the provincial authorities must request intervention before federal agencies can come to their aid. Yet these provisions have historically authorized a broad power of federal intervention, and have not always prevented its misuse (Negretto 2013).

- India (article 250) provides that 'Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List'. In other words, a Proclamation of Emergency greatly increases the power of the union parliament, which is enabled to pass laws during an emergency with on any matter, including those that would otherwise be reserved for the states (i.e. those on the 'State List' of legislative powers). Laws enacted under this provision cease to have effect six months after the end of the emergency. The Indian Constitution (article 356) also allows for 'president's rule' to be imposed in a state. This involves a temporary suspension of the state's autonomy, with executive power being relocated from the chief minister of the state to the president (acting on the advice of the union government). President's rule enables action to be taken when a crisis of governance occurs in a particular state, without imposing a state of emergency on the country as a whole. However, this provision has frequently been used to interfere in political crises rather than in response to emergency situations.

A possible alternative constitutional design choice, in a federal system, is to make the *coordination* of disaster response either a federal responsibility or one that is subject to the concurrent authority of the state/provincial and federal governments. This would give the federal government the ability to support emergency situations in a state/province as part of its ordinary constitutional powers, without having to declare a state of emergency.



Postponing elections

Many constitutions provide for the postponement of elections during emergencies. Holding an election during emergency conditions can be difficult. Depending on the nature of the emergency and the degree of disruption it causes, it may be near impossible to organize the distribution of ballots, to ensure the safety of candidates, campaigners and voters, or to validate the integrity of the result. In extreme circumstances, holding an election during an emergency might also divert energies and resources from more urgent lifesaving work. There is also a risk that an unscrupulous government could use emergency restrictions on rights (e.g. the power of administrative detention) to repress opposition candidates or critical media, which may make elections held under emergency conditions less free and fair than they should be.

The postponement of elections may follow automatically from the declaration of a state of emergency. The Constitution of Estonia (article 131), for example, states: ‘During a state of emergency or a state of war, the Riigikogu (Parliament), the President of the Republic, and the representative bodies of local governments shall not be elected, nor shall their authority be terminated.’ Elections must be held within three months after the end of the war or emergency.

Alternatively, the postponement of elections may be decoupled from the declaration of a state of emergency, such that it is possible to declare a state of emergency without postponing elections, or to postpone elections without necessarily declaring a state of emergency. For example, section 4(2) of the Charter of Rights and Freedoms within Canada’s Constitution provides that, ‘in time of real or apprehended war, invasion or insurrection’, the House of Commons or a provincial legislature may be continued beyond five years ‘if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be’.

Three aspects of the Canadian provision are particularly interesting. First, it contains a counter-majoritarian check: an election may be postponed only if a two-thirds majority supports (or at least does not oppose) the decision, which in normal circumstances should prevent the government from acting unilaterally without the consent of the opposition. Second, there are no limits on the duration of a postponement, or the number of times an election can be postponed. This contrasts, for example, with the Constitution of Malta (article 76.3), which contains no counter-majoritarian rule, but which does set strict time limits: elections in Malta may be postponed for not more than one year at a time, and for no more than a total of five successive years. Third, Canada’s Constitution—like those of Malta and many other Commonwealth countries—only allows the postponement of elections in cases of ‘war, invasion or insurrection’, not in response to natural disasters or other peacetime emergencies.

This might be problematic if a peacetime emergency were to render the holding of elections impracticable. See Box 5.1 on the holding of an election in wartime.

Box 5.1. Constitutional design in action: elections during World War II

World War II (1939–45) was a ‘total war’, in which the survival of liberal democracy in the West depended on directing the whole society and all of its economic resources into a united war effort. This posed a difficult and paradoxical challenge: how to defend democracy from existential threats without resorting to undemocratic means. In particular, it raised the question of whether elections could (and should) be held in wartime conditions. In the United Kingdom, Parliament’s term was extended by law and elections postponed until after the conclusion of the war. In the United States, where the Constitution does not provide a way to postpone elections, they were held as usual in 1944. New Zealand first followed the UK in deciding to postpone elections, but due to public and political demand, a general election was held in 1943. These examples show how—despite practical difficulties—democracies can hold elections even in the midst of major wars.

6. Checks and balances



Additional checks and balances that might help to protect liberal-democratic constitutions against the misuse of emergency powers fall into two main categories: (a) those that strengthen legislative oversight and (b) those that enable the judiciary and fourth branch institutions to protect the integrity of constitutional institutions during a state of emergency.

Strengthening legislative oversight

Legislatures cannot exercise their scrutiny powers unless they are in session. One simple rule is to require the legislature to assemble automatically if a state of emergency is declared. In Ukraine, for example, Parliament must assemble within two days after a declaration of a state of emergency (article 83). Constitutions may also require the legislature to remain in session throughout the emergency, or may give legislatures the power to meet during the emergency without waiting for convocation by the executive or head of state (e.g. Constitution of Vanuatu, article 70).

Some constitutions provide for the establishment of special legislative scrutiny and oversight mechanisms that operate in emergency situations. For instance, Brazil's constitution (article 140) states: 'After hearing from party leaders, the Executive Committee of the National Congress shall designate a Committee composed of five of its members to monitor and supervise implementation of measures concerning a state of defence and state of siege.' Such an emergency committee may also be a useful substitute for the plenary session of the legislature if the latter is unable to meet because of the emergency situation. Sweden, for example, allows for the establishment of a 'war delegation' of Parliament that can meet to transact urgent business even if the country is invaded.

An additional safeguard, in parliamentary systems that have a designated leader of the opposition, could be to require his or her consent to any motion to approve or extend a state of emergency. This would act like a supermajority rule, in broadening the requirement for political consensus, but would apply even in situations where (owing to a disproportional electoral system, for example) the opposition is numerically small. The leader of the opposition might also be invited to receive confidential high-level briefings on the management of the emergency response in order to build informal cross-party support for intended courses of action. Although such briefings to the leader of the opposition are usually only a matter of courtesy and convention, it is possible to imagine an obligation to keep the leader of the opposition informed being written into the constitutional text.

The judiciary

Even if the constitution allows extraordinary measures to be taken in emergencies, the rule of law requires that these measures be taken only in accordance with the law, and that their legality—including their conformity with international law—should be capable of being tested in the courts. Accordingly, some constitutions specify the right of the judiciary to exercise judicial review in relation to: (a) a declaration or extension of a state of emergency and/or (b) the exercise of emergency powers.

- The Constitution of Kenya (article 58), for example, expressly permits the Supreme Court to decide on the validity of: (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; and (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- The Constitution of Slovakia (article 129) states: ‘The Constitutional Court shall decide on whether a decision on declaring an exceptional state or an emergency state and other decisions connected to this decision were issued in conformity with the Constitution and constitutional law.’
- The Constitution of South Africa allows judicial review of both the original declaration of a state of emergency (article 37.3(a)) and any subsequent extension (article 37.3(b)).
- In France, the Constitution (article 16) allows the Constitutional Council to determine, at the request of around 10 per cent of the members of Parliament, whether the circumstances still require the continuation of emergency powers.



However, judicial review is not always sufficient to protect against the abuse of emergency powers. It is often a slow and complex process, which may take some time to catch up with alleged violations of rights. Judges, moreover, are state functionaries and usually belong to the same elite as members of the executive and legislature. They may, out of habit or by inducement, defer to the executive, especially in times of emergency (Posner and Vermeule 2007; Sagar 2016).

Prohibition on constitutional amendments

Some constitutions forbid the passage of constitutional amendments during emergencies. The Constitution of Moldova (article 142) provides that ‘The Constitution may not be revised under a state of national emergency, martial law or war.’ The Constitution of Montenegro (article 156) likewise states that, ‘Change of the Constitution shall not take place during the state of war and the state of emergency’.

The rationale behind this prohibition is fourfold: (a) during an emergency, hasty decisions may be made that address current fears and concerns but neglect longer-term interests in ways that may ultimately be harmful for democracy; (b) the enhanced powers of the executive and the restrictions on rights during an emergency may make it easier for the government to unfairly influence the amendment process; (c) amendment processes sometimes require an intervening general election or referendum to allow the people to express their approval or disapproval to a constitutional change, and that might be difficult to arrange during an emergency; and (d) it prevents the constitutional provisions regulating states of emergency (in terms of their effects, duration and safeguards) from being changed while the state of emergency is in force, thereby preventing changes which could extend a state of emergency or otherwise open the way to a misuse of power.

7. Contextual considerations



Minority protections, divided societies and federal bargains

Unscrupulous governments have in the past exploited emergencies to attack the rights of minorities. Even if there is no deliberate malice, the restriction of certain rights or the centralization of certain powers during a state of emergency may have a disproportionate effect on minorities or marginalized groups in society.

Moreover, in a pluralist society certain rights (for example, language rights or rights to cultural autonomy) may have been carefully negotiated during the constitution-building process in order to ensure that the state includes and protects these minorities. The suspension of such rights could undermine these negotiated constitutional agreements and thus jeopardize the state's legitimacy.

Similarly, in federal, regionalized or devolved systems of government, provisions that allow for a temporary transition to a unitary form of government in response to an emergency could threaten to undermine the overarching political agreement on which the constitution depends.

Additional safeguards may therefore be needed to protect ethnic, linguistic, cultural or religious minorities, or to uphold the autonomy of states and provinces. This is especially so if trust between minorities and the majority population, or between state/provincial and central/federal authorities, is fragile. Such safeguards could include, for example, anti-discrimination clauses, minority protection clauses, or language and cultural autonomy rights as absolute rights that may not be suspended or restricted. Alternatively, the consent of the state, provincial or regional legislature could be required for the approval of a state of emergency which applies to the territory under their jurisdiction.



Number of veto players in ordinary politics

Constitutions differ in the number of ‘veto players’ they include in their ordinary political processes—that is, how many different actors, parties or institutions have to agree in order for a change in policies to be accepted. As a general observation, a country with a majoritarian and centralized decision-making structure (i.e. few veto players) is probably less likely to require additional emergency powers in order to provide an effective response compared to a country with a power-sharing, fragmented or decentralized decision-making process (i.e. many veto players). However, a country with few veto players in its decision-making process is likely to require greater safeguards against the misuse of emergency powers than a one in which decision-making is more diffused.

Party politics, political culture and institutional dynamics

Constitutional designers must consider how formal constitutional rules interact with party politics, political culture, and the real distribution of power in the state and society. For example, requiring legislative approval to declare a state of emergency might mean little if the legislature is politically subordinate to the executive and if its approval is likely to be automatic. In such cases, requiring a super-majority may prevent the misuse of this power, but only if there is an effective opposition that can block unilateral decisions by the governing majority.

Similarly, the effectiveness of judicial mechanisms to restrain the misuse of emergency powers depends on the efficiency, accessibility, independency and integrity of the judiciary, and on the judges’ commitment to democratic institutions.

Therefore constitutional designers must think carefully about the context of the country when addressing emergency provisions. As shown in Section 8, the constitutional rules governing states of emergency in South Africa and Kenya are remarkably similar, reflecting ‘constitutional borrowing’—the emulation of constitutional designs and their application to other contexts. However, since these two countries have very different political-institutional contexts, similar rules are likely to be applied in different ways. South Africa has a strong and consolidated party system: the African National Congress has been the dominant party since the 1990s. It also has a parliamentary-style system of government, in which the executive is derived from (and responsible to) the legislature. Kenya, by contrast, has an institutional separation of powers between an independent legislature and presidency, as well as a complex, fluid, multi-party system with many different personal factions organized into loose, ethnically based coalitions. These different political contexts mean that similar rules are likely to be applied in different ways.

Therefore, while constitutional provisions dealing with emergency powers are important, it might be even more important to focus on reforms that would improve the overall system of representation, strengthen political checks and balances, or ensure that the public and civil society have reliable mechanisms through which to challenge and control the government. Above all, consideration should be given to efforts aimed at deepening and consolidating democratic values throughout society.

Threats

Emergency provisions should be targeted to address the types of threats a particular country is likely to face. For example, is it in an earthquake zone, or does it contain active volcanoes, or is it prone to tsunamis? Is there an on-going low intensity conflict in certain areas? A persistent problem with narco-violence? Are parts of the country prone to domestic terrorism or civil disturbances?

8. Examples



Table 8.1. Emergency provisions, Afghanistan

Who can declare a state of emergency?	The president proclaims a state of emergency ‘with the endorsement of the National Assembly’ (article 64).
Under what conditions?	‘If because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible’ (article 143).
Legislative approval rules	Pre-declaration approval by both houses of the National Assembly is required, but no super-majority requirements specified in the Constitution.
Time limits and renewal	If the state of emergency continues for more than 2 months, the consent of the National Assembly shall be required for its extension.
Restrictions on rights	‘During the state of emergency, the President can, after approval by the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, suspend the enforcement of the following provisions or place restrictions on them:’ 1. Freedom from arbitrary arrest; 2. Right of assembly and demonstration; 3. Freedom from interference in private communications; 4. Prohibition against entering or searching a residence without a court order.
Allocation of powers	‘During the state of emergency, the President can, in consultation with the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, transfer some powers of the National Assembly to the government’ (article 144).
Delaying elections	‘If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential as well as parliamentary terms shall extend up to 4 months. If the state of emergency continues for more than four months, the President shall call the Loya Jirga (a special assembly consisting of members of the National Assembly and the presidents of local councils). Within two months after the termination of the state of emergency, elections shall be held’ (article 147).
Other comments	The constitution shall not be amended during a state of emergency (article 146).

Table 8.2. Emergency provisions, Estonia

Who can declare a state of emergency?	The president and the government can propose a declaration of a state of emergency to Parliament (articles 78, 129), but the decision to declare it rests with Parliament (article 65). This is an example of pre-declaration legislative approval.
Under what conditions?	A state of emergency can be declared ‘In the case of a threat to the Estonian constitutional order’ (article 129). The government may also declare an ‘emergency situation’: ‘in the case of a natural disaster or a catastrophe, or to prevent the spread of an infectious disease’ (article 87).
Legislative approval rules	Pre-declaration approval by a ‘majority of the membership’ of Parliament (article 129).
Time limits and renewal	State of emergency may be declared for up to 3 months (article 129).
Restrictions on rights	‘During a state of emergency or a state of war, the rights and freedoms of a person may be restricted, and duties may be placed upon him or her in the interests of national security and public order, under conditions and pursuant to procedure prescribed by law’ (article 130).
Guaranteed/ absolute rights	According to article 130, the following rights cannot be restricted by an emergency provision: citizenship rights (article 8); the requirement for limitations on rights to be constitutional and ‘necessary in a democratic society’ (article 11); equality before the law and freedom from discrimination (article 12); right to legal protection (articles 13 and 14); the right of recourse to the courts (article 15); the right to life (article 16); the right to personal honour and reputation (article 17); the right not to be subject to torture or degrading treatment or punishment (article 18); freedom from imprisonment for debt (article 20, para. 3); presumption of innocence (article 22); prohibition of retroactive laws (article 23); right to public justice (article 24, paras. 2 and 4); right to compensation for damages caused by unlawful acts (article 25); family and spousal rights (article 27); the right to healthcare, social security, welfare and family and disability allowances (article 28); right not to be extradited except in accordance with treaty provisions and the law (article 36, para. 1); freedom of conscience, religion and thought (articles 40 and 41); right to national identity (article 49); and the right to address state agencies in the Estonian language (article 51, para. 1).
Allocation of powers	No constitutional provision for the re-allocation of powers.
Delaying elections	‘During a state of emergency or a state of war, the Parliament, the President of the Republic, and the representative bodies of local governments shall not be elected, nor shall their authority be terminated’ (article 131).
Other comments	‘Amendment of the Constitution shall not be initiated, nor shall the Constitution be amended, during a state of emergency or a state of war’ (article 161). Although the Constitution prescribes the declaration of states of emergency in some detail, it also makes provision for a ‘State of Emergency Act’, to be passed by an absolute majority (article 104), which regulates the ‘organisation of a state of emergency’ (article 129).



Table 8.3. Emergency provisions, India

Who can declare a state of emergency?	The president, acting on the binding advice of the union cabinet, communicated in writing (article 352.3). In effect, the prime minister is the key decision-maker.
Under what conditions?	‘If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion’ (article 352). ‘A proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof’ (article 352.1).
Legislative approval rules	A proclamation of emergency must be approved (post-declaration approval) by ‘a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting’ (article 352.6).
Time limits and renewal	<p>A proclamation of emergency shall ‘cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament’ (article 352.4).</p> <p>A proclamation of emergency approved by Parliament shall ‘unless revoked, cease to operate on the expiration of a period of six months’ from the date of approval, but may be extended by a resolution of both Houses for additional 6-month periods (article 352.5).</p>
Restrictions on rights	While a proclamation of emergency is in effect, Parliament or the state legislatures may make laws that would otherwise be incompatible with article 19 (which defines civil liberties such as freedom of speech, assembly and association). Such laws cease to have effect when the proclamation expires.
Allocation of powers	‘Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List’ (article 250). Such laws remain in force for no longer than 6 months after the emergency proclamation ceases to be in effect. When a proclamation of emergency is in effect, ‘the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised’ (article 353).
Delaying elections	‘...while a Proclamation of Emergency is in operation’, Parliament’s term of office may ‘be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate’ (article 83).
Other comments	The Constitution also makes provision for ‘President’s Rule’ in the states: ‘If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution’ (article 356), the state governments and state legislatures may be suspended. The executive power of the state is then transferred to the presidentially appointed governor, while the Union Parliament exercises the power of the state legislature. This may continue for up to 2 months, unless Parliament allows it to be extended for a further 6 months. In other words, this provision allows the centralization of power associated with a proclamation of emergency, but without the limitations on rights. In the past, it has been misused as a tool of political manipulation, for arguably partisan reasons, although the Supreme Court has imposed some limits on this power.

Table 8.3. Emergency provisions, Kenya

Who can declare a state of emergency?	President declares a state of emergency (article 132.4); extensions must be authorized by the National Assembly (article 95.6).
Under what conditions?	Only when ‘the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency’ and ‘the declaration is necessary to meet the circumstances for which the emergency is declared’ (article 58.1).
Legislative approval rules	The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all members. A public debate in the National Assembly must precede the voting.
Time limits and renewal	State of emergency shall be effective for ‘not longer than fourteen days from the date of the declaration, unless the National Assembly resolves to extend the declaration’ (article 58.2). The National Assembly may extend a state of emergency for ‘not more than two months at a time’ (article 58.3).
Restrictions on rights	‘Any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency; and the legislation is consistent with the Republic’s obligations under international law applicable to a state of emergency’ (article 58.6).
Allocation of powers	‘The President may suspend a county government in an emergency arising out of internal conflict or war or in any other exceptional circumstances’ (article 192). This power may not be exercised unless ‘an independent commission of inquiry has investigated allegations against the county government, the President is satisfied that the allegations are justified and the Senate has authorised the suspension’.
Delaying elections	‘When Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time’ (article 102.2). The total period of postponement may not be more than 12 months (article 102.3).
Other comments	‘A declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission’ (article 58.7). There is provision for judicial review: ‘The Supreme Court may decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency’ (article 58.5).



Table 8.3. Emergency provisions, South Africa

Who can declare a state of emergency?	The Constitution allows a state of emergency to be declared 'in terms of an Act of Parliament' (article 37.1). In other words, the constitution itself does not specify who possesses this power, and leaves it to ordinary legislation. The operative statute is the State of Emergency Act 1997, which give the president power to declare a state of emergency.
Under what conditions?	Only when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order' (article 37.1).
Legislative approval rules	'The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly' (article 37.2).
Time limits and renewal	A state of emergency is effective 'for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration' (article 37.2). The National Assembly 'may extend a declaration of a state of emergency for no more than three months at a time' (article 37.2).
Restrictions on rights	'Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency; and the legislation is consistent with the Republic's obligations under international law applicable to states of emergency...' (article 37.4). There is a table (article 37.5) of 'non-derogable rights' to which any legislation enacted under a state of emergency must conform.
Allocation of powers	No emergency power to alter allocation of powers between national government and the provinces specified in the Constitution.
Delaying elections	No emergency power to delay elections specified in the Constitution.
Other comments	Judicial review: 'Any competent court may decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency' (article 37.3). In addition to a state of emergency, the Constitution (article 203) also makes provision for a 'state of national defence'.

9. Decision-making questions



When considering emergency provisions, constitution designers should consider these questions:

1. What are the primary threats to stable, safe constitutional democracy under consideration? Are they principally threats of foreign aggression, domestic or international terrorism, or natural and environmental threats? How does the nature of the threat affect the type of constitutional provisions necessary to protect against it?
2. What is the country's history of constitutional democracy? Has there been a well-established tradition of stable democracy that respects the rule of law and democratic norms, which might mean that it is acceptable to leave the regulation of states of emergency to ordinary law with only minimal constitutional prescription? Or has the government habitually abused emergency powers, which might suggest the need for their stronger and stricter constitutional regulation?
3. How strong, independent, inclusive and well respected are the key institutions, other than the executive, which might have to approve or oversee the use of emergency powers? For example, if judicial review of emergency powers is being considered, how capable, independent and respected is the judiciary? Can it be relied on to exercise this constraining, balancing power? Do the military see their role as neutral, non-partisan and subject to the constitutionally bound civilian authorities, or do they claim a political role that might be abused in an emergency situation?



4. How proportional and inclusive is the electoral system? How many significant parties does the legislature represent, and what are their sizes and the relationships between them? How do these considerations affect the size of majority required in order to give the opposition and minority parties adequate protection against the misuse of a declaration of a state of emergency?
5. On what sort of federal bargains or inter-communal agreements is the constitution (formally or informally) based? Is there a risk that emergency powers could upset these bargains by violating communal rights or by centralizing power? If a central intervention is required, what procedures and safeguards can be included in the constitution to reassure the different regions or communities that their interests will be protected?
6. What steps could be taken to avoid reliance on emergency powers as an abnormal constitutional condition? For example, could changes to the limitation clause or to the distribution of power within public institutions create a more flexible balance between democratic rights and state security that can protect democracy in nuanced ways without having to impose frequent states of emergency?
7. Is the process for declaring states of emergency clearly stated in the proposed constitution? Are the provisions well drafted and free from ambiguity?
8. What fundamental rights still need to be protected, even in an emergency? How does this relate to the state's obligations under international law? Are the proposed measures for guaranteeing those rights likely to be adequate?

10. References



Where to find constitutions referred to in this Primer

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Annex



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Elliot Bulmer is a Senior Programme Officer with International IDEA's Constitution-Building Processes Programme. He holds a PhD from the University of Glasgow and an MA from the University of Edinburgh. He is the editor of International IDEA's Constitution-Building Primer series and specializes in comparative approaches to constitutional and institutional design. In addition he is engaged in offering technical assistance and capacity building in support of constitutional change processes around the world, with recent projects on Afghanistan, Myanmar, Tuvalu and Ukraine.

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