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States of Emergency

Analysing Global Use of Emergency Powers in Response to COVID-19

Joelle Grogan[*]

Abstract

The measures taken in response to the coronavirus pandemic have been among the most restrictive in contemporary history, and have raised concerns from the perspective of democracy, human rights, and the rule of law. Building on a study of the legal measures taken in response to pandemic in 74 countries, this article considers the central question of the use of power during an emergency: is it better or worse for democracy and the rule of law to declare an emergency or, instead, to rely on ordinary powers and legislative frameworks? The article then considers whether the use of powers (ordinary or emergency) in response to the pandemic emergency has ultimately been a cause, or catalyst of, further democratic deconsolidation. It concludes on a note of optimism: an emerging best practice of governmental response reliant on public trust bolstered by rationalized and transparent decision-making and the capacity to adapt, change and reform measures and policies.

Keywords: coronavirus, emergency law, emergency powers, autocratization, democratic deconsolidation, state of emergency, rule of law, transparency, accountability, legislative scrutiny.

A Introduction

On 30 January 2020, the World Health Organization declared the outbreak of the novel coronavirus SARS-CoV-2 to be a global health emergency. As infection rates grew exponentially across the world, the limitations that were placed on individual liberty, movement, assembly, worship, education and commercial activity – as well as on elections, parliaments and the courts – were the most restrictive in contemporary history. Debate has raged over the degree to which countries have been prepared for the threat of a pandemic, let alone one unparalleled in its current scale and impact. In the initial phase of the crisis, states responded to the emergency with executive action: government decrees or administrative decisions that have been sometimes relying on questionable legal basis for enabling national lockdown. While a majority of states declared a state

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of emergency in order to make urgent use of emergency powers, many states did not, relying instead on ordinary legislative provisions (primarily health legislation), which may be unsuited, by either design or legislative intent, to serving as the legal basis for the use of powers that have been exercised in response to the global health emergency.

From 6 April to 26 May 2020, the 'COVID-19 and States of Emergency' Symposium, co-hosted by the Verfassungsblog and Democracy Reporting International and convened by the author of this article, published reports daily on states of emergency and executive action taken in response to COVID-19 in 74 countries, analysing legal measures and the use of emergency powers that impact nearly 80% of the global population.[1] These reports were provided by a worldwide network of professors and scholars of constitutional, public and international law as well as former judges of the European Court of Human Rights.

This article first considers the central question of the use of power during an emergency: is it better or worse for democracy and the rule of law to declare an emergency or, instead, rely on ordinary powers and legislative frameworks? (Section B) The article then considers whether the use of powers (ordinary or emergency) in response to the pandemic emergency has ultimately been a cause, or catalyst of, further democratic deconsolidation. In doing so, it highlights how states have struggled to maintain some degree of legislative and judicial normality – essential for the scrutiny and review of emergency measures – while other states have given it up entirely (Section C). It concludes on a note of optimism: an emerging best practice of governmental response reliant on public trust bolstered by rationalized and transparent decision-making and the capacity to adapt, change and reform measures and policies (Section D).

B Examining the Response: Emergency Versus Ordinary Powers

I Can Conditions Alone Prevent Abuse or Misuse of Emergency Power?

The global COVID-19 pandemic caused by the novel coronavirus SARS-CoV-2 was declared by the WHO to be a global health emergency on 30 January 2020.[2] By

1 This analysis is drawn from the final report of the 'COVID-19 and States of Emergency' Symposium which took place from 6 April to– 26 May 2020: *see*https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/. States included were: Albania, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Croatia, Cyprus, Czechia, Denmark, Ecuador, Egypt, Estonia, European Union, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Kenya, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Nepal, Netherlands, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, United Kingdom, Ukraine, United States of America, Venezuela, and Vietnam.

2 Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (30 January 2020) at www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

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April 2020, 41 of 74 countries analysed in the Symposium (or 55%)[3] had declared a state of emergency or relied on emergency powers in response to the pandemic. Those that did not declare a state of emergency relied instead on powers within ordinary, and typically health, legislation. While the pandemic on such a global scale and impact is unprecedented in modern times, discussion regarding the risk of emergency powers to democracy, human rights and the rule of law is not. It has been debated whether a clause for a state of emergency would limit the potential for abuse or whether the existence of such a clause would leave it *open* to abuse. Much can be made of the conditionality that attaches to the declaration and use of power under a state of emergency.

As a starting point, the conditionality on the use of power should be in 'terms of necessity, proportionality, exigency in the situation, temporality and a commitment to human rights as a framework for legitimate emergency measures'.[4] The declaration of a state of emergency should act almost as a 'quarantine' on the use of those powers.[5] The preferred framework from the perspective of the rule of law and democratic legitimacy, which is supported by the analysis of states' responses to COVID-19, is a two-step process whereby the executive may declare a state of emergency that must be confirmed within a reasonable time by the legislature. Any extension of the state of emergency must also be confirmed by the legislature. An example of this in practice is in the design of state of emergency declarations in Mexico. Following 2011 constitutional reform, the 1917 Constitution of Mexico envisions the oversight by both judicial and legislative branches, and these political and legal safeguards against its misuse cannot be overridden by the executive. Despite numerous situations that may have called for a state of emergency, it has been declared only once, in 1942, during World War II, and has not been declared in the current crisis.[6]

States can have highly prescriptive conditions attaching to a state of emergency, including the obligation to derogate from constitutional rights and international treaties, arguably attach to higher bars for their activation and so act as a legal or constitutional safeguard on their use. However, this has not necessarily correlated with having less likelihood of abuse or higher degrees of parliamentary oversight in the current crisis. For example, the 1992 Constitution of Estonia and the 1980 Chilean Constitution define varying levels of emergency, each with corresponding powers and conditionality over their use. The constitutions reserve the most serious levels for parliamentary approval. Both states declared a state of emergency – in Chile the estado de catástrofe and in Estonia the eriolukord – which are declared by the executive and do not require

3 This reflects the overall global majority of countries declaring a state of emergency: *see* Christian Bjørnskov and Stefan Voigt, '*The State of Emergency Virus*' (Verfassungsblog, 19 *April* 2020) at https://verfassungsblog.de/the-state-of-emergency-virus/.

4 M. Scheinin, 'Covid-*19 Symposium: To Derogate or Not to Derogate?' (6 April 2020)* Opino Juris, at https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/.

5 Alan Greene, 'Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?' (2020) *EHRLR* 262, 266.

6 *See* Eugenio Velasco, '*Mexico: Emergency Powers and COVID-19*' (Verfassungsblog, *16 April 2020*) at https://verfassungsblog.de/mexico-emergency-powers-and-covid-19/.

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parliamentary approval. Both countries notified derogations under the American Convention on Human Rights and the European Convention on Human Rights [ECHR], respectively, and also under the International Covenant on Civil and Political Rights [ICCPR]. In principle, the relevant constitutional safeguards have been engaged. In practice, however, both states reveal worrisome trends in their use of emergency powers. With little parliamentary scrutiny or oversight, the Estonian coalition introduced a package of measures unrelated to the crisis but closely aligned with their political agenda.[7] The Chilean government has made use of emergency powers to curb ongoing civil unrest and to potentially delay a planned referendum on a new constitution beyond the pandemic.[8]

While some constitutional provisions obligate derogation from international treaties on human rights as a necessary safeguard in the use of emergency powers, there is ongoing debate[9] in regard to the necessity of derogation from international human rights instruments during the pandemic, with the concern that by *not* derogating the use of exceptional and emergency powers may be normalized and human rights protections permanently weakened.[10] In the current emergency, derogation from international treaties appears not to be a significant indicator of commitment to individual rights or of acting as a restraint on emergency powers. Of the 74 countries analysed in the Symposium, only 12 have also derogated from international human rights treaties.[11] At a global level, only 14 of 173 signatory states (or 8%) notified derogations from the ICCPR. It is notable that while an overall majority of states engaged with emergency powers, only a minority (overall) have derogated from international treaties.

Conditionality alone cannot limit the potential for abuse of emergency powers. As a notable example, the 2014 Egyptian Constitution was drafted with the intention of bringing an end to the near perpetual state of emergency since 1967. The safeguards introduced, including two-thirds approval of the House of Representatives, have been sidestepped through formalistic proceduralism: the president will declare a new state of emergency a few days after the lapse of the last one. Egypt did not declare a state of emergency through the coronavirus crisis

7 *See* Rait Maruste, '*State of Emergency in Estonia*' (Verfassungsblog, *17 May* 2020) at https://verfassungsblog.de/state-of-emergency-in-estonia/.

8 Leonardo Cofre, *'Chile and COVID-19: A Constitutional Authoritarian Temptation*' (Verfassungsblog, 19 May 2020) at https://verfassungsblog.de/chile-and-covid-19-a-constitutional-authoritarian-temptation/.

9 *See e.g.* Scheinin (n 4); Cassandra Emmons, '*International Human Rights Law and COVID-19 States of Emergency*' (VerfBlog, 25 April 2020) at https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-of-emergency/, DOI: https://doi.org/10.17176/20200425-164920-0' and Niall Coghlan, *'Dissecting Covid-19 Derogations*' (VerfBlog, 5 May 2020) at https://verfassungsblog.de/dissecting-covid-19-derogations/, DOI: https://doi.org/10.17176/20200505-133454-0.

10 Greene (n 5) 263.

11 For derogations from the American Convention on Civil and Political Liberties *see*www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp. For the European Convention on Civil and Political Rights, *see* Council of Europe, 'Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms Declarations in Force as of 30/06/2020', at www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354. *See* Coghlan (n 9); and Emmons (n 9).

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because it has never left such a state for more than a few days since 2017. The Egyptian government did introduce a range of concerning measures, however, including the expansion of the jurisdiction of the military courts over violations of coronavirus restrictions and other civilian matters.[12]

What has become apparent is that even where provisions on states of emergency are robust from the perspective of democratic oversight, individual rights and the rule of law, it is clear that compliance is predicated on executive commitment to constitutional and legal order and on the question of whether or not there is sufficient separation of powers to ensure it. Without an independent judiciary or parliamentary oversight to enforce constitutional norms and safeguards, limits on the use of power are just words on paper.

II Reliance on Ordinary Legislation

Despite the declaration of a global health emergency, a sizable minority of states have not declared a state of emergency (or relied on emergency powers) but instead have relied on ordinary provisions that might be even less suitable for use in an emergency situation. The reasons for this have varied from legal impossibility to political reticence, rather than its necessarily being a preferable response to the pandemic.

First, as in the case of Japan,[13] there may be no constitutional provision for a state of emergency: a negative experience of the abuse of emergency power led Japan to omit an emergency clause in the 1947 Constitution. Alternatively, for many countries, the pandemic did not constitute an 'emergency' within constitutional or legal provisions allowing for a state of emergency.[14] While most constitutions that have provision for a state of emergency stipulate war, external aggression or armed rebellion as a condition for declaration,[15] only a few refer to

12 Emergency Law no. 162/1958. *See* Ahmed Ellaboudy, *'Emergency Law Amendments to Fight Covid-19 in Egypt: Putting the Poison in the Honey'* (Verfassungsblog, *19 May* 2020) at https://verfassungsblog.de/emergency-law-amendments-to-fight-covid-19-in-egypt-putting-the-poison-in-the-honey/.

13 For example, the US constitution has no provision for an emergency, operating instead under the principle that the 'same law applies in war as in peace' (*ex p Milligan* (1866) 1 US (4 Wall) 2, 120-21). *See* O. Gross, 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011, 1042-53.

14 For example, in Ireland, wherein an emergency can only be declared 'in time of war or armed rebellion' under Art. 28.3.3° of the Irish Constitution. *See* Alan Greene, *'Ireland's Response to the COVID-19 Pandemic'* (VerfBlog, 11 April 2020) at https://verfassungsblog.de/irelands-response-to-the-covid-19-pandemic/, DOI: https://doi.org/10.17176/20200411-152559-0.

15 For critical analysis prior to COVID-19, *see* Kim Lane Scheppele, 'Small Emergencies' (2006) 40 *Georgia Law Review* 835-62; David Dyzenhaus, 'States of Emergency' in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); and Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Bloomsbury 2018).

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a natural disaster[16] and fewer still to an epidemic or health emergency.[17] Where there is no provision to declare a state of emergency in response to a pandemic, states have had to rely on other provisions – or create a *new* state of emergency. For example, having experienced a two-year state of emergency following terrorist attacks in 2015, France declared a *new* state of a 'health emergency' that mimics the pre-existing provisions for a state of emergency but only provides a more limited role for parliament and did not derogate from the ECHR or ICCPR.[18]

In other states, negative historical experiences of the abuse of emergency powers created an unwillingness by government to be associated with it, for example, in the initial responses of India[19] and Bangladesh. However, the call of a 'general holiday' in Bangladesh to avoid the negative associations of a state of emergency belies the gravity of the situation and misleads the population into high-risk behaviours, including mass migration.[20] There can also be a related political unwillingness to call a state of emergency, even where there is significant popular pressure to do so, owing to a downplaying or underestimation of the threat of COVID-19. This is evidenced in the initial reluctance of the Indonesian government to call an emergency,[21] although we might also include Brazil in this category.[22] As a final point of contrast, Egypt was *already* in a state of emergency but has since profited from the pandemic to entrench executive powers.[23]

16 *See e.g.* Art. 17 of the Constitution of Croatia. There is, however, debate on whether the pandemic could constitute a 'natural disaster': *see* Nika Bačić Selanec, *'Croatia's Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic'* (Verfassungsblog, 09 May 2020) at https://verfassungsblog.de/croatias-response-to-covid-19-on-legal-form-and-constitutional-safeguards-in-times-of-pandemic/.

17 *See e.g.* Art. 119 Constitution of Turkey. *See* Serdar Ünver, *'Fighting COVID-19 – Legal Powers, Risks and the Rule of Law: Turkey'* (Verfassungsblog, 15 April 2020) at https://verfassungsblog.de/fighting-covid-19-legal-powers-risks-and-the-rule-of-law-turkey/.

18 Sébastien Platon, *'From One State of Emergency to Another – Emergency Powers in France'* (VerfBlog, 9 April 2020) at https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/, DOI: https://doi.org/10.17176/20200409-153015-0. *See also*: Sébastien Platon, 'Reinventing the Wheel…and Rolling Over Fundamental Freedoms? The Covid-19 Epidemic in France and the "State of Health Emergency"', *The Theory and Practice of Legislation* (2020), DOI: 10.1080/20508840.2020.1804110.

19 Gautam Bhatia, *'An Executive Emergency: India's Response to Covid-19'* (Verfassungsblog, *13 April* 2020) at https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/.

20 Ridwanul Hoque, *'Bangladesh's Unofficial Emergency: Managing the COVID-19 Crisis by Notifications'* (Verfassungsblog, 6 May 2020) at https://verfassungsblog.de/bangladeshs-unofficial-emergency-managing-the-covid-19-crisis-by-notifications/.

21 Abdurrachman Satrio, *'Indonesia's Fight against COVID-19: A Battle Over the Meaning of Emergency?'* (VerfBlog, 12 April 2020) at https://verfassungsblog.de/indonesias-fight-against-covid-19-a-battle-over-the-meaning-of-emergency/, DOI: https://doi.org/10.17176/20200412-152546-0.

22 Emilio Peluso Neder Meyer and Thomas Bustamante, *'Authoritarianism Without Emergency Powers: Brazil Under COVID-19'* (VerfBlog, 8 April 2020) at https://verfassungsblog.de/authoritarianism-without-emergency-powers-brazil-under-covid-19/, DOI: https://doi.org/10.17176/20200408-153025-0.

23 Ellaboudy (n 12).

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Beyond these rationales, there is good reason to support an approach that rejects emergency powers: the principle of normalcy guides response to the health emergency through

> normally applicable powers and procedures and insist on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights on the basis of a pressing social need created by the pandemic.[24]

However, inevitable pitfalls have been exposed. States have relied on health acts to provide the legal basis for sweeping powers for detention, quarantine and even lockdown. A tangible concern in this context is the interpretation of ordinary legislation to the effect that it allows action that ought to have been ultra vires. As an example, the UK's Public Health (Control of Disease) Act 1984 allows a minister to make a 'special restriction or requirement'[25] 'on where [a person] goes or with whom [a person] has contact'.[26] To interpret these sections as allowing for a nationwide lockdown of the entire population has been variously argued to be either 'suitable and necessary',[27] or, as the 'legal underpinnings of the provisions are so thin'[28] that the Regulation is ultra vires and unlawful.

In many cases, the Health Acts that were initially relied on were promulgated in very different times, for example in Nepal (Infectious Diseases Act 1964), Ireland (Health Act 1947) and India (Epidemic Diseases Act 1897). The critical issue in this context is that existing legislation was often unsuitable and necessitated reform to account for the unique challenges that arose from the pandemic, most often in the form of an amendment to grant increased powers to the executive to adopt COVID-19-specific measures. The speed of amendments in some countries, however, afforded extraordinarily little time for meaningful review (from 4 days for the review of the Coronavirus Act 2020 in the UK,[29] to only 12 hours for review of amendments to the Epidemics Act in Denmark[30]), raising concerns over the *quality* of the law. Following a storm of protest from legal scholars, lawyers and judges in regard to the secrecy and lack of accountable input, the Norwegian government radically revised its initial draft law on action

24 *See* Scheinin (n 4).
25 Section 45c Public Health (Control of Disease) Act 1984.
26 Section 45g Public Health (Control of Disease) Act 1984.
27 Jeff King, 'The Lockdown is Lawful: Part II' (*UK Constitutional Law Blog U.K. Const. L. Blog*, 2 April 2020).
28 Robert Craig, 'Lockdown: A Response to Professor King' (*UK Human Rights Blog*, 6 April 2020).
29 Joelle Grogan, *'Right Restriction or Restricting Rights? The UK Acts to Address COVID-19'* (VerfBlog, 17 April 2020) at https://verfassungsblog.de/right-restriction-or-restricting-rights-the-uk-acts-to-address-covid-19/, DOI: https://doi.org/10.17176/20200417-182523-0.
30 Kristian Cedervall Lauta, *'Something is Forgotten in the State of Denmark: Denmark's Response to the COVID-19 Pandemic'* (VerfBlog, 4 May 2020) at https://verfassungsblog.de/something-is-forgotten-in-the-state-of-denmark-denmarks-response-to-the-covid-19-pandemic/, DOI: https://doi.org/10.17176/20200504-133656-0.

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concerning the coronavirus.[31] Finland, by contrast, offers an example of best practice for the pluralistic review of constitutionality and rights-compliance of executive decrees through standing committees and engagement with external legal and constitutional experts.[32]

While emergency necessitates urgent action, there is always capacity for subsequent review and reform. On this point, Italy is exemplary. The country suffered one of the highest mortality rates in Europe and was among the first to introduce restrictive measures and the second globally, behind China, to introduce a national lockdown. The initial measures diverged at the local, regional and national levels and were introduced so quickly and haphazardly as to create 'regulatory and legal chaos'.[33] However, this changed: responding to the criticism from academics, lawyers and the media directed at earlier provisions, the Italian government reformed the legal measures to include clear constitutional safeguards and protections for the rule of law.[34] This trend of informed legal reform has echoed across the EU (with the notable exception of Hungary and Poland): initial legal shortcomings were subsequently rectified through legal and policy reform.[35] Even where arguably there is clear international principle on the use of emergency power,[36] it is nevertheless probable that this decade will witness legal reform concerning health emergencies, and some key insights may be gleaned from collective experience. Ongoing stakeholder engagement, involving external constitutional and legal experts paired with readiness to reform and adapt, not only creates better quality law but can also lead to more positive outcomes.

Ultimately, the evidence of the Symposium indicates that while it is true that the use of emergency powers heightens the risk of the misuse or abuse of power or a permanent shift in the balance of power in favour of the executive, it is false to conclude that all use of emergency powers can be an indicator of abuse by the executive or government. Similarly, while it is true that states should rely as much as possible on the ordinary powers of government in order to safeguard democracy, it is false to conclude that all states that rely on ordinary powers during an emergency are unlikely to be misusing, or even abusing, powers. By engaging powers under ordinary legislation only, the scrutiny and conditionality that normally attach to the use of emergency powers can be avoided. However,

31 Hans Petter Graver, 'Fighting the Virus and the Rule of Law – A Country Report on Norway' (*Verfassungsblog*, 13 April 2020) at https://verfassungsblog.de/fighting-the-virus-and-the-rule-of-law-a-country-report-on-norway/.

32 Martin Scheinin, '*The COVID-19 Emergency in Finland: Best Practice and Problems*' (Verfassungsblog, *16 April* 2020) at https://verfassungsblog.de/the-covid-19-emergency-in-finland-best-practice-and-problems/.

33 *See* Julinda Beqiraj, *'Italy's Coronavirus Legislative Response: Adjusting Along the Way'* (Verfassungsblog, *08 April* 2020) at https://verfassungsblog.de/italys-coronavirus-legislative-response-adjusting-along-the-way/.

34 Ibid.

35 Michael Meyer-Resende, *'The Rule of Law Stress Test: EU Member States' Responses to COVID-19'* (Verfassungsblog, 24 May 2020) at https://verfassungsblog.de/the-rule-of-law-stress-test-eu-member-states-responses-to-covid-19/.

36 Greene (n 5).

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abusive legal formalism in the declaration of an emergency and the change of laws under a state of emergency can limit or remove scrutiny and any proportionality on the use of power. A stronger indicator, albeit often more difficult to quantify and analyse than legal text, is the social and political ecosystem in which those rules are operating rather than the form and content of the rules themselves.

C Has Emergency Been a Catalyst for or Cause of (Further) Democratic Deconsolidation?

I Concerns for the Abuse of Power During an Emergency Realized

Emergency powers can be within the

> zones of discretionary power where, ostensibly, there appears to be legal oversight and judicial review of this discretion but such judicial oversight has so light a touch as to be non-existent.[37]

By their nature and justifying urgency of the situation that calls for their use, emergency powers are at heightened risk of misuse or abuse as there is (often) limited capacity for legislative scrutiny or oversight. Against the backdrop of increasing executive dominance[38] connected with larger concerns for the autocratization[39] and democratic decay of consolidated democracies,[40] the wariness regarding the use of emergency powers has crystallized into the concern that the COVID-19 pandemic will provide a vehicle for further consolidation of autocratic and undemocratic regimes.

A central concern with regard to emergencies is that they may function as opportunities to permanently shift the balance of power, resulting in executive decision-making that is all but unaccountable. Where there is no requisite degree of oversight, the concerns that arise both within the context of a state of emergency and upon reliance on ordinary legislation are indistinguishable. The almost unlimited (in time and scope) legislative power given to the Hungarian government has since been used to transfer the most profitable revenue sources for local governments to county governments in areas controlled by opposition parties[41] that have little plausible connection with COVID-19. The use of power by the Hungarian prime minister has had the effect of consolidating power with

37 Greene (n 5) following *D. Dyzenhaus,* The Constitution of Law: Legality in a Time of Emergency *(Cambridge: Cambridge University Press, 2006) 41-43.*

38 Tom Ginsburg and Mila Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic' (2020) Virginia Public Law and Legal Theory Research Paper 2020-52 and (2020) University of Chicago Public Law Working Paper 747.

39 Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

40 Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9.

41 Valerie Hopkins, 'Orban's Emergency Powers Hit Opposition Funding' (*Financial Times*, 24 April 2020) at www.ft.com/content/5ba8a724-871c-480e-930d-ed9b0469cafe.

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little oversight within the executive.[42] The reality of permanent transfiguration of the legal system during an emergency to favour executive dominance is that it can rarely be easily undone.

Emergencies can provide a further catalyst for executive overreach that

> can generate negative externalities ranging from the normalization of draconian measures and alarmist rhetoric to the militarization of public policy to the concentration of power in one set of institutions and the erosion of rule-of-law values.[43]

The dangers of vague provisions make executive overreach all the more possible.[44] Executive action without legal justification or adequate legal basis, exemplified in unpublished decisions and government circulars, created legal chaos in a situation that calls for clear communication and legal certainty in Cameroon[45] and Turkey.[46] In the UK, a critical concern arose where there is disparity in the application of the law, particularly where there was little guidance on what constitutes a 'reasonable belief' in what may not be an exhaustive list of excuses for when a person could have left their residence during lockdown, leading to the allegation of discriminatory application of measures.[47] Equally, elected or government officials who ignore the rules that they themselves have designed have risked critically undermining their own legitimacy and the rules' efficacy.

In attempting to address the pandemic, a number of states have adopted disproportionate penalties for breaking (new) criminal laws related to COVID-19 measures: including large fines disproportionate to the countries' media wage and

42 See Gábor Halmai, Gábor Mészáros, and Kim Lane Scheppele, 'From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law' (Verfassungsblog, *30 May 2020) a*thttps://verfassungsblog.de/from-emergency-to-disaster/.

43 Pozen David and K. Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 (4) *American Journal of International Law* 608-617, 614, 'Executive Underreach, in Pandemics and Otherwise' (30 June 2020), *American Journal of International Law*, Forthcoming, Columbia Public Law Research Paper No. 14-664, Available at SSRN: https://ssrn.com/abstract=3649816 or http://dx.doi.org/10.2139/ssrn.3649816, 12; and Gross (n 13).

44 *See,* for example, the experience of Bulgaria (Radosveta Vassileva, *'Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?*' (Verfassungsblog, 10 April 2020) at https://verfassungsblog.de/bulgaria-covid-19-as-an-excuse-to-solidify-autocracy/), India (Bhatia (n 19)); and Russia (Paul Kalinichenko and Elizaveta Moskovkina, 'Russia – With Scepter and Corona' (*Verfassungsblog*, 23 May 2020) at https://verfassungsblog.de/russia-with-scepter-and-corona/.

45 Éric-Adol Gatsi Tazo, *'Cameroon's Fight Against COVID-19: An Ordinary Legal Framework for an Extraordinary Situation'* (VerfBlog, 21 May 2020) at https://verfassungsblog.de/cameroons-fight-against-covid-19-an-ordinary-legal-framework-for-an-extraordinary-situation/, DOI: https://doi.org/10.17176/20200521-133119-0.

46 Ünver (n 17).

47 *See* Grogan (n 29).

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extended prison sentences for non-compliance with lockdown orders.[48] These measures disproportionately impact the most vulnerable communities. The introduction of provisions criminalizing acts likely to spread the disease led to mass arrests in Peru,[49] only escalating concerns of viral spread in prisons. In South Africa, eight people were killed by police during the initial lockdown.[50] While not only related by the pandemic, extrajudicial killings and police brutality in the enforcement of government mandates were reported in Nigeria[51] and Kenya.[52] Hungary's Viktor Orbán has been authorized to direct the military to use force against civilians 'up to but not including death'.[53] Targeted use of emergency powers against vulnerable or minority groups,[54] and also political enemies, including, for example, opposition parties and journalists,[55] has intensified during the pandemic. In Uganda, the LGBTQ population has been targeted by the police force.

Often paired with criminalization of COVID-related measures restricting movement are state censorship[56] and restrictions on freedom of expression that cannot be justified in the context of controlling the pandemic,[57] although they are in tandem with democratic deconsolidation. A number of states have

48 For example, *see*: Khemthong Tonsakulrungruang and Rawin Leelapatana, '*Health Before Rights and Liberties: Thailand's Response to COVID-19*' (Verfassungsblog, 08 May 2020) at https://verfassungsblog.de/health-before-rights-and-liberties-thailands-response-to-covid-19/; José Gonzalez, '*Challenges Beyond Public Health – Guatemala and the Covid-19 Crisis*' (VerfBlog, 28 April 2020) at https://verfassungsblog.de/challenges-beyond-public-health-guatemala-and-the-covid-19-crisis/, DOI: https://doi.org/10.17176/20200428-164944-0; and Bianca Selejan-Gutan, '*Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis*', (VerfBlog, 21 May 2020) at https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/, DOI: https://doi.org/10.17176/20200521-133211-0.

49 David Lovatón, '*Quarantine, State of Emergency, State of Enforcement, and the Pandemic in Peru*' (VerfBlog, 26 April 2020) at https://verfassungsblog.de/quarantine-state-of-emergency-state-of-enforcement-and-the-pandemic-in-peru/, DOI: https://doi.org/10.17176/20200426-164522-0.

50 Dickens Olewe, 'Coronavirus in Africa: Whipping, Shooting and Snooping' (*BBC News*, 8 April 2020) at www.bbc.co.uk/news/world-africa-52214740.

51 Lukman Abdulrauf, '*Nigeria's Emergency (Legal) Response to COVID-19: A Worthy Sacrifice for Public Health?*' (VerfBlog, 18 May 2020) at https://verfassungsblog.de/nigerias-emergency-legal-response-to-covid-19-a-worthy-sacrifice-for-public-health/, DOI: https://doi.org/10.17176/20200518-133659-0.

52 Allan Maleche, Nerima Were and Tara Imalingat, '*Excessive Law Enforcement in Kenya*' (VerfBlog, 14 May 2020) at https://verfassungsblog.de/excessive-law-enforcement-in-kenya/, DOI: https://doi.org/10.17176/20200514-133513-0.

53 Gábor Halmai and Kim Lane Scheppele, *The Moment for Lies*, EURACTIV (26 June 2020) at www.euractiv.com/section/justice-home-affairs/opinion/the-moment-for-lies.

54 United Nations Network on Racial Discrimination and the Protection of Minorities, 'Leave No One Behind Racial Discrimination and the Protection of Minorities in the COVID-19 Crisis' (UNHR, 29 April 2020) at www.ohchr.org/EN/Issues/Minorities/Pages/COVID19-and-minority-rights.aspx.

55 *See* Reporters Without Borders Global Tracker, at https://rsf.org/en/tracker19-Coronavirus-Covid19.

56 Melodie Labuschaigne and Ciara Staunton, '*COVID-19: State of Disaster in South Africa*' (VerfBlog, 11 April 2020) at https://verfassungsblog.de/covid-19-state-of-disaster-in-south-africa/, DOI: https://doi.org/10.17176/20200411-152621-0.

57 *See* Hoque (n 20).

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introduced criminal offences related to 'miscommunication' or the publication of false or misleading assertions related to the epidemic and the measures introduced by governments to tackle it.[58] Such offences are often drafted in terms general enough to ensure that political opponents fall within their scope and have been introduced as permanent changes to criminal codes.[59] Throughout the first phase of the virus, the Lukashenko regime in Belarus had been largely in a state of denial concerning the reality of coronavirus, and a chilling effect on reporting the virus has been created through arrests of journalists and doctors, thereby masking the true extent of infection and mortality.[60]

Although beyond the scope of this article, which focuses on the *use* of power, it is necessary to highlight a concern opposite to executive overreach, namely executive *underreach* or "a national executive branch's wilful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address".[61] Underreaction to the pandemic has correlated with the highest infection and mortality rates globally. This has been evidenced by the experiences of the United States[62] and Brazil.[63] The federal executive powers of both countries downplayed or denied the threat of COVID-19, and have now among the highest mortality and infection rates in the world.

Ultimately, what emerges from the analysis is a global picture of COVID-19 providing the catalyst for *further* democratic deconsolidation and rule-of-law backsliding – but certainly not being a cause.

II A Limited Capacity for Oversight and Scrutiny of Executive Action

An essential safeguard against the misuse of power (emergency or ordinary) is judicial review and separation of powers.[64] While it has been recognized that the legislature is typically less suited to responding to emergencies than the executive,[65] legislative control over actions taken in an emergency is nevertheless

58 Michael Henry Yusingco, '*The Philippines' Dalliance with Authoritarianism in Times of National Emergency*' (VerfBlog, 21 April 2020) at https://verfassungsblog.de/the-philippines-dalliance-with-authoritarianism-in-times-of-national-emergency/, DOI: https://doi.org/10.17176/20200421-182538-0.

59 *See* Tonsakulrungruang and Leelapatana (n 48).

60 Uladzislau Belavusau and Maksim Karliuk, '*The State of Denial Amidst a Military Parade: COVID-19 in Belarus*' (VerfBlog, 20 May 2020) at https://verfassungsblog.de/the-state-of-denial-amidst-a-military-parade-covid-19-in-belarus/, DOI: https://doi.org/10.17176/20200520-133705-0.

61 David and Scheppele (n 43).

62 Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 62-63.

63 Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 62-63.

64 Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 62-63.

65 Ronan Cormacain, 'Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation' (2020) *The Theory and Practice of Legislation*, DOI: 10.1080/20508840.2020.1786272.

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essential to uphold democracy and the rule of law.[66] However, reflecting a trend prior to the pandemic of the increasing marginalization of the legislature,[67] in some states the parliament was entirely left out,[68] suspended[69] or threatened with dissolution by the executive.[70] States in the middle of election cycles have been faced with the challenges of governing a pandemic without a government. This led to interim governments adopting sweeping measures[71] and also to power struggles[72] when minority governments[73] have tried to handle the crisis with little parliamentary support.

The separation of powers is designed to ensure constitutional checks on the use of power. It is all the more important in a situation where urgency and extreme measures can be justified but becomes difficult to sustain where the executive is at odds with the parliamentary majority.[74] It has also been shown that while there is limited capacity for parliamentary sessions, committees and equivalent can be best placed to provide fact-finding parliamentary oversight of government action through and following the emergency.[75] Where the emergency situation is rapidly changing, involving complex, context-specific and rapidly evolving policy,[76] the possibility of the normal mechanisms of stakeholder engagement may appear more challenging.[77] However, standing committees and open calls for evidence can introduce an important level of critical feedback, even under highly restricted timelines and should be further supported as good practice during and following the pandemic.

66 European Commission for democracy through Law (Venice Commission), 'Emergency Powers' (1995) CDL-STD(1995)012, 13.

67 Elena Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) *The Theory and Practice of Legislation*, DOI: 10.1080/20508840.2020.1789935. For an overview of reaction within the EU, *see* European Parliament, 'Adjustment of Parliamentary Activity to COVID-19 Outbreak and the Prospect of Remote Sessions and Voting' (2020) 27 *Spotlight of Parliaments in Europe*.

68 Maruste (n 7).

69 Gonzalez (n 48).

70 Andrés Cervantes, *'Ecuador – Constitutionalism and Covid-19'* (VerfBlog, 9 May 2020) at https://verfassungsblog.de/ecuador-constitutionalism-and-covid-19/, DOI: https://doi.org/10.17176/20200509-133249-0.

71 Greene (n 5).

72 Tamar Hostovsky Brandes, *'Israel's Perfect Storm: Fighting Coronavirus in the Midst of a Constitutional Crisis'* (VerfBlog, 7 April 2020) at https://verfassungsblog.de/israels-perfect-storm-fighting-coronavirus-in-the-midst-of-a-constitutional-crisis/, DOI: https://doi.org/10.17176/20200407-153043-0.

73 Sarah Ganty, *'Belgium and COVID-19: When a Health Crisis Replaces a Political Crisis'* (VerfBlog, 21 April 2020) at https://verfassungsblog.de/belgium-and-covid-19-when-a-health-crisis-replaces-a-political-crisis/, DOI: https://doi.org/10.17176/20200421-182602-0.

74 Selejan-Gutan (n 48); and Jesús María Casal Hernández and Mariela Morales Antoniazzi, *'States of Emergency without Rule of Law: The Case of Venezuela'* (VerfBlog, 22 May 2020) at https://verfassungsblog.de/states-of-emergency-without-rule-of-law-the-case-of-venezuela/, DOI: https://doi.org/10.17176/20200522-133136-0.

75 Griglio (n 67); Malcolm Shaw, 'Parliamentary Committees: A Global Perspective' (1998) 4 *Journal of Legislative Studies* 225, 236.

76 Health Foundation, *COVID-19 Policy Tracker*, 24 June 2020.

77 *See* Cormacain (n 65).

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As could be expected, the COVID-19 crisis has brought delays to sometimes already overwhelmed justice systems. This has been a critical concern not only for the ordinary administration of justice, but also, and even more importantly, in respect of judicial review (where provided) of actions taken in an emergency. Relying on the justification of preventing the spread of the virus, executive restrictions on access to justice have been the greatest worry: measures have included freezing courts,[78] limiting access to 'extremely urgent'[79] or critical cases[80] or giving sole access to violations of coronavirus measures. The gravest concern has been the exclusion of emergency measures (and actions taken under them) from the scope of review. Hungary closed ordinary courts altogether and thus foreclosed the possibility for review of the proportionality of measures introduced under emergency conditions.[81] In Thailand, an ouster clause precludes administrative review of regulations made under emergency legislation.[82] In Czechia, even while courts have annulled some restrictive measures by the Ministry of Health, they still refused (on a split decision) to review the declaration of a state of emergency for lack of competence.[83] The Romanian constitutional court refused jurisdiction but, in doing so, implicitly held that presidential decrees are outside the reach of both the parliament and the constitutional court.[84] The complete exclusion of executive action from the scope of review is a profound concern, especially where courts lack any degree of independence and particularly where there is little scope for either political or popular objection through elections or protests. These initial examples may not be determinative, however, as it has been shown that judicial scrutiny of the use of emergency powers becomes stricter over time, though beginning with an initial deference.[85]A far greater concern is the harm caused by the absence of an independent judiciary whose role is essential, particularly where emergency measures might unconstitutionally limit rights. Without effective mechanisms for scrutiny, legal or constitutional safeguards are rendered moot.

D Seeking Best Practice: Legitimacy, Transparency and Trust

Policies and measures that rely primarily on public trust appear to correlate with positive outcomes and are a stronger determiner than whether or not a state

78 Vassileva (n 44).
79 Bhatia (n 19).
80 Lauta (n 30).
81 Kriszta Kovács, '*Hungary's Orbánistan: A Complete Arsenal of Emergency Powers*' (Verfassungsblog, 6 April 2020) at https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/.
82 Section 16 Emergency Decree on Public Administration in Emergency Situation, B.E. 2548.
83 Pl. ÚS 8/20. Zuzana Vikarská, '*Czechs and Balances – If the Epidemiological Situation Allows…*' (VerfBlog, 20 May 2020) at https://verfassungsblog.de/czechs-and-balances-if-the-epidemiological-situation-allows/, DOI: https://doi.org/10.17176/20200520-133608-0.
84 Decision no. 152/2020. Selejan-Gutan (n 48).
85 Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency' (2009) 28 *Yearbook of European Law* 664, 693-94.

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declared a state of emergency.[86] Long identified as having one of the most positive responses to the pandemic, New Zealand has all but eliminated COVID-19 within its borders, doing so by a combination of ordinary legal powers, and some emergency provisions, centrally driven by social nudges communicated through clear, consistent and constant government messaging.[87] Prime Minister Jacinda Arden repeatedly underlined the central message of social responsibility and thus met 'rule-of-law expectations about clarity, certainty, accessibility and congruence in application'.[88] Iceland's transparency of decision-making and 'rule of common sense'[89] has similarly been driven by clear government guidelines, recommendations and daily expert advice, with promising outcomes.[90] This approach is reliant on individual compliance which (in turn) is built on high levels of trust in government action, bolstered by rationalized and transparent decision-making and the capacity to adapt, change and reform measures and policies.[91]

Legal certainty and transparency of state and government action are vital to ensure public trust, which has proven essential to a high degree of public compliance with COVID-19 measures.[92] Sweden's measures in response to COVID-19 have been reported internationally, by some to exemplify a preferable alternative to highly restrictive measures.[93] Premised on high levels of public trust, the Swedish approach was to collectivize responsibility, both at the government level and among individuals. Public health recommendations on social distancing were introduced, accompanied by measures (albeit comparatively minimal) to limit gatherings of groups, as well as by closures of businesses and schools. The efficacy of this approach, advocating primarily social responsibility over lockdown might, however, be vindicated in the future with a

86 Based on infection and mortality rates as reported on John Hopkins Coronavirus Resource Centre, at https://coronavirus.jhu.edu/map.html (accessed 20 August 2020). For the means by which this assessment was made, *see* 'Methodology' in J. Grogan and N. Weinberg, *Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies* RECONNECT Policy Brief (August 2020) at https://reconnect-europe.eu/publications/policy-briefs/.

87 Dean Knight, *'Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand'* (VerfBlog, 7 April 2020) at https://verfassungsblog.de/covid-19-in-new-zealand-lockdown-bubbles-through-layers-of-law-discretion-and-nudges/, DOI: https://doi.org/10.17176/20200407-153019-0.

88 Ibid.

89 Hafsteinn Dan Kristjánsson, *'Iceland's Rule of Common Sense … and Law?'* (VerfBlog, 20 April 2020) at https://verfassungsblog.de/icelands-rule-of-common-sense-and-law/, DOI: https://doi.org/10.17176/20200420-182624-0.

90 Ibid.

91 Alicia Ely Yamin, 'Global Responses to COVID-19: An Inflection Point for Democracy, Rights, and Law' Bill of Health Harvard Law Petrie-Flom Center, at https://blog.petrieflom.law.harvard.edu/2020/06/12/global-responses-covid19-reflections/.

92 Grogan and Weinberg (n 86).

93 Iain Cameron and Anna Jonsson-Cornell, 'Sweden and COVID 19: A Constitutional Perspective' (*VerfBlog*, 7 May 2020) at https://verfassungsblog.de/sweden-and-covid-19-a-constitutional-perspective/, DOI: https://doi.org/10.17176/20200507-133715-0.

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lower rate of resurgence. However, Sweden has so far experienced a higher mortality rate than its neighbours Denmark, Norway and Finland.[94]

While it may seem self-evident that high levels of public compliance and trust in the government's directions to comply can correspond with an overall positive response and recovery from the COVID-19 pandemic, some necessary caveats must be stated. First, there are externalities and factors that play into the comparative capacity of countries to respond to the pandemic, including levels of wealth and poverty; population size and density; and the quality and capacity of the health and social care systems. Second, following Alicia Ely Yamin, "political trust needs to be continually earned, and traditions of transparency are deeply ingrained; they do not begin during pandemics".[95] In terms of public trust too, and to echo and underline Fukuyama:

> The major dividing line in effective crisis response will not place autocracies on one side and democracies on the other. The crucial determinant in performance will not be the type of regime, but the state's capacity and, above all, trust in government.[96]

Nevertheless, there are identifiable principles of good governance that can be derived from current experience and that can provide foundation and support to the legitimacy for future action.[97] First, clear, accessible, consistent, correct and constant guidance, with officials leading by example, is essential. This not only has the effect of tackling the spread of misinformation on the virus but is also critical to ensuring legal certainty and guaranteeing the transparency of government action. Second, states should introduce only measures that are necessary, proportionate and temporary in nature and respect human rights and the principle of legality. They should also avoid the disproportionate use of force and penalties for breaches of COVID-19 measures and guard against the arbitrary or discriminatory application of these measures. States should ensure equal and consistent application of the relevant rules, differentiating in treatment only for objectively justified and health-based reasons. Third, states should seek to protect oversight mechanisms to ensure higher quality of law, policy and compliance by ensuring that the legislature and the judiciary continue their ordinary functions so far as is possible through reasonable adjustments. Where the protection of public health can justify short-term limitation of political accountability through the legislature, there must be a robust and heightened commitment to public rationality through transparent decision-making processes.

94 'Sweden's Death Toll Unnerves Its Nordic Neighbours' (*Financial Times*, 20 May 2020) at www.ft.com/content/46733256-5a84-4429-89e0-8cce9d4095e4.

95 Yamin (n 91).

96 Francis Fukuyama, 'The Thing That Determines a Country's Resistance to the Coronavirus' (*The Atlantic*, 30 March 2020) at www.theatlantic.com/ideas/archive/2020/03/thing-determines-how-well-countries-respond-coronavirus/609025.

97 These recommendations are based on Grogan and Weinberg (n 86).

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E Conclusions

As of October 2020, there is neither a cure to COVID-19 nor a vaccine for the SARS-CoV-2 virus. States exiting (either de jure or de facto) states of emergency are now grappling with the unprecedented social and economic consequences of measures taken in response to the emergency, while also having to consider whether (or when) to reintroduce measures in the event of second or even further successive waves of infection. As the immediate crisis passes, there will be an opportunity for states to examine and review their constitutional and legal architecture, as well as health and crisis response preparedness. The most significant question, and one that will be asked with increasing frequency if and when lockdown measures are reintroduced either at the local or national levels will be how to govern the effective and proportionate use of the most extremely restrictive measures in modern history in light of the experiences of the first six months of 2020. In the reconstruction of emergency frameworks, I offer these observations. First, declaring a state of emergency or relying on ordinary legislation made the likelihood of abuse of power no more nor less likely. The effectiveness of legal safeguards against abuse depends on executive observance of the rules and on the strength of the separation of powers to enforce it. While it is too early to identify the best practice, there is emerging evidence of *good* practice: those state policies based on legal certainty, transparency, clear communication and early reaction have strongly correlated with lower mortality rates, and earlier lifting of restrictions. These principles are simple and universal.

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