

States of Emergency

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Geneva Centre for the
Democratic Control
of Armed Forces

What is a state of emergency?

A state of emergency derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country.

The declaration may suspend certain normal functions of government, may alert citizens to alter their normal behaviour, or may authorise government agencies to implement emergency preparedness plans as well as to limit or suspend civil liberties and human rights.

The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis or a general strike.

States of emergency are not uncommon occurrences, particularly in dictatorial regimes where the state of emergency may endure as long as the regime lasts. In some situations, martial law is also declared, allowing the military greater authority to act.

Other terms for referring to emergency situations are state of exception, state of alarm and state of siege.

What are the key components of a state of emergency?

States of emergency have two components:

- a **legal framework** consisting of the constitutional and legislative bases for the state of emergency, and
- an **operational framework** involving the organisational structure and strategic plans for dealing with the state of emergency.

While separate, these components must be compatible; in other words, the legal framework must take into account operational requirements, and the operational requirements must respect the legal framework, including international law.

Focusing on the legal framework, this backgrounder will deal with democratic accountability, human rights and the rule of law during states of emergency.

Why is this issue important?

The implementation of emergency law invariably leads to restrictions on normal economic, civil or political activity and rights in order to address the extraordinary circumstances that have given rise to the emergency situation. Certain restrictions may be fully justified.

At the same time, there is a danger that a government will take advantage of a state of emergency to introduce

unwarranted restrictions on human rights and civil liberties, to neutralise political opponents, to postpone elections, or for other self-serving purposes that would be more difficult to pursue under normal circumstances.

In some countries, there has been a tendency to maintain states of emergency for years or even decades, long after the original reason for its proclamation has disappeared. The danger that a “constitutional dictatorship” can arise out of a state of emergency should not be understated.

What essential principles must be respected during emergency rule?

A country’s constitution or legislation normally describes the circumstances that can give rise to a state of emergency, identifies the procedures to be followed, and specifies limits on the emergency powers that may be invoked or the rights that can be suspended. While each country will want to define its own practices, international norms have developed that can provide useful guidance. For example, important international treaties such as the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) stipulate that states are to observe the following principles.

- **temporality:** this refers to the exceptional nature of the declaration of a state of emergency
- **exceptional threat:** the crisis must present a real, current or at least an imminent danger to the community
- **declaration:** the state of emergency must be announced publicly; this informs citizens of the legal situation and reduces the possibility of a de facto state of emergency, that is, a situation whereby the state restricts human rights without officially proclaiming a state of emergency
- **communication:** notification of the measures taken must be made to other states and relevant treaty-monitoring bodies; for example, if a state is to derogate from its obligations under the ECHR or ICCPR then it must inform the Secretary General of respectively the Council of Europe or the UN of its derogation, the measures it has taken and the reasons therefore, as well as the termination of the derogation.
- **proportionality:** the measures taken to

counter the crisis must be proportional to the gravity of the emergency situation; this applies to the area of application, their material content and their duration.

- **legality:** human rights and fundamental freedoms during a state of emergency must respect the limits provided for by the relevant instruments of international and national law; furthermore, a state of emergency does not imply a temporary suspension of the rule of law, nor does it authorise those in power to act in disregard of the principle of legality, by which they are bound at all times.
- **intangibility:** this concerns the fundamental rights from which there can be no derogation, even during times of emergency.

Which human rights cannot be limited even in the event of a state of emergency?

Certain human rights are non-derogable under any circumstances. The ECHR and the ICCPR identify these rights as follows:

- the right to life
- prohibition of torture
- freedom from slavery
- freedom from post facto legislation and other judicial guarantees
- the right to recognition before the law
- freedom of thought, conscience and religion.

The UN Human Rights Committee has recognised that, in addition to the non-derogable rights listed above, there are several other humanitarian provisions that must remain inviolable.

- the humane treatment of all persons deprived of their liberty
- prohibitions against hostage-taking and unacknowledged incarceration
- protection of the rights of persons belonging to minorities
- the prohibition of propaganda advocating war or national, racial, or religious hatred
- procedural guarantees and safeguards designed to ensure the integrity of the judicial system.

What special powers can be proclaimed in a state of emergency?

Special emergency powers are granted to the government by virtue of the constitution or statutory laws. Examples of emergency measures or powers range widely, for example:

- the restriction of press freedom and the prohibition of public meetings
- domestic deployment of the armed forces
- evacuation of people from their homes and places of work
- searches of homes and other private places without a warrant; arrests without charges
- confiscation of private property (with or without compensation) and/or its destruction
- regulation of the operations of private enterprise; interference with financial transactions and export regulations
- special legislation to punish non-compliance with emergency regulations.

In some countries (e.g., the UK), special judicial bodies may be set up during the emergency situation, whereas in other countries (e.g., Germany), extraordinary judicial bodies are forbidden.

In a state of emergency, responsibility for government must remain with civilian authorities on the national and local level. Security forces assist the civilian authorities in a subsidiary role.

What mechanisms and approaches can help guard against the abuse of emergency powers?

The role of parliament

Most legal systems ensure that the executive does not have sole authority to declare a state of emergency and provide for parliamentary ratification of the decision of the executive - often, with a qualified vote. As a general rule, governments, checked by parliament, must provide a well-considered justification for both their decision to declare a state of emergency and the specific measures to address the situation.

Most parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. This parliamentary role is especially important in long-lasting states of exception, where the principle of civilian

supremacy over the security sector may be at risk.

Whatever the emergency situation, the *post hoc* accountability powers of parliament, i.e. the right to conduct inquiries and investigations on the execution of emergency powers ought to be guaranteed by law. This is important for both assessing government behaviour and identifying lessons learned with a view to future emergencies.

The role of the judicial system

The judicial system must continue to ensure the right to fair trial. It also must provide individuals with an effective means of recourse in the event that government officials violate their human rights.

In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through independence of the judiciary.

The courts can play a major role in decisions concerning the legality of a declaration of a state of emergency as well as in reviewing the legality of specific emergency measures.

The role of civil society

An emergency situation exerts enormous pressure on state and society. To deal with it effectively, governments need the cooperation of their citizens. Any abuse or unwarranted limitation of human rights in such a situation will undermine that cooperation and make it more difficult to surmount the emergency situation. A state has a vital interest in dealing with a state of emergency in an accountable and responsible manner.

The role for neighbouring states and the international community

Emergency situations may also affect the relations of a state with its neighbours and have implications for the international community. All states should have an interest in ensuring that the declaration and implementation of states of emergency are subject to certain limitations and proceed in accordance with international norms.

The international community needs to be actively engaged in ensuring that governments observe these norms. In particular, it must work with concerned governments to secure a swift return to normalcy and the restoration of the constitutional order in which rights can again be fully ensured.

Which branch of government can declare a state of emergency?

Most states have legal mechanisms governing the declaration of a state of emergency and the implementation of derogations. As concerns the prerogative to declare a state of emergency, the three most common approaches are the following:

- The executive declares the state of emergency and is obliged to inform parliament within a specified period of time (e.g. US)
- The executive declares the state of emergency but must have this ratified by parliament before it can proceed with emergency measures (e.g. Germany)
- Parliament itself declares the state of emergency (e.g. Hungary)

Typically, a state of emergency empowers the executive to name coordinating officials to deal with the emergency and to override normal administrative processes regarding the passage of administrative rules.

Related Issues

- civil emergency planning
- parliamentary oversight of the security sector
- human rights and the security sector
- cooperation, coordination and communication within the security sector

Further Information

‘The Emergency Constitution’

www.yalelawjournal.org/pdf/113-5/Ackerman%20FINAL.pdf

Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices
<http://www.dcaf.ch/oversight/>

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
www.unhcr.ch/html/menu3/b/h_cat39.htm

European Convention on Human Rights
www.hri.org/docs/ECHR50.html

International Covenant on Civil and Political Rights (ICCPR), particularly Article 4

This DCAF Backgrounder was prepared by the Centre’s Security Sector Reform Working Group, in conjunction with Hans Born, Ingrid Beutler, and Thorsten Wetzling. The document was edited by David Law and Jason Powers.

Other Backgrounders are available at www.dcaf.ch/publications/backgrounders

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