

Constitutional Derogations of Human Rights in a State of Emergency – European Experiences in the COVID-19 Pandemic

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Abstract

In a state of emergency when the safety of citizens usually is seriously endangered, in state constitutions special powers are provided for the state bodies. These special powers are imposed by the need to successfully deal with the threats. In those circumstances the governments impose extraordinary measures for citizens which usually derogate some fundamental human rights. Hence, from a human rights perspective declared state of emergency is a huge challenge because it could pave the way for human rights unjustified restrictions and violations. The explanation and justification from the state officials usually is that this is the way of protection wider public interest. However, because emergency powers could be abused, it is essential to create strict constitutional limits regarding the circumstances, duration and scope of such powers.

In this paper we made a comparative overview of the conditions under which a state of emergency could be declared according to constitutions of various European countries. Special focus was placed on the provisions for restriction of human rights in extraordinary situations with review on experiences of European countries during the COVID-19 pandemic.

Keywords

human rights, derogations, state of emergency, constitutions, COVID-19, European experiences

Sažetak

U izvanrednom stanju, kad je sigurnost građana obično ozbiljno ugrožena, ustavom države predviđaju se posebne ovlasti državnih tijela. Te posebne ovlasti nametnute su potrebom za uspješnim suočavanjem s prijetnjama. U takvim okolnostima vlade građanima nameću izvanredne mjere, koje obično odstupaju od nekih temeljnih ljudskih prava. Stoga je iz perspektive ljudskih prava proglašavanje izvanrednog stanja velik izazov jer bi se time moglo utrti put neopravdanim ograničenjima i kršenjima ljudskih prava. Državni dužnosnici obično daju objašnjenja i opravdanja da je to način zaštite šireg javnog interesa. Budući da bi se izvanredne ovlasti mogle zloupotrijebiti, ipak je prijeko potrebno uspostaviti stroga ustavna ograničenja s obzirom na okolnosti, trajanje i opseg takvih ovlasti.

Ovim radom dali smo usporedni pregled uvjeta u kojima se može proglasiti izvanredno stanje u skladu s ustavom pojedinih europskih država. Posebno smo se usredotočili na odredbe o ograničavanju ljudskih prava u izvanrednim situacijama s osvrtom na iskustva europskih država tijekom pandemije bolesti COVID-19.

Ključne riječi

ljudska prava, odstupanja, izvanredno stanje, ustav, COVID-19, europska iskustva

Introduction

A state of emergency refers to situations of major natural disasters, pandemics, large-scale industrial accidents, economic or energy crises that may endanger the safety of citizens who gravitate to the area in which these threats occur. The ongoing health crisis with COVID-19 virus imposed declaration of state of emergency in many European countries and in the almost whole world. However, this health crisis in the same time opened several issues related to the limitation of human rights and personal freedoms in a state of emergency. In such circumstances, national constitutions usually provide special powers for the state bodies in order to adequately deal with the challenges and dangers. The executive powers usually receive greater or extraordinary competencies, sometimes even legislative competencies.

From a human rights perspective, states of emergency are important because the extraordinary circumstances could pave the way for human rights violations. Although the restriction of human rights in those circumstances is justified by the fact that the wider public interest is protected, some authors legitimately pose the following question: In what sense are human rights *rights* if they are subject to derogation during emergencies? (Criddle and Fox-Decent, 2012). One of the possible answers to this question is that the most of the human rights are not absolute which means that under certain circumstances they may be restricted, if it is necessary “to resolve the conflict between human rights, as well as when a balance needs to be struck between human rights and some other constitutional values” (Treneska, 2022). Certain extraordinary measures could be implemented and some rights could be suspended for a certain period of time in order to create conditions for the protection of some other rights or other high social interests. However, those measures and any other actions must be truly exceptional as no state has the right to disregard the principle of the rule of law, even in extreme situations (CoE Rec. 1713/2005). A justified and temporary restriction of some rights does not mean the possibility of absolute denial of those rights. Among others, this means that if states can attain their objectives in emergency situations without using measures that derogate human rights, they should do it. On the national level, states have a margin of discretion in assessing whether there are emergency circumstances which could impose derogations of human rights. National authorities also decide on the nature and extent of the derogations needed to overcome the emergency. However, although states have a wide margin of discretion in this area, their powers are not unlimited. Each country on its own determine the circumstances that might give rise to a state of emergency, but the international norms however can provide useful directions for procedures that should be followed, as well as for the rights that can be suspended. Article 15 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) entitled as “Derogation in time of emergency” permits derogations in time of war or other public emergency threatening the life of the Nation. In general, derogating measures must be strictly required by the exigencies of the situation and should not be inconsistent with other obligations under international law. That limitation

should be necessary and reasonable in actual circumstances. The exercise of the rights must not be restricted beyond what is necessary and the basic essence of any human right must not be called into question. Moreover, the restriction of any human right must not be on a discriminatory basis. Finally, a set of human rights, also known as absolute rights, must not be restricted even in extraordinary circumstances.

During the COVID-19 pandemic, European states as well as the rest of the world were forced to restrict some of their citizens' rights in order to deal with the health crisis. In this regard, the experiences of European countries are different and each country has created a security strategy in accordance with the current circumstances at the national level. As a legislative basis for the suspension of some of the basic human rights in these circumstances, certain states have invoked their national constitutions, while a smaller number of states have invoked the provisions of the ECHR. Between March and April 2020, ten States Parties to the Convention notified the Secretary General of the Council of Europe of derogation specifically with respect to the COVID-19 pandemic: Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino.

How do the constitutions of the European countries regulate a state of emergency?

Some European countries have incorporated provisions in their constitutions for many aspects of the state of emergency, while the constitutions of other countries are rather scarce on this subject. From a content point of view, the differences are also significant: according to some constitutions - declaring, extending and ending the state of emergency is the exclusive right of the executive, while in others the role of parliaments is also important. Most European constitutions contain provisions on emergency situations, although different terminology for denoting emergency circumstances can be found, such as: state of emergency, state of public danger, state of alert, martial law, state of siege, state of natural disaster, etc. Many European constitutions contain at least two forms of state of emergency. A distinction is often made between a state of war, on the one hand, and other types

of emergencies, on the other. Within this division, the terms referring to emergencies, although terminologically different, do not imply substantial differences and are generally reduced to large-scale natural disasters or other threats. Declaring a state of emergency, according to the constitutions of some countries, is under the jurisdiction of the legislature (N. Macedonia, Croatia, Slovenia, Serbia, Albania, etc.), which usually decides on this issue by a two-thirds majority. If the parliament is unable to convene, a state of emergency shall be declared by the President of the state, in N. Macedonia (Art. 125), Slovenia (Art. 92), Romania (Art. 93), Bulgaria (Art. 100), or shall be jointly declared by the President of the state, the Prime Minister and the Speaker of the Parliament (Serbia). However, it is almost always necessary for the legislature to confirm that decision when the conditions allow. This means that parliamentary debates on those decisions are held at subsequent sessions. These are logical constitutional solutions because they take into account the fact that in emergency circumstances, action should be taken without delay. However, the occurrence of emergency circumstances does not automatically mean the suspension of the legislature because the authority should continue to sit and work as long as it is able to do so. Different solutions from the above mentioned are those embedded in Article 16 of the Constitution of France, where the President of the Republic shall take measures when there are serious and immediate threats, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council. Similarly, in Slovakia the President of the Republic declares a state of emergency (Art. 102) at the proposal of the Government (Art. 119). According to Art. 129 of the Constitution of Slovakia, the Constitutional Court decides whether a decision on declaration of the martial law, or the state of emergency, and relating decisions were issued in compliance with the Constitution or constitutional laws. Similarly, in Poland the President of the Republic declares a state of emergency on request of the Council of Ministers (Art. 230); as well as in Turkey where the decision for a state of emergency shall be published in the Official Gazette and submitted to the Grand National Assembly for approval on the same day, but if the Assembly is in recess, it shall be immediately summoned (Art. 119). In Portugal, the President of the Republic declares a state of emergency

(Art. 134) with the prior consultation of the Government and authorization by the Assembly (Art. 138). In Spain, the Government proclaimed a state of emergency by decree agreed in the Council of Ministers, after prior authorization by the Congress (Section 116 point 3). The same rules exist in the Czech Republic (Art. 5, Para. 1) with the difference that if delay would present a danger, the Prime Minister may declare a state of emergency and within 24 hours the Government shall either ratify or annul his decision (Art. 5, Para. 3) and shall inform the Assembly of Deputies which may annul the decision (Art. 5, Para. 4). There are also some other specific constitutional solutions. The Constitution of Hungary, for example, is specific not only in terms of the scope of the provisions devoted to this issue, but also in the fact that in a special section entitled "Special legal orders" it deals in detail with several different extraordinary situations, such as: state of national crisis, state of emergency, state of preventive defence, terror threat-situation, unexpected attacks, and state of danger. A state of danger is defined as the events of natural disasters or industrial accidents which endanger lives and properties when the authorities may introduce extraordinary measures (Art. 53). On the other hand, a state of emergency shall be declared in the event of armed actions aimed at subverting the lawful order or at exclusive acquisition of power, or in the event of serious acts of violence endangering life and property on a massive scale, committed with arms or with objects suitable to be used as arms (Art. 48). There are common rules for the state of national crisis and the state of emergency, embedded in Article 48. Briefly, according to these provisions, the National Assembly shall declare a state of emergency with two-thirds of the members. If the National Assembly is prevented from taking such decisions, the President of the Republic shall have the right to declare a state of emergency. As soon as the National Assembly is no longer prevented from acting, it shall at its first sitting review whether the declaration of a state of emergency was justified, and decide on the legality of the measures adopted. For such a decision, the votes of two-thirds of the members shall also be required.

Another interesting example is the Constitution of Lithuania where, according to Article 144, in cases of urgency, between sessions of the Seimas, the President of the Republic shall have the right to adopt decision for declaring

a state of emergency and convene, at the same time, an extraordinary session of the Seimas for the consideration of this issue. The Seimas could approve or overrule the decision of the President of the Republic.

It is worth mentioning that in the most European constitutions, the word epidemic or pandemic is not contained as a condition under which a state of emergency could be declared. Instead, constitutions either simply contain only the term state of emergency, or allude to situations in which the lives of citizens or the normal functioning of institutions are endangered. However, there are exceptions: the Constitution of the Czech Republic in Art. 2 states that, among other preconditions, if health is to a significant extent directly threatened, a state of emergency shall be declared; the Constitution of the Republic of N. Macedonia, Art. 125 paragraph 1 states that “A state of emergency occurs when major natural disasters or epidemics occur”; the Constitution of the Republic Srpska (one of the two main political-territorial units of Bosnia and Herzegovina) in Art. 70 Para. 3 proclaims that “The National Assembly, in accordance with the Constitution and the law, declares: State of emergency for the Republic or part of the Republic in case of endangering security due to natural disasters (floods, earthquakes and fires), epidemics, human rights and freedoms and normal functioning of constitutional bodies.” The existence of this term in the above mentioned constitutions was useful in declaring a state of emergency in relation to the COVID-19 virus in the sense that in this case there were no dilemmas at least for the legal basis that were otherwise present in some other countries.

However, there are several examples of the constitutions which do not explicitly regulate the state of emergency. The Constitution of Italy does not have a clearly articulated constitutional framework governing emergencies and does not contain any explicit provisions regarding emergencies different from war in its traditional meaning (Art. 78). In those circumstances, the Council of Ministers in Italy declared a national health emergency according to Legislative Decree 1/2018. Similarly, in the Constitution of Greece the normative definition of a state of emergency is provided in Article 48, as a “state of siege” which is applied to threats in case of war or mobilization owing to external dangers or an imminent threat to national security. Another example is the Constitution of Bosnia and Herzegovina which

does not regulate the issue of declaring a state of war and emergency, but it is regulated by the constitutions of the entities and the Law on Defence of Bosnia and Herzegovina, which is not often the case (Mitrović, Grbić Pavlović and Pavlović, 2016).

Differences in the constitutional provisions could be also noticed in relation to the extraordinary powers which mainly refer to the increased competencies entrusted to the executive power. Although the solutions and options are different, mainly in a state of emergency, the executive usually plays a key role with the consequent marginalization of the legislature. For example, the Government of the Republic of Macedonia in case of a declared state of emergency may issue decrees with legal force. This means that the Government in some way takes over the normative activity from the Parliament which however should be only in the function of dealing with an emergency situation. In Serbia, if the Parliament cannot convene, then the measures deviating from some human or minority rights are also prescribed by the Government, which requires the signature of the President (Art. 200). In several other countries, this role is entrusted to the presidents of the state but such decisions must be submitted for confirmation to the National Assembly immediately upon it next convening (Croatia, Slovenia, Greece). In Croatia, the President of the Republic, at the proposal of the Prime Minister and with his counter-signature, may issue decrees with the force of law if the governmental bodies are prevented from performing their constitutional duties regularly (Art. 101).

Finally, regarding the duration of the state of emergency and duration of implementation of extraordinary measures, including derogation of human rights, the national European constitutions also contain different solutions, but generally range from fifteen days (Greece, Portugal), thirty days (Macedonia, Spain, France, Czech Republic), sixty days (Albania), ninety days (Serbia, Poland), six months (Lithuania, Turkey), etc. An extension of the initially established deadline is usually allowed if the extraordinary circumstances impose that need. Some constitutions, however, do not contain provisions on time limits (such as the constitutions of Bulgaria, Slovenia, and Slovakia).

Constitutional provisions regarding derogation of human rights in a state of emergency in European countries

Urgent measures taken in a state of emergency affect the functioning of state institutions and may impose restrictions on basic human rights and freedoms. Many constitutions of the European countries contain provisions that measures taken as a result of extraordinary circumstances must be in proportion to the level of risk and must aim to re-establish the conditions for the normal functioning of the state, as soon as possible. However, regarding the limitations of human rights, as topic that is the focus of this paper, different approach in design of those provisions is noticeable. Based on this criterion, constitutions can be classified under one of the followed three categories:

1. Constitutions that do not contain explicit provisions regarding rights that can be derogated in a state of emergency. Most of the constitutions that fall into this category are mostly those of Western European countries, which include Belgium, Denmark, Sweden, France, Germany, Italy, Norway, but also a small number of newer democracies from other parts of Europe, such as Bosnia and Herzegovina. This group also includes the Czech Republic whose Constitution in Article 6 prescribes that with the declaration of the state of emergency, the Government must specify which rights prescribed in individual statutes shall, in conformity with the Charter of Fundamental Rights and Basic Freedoms, be restricted, and to what extent.
2. The second set of constitutions explicitly lists the rights that can be derogated during a state of emergency. Some of the examples are the constitutions of Albania (Art. 175 Para. 1), Spain (Section 55 Para. 1), Lithuania (Art.145), etc. In this category there are also constitutions which contain a general clause on the possibility of derogating the rights in emergency, while at the same time emphasizing the rights that cannot be restricted or that cannot be waived even in such circumstances. The list of rights that can be derogated varies from country to country, but usually includes freedom of movement, freedom of association, right to privacy, freedom of speech, etc. For example, the Constitution of Lithuania

stipulates that in a state of emergency, the right to privacy and the privacy of communication may be temporarily restricted. (Art. 22), as well as the right to inviolability of the home (Art. 24); freedom of expression, information and persuasion (Art. 25); freedom of movement (Art. 32); freedom of association (Art. 35); and freedom of assembly (Art. 36). On the other hand, Constitution of Spain provides for the suspension of some rights, which are explicitly mentioned, only in the event of the declaration of states of exception and siege but not under the state of alarm. However, according to Art. 116.1 SC of the Constitution, it is possible to establish limitations during the state of alarm, which according to Art. 11 of the Organic Law 4/1981 can affect the freedom of movement at certain hours or under certain requirements, to goods that can be requisitioned, to the compulsion of personal contributions, to the intervention and temporary occupation of premises (except private homes), to the limit or rationing of the use or consumption of services or essential commodities or to the adoption of health and environmental protection measures.

3. The third category are constitutions that contain a general clause that rights and freedoms may be partially or entirely suspended, such as the constitutions of Armenia (Art. 76), Azerbaijan (Art. 71 Para. 3), N. Macedonia (Art. 54), Croatia (Art. 17), Serbia (Art. 20), Bulgaria (Art. 57 Para. 3), Hungary (Art. 54 Para. 1), Portugal (Art. 19), Turkey (Art. 15), Ukraine (Art. 64), Slovenia (Art. 16), Slovakia (Art. 13), etc. Most of the constitutions in this category, in parallel with the general clause, contain a provision with a specific enumeration of the so-called absolute rights that cannot be suspended under any circumstances. These provisions almost always include the right to life, the prohibition of torture and other inhuman or degrading treatment or punishment, freedom of belief and religion, non-retroactivity of criminal law and the right to a fair trial.

European experiences in derogation of human rights during COVID-19 pandemic

The extent of measures taken in response to COVID-19 and the way they are applied vary considerably from one state to another in different points of time. There were and still are disparities in national strategies regarding the corona virus. As mentioned above, many of the European countries have declared a state of emergency in accordance with their national constitutional provisions, while the ECHR's mechanism contained in Article 15 has been applied by several countries which notified the Secretary General of the Council of Europe of their decision. Because of this, some authors believe that there is some confusion about whether a country should declare a state of emergency under the ECHR or it can simply go alone. According to some MEPs, this sends out the "wrong signal" about the state's commitment to human rights (Greene, 2020). As regards the applied measures, Italy and France for example, imposed a strict lockdown in order to limit the spread of the virus, going until curfews in a few municipalities. On the other hand, Denmark, with its smaller population and lower rate of confirmed cases, was able to adopt a softer version of lockdown and social distancing after an early closing of the borders. However, none of these countries realizes massive testing like in Germany, which fatality rate is lower than the other European states (Lebret, 2020).

Regardless of this, the emergency situation in Europe as well as in almost the whole world has caused a chain of events affecting everyone and forcing states to take decisions on restricting human rights within short time limits. Health safety restrictions have had an impact on the liberty and security of persons being quarantined as a result of contracting or being suspected of having contracted the virus. Freedom of movement was allowed only for specific reasons including working, shopping, visiting a doctor and assisting a person in need of help, walking a pet or attending, etc. Citizens leaving their domiciles had to declare the purpose of their movement (by filling a document or sending an SMS). Assemblies and protests had been prohibited to prevent the spread of the virus. Moreover, limits on freedom of expression have been imposed in order, allegedly, to prevent information disorder.

Equally, access to courts had been impeded or allowed only under special arrangements. One might argue that there have been violations of the right to life of individuals who have died because of the virus and of the lack of sufficient medical care, especially in detention or care institutions. The right to family life has also been disrupted due to restrictions on movement of persons. Moreover, there have been instances of interference with the right to respect for private life by public authorities tracking infected persons. Other measures meant a reduced number of people present in public places (streets, restaurants, congress halls, etc.). Freedom of assembly had been essentially suspended, being allowed up to a maximum of several persons. In N. Macedonia, for example, measures limited the number of people present even in a private space, with members of the police authorized to enter a home or other space to check it. This measure was quite controversial from a legal point of view, given the inviolability of the home as a fundamental human right. Hotels, courthouses, theatres and cinemas, gyms and playgrounds, cafes, restaurants, bars, shopping malls, museums and archaeological sites and food outlets were also closed, excluding supermarkets, pharmacies and take-away/delivery food outlets. Some measures meant the derogation of the right of movement for a certain period for the population of a certain age. In N. Macedonia, in the first wave of the Corona virus, it was determined in which time period a certain age population should visit grocery stores, and the age of the persons was identified by personal documents that they showed to the sellers. Significant restrictions have also been applied to the right of religious freedom, given the fact that churches remain open only for private prayer. Schools and universities were closed in most of the countries and were adapted to online education. Some countries have also closed their borders to all non-EU citizens. All this has introduced quite a lot of confusion in the functioning of everyday life, but also doubts about whether this is the most adequate way to deal with the pandemic. In this context, one thing is more than clear – although restrictions on human rights must have a clear goal, they could still be used to other ends. Before this pandemic, efforts were made within the Council of Europe and the Venice Commission to avoid abuses of human rights and to ensure that basic standards were met in a state of emergency. These mainly concerned emergencies caused

by terrorist activities or armed conflicts. The conditions imposed by this pandemic were the reason for returning and reaffirming previously adopted documents such as Opinion (no. 359/ 2005) of the Venice Commission, as well as Recommendation 1713 (2005) of the Council of Europe, equally applicable in all emergencies that endanger the life of the nation and make it difficult to perform state functions in a normal manner. Those documents refer to the standards according to which: emergencies should be clearly defined and limited by the constitution; a state of emergency should be officially declared; deviation from human rights standards in emergencies is legitimate only if it is needed for dealing with the threats; the constitution should clearly specify which rights can be suspended and which rights should not be waived and should be respected in all circumstances; and finally, even in a state of emergency, the basic principle of the rule of law should prevail. Supervision in those circumstances is of primary importance. Because practice shows that the greatest human rights violations tend to occur in the context of emergencies, the authorities in European countries have been also reminded with some new documents, such as A toolkit for member states from 2020, for the importance of respecting the rule of law and democratic principles in times of emergency, as well as the relevant human rights standards.

Conclusion

Public health is recognized in the constitutions of the European countries as one of the major components of the public interest and to this end, some human rights and freedoms have been under intense pressure since March 2020 because of the COVID-19 pandemic. The protection of public health may justify restrictions on the full enjoyment of certain human rights, and even derogations from certain human rights obligations. Faced with the pandemic and in order to deal with it, many European countries have resorted to a number of decrees with the force of law containing measures that severely limited some basic human rights and personal freedoms. Although the human rights derogation's form and extent in a state of emergency depend on the national government's interpretation, however, according to international standards, derogations in general should be

proportionate to the threat, necessary for protecting and responding to the threat, not discriminatory on any basis and should last only as long as necessary. Hence, there is no doubt that declaring a state of emergency has a beneficial effect on defining the boundaries of exceptional powers, as well as limiting the time for their implementation, preventing arbitrariness and unrestricted exercise, because emergency powers should not tend to become permanent. However, states that have not declared a state of emergency can still legally limit individual rights and freedoms under international human rights law. On the other hand, although emergency decrees provide governments with the necessary flexibility for the nation protecting in a time of pandemic, sometimes it could be used for political ambitions beyond public health protection. Consequently, restrictions and derogations of human rights and freedoms must be regulated by law and preferably have a foundation in the constitutions. Through the analysis of the European constitutions, we have concluded that with the exception of only a few countries, national constitutions mainly regulate the conditions for declaring a state of emergency and restrictions on human rights and freedoms in such circumstances. Although there are differences, the regulation mainly comes down to prescribing the preconditions when a state of emergency could be declared; the state institution makes that decision; and for what timeframe. Regarding the constitutional design from the aspect of human rights limitations, we classified constitutions into three categories. There are constitutions that do not contain explicit provisions regarding rights that can be derogated in a state of emergency, then constitutions that explicitly list the rights that can be derogated, and finally constitutions that contain a general clause that rights and freedoms may be partially or entirely suspended with an enumeration of the rights which cannot be suspended under any circumstances. However, given that these measures could be abused, states must also pay attention to abide by the acts of the Council of Europe and the Venice Commission regarding implementation of extraordinary measures.

Although the COVID-19 pandemic imposed imminent emergency threatening the life of the nation, there was still doubt whether all the extraordinary measures taken during the pandemic were really adequate and whether they were a proportionate response to the situation. In the very

first months, when there was no clear evidence on how the virus spread and which protection measures were most effective, some extraordinary measures like putting whole cities under lockdown could probably be justified. However, later when some facts about the virus are already clear to the world health powers, many of the severe restrictions could not be justified. Any kind of current or future restrictions on human rights should be justified by a constant evaluation of the current situation and of the effectiveness of the measures. Restrictions really need to be justified, because in practice they could still be used for other purposes. Hence the complaints and demonstrations of citizens in many European countries regarding the measures and restrictions imposed during the COVID-19 pandemic.

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