

Emergency Law Responses and Conflict-Affected States in Transition

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Sean Molloy

Christine Bell

Asanga Welikala

Erin Houlihan

Kimana Zulueta-Fülscher

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This post looks at emergency law responses to the Covid-19 pandemic in conflict-affected states in transition. While some type of emergency response to Covid-19 has been used in most states, we suggest that conflict ‘fault lines’ can mean that emergency law responses have a capacity to undermine transitions. We suggest four key areas of concern:

1. How emergency law has impacted on efforts to build the rule of law as a mechanism of transition;
2. The impact on timing of elections and governmental succession;
3. The impact on relationships between the central state and divided groups in sub-state regions; and
4. The impact on militarisation of the state.

Whether or not these issues operate to trigger wider conflict fault lines is inherently linked to histories of conflict, and differ in terms of relevance from one setting to the next.

This piece identifies and illustrates the ways in which Covid-19 emergency responses can impact on these areas of concern, and suggests policy responses to ensure the continuation of the transition post-Covid-19. These are based on the deliberations at the Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building, held in December 2020. The Edinburgh Dialogues are the result of a partnership between International IDEA, the University of Edinburgh’s Political Settlements Research Programme, and the Edinburgh Centre for Constitutional Law.

The Rule of Law

Transitional societies often approach building the rule of law as key to conflict resolution. The legal grounding upon which Covid-19 emergency measures are taken is crucial to either supporting or hindering democratic development. Covid-19 responses have indicated different ways of institutionalising an emergency response. States like **Ethiopia** and **Mali** have declared a constitutional state of emergency. Some countries like **Nepal**, **Myanmar** and **Kenya** have relied on existing legislation. In different ways and

to varying degrees, these models support transitions in that executives remain within existing legal frameworks. In other cases, however, states have exerted emergency powers with no clear legal basis. For instance, **Somalia** and **Sudan** have each taken measures to combat Covid-19 without any reference to specific legal instruments. During the formative stages of the pandemic, the **Sri Lankan** government imposed an island-wide lockdown with no clear legal basis. Where states act in ways that appear to have no legal basis, this undermines progress towards a rule of law-based society.

Executive Powers and Institutional Safeguards

The ways in which emergency powers are used can either support or hinder transitions. For instance, when executive measures are necessary, proportionate, and non-discriminatory, transitions can be supported by a government demonstrating its willingness to protect its citizens. Where decision-making is inclusive of political opponents and civil society, executive measures can be used in ways that reflect the goals and aspirations of democratic deliberation.

In some cases, however, executives appear to have used the pandemic as an excuse to consolidate power. In **Sri Lanka**, for instance, the president flatly refused to recall the parliament which had been dissolved ahead of elections, notwithstanding that the Constitution clearly requires such a recall in circumstances such as a pandemic. The Supreme Court, in what appears to be an act of extreme deference to the executive during a pandemic, also denied leave to proceed to multiple challenges against the president's refusal to act according to the Constitution. The result was that the pandemic facilitated an executive takeover of the state.

Although some degree of rights restrictions is necessary and legitimate in response to the contagion, in transitioning societies, infringements of rights can be a point of tension and potentially conflict. Expanded executive powers can also lead to human rights violations, in contexts in which these are understood to have implications for the conflict landscape. There are reported cases of infringements of the rights to freedom of expression, assembly, privacy, and liberty in contexts such as Ethiopia, Kenya, Nepal, the Central African Republic, and Sri Lanka. Human rights protections are a central feature of transitions to both democracy and peace. For instance, horizontal inequalities between groups, whereby certain sections of the population have their rights protected while others are marginalised, can be a conflict trigger. Human rights violations are often if not always a cause and consequence of conflict. Peace negotiations thus place human rights centre stage to ensure that the same violations which precipitated, and may arise again from a renewal of conflict, are not replicated.

Transitioning societies also work towards establishing checks and balances on power. However, the evolving nature of this process can hinder the capacity of institutions to effectively constrain executive power. Some states previously in transition have been subject to trends of democratic backsliding both prior to and during the pandemic, and leaders seek to further consolidate power by minimizing the capacity of state institutions to curb executives. Examples include **Sri Lanka** and the **Philippines**. In other cases,

state institutions are still evolving and thus incapable of effectively constraining executive power. For example, in the **Democratic Republic of Congo**, observers have questioned whether the Constitutional Court is a broken shield when it failed to rule unconstitutional the failure of the president to achieve approval for a state of emergency from both the Senate and the National Assembly as required by law. In other cases, the limited role of institutional oversight can be explained by the lack of progress in establishing the institutions necessary to contain executive action. For instance, a State of Health Emergency was declared in Sudan, supported by Articles 40- 41 of the Constitution. The declaration of a state of emergency is extinguished if the Legislative Council does not ratify it. However, Sudan does not have a legislature and thus the emergency response could not be approved in ways required by its Constitution.

Elections

In transitioning societies, elections are instrumental in conferring legitimacy on a government and are frequently viewed as the end goal of any negotiated transition and a key step in democratization. They have become the primary mechanism since the Cold War for regulating political contestation among conflict parties emerging from civil war through a negotiated settlement. Given the salience attached to elections in transitioning societies, using emergency measures to suspend or delay elections plays out in different ways in transitioning states. One perspective is that delaying elections can support democracy because of lower turnouts as a result of the pandemic, and the fact that transitioning societies can rarely deal with the risks they expose their population to in elections. Another is that carrying on with elections can guarantee democracy by ensuring that leaders are popularly elected. Both arguments can be defended from a democracy standpoint.

However, elections also interact with Covid-19 and conflict dynamics in ways that are wholly unpredictable. Covid-19 dynamics have often not been a decisive element in what has emerged, but nonetheless have been an important part of the context. In **Ethiopia**, parliamentary elections were originally planned for 29 August 2020. As a result of Covid-19, the National Electoral Board announced that elections would need to be postponed. Though there was broad understanding that postponement was necessary, it was seen as particularly benefiting the federal ruling party. Some opposition groups, particularly the Tigray's People's Liberation Front (TPLF), considered the decision as 'gamed.' This exacerbated the political contestation between the federal government and the Tigray politicians, who resigned after accusing Prime Minister Abiy of authoritarian tendencies. The delaying of elections, therefore, fed into an already volatile political climate and subsequently provided the catalyst for renewed conflict. In **Myanmar**, elections were not delayed and the National League for Democracy (NLD) won with a landslide. The success is attributed, amongst other things, to a degree of success in the NLD's handling of the pandemic, that Aung San Suu Kyi remains the preferred leader of a majority of the population, and that the NLD is the only option to continue the transition(s). However, this victory significantly affected the military's influence in the country and led to the recent military coup. These examples demonstrate the unpredictability of transitioning societies and the potential for fault lines to emerge.

In the **Central African Republic**, presidential and legislative elections were respectively due in December 2020 and March 2021. In March 2020, it became evident that due to Covid-19, it would not be possible to hold the elections within the constitutionally required deadline. The 2016 Constitution, however, imposes a two-term limit on the president and prohibits any form of extension (Article 35); it also prohibits amendment to the term limit provisions (Article 153). Since elections could not be organized in the pandemic, delays would lead to a potential constitutional and power vacuum. Legislators from the majority party, including the deputy speaker of the National Assembly, proposed constitutional amendments under the notion of ‘force majeure’. These aimed to amend Article 36, which establishes the period within which presidential elections must be held before the end of the term of the incumbent, and Article 68, which prescribes the period within which legislative elections must be held. The proposed amendment received the support of two-thirds of members of the National Assembly and was formally endorsed by the cabinet on 15 May. The draft amendments were then submitted for review to the Constitutional Court, as is required under constitutional amendment procedures. The Court subsequently held that the Constitution includes ‘constitutional locks’, which prevent any amendments pertaining to the number and duration of presidential terms. Thus, differing from the example of **Sri Lanka**, the Constitutional Court acted as a safety valve on emergency power. However, the example illustrates problems associated with incomplete constitutions, which must themselves be updated to cover new emergencies.

Sub-State Governance

When the origins of conflict revolve around identity, territorial power sharing is often a device used to accommodate minority groups in peace settlements. These arrangements, which can be along the lines of federalism, autonomy, or devolution, seek to stave off demands for secession while at the same time affording substate entities competences to govern themselves. The relationship between the state and substate entities can be undermined or tested as a result of external shocks. Given the salience of these arrangements to peace, the potential for violence or the undoing of constitutional settlements are always a risk.

Covid-19 response problems can stem from complex political and constitutional arrangements on multi-level governance which flow from a political settlement. For instance, **Bosnia and Herzegovina’s** fragmented state structure has made crisis management more of a challenge, as the country failed to establish a central organization to coordinate the crisis response. Emergency situations were introduced separately on 16 March 2020 in the Bosniak-Croat Federation (state of disaster) and the Serb Republic (state of emergency); and a state-wide state of disaster introduced on 17 March 2020, as announced in the Official Gazette of BiH, No. 18/20. In addition to a state-wide state of emergency, this has meant competing and overlapping legal frameworks without a clear understanding as to which laws prevail. Territorial power sharing arrangements can thus contribute to confusion as to which laws apply and complicate coordination between different layers of governance.

Tensions can also emerge when the emergency law response is predicated on laws that predate the new territorial political settlement. In **Nepal**, federalism emerged as a hard-fought agenda of the peace process, which was inked into the 2015 Constitution. Despite being a core agenda of the peace process with a constitutional mandate, Nepal's federalisation process is incomplete and many political parties continue to be 'reluctant federalists' averse to fundamentally transforming the centralised system. Nepal enacted its Disaster Risk Reduction and Management Act 2017 as one of the first sectoral federal laws after the promulgation of the Constitution. This defines a pandemic as a non-natural disaster. The Act sets out the institutional mechanisms for disaster management from federal to local level, with clear roles and responsibilities given to each level of government. Nevertheless, in response to Covid-19, the Nepali government invoked the Infectious Disease Control Act 1964. This Act in its legal grounding is broad, lacks specificity, and is indiscriminate in terms of what is permitted. Most importantly, it does not specify the distribution of powers amongst the levels of government, making it difficult to implement it in the recently instituted federal system.

The pandemic has also exposed difficulties in substate arrangements around capacity. For instance, the 2010 Constitution of Kenya reconfigured the balance of power by devolving power and responsibilities from the national government to 47 elected county governments, creating a two-tier governance system. Health is a fully devolved function in Kenya but has been a recurring point of tension since the process of devolution began. A lack of resources – both in terms of financing and administrative capacity – has also been a major issue in key service delivery issues, such as health, with county governments ill-equipped to manage complex tasks, such as dealing with this pandemic.

Militarising the State

In response to Covid-19, many countries have increased the role of the military. While resorting to military capacity is legitimate, in some cases, the use of the military operates as an extension of problematic efforts to further militarise civilian roles that were ongoing prior to the pandemic. For instance, in the **Philippines**, the government's pandemic response has been highly militarised, with security forces detaining thousands of people for violating curfew and killing many individuals. President Duterte has deployed police and military forces to enforce emergency measures, including issuing the military with shoot-to-kill orders against those violating lockdown rules. In **Sri Lanka**, a pre-existing process of militarization of civil administration has been accelerated by the pandemic.

In other cases, the use of the security apparatus is problematic for transition because of roles played by the military during and prior to conflict, and potential disruptions to ongoing security sector reform efforts. For instance, an unfinished aspect of **Nepal's** peace process has been the agenda of democratisation of the Nepal Army. Processes have focused on ensuring civilian control of the Nepal Army and its compliance with human rights. In response to Covid-19, however, the government used the Nepal Army for different aspects of the pandemic response, particularly related to supply chain management. The Army, rather than the Health Ministry, was put in charge of procuring medical supplies, setting up and managing quarantine centres, and transporting people,

among other tasks. In **South Sudan**, the response to Covid-19 has been led by the High-Level Taskforce (HLTF) chaired by the President and deputised by the First Vice President, Dr Riek Machar. The HLTF includes national security services, the Ministry of Interior and the defence forces, whose role is to enforce measures adopted by the taskforce including controlling borders and enforcing compliance of testing and contact tracing.

Although many countries called upon their security forces to help in managing the pandemic, securitising the fight against the contagion can also erode the quest for building constitutionalism and peacebuilding in transitioning settings. Poor governance of the security sector is often a source of conflict and a key obstacle to peacebuilding. Security forces are often the agents of state repression and have been associated with major human rights abuses. Democratisation of a state is often impossible without a transformation of the sector's institutions and methods of their oversight and control. Security sector reform is, therefore, a key aspect of transitions and the use of security apparatus must be understood in context.

2021 Outlook

What then for conflict-affected states in transition going forward? In some cases, Covid-19 and/or the responses to it have proved to be a catalyst for renewed conflict. **Myanmar** is again under a military regime. Ethiopia descended into conflict in December but has since renewed peace. While Covid-19 was not the central cause in either, it has been a contributory factor by exacerbating, tangentially or directly, pre-pandemic fault lines. The **Sri Lankan** government hoarded the credit for the pandemic response through the absence of parliamentary and judicial scrutiny to win a two-thirds majority in delayed parliamentary elections. It then used that majority to enact a constitutional amendment that formalized its executive aggrandizement. Tensions continue around the process of federalism in **Nepal**, and the **Philippines** are continuing towards deconsolidating democracy.

Nevertheless, in identifying potential areas of tension, some points might be offered for how to emerge from the pandemic in ways that seek to reduce the potential for existing fault lines to undermine transitions in the future.

Reform legal frameworks. The pandemic has helped to expose limits and gaps in existing legal frameworks. In some cases, epidemics are not covered in constitutional emergency provisions, limiting the options available to decision-makers. In others, outdated legislation that remains in force has been used as the enabling mechanism for emergency responses in opportunistic ways. There is an opportunity to update these legal groundings and to harmonize legal frameworks so as to ensure that rule of law-based responses can be adopted in future. Similarly, opportunities exist for amending legislation in order to address the possibility that elections cannot be held, and to obligate electoral management bodies to take the steps necessary to plan for and mitigate risks of disruptions in future scenarios. In either case, law reform can help define the boundaries of emergency power in ways that are clear and constitutional.

Addressing inter-governmental cooperation between central and sub-state governments. The pandemic has exposed difficulties in some situations of multi-layered governance, particularly where arrangements are complex and identity-driven, and provides an opportunity to address these weaknesses. Efforts could be focused on redrafting laws or clarifying constitutional arrangements on issues of overlapping jurisdiction and distribution of powers. In this process, properly delineating responsibilities and addressing the lack of inter-governmental coordination mechanisms, and institutions and their capacity, could be pursued. Building the capacity of sub-state entities to respond to external shocks could also be prioritized.

Completing devolution of power-sharing arrangements. In such contexts as South Sudan and Somalia, but also Nepal, the process of moving towards a decentralized system of governance could be galvanized by the pandemic. As governments in countries like the Philippines and Sri Lanka undermine transitions towards democracy, it is possible that opposition will continue to grow in these settings, pushing for reform and change. In this sense, recognizing the problems that flow from incomplete systems could provide the impetus for further democratization, particularly from civil society.

Actively building trust across conflict lines. The pandemic has helped to identify the continued existence of fault lines which, despite progress in building peace or democracy, still remain. In recognizing the potential for these fault lines to undermine transitions, renewed efforts can focus on building reconciliation and cooperation between groups.

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Sean Molloy Sean Molloy is a lecturer at Northumbria Law School and an Associate of the Political Settlements Research Project.



Christine Bell Christine Bell is Professor of Constitutional Law and Assistant Principal (Global Justice) and a member of the British Academy. She leads the Political Settlements Research Project at the University of Edinburgh.



Asanga Welikala Asanga Welikala is Lecturer in Public Law at the School of Law, University of Edinburgh, and the Acting Director of the Edinburgh Centre for Constitutional Law.



Erin Houlihan Erin Houlihan is a programme officer with the constitution building programme at International IDEA.



Kimana Zulueta-Fülscher Kimana Zulueta-Fülscher is Acting Head of International IDEA's Constitution Building Programme.

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