

## COVID-19 REGULATION IN NORWAY AND STATE OF EXCEPTION

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SUMMARY: I. *Covid-19 and the Norwegian Constitution*. II. *The State of Emergency*. III. *The Element of the Unregulated*. IV. *Control of exceptional powers*.

### I. COVID-19 AND THE NORWEGIAN CONSTITUTION

Norwegian Prime Minister Erna Solberg held a press conference on March 12, 2020. Here she announced, “the strongest and most comprehensive measures we have had in Norway in peacetime”.<sup>1</sup> This, and subsequent measures to deal with the pandemic, challenged the basic constitutional rules of Norway on the state’s exercise of authority in several ways. The decision to shut down the country on March 12, 2020 was formally taken by the Norwegian Directorate of Health and overlooked the Constitution’s requirement that it is the cabinet that must make such decisions. The rules of the Disease Prevention Act (1995) were subsequently stretched to the extreme, both by state and local authorities. A Corona Act was prepared in secrecy. The bill proposed a transfer of authority to the government, which at best was at the very edge of what the Constitution allows, with scant provision for parliamentary and judicial control. Use by the authorities of both legal regulation and recommendations and advice, partly in regulatory form, for example on social gatherings and social distancing, created uncertainty about the state of the law. The authorities later proposed rules on the detention and quarantine of the sick and infected, with a reach far beyond the corona situation, and with far-reaching implications for the disease prevention policy that has been implemented to date.

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<sup>1</sup> Pressemelding se <https://www.regjeringen.no/no/aktuelt/nye-tiltak/id2693327/>.

Such exceptional measures represent challenges to the existing legal order. First, there is always a danger in the situation itself. In the case of extraordinary threats to important interests, it is easy to shift the perspective so that fighting these threats dominates all other considerations. Thus, there is a danger that other considerations and interests are set aside to a greater extent than is necessary. The danger is reinforced by the fact that the authorizations often make exceptions to the usual rules and forms of preparation of laws and regulations. Lack of proper preparation and public consultation will often lead to that affected rights and interests are ignored.

Secondly, the exception to ordinary legislative procedure in Parliament means that the democratic legitimacy of the measures is diminished. It shifts the balance of power between the parliament and the government. The fact that the rules are excluded from treatment in the parliament also reinforces the effect of a lack of investigation and consultation.

In addition, thirdly, it is a common opinion that the courts should exercise restraint in examining the authorities' assessment of the measures necessary to deal with emergency situations. That the courts should be restrained in their review is said to lie in the special nature of the emergency and in the fact that the rules of state of emergency are imprecise, and that the courts should exercise moderation in setting their standards instead of those of the government.<sup>2</sup> This view is not specific to Norway and Norwegian law. US Judge Richard Posner believes that courts should exercise restraint because they lack insight into how to fight crises, and because they should allow the measures that the legislative and executive powers take against unknown dangers to be tried before they are possibly set aside.<sup>3</sup>

## II. THE STATE OF EMERGENCY

The state of emergency is not something that Norwegian lawyers or Norwegian society is familiar with. Most people view the state of emergency as something that happens in other countries, or as an interesting theoretical problem with little current significance for Norway. The state of emergency is not a term in the Norwegian constitution, and there is no provision for

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<sup>2</sup> See Ola Rambjør Heide, *Konstitusjonell nødrett: sett i lys av Den europeiske menneskerettighets konvensjon artikkel 15*, Oslo 1998 s. 70-74.

<sup>3</sup> Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford 2006 s. 36-37.

the state of exception.<sup>4</sup> Only a handful of times in Norwegian constitutional history have there been anything resembling of a state of emergency.<sup>5</sup> This contrasts with, for example, the United States, which has been in an almost permanent series of state of emergency since the Great Depression of the 1930s.<sup>6</sup>

The state of emergency raises the tension between, on the one hand, the notion of right as universal, formal and rationally coherent and, on the other, the need of the state and the authorities to be able to implement effective measures without having to distinguish other than efficiency and goal achievement. The state of exception is usually characterised by three elements: a formal authority to act independently of the ordinary rules of judicial competence, a possibility to suspend rights and derogate from the law, and an acceptance of not being bound by the ordinary forms of law.<sup>7</sup> During the pandemic we have seen examples of all three. The initial measures to shut down the country were adopted independently of the Constitution's requirement that important issues must be dealt with by the government. Both the Disease Prevention Act and the Coronal Act provided for the restriction of rights, which was done in accordance with both laws. The Corona Act itself, and a number of legislative and regulatory decisions, were made without regard to the usual rules of consultation and preparation of legislative decisions.

The state of exception is a contentious concept in the philosophy of law. A well-known and influential perspective on the state of exception is the theory of German state and legal theorist Carl Schmitt. For Schmitt, the state of exception is the state in which the law suspends itself, and in which the ruler proves to be sovereign. "Sovereign is he who decides on the exception," he says in a famous quote.<sup>8</sup> A different view has been taken by the US judge and theorist Richard A. Posner, who writes that the government's power to take measures to protect national security is the other side of indi-

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<sup>4</sup> In Europe Norway is in the company with Denmark, Luxemburg, Sverige, Switzerland and Austria, see European Commission for Democracy through Law (Venice Commission) Emergency Powers, Strasbourg 1995, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e).

<sup>5</sup> See Dag Michalsen, *Unntakstilstand og forfatning: En introduksjon* i Dag Michalsen (red), *Unntakstilstand og forfatning. Brudd og kontinuitet i konstitusjonell rett*, Oslo 2013 s. 21–38.

<sup>6</sup> Kim Lane Scheppele, «Small Emergencies», *Georgia Law Review* 40, no. 3 (Spring 2006): 835–862.

<sup>7</sup> See Jørgen Stubberud, *Hva er unntakstilstand* i Dag Michalsen (red), *Unntakstilstand og forfatning. Brudd og kontinuitet i konstitusjonell rett*, Oslo 2013 s. 94.

<sup>8</sup> Schmitt, Carl, 1922. *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, München und Leipzig: Verlag von Duncker & Humblot; translated as *Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab (trans.), Chicago: The University of Chicago Press, 2005 p. 5.

viduals' right to freedom and privacy.<sup>9</sup> The state of exception changes the scope, not the existence of rights according to Posner.<sup>10</sup> Thus, while Schmitt believes that the state of exception abrogates all rights, Posner believes that it modifies them without revoking them.

Schmitt's point is that it is not possible to regulate the conditions for when an extreme emergency exists, nor can it be substantively determined what will happen in such cases. There always comes a point where the sovereign has to act against the unforeseen, and in these cases the sovereign acts outside of the law, and thereby determines it. What the sovereign decides cannot be supported by the law, but it becomes law because the sovereign has power.

Logically, Schmitt has an unassailable point. A rule cannot specify the criteria for assessing a situation that is outside the rule. Therefore, when a situation arises that the rule does not cover, someone must step in and decide, unbound by the rule. However, Schmitt's approach presupposes a specific view of the law as a formal and closed system of rules. If the law is seen as open and created through the application of norms, either on the basis of principles or on the basis of pragmatic considerations, then no logical situation needs to arise outside of the law. Whether such a situation arises will then be a political question and not a question of logic. As demonstrated by Douglas Hofstadter in his wonderful book on self-referencing systems, *Gödel, Escher, Bach: An Eternal Golden Braid*, this will be the case where both the president and the Supreme Court claim to have the final say. In such situations, it is only the power to force their will through which determines who is right.<sup>11</sup> Such a power struggle has rarely come to the forefront in Norwegian constitutional history, and certainly not during the 2020 pandemic.

Carl Schmitt's theory is interesting as a theory of the content and boundaries of the rule of law, but it is not relevant to the analysis of exceptions and constitutional emergency law in Norway. Schmitt himself says that "not every extraordinary power of attorney, not every police action for an emergency or any regulation in such an emergency is an automatic state of emergency. Such a condition belongs much more to an essentially unlimited power of attorney, that is, the suspension of the entire existing order".<sup>12</sup>

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<sup>9</sup> Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford 2006 s. 8.

<sup>10</sup> *Op. cit.* s. 23.

<sup>11</sup> Douglas Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid*, Harmondsworth 1979, se s. 692.

<sup>12</sup> Siter fra Rune Slagstad, *Carl Schmitt. Politikk og rett et antiliberal tema med variasjoner*, Oslo 2020 s. 208.

With such a starting point, it is perhaps only the decisions of the Norwegian Government in exile during the Second World War that can be characterized as an example of state of emergency in Norwegian history. The events in Norway, and in most other countries, during the pandemic were not at all a state of emergency in Carl Schmitt's sense, regardless of whether or not a formal state of emergency was declared.<sup>13</sup>

### III. THE ELEMENT OF THE UNREGULATED

Nevertheless, an important acknowledgment to Schmitt's theory lies in the fact that there is always an element of the unregulated in the content and the exercise of extraordinary powers. It is also correct that who decides when an extraordinary situation exists, and what measures to take, is a key point. In our legal order, this can be either the executive, the parliament or the courts. Schmitt's point is not that the executive power is necessarily sovereign in a state of emergency, only that whoever decides it, is sovereign. The sovereignty in this sense can lie with each of the three powers of government. The key question is whether sovereignty can also be shared between them, in that none of them can exercise it uncontrolled by the others. It just cannot be normatively regulated in advance; the exception requires a decision that is unbound by general norms. This does not, however, necessarily lead down the road to dictatorship.

American sociologist and law theorist Kim Lane Scheppele distinguishes between three situations where the state of emergency is triggered.<sup>14</sup> First, there are those cases where the rulers themselves control the situation that triggers the state of emergency. Such state of emergency kills the rule of law. Scheppele uses the Nazis' exploitation of the fire in the Reichstag in 1933 as an example. Then we have the situation where the power-holders deliberately exploit a real threat to take measures that exceed what is necessary to fight the danger. Such state of emergency harms the rule of law. She uses the Bush administration's "war on terror" after September 11 as an ex-

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<sup>13</sup> In this respect it is interesting that Schmitt never mentioned the influenza pandemic of 1918-1919, even though he developed his theory during this period, and was well aware of the state measures taken to combat the pandemic, see Mehring, Reinhard: Carl Schmitt und die Pandemie. Teil I, *VerfBlog*, 2020/5/11, <https://verfassungsblog.de/carl-schmitt-und-die-pandemie-teil-i/>.

<sup>14</sup> Scheppele, Kim Lane: Underreaction in a Time of Emergency: America as a Nearly Failed State, *VerfBlog*, 2020/4/09, <https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/>.

ample of this. As a third group, she considers the emergencies triggered by natural disasters. According to Scheppele, these have not received the same attention in political and legal theory.

Natural disasters are not political and cannot be triggered or controlled by authorities seeking more power, Scheppele claims. While it is hardly always right, just think of hunger disasters that are often triggered by political conditions more than nature, she is right that they do not necessarily represent the same threat to the rule of law as crises of a more political nature.

The important distinction between the three situations Scheppele outlines is the extent to which political considerations play into the definition and perception of something like a disaster that requires extraordinary measures. In the case of natural disasters, this applies to a small extent, at least initially. However, as we have seen during the pandemic, political elements will come into play as the situation develops. Such disasters, too, can give rise to excessive restraint of fundamental rights, and they can be used as an argument to generalize state of emergency and extraordinary powers of state to deal with crises.

#### IV. CONTROL OF EXCEPTIONAL POWERS

There are variants of parliamentary control over the executive's use of emergency powers in many countries.<sup>15</sup> Most democratic states recognize the need for control over the government's use of extraordinary powers. In Norway, the Corona Act was time-limited to one month at the time and was in effect only for two months before it expired. The main purpose of the act was to adopt economic measures to compensate those hit most hard by the lockdown, to facilitate the functioning of the courts and the administration by the use of virtual hearings and signatures, immigration control measures and certain other measures. The King's power of attorney in § 7-12 of the Disease Prevention Act is permanent, but rules adopted pursuant to the provision shall be submitted to the parliament as soon as possible.

It is important to design procedures to ensure that interests and rights affected by the measures are identified and subject to public consultation and parliamentary review. Often in emergency situations, decisions are taken by a small group of people behind a veiled obscurity. This leads to less

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<sup>15</sup> See Ittai Bar-Siman-Tov, *Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic – A Comparative Overview* (March 22, 2020), paper uploaded at Researchgate [https://www.researchgate.net/publication/340091555\\_Parliamentary\\_Activity\\_and\\_Legislative\\_Oversight\\_during\\_the\\_Coronavirus\\_Pandemic\\_-\\_A\\_Comparative\\_Overview](https://www.researchgate.net/publication/340091555_Parliamentary_Activity_and_Legislative_Oversight_during_the_Coronavirus_Pandemic_-_A_Comparative_Overview).

transparent and informed decisions than decisions taken in accordance with regular democratic procedures.<sup>16</sup>

There are also other ways to control the government. It is a fundamental principle in many constitutions that the government's mandates under such provisions must only be used where necessary and that they go no further than necessary, *i.e.* a condition of proportionality. The assessment of proportionality contains both academic and political elements.

Some countries have institutionalized judicial review of whether the situation warrants emergency powers, and their use. In some countries, it is permissible to try the authorities' measures in accordance with special emergency procedures to prevent any unlawful measures being taken at all. In Israel, the Supreme Court banned the implementation of surveillance measures before Parliament had established a committee to oversee the government's use of them. In Germany, there have been several lawsuits in both the states and in the Constitutional Court on several sides of government action. In the Norwegian Corona Act a provision was inserted by the parliament stating that the legality and proportionality of all measures under the act should be subject to full judicial review.

The experience gained with the corona pandemic should be utilised in reviewing the legislation once the situation has stabilized. We can already draw some conclusions. There is widespread acceptance by the people of all countries that the authorities must have the power to adopt and take effective measures. Countries that have not already had rules on this have introduced such rules through exemption procedures and emergency decisions. At the same time, experience shows that in an exceptional situation there is little capacity and time to think about the precise design of the measures, how they should be coordinated and how to avoid undesirable consequences. It is also a challenge to design exemptions and regulations that can avoid having an effect of contagion on other types of extraordinary situations where the authorities' perception of the situation is more political, and not just as obvious to everyone.

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<sup>16</sup> See Nature 17. March 2020, Coronavirus: three things all governments and their science advisers must do now, *Nature* 579, 319-320 (2020) doi: 10.1038/d41586-020-00772-4.