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Rights as Constraint or Rights as Casualty? Mapping Human Rights in COVID-19 Emergency Regimes Across Thirty-Three Jurisdictions

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ABSTRACT

Background. Every emergency legal regime embeds an implicit epistemology of human rights: some treat rights as a binding constraint on emergency power, others as a suspendable casualty of it.

Objective. This study maps the rights-protective design of the principal COVID-19 emergency regime of thirty-three jurisdictions, sorts the regimes into types, and asks whether formal treaty derogation signals the rule of law.

Methods. A structured content analysis coded each regime on eight rights-protective design features (legality of basis, treaty derogation, express proportionality, sunset clause, retained legislative oversight, retained judicial review, non-derogable rights, and ex-post accountability), summed into an index (0–8). A second coder recoded a subsample (Cohen's $\kappa = 0.635$).

Results. The mean index was 6.12 of 8 but stratified. A dual-accountability accommodation model, with both checks retained, characterized twenty-three states (mean 7.26); a curial-backstop model, with courts but a sidelined legislature, four (mean 5.5); an executive-exceptionalism model, with neither check, six (mean 2.17). The index differed by regime type (Kruskal–Wallis $p = 0.0006$; democracies 7.12 versus non-democracies 3.44, $p < 0.001$). Derogating states scored higher on the eight-item index (7.5 versus 5.33), but without the derogation item itself the difference was small overall (6.5 versus 5.33, one-sided $p = 0.078$) and absent within democracies (6.55 versus 6.77). Indonesia, a hybrid regime, fell within the accommodation model (index 6).

Conclusion. The meaningful cleavage is not whether rights were limited but whether the limitation remained inside a structure of legal accountability. The derogation association is largely built into the index.

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1. Introduction

Every emergency legal regime encodes a theory of rights. A state facing a crisis must settle, in the very design of its emergency law, what happens to the rights that ordinary law protects. Do they persist as a constraint the emergency power must respect? Do they bend but survive as limits requiring justification? Or do they fall away as casualties of necessity? That choice is rarely explicit. It can be read off the architecture of the legislation: whether the emergency is declared under a pre-existing legal framework or improvised by decree, whether the measures must be proportionate, whether the powers expire, whether parliament and the courts keep their grip, and whether the state accepts the discipline of international accountability. The design carries an implicit epistemology of rights. A large recent literature insists that the decisive question is the answerability of executive power to law, and not the quantity of power transferred.[1–3]

The COVID-19 pandemic made that epistemology unusually visible and unusually comparable. One crisis struck almost every jurisdiction at almost the same moment. Nearly every state adopted a legal or policy response.[4–6] The synchrony is a methodological advantage. It holds the nature and timing of the shock roughly constant, so that differences in legal response show up as differences in constitutional culture and design rather than in the crisis itself. Within months, states had arrayed themselves across the full spectrum. Some channeled the pandemic through constitutional states of

emergency subject to judicial and parliamentary control, while others used it to concentrate power in the executive and to disable the checks upon it.[4,7] In the phrase of one influential study, the pandemic became a test of whether the executive could be 'bound' even under maximal pressure.[3]

The comparative literature supplies a rich conceptual scaffolding. Yet it has rarely put that scaffolding through systematic cross-national measurement across a common crisis. One influential study mapped the institutional checks that survived the pandemic across a large sample, but it did not build an index of rights-protective design or an epistemological typology.[3] Derogation scholarship analyzed the doctrine without quantifying regime design.[8,9] Qualitative accounts documented rule-of-law stress without a reproducible metric.[2,10] Still missing is an instrument that scores each regime's treatment of rights on a common metric and sorts regimes into types defined by the structural checks they preserved. The gap lies between a well-developed theory of legality-in-emergency and the absence of a measured, comparative mapping of it. This article occupies that space.[10,11]

The Indonesian case sharpens the stakes. Indonesia answered the pandemic with a government regulation in lieu of law (*Peraturan Pemerintah Pengganti Undang-Undang*, '*Perppu*') that carried sweeping fiscal-emergency powers, later ratified as *Undang-Undang No. 2 Tahun 2020*[12] and layered upon the standing health-quarantine statute, *Undang-Undang No. 6 Tahun 2018 tentang Kekarantinaan Kesehatan*.[13–16] Critics widely faulted the decree for the breadth of executive authority and for the immunity provisions it first asserted. Indonesia's status as a hybrid rather than fully liberal democracy might have predicted an exceptionalist response. Even so, the Constitutional Court reviewed the instrument in *Putusan No. 37/PUU-XVIII/2020*,[17] and Parliament converted it into ordinary law. Both structural checks survived.[14,18] Whether this places Indonesia among the rights-suspending or the rights-constraining regimes is exactly the kind of question a measured typology can answer. The case anchors the analysis. It resists the easy equation of hybrid regime with rights-suspension.

Three questions organize the analysis. First, how rights-protective, in design, were the world's COVID-19 emergency regimes, and which safeguards were most and least common? Second, into what epistemological types do they fall, and what separates the type that treats rights as a constraint from the type that treats them as suspendable? Third, what explains the variation: regime character, legal tradition, or the counter-intuitive discipline of formal derogation? The article makes three contributions. One is a reproducible eight-feature coding instrument and rights-protection index for emergency regimes. Another is an empirically grounded epistemological typology built on the two most diagnostic structural checks. The last is an evidentiary test of the 'derogation paradox', that is, whether states that formally announce the suspension of rights build more, or less, accountable regimes. Sections 1.1 and 1.2 set out the theoretical framework. The methods section then details the instrument and its reliability, and results follow. The discussion is organized around the central cleavage between rights-as-constraint and rights-as-casualty and includes an account of limitations. A conclusion draws out the reform implications.

A measured mapping matters for another reason, and the reason is simple. Debates about pandemic emergency law have often proceeded by anecdote. A handful of notorious cases stand in for global patterns, while the many jurisdictions that quietly kept the emergency inside legality receive little attention. Anecdote cannot establish which safeguards were common and which were rare. Nor can it say whether the exceptionalist cases were outliers or the norm, or whether the intuitive association between derogation and rights-hostility survives contact with evidence. Replacing anecdote with a reproducible index is therefore no mere technical improvement. It is a condition of drawing defensible comparative conclusions about the epistemology of emergency rights.[11,19]

1.1 Models of emergency government

Comparative scholarship offers a small set of ideal-typical responses to emergency. One tradition names three. Under a business-as-usual model, the state meets the crisis with ordinary legal powers. Under an accommodation model, special powers are granted but stay within the constitutional order and answer to its controls. Under extra-legal measures, officials act outside the law and account for it afterward.[1] A related opposition sets the neo-Roman dictatorship, a time-limited and supervised concentration of power, against the executive that governs by permanent exception. A single normative fault line runs through all these accounts. Emergency government either remains inside a project of legality, in which power is answerable to law, or it slips into a zone where the state of exception becomes the rule and law is suspended in the name of its own preservation.[1,2] Pandemic scholarship has recently confirmed this fault line and given it an empirical edge. Where legislative and judicial checks survive, backsliding is less likely. The mere existence of emergency powers is not what separates regimes.[3,7]

Where, on that fault line, does each regime's treatment of rights sit? That is the epistemological question this article poses. A regime that keeps the emergency inside legality treats rights as a constraint. Measures must be authorized, proportionate, temporary and reviewable, and non-derogable rights survive absolutely. A regime that governs by exception treats rights as a casualty: the executive decides what is necessary, the powers never expire, and both legislature and courts are pushed aside. What separates the two is not whether rights were limited, since nearly every state limited rights during the pandemic,[20] but whether the limitation stayed answerable to law. The reframing matters. A purely quantitative account of rights restriction would class a proportionate, reviewable curfew and an unreviewable decree as equivalent intrusions, although the constitutional difference between them is categorical.[21]

1.2 Derogation and the paradox of transparency

International human-rights law offers one special instrument for keeping emergency limitations inside legality, namely derogation. Article 4 of the International Covenant on Civil and Political Rights (ICCPR),[22] Article 15 of the European Convention on Human Rights (ECHR)[23] and Article 27 of the American Convention on Human Rights (ACHR)[24] let a state suspend some obligations during a public emergency threatening the life of the nation. The conditions are strict: the state must officially proclaim the emergency, notify the treaty body, act proportionately, and respect a core of non-derogable rights, as elaborated in the Human Rights Committee's General Comment No. 29[25] and the Siracusa Principles.[26] Scholars disagree about what derogating signals. Does it show hostility to rights, or respect for them? The intuitive reading treats derogation as a license to suspend. The revisionist reading sees formal derogation as a rule-of-law signal. A state that derogates admits that its measures would otherwise breach its obligations, submits them to an international standard of justification, and accepts monitoring, whereas a state that limits the same rights without derogating escapes that discipline.[8,9] The debate remains open. Some argue that Article 15 notifications during COVID-19 were legally unnecessary or performative, while others defend derogation as the doctrinally correct route for measures that exceed ordinary limitation clauses.[20,27] Which reading the COVID-19 evidence supports is one of this study's central empirical questions.

Proportionality needs separate emphasis. It is the doctrinal hinge on which the constraint conception turns. Under the ICCPR and the regional conventions, and in the constitutional

jurisprudence of most accommodation-model states, an emergency limitation is lawful only when it is suitable, necessary, and proportionate *stricto sensu* to the exigency. The test turns rights from trumps that either hold or fall into constraints that must be justified by evidence of necessity. Through it, courts and legislatures police the executive's claim of exigency.[28] Some curial-backstop and exceptionalist regimes left an express proportionality standard out of their emergency framework. Doing so removed the yardstick against which the necessity of a measure could be tested. That is why this feature is coded as rights-protective and not treated as a mere doctrinal nicety.[9,29]

2. Methods

2.1 Research type and justification

This is an empirical comparative-legal study. It applies structured content analysis to primary legal instruments, in a cross-sectional, observational design with a purposively constructed sample and an ordinal composite outcome. The unit of analysis is the state's principal COVID-19 emergency legal regime. What gets measured is the rights-protective design of that regime, operationalized as a set of coded institutional features. The design is quantitative-descriptive and inferential. Even so, each coding decision rests on doctrinal analysis of the underlying instruments: a grammatical reading of the enabling text, a systematic reading against the constitutional order, and attention to the instrument's stated purpose in the teleological sense. An empirical design suits the research question. A claim about how emergency regimes across the world conceived rights can be tested only by measuring many regimes on a common metric, and a doctrinal case-study alone cannot supply that.[3,4,11,30]

2.2 Sample and sources

Thirty-three jurisdictions make up the sample. They were purposively selected to span regime types (liberal democracies, electoral democracies, hybrid regimes, and authoritarian states), legal traditions (common, civil, mixed, and socialist), regions, and derogation status. For each state, the principal legal instrument or instruments of the COVID-19 response were identified and coded from authoritative comparative sources. These were the guidance and derogation compilation of the Office of the UN High Commissioner for Human Rights (OHCHR),[31] the Council of Europe derogation registry, the Venice Commission observatory on emergency powers,[32] the International Center for Not-for-Profit Law COVID-19 Civic Freedom Tracker, the Oxford COVID-19 Government Response Tracker, and academic constitutional analyses, together with the emergency legislation itself. Freedom House's 2020 classification served as a guide for assigning regime type. The sample was built to span regime types, so its composition is non-representative by construction. Descriptive proportions therefore characterize the constructed sample, not the universe of states, although the inferential contrasts are internal to it. Every country's source is recorded in the coded dataset.

2.3 Coding instrument

Each regime was coded on eight binary rights-protective design features, which were summed into a rights-protection index from 0 to 8, as detailed in Table 1. The features track whether the emergency limitation of rights stayed inside a structure of legal accountability. They are (E1) a pre-existing legal basis, (E2) a formal treaty derogation, (E3) an express proportionality requirement, (E4) a temporal sunset, (E5) retained legislative oversight, (E6) retained judicial review, (E7) the preservation of non-derogable rights, and (E8) an *ex-post* accountability mechanism. The index is a formative composite. Its features constitute the construct of rights-protective design instead of merely reflecting it, so equal weighting is a deliberate choice made for content coverage. What it measures is design, not compliance in practice. A regime can score highly on design and still be defied by its executive, a distinction developed in the limitations. Binary coding was adopted for reproducibility and inter-coder reliability, at the acknowledged cost of compressing gradations.[29] Because E2, E5 and E6 enter both the index and the analyses that follow, Section 3 reports the main contrasts also on the items that remain once those items are set aside.

Table 1. Rights-protective design features coded for each emergency regime.

Code	Feature	Accountability function
E1	Pre-existing legal basis	Legality: emergency authorized by prior constitutional/statutory law
E2	Formal treaty derogation	International accountability under ICCPR/ECHR/ACHR
E3	Express proportionality requirement	Measures must be necessary and strictly limited to the exigency
E4	Sunset clause	Powers expire automatically or on a fixed renewable term
E5	Retained legislative oversight	Parliament retains contemporaneous approval/scrutiny of emergency powers
E6	Retained judicial review	Courts retain effective jurisdiction over emergency measures
E7	Non-derogable rights preserved	Core rights (life, torture, fair-trial minima) remain absolute
E8	Ex-post accountability mechanism	Post-hoc review, inquiry, or reporting on the exercise of powers

Note. Each feature is coded as present (1) or absent (0); the rights-protection index is their sum (0–8).

The coding protocol ran in three passes to guard against error. First, the principal emergency instrument for each state was identified and read in full. Second, each of the eight features summarized in Table 1 was coded against the instrument's text and its constitutional setting, and the coder recorded a short justification and a source for every indicator. Third, the codings were cross-checked against the comparative trackers to catch omissions and reconcile discrepancies, with the primary instrument governing in every case of conflict. Triangulating primary legislation with independent comparative databases makes the codings auditable. Every indicator is sourced in the coded dataset, so a reader can trace and contest any single judgment.[11,28]

2.4 Typology and analytical framework

Each country was placed in a three-part epistemological typology. Two structural checks define it, because they most directly decide whether an emergency stays inside legality: retained legislative oversight (E5) and retained judicial review (E6). Where both are present, the regime is one of dual accountability. This is the accommodation model, in which rights function as a constraint policed by both political branches. Where the legislature is sidelined but the courts remain, the regime relies on a curial backstop, and rights are protected only reactively, through litigation. Where both checks are absent, the regime is one of executive exceptionalism, the state of exception in which rights become

suspendable. No regime in the sample combined retained legislative oversight with absent judicial review (all 23 regimes with E5 also have E6), so the fourth combination is empty. Theory drives the typology. It operationalizes the accommodation/exception distinction through the two checks that comparative pandemic scholarship identifies as the best diagnostic of backsliding.[3,7,33]

2.5 Reliability and statistical analysis

A blind second coder independently re-coded a subsample of eight countries, which amounted to sixty-four indicator judgments. Agreement reached 82.8% (53 of 64 judgments), with Cohen's κ = 0.635 (approximate 95% confidence interval 0.44–0.83, from the observed agreement and the chance agreement implied by κ), in the substantial range.[34] Disagreements clustered on the two most interpretive indicators: the presence of an express proportionality requirement (E3) and of a meaningful *ex-post* accountability mechanism (E8). Regime types were compared with the Kruskal–Wallis test. Pairwise contrasts (democracies versus non-democracies, and derogators versus non-derogators) used the one-sided Mann–Whitney U test with a tie-corrected normal approximation and continuity correction, and the one-sided direction follows the derogation-paradox hypothesis, and two-sided p-values are reported alongside it in Section 3.3. A reproducible script accompanying the dataset implements every analysis. With a small purposive sample and an ordinal outcome, no multivariable regression was fitted. To control for regime type non-parametrically, the derogation contrast was instead re-tested within the democracy subsample (11 derogating and 13 non-derogating democracies).

3. Results

3.1 The anatomy of emergency rights-protection

On average, the world's COVID-19 emergency regimes were moderately rights-protective in design, with a mean index of 6.12 of 8. That average hides a sharply stratified distribution. The individual features fall into two tiers, as detailed in Figure 1. A pre-existing legal basis was universal (100%): no state in the sample abandoned every claim to legality, however thin. Judicial review, non-derogable rights and *ex-post* accountability were each retained in 82% of regimes, and a sunset clause in 85%. Two features were far scarcer, and an express proportionality requirement (76%) also fell below the 82–85% tier. Only 70% retained legislative oversight, the check executives gave up most readily when they legislated by decree.[7] Formal treaty derogation, the instrument of international accountability, was invoked in just 36%. Figure 1 makes plain that the scarce features are exactly those two that submit the emergency to an external judge of its necessity, namely the legislature and the treaty body. The regimes divide on them.[8]

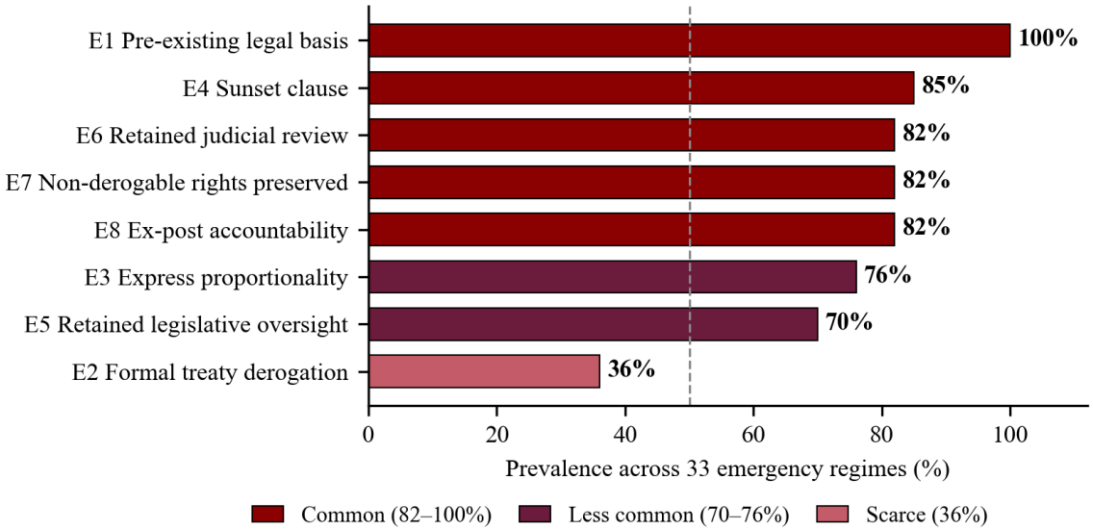

Figure 1. Prevalence of each rights-protective design feature across the 33 emergency regimes.

3.2 Three epistemologies of emergency rights

Three epistemologies sort the thirty-three regimes with little overlap, as summarized in Table 2 and illustrated country by country in Figure 2. Twenty-three regimes retained both legislative and judicial control. They form the dual-accountability accommodation model, with a mean index of 7.26. Here the pandemic was absorbed within constitutional legality. Prior law governed the declaration, time bounded it, and both parliament and the courts could question it, so rights operated as a live constraint that demanded justification. The model spans regime types and regions, running from Germany, France and New Zealand to the Latin American and Baltic states that declared constitutional states of emergency, and it includes Indonesia. India, Peru, Australia and South Africa, four regimes in all, form a curial-backstop model (mean 5.5). The legislature was effectively sidelined, whether by governing through standing disaster statutes that required no parliamentary approval or by executive-dominated declarations, and the courts remained as the sole check.[29] Six regimes, Hungary, Malaysia, Thailand, Egypt, China and Russia, form an executive-exceptionalism model (mean 2.17). Neither the legislative nor the judicial check survived, whether through an enabling act that suspended parliament and ousted review, a decree regime immunized from the courts, or a 'high-alert' framework designed to bypass the constitutional emergency safeguards altogether. At the foot of Figure 2, rights ceased to function as a constraint at all.[4]

Table 2. The epistemological typology of emergency rights-protection.

Epistemological model	n	Mean index	Rights function as…
Dual accountability (accommodation)	23	7.26	a live constraint (both checks)
Curial backstop (judicial only)	4	5.5	a reactive litigable limit
Executive exceptionalism	6	2.17	a suspendable casualty

Note. Types are defined by retained legislative oversight (E5) and retained judicial review (E6); no regime combined E5 with absent E6. n = number of jurisdictions.

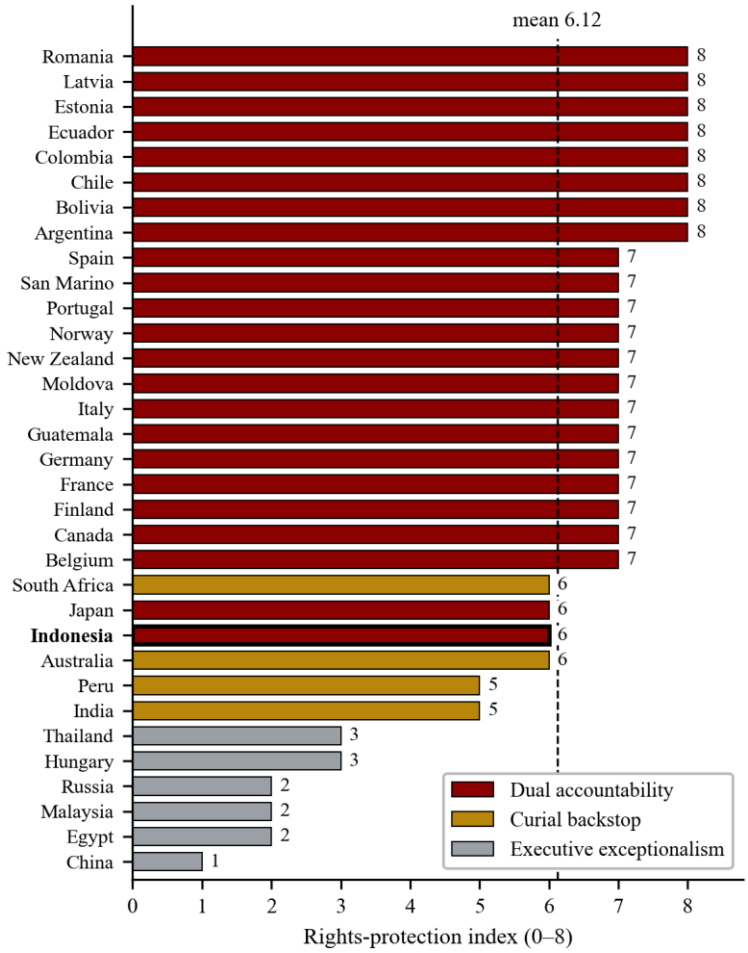

Figure 2. Rights-protection index by country, colored by epistemological type; the dashed line marks the sample mean (6.12) and Indonesia is outlined.

The features co-occur in a revealing pattern. The eight indicators are not independent draws. Accommodation regimes tend to satisfy the whole cluster together: a state that retained legislative oversight always kept judicial review (all 23 such regimes also have E6), a sunset clause and the non-derogable core as well. Exceptionalist regimes shed the cluster together. The rights-protection index is therefore no sum of unrelated safeguards. It measures an underlying disposition, namely whether the regime treated the emergency as an occasion for accountable government or for its suspension. The two structural checks (E5 and E6) mark that disposition most sharply. That is why the typology reported in Table 2 rests on them, and not on commoner but less discriminating features such as the sunset clause.

3.3 Regime type and the derogation paradox

Regime character tracks the index closely, as Figure 3 shows. Mean scores rise from authoritarian states (1.67) through hybrid regimes (4.33) to liberal (7.06) and electoral democracies (7.25), and the differences are significant (Kruskal–Wallis $H(3) = 17.48$, $p = 0.0006$). Pooled, democracies average 7.12 against 3.44 for non-democracies (Mann–Whitney $p < 0.001$). Regime type is thus strongly associated with whether an emergency regime keeps rights inside legality. That is unsurprising, but it is now measured.[4] Cross-national work on the state-of-emergency decisions of 180 states likewise found that democratic institutions were among the drivers of emergency declarations.[6]

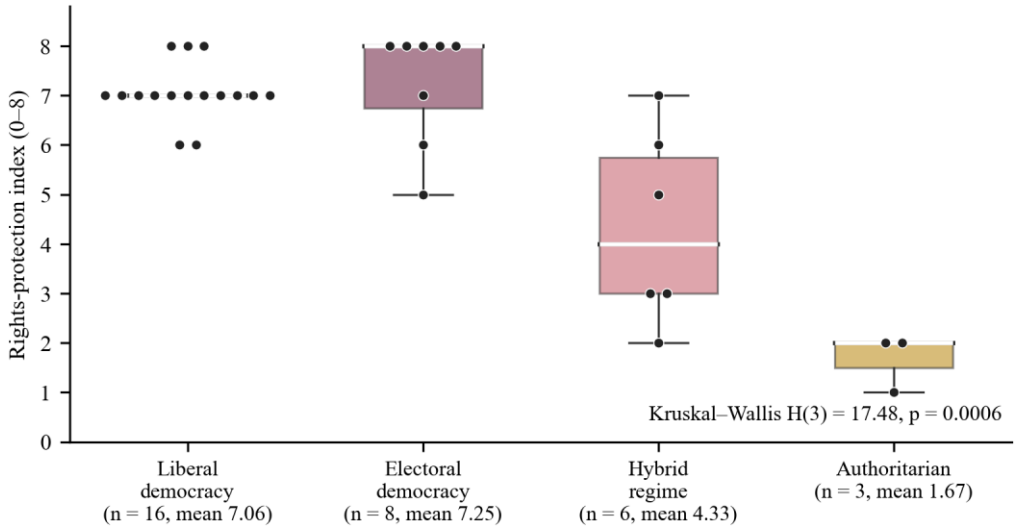

Figure 3. Rights-protection index by regime type (box-and-dot plot); Kruskal–Wallis test annotated.

The derogation result is the more interesting one. Intuition treats formal treaty derogation, the act of announcing that rights are being suspended, as a marker of rights-hostility. At first sight the data invert that intuition. As reported in Table 3, derogating states scored higher on the eight-item index than non-derogating states (7.5 versus 5.33, $p < 0.001$). Because E2 is itself one of the eight items, every derogating state gains one point by construction; on the seven remaining items the means are 6.5 and 5.33. Most derogators were democracies, so the gap could be a regime-type artifact. Within democracies, derogating states scored 7.55 and non-derogators 6.77 on the eight-item index ($p = 0.00119$; two-sided $p = 0.0024$); excluding E2, the corresponding means are 6.55 and 6.77. Recomputed from the group means and the country scores in Figures 2 and 3 (the derogating democracies are then eight regimes scoring 8, two scoring 7 and one scoring 5, the composition that reproduces the reported p-value), the seven-item contrast is not significant overall (one-sided $p = 0.078$; two-sided $p = 0.16$) and shows no advantage for derogators within democracies (one-sided $p = 0.65$; two-sided $p = 0.76$). The two-sided p-value of the eight-item overall contrast is 0.0002. Formal derogation therefore cannot be read as a rule-of-law signal on the strength of the eight-item index alone, and the seven-item results give no support to the intuitive view that it is a license to suspend. States that submitted their emergency limitations to international notification and justification scored highest on the eight-item index, largely because the index counts derogation itself, while many that limited identical rights without derogating, several established democracies among them, simply avoided that external scrutiny.[8,9] On the eight-item index, rights scored highest where their limitation was most openly owned, but the seven-item results show that this advantage disappears once derogation itself is set aside.

Table 3. Rights-protection index by regime type and by derogation status.

Grouping	n	Mean index	Test / contrast
Liberal democracy	16	7.06	Kruskal–Wallis H(3) = 17.48
Electoral democracy	8	7.25	p = 0.0006 (4 groups)
Hybrid regime	6	4.33	
Authoritarian	3	1.67	
Democracies (pooled)	24	7.12	vs non-democracies, p < 0.001
Non-democracies (pooled)	9	3.44	
Derogating states	12	7.5	vs non-derogators, p < 0.001
Non-derogating states	21	5.33	
Democracies that derogated	11	7.55	vs dem. non-derog., p = 0.00119
Democracies that did not	13	6.77	

Note. n = number of jurisdictions; mean = rights-protection index (0–8). Derogation = formal notification under the ICCPR, ECHR or ACHR. Tests: Kruskal–Wallis; one-sided Mann–Whitney U with tie and continuity correction. Because E2 is an index item, the seven-item means recomputed from the printed values are 6.50 for derogating and 5.33 for non-derogating states (one-sided $p = 0.078$; two-sided $p = 0.16$) and 6.55 for derogating and 6.77 for non-derogating democracies (one-sided $p = 0.65$; two-sided $p = 0.76$).

3.4 Indonesia within the typology

Indonesia offers a useful test, since it resists any equation of hybrid regime with rights-suspension. Its response paired the government regulation in lieu of law (*Perppu* No. 1 Tahun 2020, ratified as *Undang-Undang No. 2 Tahun 2020*), which carried the fiscal-emergency powers, with the standing health-quarantine statute (Undang-Undang No. 6 Tahun 2018). Critics objected strongly. They pointed to the breadth of executive authority and to the immunity provisions the decree first

asserted.[14,15] Still, on the design measures the regime scored six of eight and fell within the accommodation model. The powers rested on prior statutory and constitutional bases (*Pasal 22 UUD 1945* for the *Perppu*; *Pasal 28J* for proportionate limitation)[35] and were bounded. They also stayed open to review by the Constitutional Court, which reviewed Law No. 2 of 2020 in *Putusan No. 37/PUU-XVIII/2020* and, on 28 October 2021, held Articles 27(1), 27(3) and 29 conditionally unconstitutional while upholding the *Perppu*'s issuance,[17,36] and to ratification by Parliament, which converted it into ordinary law.[14,18] Figure 2 marks Indonesia with an outlined bar. Its score of 6 equals those of Japan, Australia and South Africa and exceeds those of India and Peru (5), and both structural checks survived. The case shows that the epistemology of emergency rights depends less on a regime's general character than on whether, in the specific design of its crisis law, the political and judicial controls are left standing.

4. Discussion

The mapping yields one organizing claim. The meaningful division among emergency regimes does not run between those that limited rights and those that did not, since all of them limited rights. It runs between those that kept the limitation inside a structure of legal accountability and those that did not. Two checks capture that division and define the typology reported in Table 2. Where the legislature and the courts both retained their grip, rights functioned as a constraint the emergency power had to justify. Where the legislature was sidelined but the courts survived, rights persisted as a reactive limit, enforceable only through litigation. Where both were absent, rights became a casualty, suspended at executive discretion in the manner the theoretical literature calls the state of exception.[1,2] The typology is more than descriptive. The mean index falls across the types as accountability is progressively removed, and the larger fall (−3.33, against −1.76) comes where the judicial check is lost after the legislative one. Because E5 and E6 are themselves index items, part of this fall follows from the definition of the types. On the six items other than E5 and E6 the type means are 5.26, 4.50 and 2.17, so the ordering and the larger fall at the loss of the judicial check (−2.33, against −0.76) remain. The pattern is therefore in line with comparative pandemic scholarship that treats the survival of the legislature, alongside that of the courts, as an important variable.[3,7]

The derogation paradox sharpens the point. Formally derogating states, those that publicly announced the suspension of rights, scored highest on the eight-item index. Part of that advantage is built into the index, however, and on the seven other items it is small overall and absent within democracies (Section 3.3). The revisionist derogation scholarship argued in theory that derogation is an act of legality,[8,9] and the present data neither confirm nor contradict that argument. Recent work on what explains derogation points in the same direction: global crisis measures, and not domestic ones, predicted ICCPR derogations,[37] and notifications varied widely in duration and in their link to domestic emergency law.[8] Derogation is an act of legality. It subjects an emergency limitation to an external standard of proportionality and to international monitoring. A state willing to undertake it signals that it accepts the discipline of accountable emergency government and does not try to evade it. The corollary is uncomfortable for the several established democracies that limited rights extensively without derogating. They often defended that avoidance as unnecessary, since ordinary limitation clauses sufficed,[27] yet it meant their limitations escaped the very scrutiny the derogating states embraced. The epistemology of rights-as-constraint shows itself in owning the limitation of rights openly, not in leaving them untouched.

A functional comparison of two contrasting regimes makes the mechanism visible. Hungary and Indonesia both faced the pandemic with strong executives and contested democratic credentials. Their emergency laws still sit at opposite poles of the typology. Hungary's Enabling Act of March 2020 let the government suspend or derogate from statutes by decree without a fixed time limit.[38] Parliament kept sitting and the Constitutional Court stayed in operation, but studies of the Hungarian emergency conclude that the control institutions malfunctioned in practice.[39,40] On that reading both structural checks lapsed, and rights became suspendable at executive discretion: the exceptionalist pole.[3,4] Indonesia's *Perppu* took the opposite path. It rested on the express *Pasal 22 UUD 1945* competence and carried a constitutional duty of parliamentary ratification in the following session, and it was submitted to Constitutional Court review in *Putusan No. 37/PUU-XVIII/2020*. Both checks operated, even though the substantive powers were broad.[14] The comparison isolates the variable that matters. It is neither the breadth of the powers claimed nor the general character of the regime, but whether the two structural checks were left standing. The transplantable lesson is that the accommodation model is open even to illiberal systems, because it turns on institutional design rather than political culture.

The Indonesian case carries a specific lesson for hybrid and transitional systems. A regime whose general character is illiberal is not condemned to an exceptionalist emergency. What fixes the epistemology of its crisis law is the preservation of the two structural checks. Constitutional Court review and parliamentary ratification of the *Perppu* placed Indonesia in the accommodation model despite the contested breadth of its emergency powers, and level with or above regimes with stronger democratic credentials that had let one of the checks lapse.[14,18] Design is separable from regime type. It is the design choice that decides whether rights survive as a constraint.

Recent case studies qualify the picture without overturning it. Constitutional courts in Hungary, Serbia and Croatia reasoned in similar ways about pandemic measures even though their legislative responses diverged.[40] That suggests the mere presence of judicial review (E6) discriminates less than the intensity of review it delivers. Work on the proportionality test itself holds that review should remain the standard in emergencies, adjusted by the precautionary principle so that it is neither too stringent nor too lax,[21] a position that fits the weight this study places on an express proportionality requirement (E3). Studies of parliaments point the same way for E5. Scrutiny was often weak in democracies that kept formal oversight, whether because executive decisions limited debate or because the available opportunities went unused.[41,42] Retained does not mean effective. A graded instrument could capture the difference.

Indonesian scholarship adds a caution. The immunity clause of Article 27 survived only in a conditionally read form, and it offers little practical protection where the elements of an offense are met.[36] Work on regional quarantine under Law No. 6 of 2018 asks for a clearer division of authority between central and regional governments.[16] Both points concern the framework around the checks, not the checks themselves. The accommodation-model reading of Indonesia stands, because the legislature ratified and the Court reviewed, but the surrounding framework left room for broad executive discretion.

4.1 Critical evaluation de lege lata

Taken as a whole, the aggregate picture in Table 3 exposes three structural deficiencies in the prevailing law of emergency rights. First, the international derogation architecture is underused and under-enforced. Formal derogation was invoked in barely a third of regimes, and treaty bodies have no mechanism to compel notification, so the ICCPR and ECHR regimes let states limit derogable rights extensively while avoiding the Article 4 and Article 15 discipline altogether. The data show how wide the gap is: formal derogation was invoked by 12 of the 33 regimes, and 13 of the 24 democracies did not derogate.[8] Second, legislative oversight is the most fragile safeguard, by design as well as in practice. Constitutions that permit

government by decree or by standing disaster statute contain no requirement of contemporaneous parliamentary approval. The political check can weaken just when it is most needed.[41–44] Third, the reviewability of emergency measures is frequently formal rather than effective. Several regimes retained nominal judicial jurisdiction while immunizing the substance of emergency decrees from meaningful proportionality review. The judicial indicator was thus satisfied on paper without constraining power in fact, an instance of the gap between rights-protection in design and in practice.[28,29] Colombia illustrates the point: preventive-isolation decrees issued through ordinary administrative law escaped the automatic constitutional review designed for states of exception.[45]

4.2 Reform proposals de lege ferenda

Three reforms follow, each naming the instrument, the responsible actor, and the legal basis. First comes an international legislative reform. The ICCPR Human Rights Committee should adopt a successor to General Comment No. 29 that treats a failure to derogate while limiting derogable rights as a matter needing justification in a state's periodic report. The default would shift so that unowned limitation, not derogation, attracts scrutiny. Actor: the UN Human Rights Committee, acting under its Article 40 reporting mandate. Basis: Article 4 ICCPR read with the Siracusa Principles.[8,9] Second, Indonesia and comparable systems need a domestic legislative reform. The *Dewan Perwakilan Rakyat* should amend the enabling framework for the *Perppu*, using its *Pasal 22 UUD 1945* authority, so that automatic parliamentary review occurs within a fixed short period and an express statutory proportionality standard binds emergency delegated legislation. Ratification, now discretionary, would become a mandatory contemporaneous check. Actor: the DPR. Basis: *Pasal 22* and *Pasal 28J* UUD 1945.[14,35,43] Third is an institutional reform. Constitutional and apex courts should adopt an expedited emergency-review track, by practice direction or standing jurisprudence, with a presumption against ouster clauses. Judicial review of emergency measures would then be effective rather than nominal. Actor: the *Mahkamah Konstitusi* and *Mahkamah Agung* (and their comparators). Basis: the courts' inherent constitutional-review jurisdiction and the non-derogable guarantee of access to a court.[28] Because they rest on UUD 1945 and match the state's obligations under Article 4 ICCPR, these reforms target the two scarcest features, retained legislative oversight (E5) and formal derogation (E2), instead of the safeguards that are already common but insufficient.

What does this mean for emergency-powers reform? The implication follows directly. If the aim is to keep rights inside legality, the levers that matter most are the two scarcest features (E5 and E2). They are the checks that submit the executive's judgment of necessity to an independent judge. Sunset clauses and judicial review, common even in some backsliding regimes, are necessary but not sufficient. A court can strike down a measure after the fact, yet only a retained legislature and an accepted external standard constrain the emergency prospectively.[7,46]

Evidence on why states derogate supports the first reform. Cross-national work finds that derogations followed global crisis signals, such as WHO responses and global death counts, and not domestic crisis measures.[37] Notifications also differed widely in duration and in their link to domestic emergency law.[8] If derogation tracks external signals more than domestic rights practice, a reporting default that asks every state to justify an unowned limitation would depend less on the state's own decision to notify.

The instrument reaches beyond the pandemic. Though calibrated to COVID-19, the eight features and the two-check typology carry over to any emergency in which a state claims exceptional powers (a natural disaster, a security crisis, a financial collapse), since they measure the generic architecture of accountable emergency government and nothing peculiar to a health threat. That portability is the instrument's main methodological contribution. A mass of heterogeneous crisis legislation becomes a common, reproducible metric. Replication on larger samples and later crises can then test whether the derogation paradox and the three-part typology remain stable. A prescription grounded in one synchronous crisis is, in that sense, a hypothesis for the next.[10,47]

The findings also bear on the international-law question of compliance. Suppose formal derogation is a rule-of-law signal. Then the widespread failure of states to derogate while still limiting derogable rights is no benign technicality. It is a compliance gap, meaning that a large share of pandemic limitations escaped the Article 4 and Article 15 discipline of proclamation, notification, and proportionality review altogether. The treaty regimes had no power to compel derogation and tolerated this evasion, and the monitoring bodies could scrutinize only those states that submitted themselves voluntarily. Hence the evidence supports the reformist argument. The derogation architecture should be recalibrated so that unowned limitation, rather than derogation, becomes the act that attracts a justificatory burden.[8,27]

4.3 Limitations

Four limitations bound these claims. The first and gravest is that the index measures the rights-protective design of the legal regime, not compliance with it in practice. A state can score highly on design and still see its executive defy the courts, as El Salvador did when its President ignored Constitutional Chamber orders even though the chamber retained formal jurisdiction (El Salvador is outside the 33-jurisdiction sample).[48] Design and practice differ. This study measures the first. A compliance study would need a different, behavioral dataset.[2,4] Second, coding rests on doctrinal judgment for several features, such as whether a proportionality requirement is genuinely express or an accountability mechanism meaningful. The reliability is considerable but imperfect ($\kappa = 0.635$), and it is concentrated on exactly those features, which marks the zone of interpretive uncertainty. Regime-type labels also depend on the classification scheme, and schemes such as V-Dem's Regimes of the World differ from Freedom House's ratings,[49] so the regime-type contrasts could change under another scheme. The coding of Indonesia's legislative check rests on formal ratification, although scholarship on the DPR's pandemic law-making is critical of the effectiveness of its oversight.[14] Third, the sample of thirty-three is purposive. It was built for variation across regime types and derogation status, not to represent the universe of states, so the descriptive proportions characterize the constructed sample, while the inferential contrasts are internal to it and are reported without covariate adjustment. Fourth, binary coding compresses gradations, since a partial legislative role scores the same as a full one. A graded instrument would refine the index, and the natural next step is a larger sample paired with a compliance measure and a graded coding, a design that would allow the gap between rights-protection in design and in practice, which the El Salvador case flags, to be estimated directly.

5. Conclusion

This article mapped the epistemology of human rights in emergency legal regimes by coding the COVID-19 crisis legislation of thirty-three jurisdictions against eight features of rights-protective design, then sorting the jurisdictions into three types. On average the regimes were moderately protective. They were also sharply stratified. One group formed a dual-accountability accommodation model, in which rights functioned as a live constraint (twenty-three states, mean 7.26), while another formed a curial-backstop model, in which rights persisted only as a litigable limit (four states, mean 5.5). The last formed an executive-exceptionalism model, in which rights became a suspendable casualty (six states, mean 2.17). The index tracked

regime type strongly. Formal treaty derogation was associated with higher scores on the eight-item index, but that association is largely produced by the derogation item itself: on the seven other items it is small overall and absent within democracies, so whether derogation signals legality remains open for larger samples.

One finding unifies the rest. The epistemology of emergency rights turns less on whether rights were limited than on whether the limitation remained answerable to law, and two scarce checks carry that answerability: a retained legislature and an accepted external standard of justification. Indonesia sits within the accommodation model, level with Japan, Australia and South Africa and above India and Peru. That placement suggests a matter of design, not of regime character. Even a contested hybrid emergency can keep rights as a constraint if the structural checks are left standing. In the next global crisis, reform should aim at preserving accountability for limitation, not at minimizing limitation. The two scarce checks, a retained legislature and an owned international standard of justification, are the levers most worth defending, since they alone constrain the executive's judgment of necessity before the fact, whereas other checks merely condemn it afterward.

Declarations

Ethics Approval and Consent

Not applicable. The study analyzed publicly available legal instruments and involved no human participants, so ethics committee approval and informed consent were not required.

Use of Artificial Intelligence

None. No artificial intelligence tools were used to generate, analyze or write any part of this work.

Author Contributions

M.-J.W.: Conceptualization, Methodology, Investigation, Formal analysis, Writing – original draft. M.C.A.: Data curation, Validation, Writing – review & editing. M.H.: Supervision, Project administration, Visualization, Writing – review & editing. All authors reviewed and approved the final version of the manuscript.

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Competing Interests

None. The authors declare no competing interests.

Data Availability

The coded dataset, the blind reliability key and the analysis script are available from the corresponding author on reasonable request.

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