

# Derogation of Human Rights During States of Emergency and the Standards of a Democratic Rule of Law

## Abstract

This paper examines the legal ramifications of derogating from human rights during states of emergency in accordance with international law, with particular reference to the International Covenant on Civil and Political Rights. It is predicated on the hypothesis that the political system's nature may influence the extent of human rights restrictions. The discussion is structured around the following research inquiries: How are human rights defined under international law, and in what ways do democratic standards affect the process of derogation from human rights? The analysis evaluates the legal modifications enacted in Poland in response to the declaration of the COVID-19 pandemic. The study employs the formal-dogmatic methodology.

**SŁOWA KLUCZOWE:** stan nadzwyczajny, prawa człowieka, umowa międzynarodowa, demokratyczne państwo prawne, ratyfikacja

**KEYWORDS:** state of emergency, human rights, international agreement, democratic rule of law, ratification

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# 1 | Introduction

A state's response to a state of emergency tests its commitment to effectively uphold human rights. International agreements governing human rights, including the International Covenant on Civil and Political Rights<sup>[1]</sup> (ICCPR), are part of the domestic legal framework.<sup>[2]</sup> These agreements address the risks of states of emergency by permitting parties to temporarily suspend specific treaty obligations during crises. However, this suspension is governed by a carefully balanced framework of restrictions, safeguards, notifications, and review processes and procedures.<sup>[3]</sup> The literature recognises that "a derogation provision raises, in an especially acute way, issues of the scope of international implementation procedures and their relationship with the concept of state sovereignty."<sup>[4]</sup> The legal framework for international agreements influences how rights and obligations are integrated domestically. The effect of crises on democracy relies on society's democratic control, dependence on institutions to solve issues, and people's participation during crises conditions.<sup>[5]</sup>

This paper examines derogations from human rights during states of emergency, under international law, with a particular focus on the International Covenant on Civil and Political Rights (ICCPR). Given that ratification is a prerequisite for enforcement, it posits that political regimes significantly influence the implementation of such measures. The central hypothesis suggests that political regimes also affect the manner in which derogations impact human rights. Key research questions include: What constitute human rights under international law? How do democratic standards influence derogations? The study also scrutinises Poland's legal reforms during the COVID-19 pandemic, employing a formal-dogmatic approach to analyse emergency measures and their implications for human rights.

<sup>1</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, accessed: 5.09.2025.

<sup>2</sup> Dominic McGoldrick, "The Interface Between Public Emergency Powers and International Law" *International Journal of Constitutional Law*, No. 2 (2004): 388.

<sup>3</sup> Emilie M. Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties" *International Organization*, No. 4 (2011): 673.

<sup>4</sup> McGoldrick, "The Interface Between Public Emergency Powers and International Law," 388.

<sup>5</sup> Adam Przeworski, *Crises of democracy* (Cambridge: Cambridge University Press, 2019), 78.

## 2 | Conceptualisation of Human Rights

There is no legal definition of “human rights.” Establishing one could solidify and clarify a commonly held understanding of the concept.<sup>[6]</sup> Therefore, exploring various interpretations of human rights is crucial, as the doctrine aims to provide a shared moral basis and evaluative framework for today’s geopolitical governance landscape.<sup>[7]</sup> Consequently, within the academic literature, this term has been characterised by emphasising its defining features. According to Serge Sur,<sup>[8]</sup> human rights pertain to everyday rights, which are commonplace and consistent. Furthermore, human rights are grounded in individual rights to protection and personal actions, especially those related to legal issues.

Within this article, human rights should be examined through international law, which refers to standards established by states in foreign policy and regarded as legally binding for all states.<sup>[9]</sup> International law regulates how states cooperate, safeguarding the environment, seas, human rights, and encouraging development. It encompasses treaties, conventions, declarations, customs, and more, enforced through negotiations, treaties, and judicial mechanisms. Organisations like the International Criminal Court provide guidelines to prevent certain behaviours and proceedings.<sup>[10]</sup>

From a broader perspective, human rights are interconnected with international security, which emphasises preventative measures against conflicts among states and the safeguarding of individuals from violence.<sup>[11]</sup>

<sup>6</sup> José A. Lindgren Alves, “The Declaration of Human Rights in Postmodernity” *Human Rights Quarterly*, No. 2 (2000): 483.

<sup>7</sup> Paul Stenner, “Subjective Dimensions of Human Rights: What do Ordinary People Understand by «Human Right»?” *The International Journal of Human Rights*, No. 15 (2011): 1216.

<sup>8</sup> Serge Sur, *International law, power, security and justice: essays on international law and relations* (Oxford-Portland: Hart Publishing, 2010), 438.

<sup>9</sup> Knut Traisbach, “International Law (Introduction),” [in:] *International Relations*, ed. Stephen McGlinchey (Bristol: e-International Relations Publishing, 2017), 62.

<sup>10</sup> Hasnain Mahmood, “Significances of International Law to maintain International Security in the Context of International Law and Duties of States” Conference: *Infinite Dimensions – International Innovation Summit 2022 At: Warsaw-Beijing Forum, Warsaw, Poland (Virtual)*, (2022): 1-10. [https://www.researchgate.net/publication/360757280\\_Significances\\_of\\_International\\_Law\\_to\\_maintain\\_International\\_Security\\_in\\_the\\_Context\\_of\\_International\\_Law\\_and\\_Duties\\_of\\_States](https://www.researchgate.net/publication/360757280_Significances_of_International_Law_to_maintain_International_Security_in_the_Context_of_International_Law_and_Duties_of_States). [accessed: 1.9.2025].

<sup>11</sup> Barry Buzan, Lene Hansen, *The Evolution of International Security Studies* (Cambridge: Cambridge University Press, 2009), 211.

International security now encompasses more than peacebuilding and armed conflict, including human rights, the environment, and global economic governance. Researchers discuss challenges such as climate change, pandemics, and economic systems that affect our survival. It involves strategies such as military action, peacebuilding, capacity building, and diplomacy to address these issues while protecting society. There is a legal link between international law and security, as law seeks to maintain the security of the international order.<sup>[12]</sup> International peace and security violations happen during state interactions, risking serious consequences for all.

According to Article 1 of the UN Charter,<sup>[13]</sup> the foundational treaty of the United Nations, a primary objective is to address conflicts and breaches of peace through peaceful means, guided by justice and international law.<sup>[14]</sup> The rule of law must ensure all states uphold these principles fairly. The Charter provides the legal basis for international law to maintain security, guiding international peace and security. It also offers mechanisms for states to affirm sovereignty and coordinate actions within international law to resolve disputes.

The concept of human rights is now primarily associated with its legal interpretation. While legal human rights are significant, they are vulnerable without a justifiable universal foundation, which must lie outside the legal framework. The examined corpora suggest two interpretations of human rights: legal and fundamental human rights. The latter can also serve as a credible foundation for the former.<sup>[15]</sup>

The effectiveness of legal human rights within the framework of human rights indicates that the term “human rights” specifically pertains to legal human rights. Annabelle Manney<sup>[16]</sup> contends that the crisis lies in the lack of a defensible and universal foundation for human rights, thereby making its future uncertain. Since laws are shaped by local cultures and practices,

<sup>12</sup> Carol A. Hopkins, “Basic Principles of Modern International Law. By V.S. Mani and The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst” *British Yearbook of International Law*, No. 1 (1995): 466.

<sup>13</sup> United Nations Charter. <https://www.un.org/en/about-us/un-charter/full-text>. [accessed: 21.8.2025].

<sup>14</sup> Kadloor Savitri, “The United Nations Charter Framework for Conflict Resolution: Procedures and Practices of Pacific Settlement of Disputes” *India Quarterly*, No. 3/4 (1997): 78.

<sup>15</sup> Annabelle Monney, “Human Rights: Law, Language and the Bare Human Being” *Language & Communication*, No. 3 (2012): 171.

<sup>16</sup> Annabelle Monney, “Human Rights: Law, Language and the Bare Human Being,” 172.

the absence of a universal legal framework suggests that the foundation of human rights cannot be solely legal. As Amartya Sen<sup>[17]</sup> notes, “The difficult questions regarding the status and standing of human rights arise in the domain of ideas, prior to such legalization.” Also of relevance is the position put forward by Tadeusz Jasudowicz,<sup>[18]</sup> who connects human rights with “the keenly felt needs and interests of any and every human being anywhere and anytime, and the struggle for their realization.”

The belief that individuals inherently possess rights by virtue of their humanity, regardless of qualifications like citizenship or legal status. Some critics accept the concept of human rights, but exclude categories like economic and social rights, often called second-generation rights, such as the right to subsistence or medical care. These rights have been incorporated into earlier declarations, broadening their scope.<sup>[19]</sup>

Numerous legislative actions and legal conventions, such as the “European Convention for the Protection of Human Rights and Fundamental Freedoms,”<sup>[20]</sup> are clearly based on the core belief in rights that exist inherently for all human beings. This principle similarly supports the adoption of the U.S. Constitution, including the Bill of Rights, which aligns with the normative vision expressed in the “U.S. Declaration of Independence.”<sup>[21]</sup> The complex questions about the status and recognition of human rights mainly arise from ideas formed before their formal legal recognition.

In light of the preceding argumentation, the characteristics of human rights as delineated by Amartya Sen<sup>[22]</sup> have been accurately articulated. Human rights are primarily ethical imperatives, not just legal or aspirational directives. While they can inspire legislation, their core importance lies in the freedoms they protect. These freedoms, including opportunity and procedural aspects, must meet specific significance and societal

<sup>17</sup> Amartya Sen, “Elements of a Theory of Human Rights” *Philosophy and Public Affairs*, No. 4 (2004): 318.

<sup>18</sup> Tadeusz Jasudowicz, “Czas a prawa człowieka. Garść refleksji” *Prawo i Więz*, No. 1 (2013): 7.

<sup>19</sup> Ivan Hare, “Social Rights as Foundational Human Rights,” [in:] *Social and Labour Rights in Global Context*, ed. Bob Hepple (Cambridge: Cambridge University Press, 2002), 172.

<sup>20</sup> [https://www.echr.coe.int/documents/d/echr/Convention\\_ENG](https://www.echr.coe.int/documents/d/echr/Convention_ENG). [accessed: 21.8.2025].

<sup>21</sup> <https://www.archives.gov/founding-docs/declaration-transcript>. [accessed: 21.8.2025].

<sup>22</sup> Sen, “Elements of a theory of human rights,” 319.

influence thresholds to form the basis of human rights. They provide justifications for agents to act in defending these fundamental freedoms.

### 3 | Fundamental Rights Enshrined in International Law

The fundamental rights are safeguarded by the ICCPR, which, together with the Universal Declaration of Human Rights<sup>[23]</sup> and the International Covenant on Economic, Social, and Cultural Rights,<sup>[24]</sup> constitutes the international framework for human rights.

The ICCPR is regarded as a pivotal document that forms a key pillar of international law, and its provisions safeguarding freedom of expression are vital for upholding public transparency and accountability. Moreover, these protections are essential for the realisation of other human rights.<sup>[25]</sup>

The ICCPR is regarded as the preeminent among the universal, international human rights treaties. It has been extensively ratified by nations across all continents. As of the year 2024, a total of 173 states have ratified the ICCPR.<sup>[26]</sup>

For all those states, it constitutes a binding treaty obligation. For non-state parties, the ICCPR is frequently utilised as evidence of customary international law and general principles of law. United Nations non-treaty mechanisms often adopt the standards established by the ICCPR<sup>[27]</sup>. Poland ratified the treaty on 18 March 1977, and it entered into force for

<sup>23</sup> Universal Declaration of Human Rights. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. [accessed: 5.9.2025].

<sup>24</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>. [accessed: 5.9.2025].

<sup>25</sup> Helen Jasper, Keegan James, Marco Guzman, Arturo J. Carrillo, "He who Dares not Offend Cannot be Honest: United Nations Human Rights Committee Jurisprudence and Defamation Laws Under the ICCPR" *GW Law Faculty Publications & Other Works* 1679 (2023): 2.

<sup>26</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en). [accessed: 21.8.2025].

<sup>27</sup> Joan Fitzpatrick, *The International System for Protecting Rights During States of Emergency. Procedural Aspects of International Law Series* (Philadelphia: University of Pennsylvania Press, 1994), 36, 68.

Poland on 18 June of that year. The basis for ratification was the Government Declaration of 23 April 1977 concerning the ratification by the Polish People's Republic of the International Covenant on Civil and Political Rights, which was opened for signature in New York on 19 December 1966.<sup>[28]</sup>

Chapter I of the Polish Constitution<sup>[29]</sup> states that Poland is governed by international law (Article 9). Article 91 confirms that ratified and promulgated international agreements are incorporated into the domestic legal system and take precedence over conflicting national laws. Moreover, Article 91, sec. 1 specifies that, once a ratified international agreement is published in the Journal of Laws of the Republic of Poland, it automatically becomes part of the national legal order and is directly applicable, unless its implementation requires the enactment of a new law.

The ICCPR encompasses several oversight mechanisms. Initially, states parties are mandated to submit periodic written reports detailing their implementation of the rights enshrined in the ICCPR, including the implications of emergency powers.<sup>[30]</sup> The Human Rights Committee (HRC), composed of independent experts, reviews these submissions meticulously. Subsequently, the HRC engages in a “constructive dialogue” with the state through oral proceedings. Following this review, the HRC issues formal Concluding Observations, which frequently highlight legal concerns or provide incisive analysis. States may be requested to respond within one year concerning urgent issues requiring expeditious remedial measures.<sup>[31]</sup> Derogations from commitments are often noted as a point of concern within these Concluding Observations.<sup>[32]</sup>

The HRC also adopts General Comments on the ICCPR, which clarify and interpret the covenant obligations, helping states understand how to meet their commitments. It has issued two General Comments on states of emergency.<sup>[33]</sup> The second monitoring mechanism includes a system

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<sup>28</sup> Journal of Laws No. 38, item 168.

<sup>29</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

<sup>30</sup> Ineke Boerefijn, *The Reporting Procedure Under the Covenant on Civil And Political Rights. Practice and Procedures of the Human Rights Committee* (Antwerpen-Oxford: Intersentia-Hart, 1999), 316-319.

<sup>31</sup> HRC Revised Rules of Procedure, rule 70(5), UN Doc. A/56/40, Vol. I, 168; Follow-Up to Concluding Observations, UN Doc. A/57/40, Vol. I, Annex III.

<sup>32</sup> UN Doc. A/57/40, Vol. I, § 30.

<sup>33</sup> General Comment 5(13), UN Doc. A/36/40, 110, adopted in July 1981, replaced by General Comment 29(72), UN Doc. A/56/40, Vol. I, 202, adopted in July 2001.

for individual petitions under the First Optional Protocol to the ICCPR,<sup>[34]</sup> widely accepted despite being non-binding. The HRC's decisions on petition admissibility and merits outline the scope of ICCPR obligations. Many petitions concern actions taken during *de jure* or *de facto* states of emergency. States rarely formally derogate from treaty obligations, and the HRC interprets derogations strictly.<sup>[35]</sup> In some cases, it has been ruled that states remain responsible for violations, even during derogations.<sup>[36]</sup> These processes collectively help shape a universal jurisprudence on rights, limitations, and derogations.<sup>[37]</sup> The doctrine has commented on the development of a universal jurisprudence on derogations, considering a national,<sup>[38]</sup> regional,<sup>[39]</sup> and nongovernmental<sup>[40]</sup> approach to standards to support or contrast this universal framework as appropriate.<sup>[41]</sup>

## 4 | Derogation Clauses of Human Rights in International Treaties

Several ICCPR rights are subject to explicit or implied limitations. The extent of these limitations is described in the ICCPR text and clarified through the interpretation by the states parties and the UN Human Rights

<sup>34</sup> Sandy Ghandhi, *The Human Rights Committee and The Right of Individual Communication. Law and Practice* (Ashgate-Dartmouth: Taylor&Francis, 1998; reissued: London: Routledge, 2018), 4.

<sup>35</sup> UN Doc. A/57/40, Vol. I, § 31.

<sup>36</sup> For complaints from interstate parties under Articles 41-42 of the ICCPR.

<sup>37</sup> Sarah Joseph, Jenny Schultz, Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2013), 885-924.

<sup>38</sup> Nihal Jayawickrama, *The Judicial Application of Human Rights Law. National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2017), 523.

<sup>39</sup> Colin Warbrick, "The Principles of the European Convention on Human Rights and the Response of States to Terrorism" *European Human Rights Law Review*, No. 3(2002): 287.

<sup>40</sup> Subrata Roy Chowdhury, *Rule of Law in A State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London: Pinter, 1989), 32.

<sup>41</sup> McGoldrick, "The Interface Between Public Emergency Powers and International Law," 389.

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Committee, which acts as the treaty body for the ICCPR.<sup>[42]</sup> The concept of limitations stems from the understanding that most human rights are not absolute; instead, they represent a balance between individual freedoms and community interests.<sup>[43]</sup>

In academic literature, various definitions of “absolute right” exist. Dinah Shelton<sup>[44]</sup> characterises absolute rights as those that apply without limitations clauses and cannot be reserved, derogated, or denounced, forming treaty-based ‘fundamental standards of humanity. Alan Gewirth<sup>[45]</sup> states that “a right is absolute when it cannot be overridden under any circumstances, meaning it can never be justifiably infringed and must always be fulfilled without exceptions.”

A derogation is the complete or partial elimination of an international obligation.<sup>[46]</sup> Like reservations to human rights treaties,<sup>[47]</sup> which act as permanent derogations, often for specific articles, temporary derogations during states of emergency from all but non-derogable obligations can undermine the value and integrity of these treaties.<sup>[48]</sup>

One important aspect of these definitions is that the concept of an absolute right is more stringent than that of a non-derogable right. Derogable rights are those that states can suspend under certain conditions during a “public emergency that threatens the life of the nation.” (ICCPR Article 4; see also Art 15 of the European Convention on Human Rights (ECHR)<sup>[49]</sup>).

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<sup>42</sup> See, for example, General Comment 23 on article 27 (minority rights), UN Doc. A/49/40, Vol. I, Annex V.

<sup>43</sup> Erica Irene Daes, “The Individual’s Duties to the Community and the Limitations on Human Rights and Freedoms under No. of Human Rights: A Contribution to the Freedom of the Individual under Law” UN Doc. E/CN.4/Sub.2/432/Rev.2, 82.XIV.1 (1983): 132.

<sup>44</sup> Dinah Shelton, Patricia Roberts, *Are there Differentiations among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-Derogability* (Strasbourg: European Commission for Democracy through Law-Venice Commission, 2005), 18.

<sup>45</sup> Alan Gewirth, “Are there any Absolute Rights?” *The Philosophical Quarterly*, Vol. XXXI (1981): 2.

<sup>46</sup> McGoldrick, “The Interface Between Public Emergency Powers and International Law,” 390.

<sup>47</sup> Eric Neumayer, “Qualified Ratification: Explaining Reservations to International Human Rights Treaties”, *Journal of Legal Studies*, Vol. XXXVI (2007): 398.

<sup>48</sup> McGoldrick, “The Interface Between Public Emergency Powers and International Law,” 390.

<sup>49</sup> <https://eur-lex.europa.eu/EN/legal-content/glossary/european-convention-on-human-rights-echr.html>. [accessed: 5.9.2025].

In contrast, non-derogable rights are protected from such suspension; they must be upheld and guaranteed, even in emergencies. Labelling a right as absolute indicates that no limitations or restrictions on that right are ever justified. Therefore, while all absolute rights are non-derogable, not all non-derogable rights are necessarily absolute. For example, rights like freedom from torture or cruel, inhuman, and degrading treatment are absolute, whereas rights such as the freedom of religion are non-absolute, but still non-derogable.<sup>[50]</sup>

Martin Wayne and Sándor Gurbai<sup>[51]</sup> introduced a concept of defining “absolute rights,” suggesting that the term itself may not need a specific definition. Instead, focus should be on two key theorems that encompass all related definitions: T1 states that every absolute ban has an equivalent absolute right, and T2 indicates that, if a right is absolute, then proportionality judgements are unnecessary. For example, T1 implies that an absolute prohibition, such as the prohibition against slavery, is equivalent to the absolute right not to be enslaved. T2 emphasises that violations of an absolute right, like torturing a terrorism suspect, cannot be justified by proportionality considerations, regardless of potential benefits.

The concept of an absolute right is absent from UN treaties or international agreements, leading some to avoid using it in interpreting UN standards.<sup>[52]</sup> Some argue no rights are truly absolute. However, UN bodies often use the term; for example, the UN Human Rights Committee states the right to life isn’t absolute (UN Human Rights Committee, 2018, para. 10<sup>[53]</sup>), despite being fundamental.<sup>[54]</sup> While the ICCPR doesn’t specify reasons for depriving life, it requires it not to be arbitrary. Article 6, sec. 1 implicitly permits non-arbitrary reasons, like lethal force in self-defence,

<sup>50</sup> ICCPR Article 4 establishes that Article 18 is a non-derogable right. However, since Article 18 covers freedom of thought, conscience, and religion, it allows for restrictions to protect national security, public order, health, morals, or others’ rights. Therefore, these freedoms are not absolute under the ICCPR.

<sup>51</sup> Martin Wayne, Sándor Gurbai, “Surveying the Geneva Impasse: Coercive Care and Human Rights” *International Journal of Law and Psychiatry*, Vol. LXIV (2019): 118.

<sup>52</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), 135.

<sup>53</sup> UN Human Rights Committee General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life CCPR/C/GC/36, (2018)

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under certain conditions. Any deprivation of life must be non-arbitrary, law-based, and safeguarded against misuse.<sup>[55]</sup>

The European Court of Human Rights (ECtHR) regularly uses the concept, despite the ECHR not explicitly mentioning absolute rights.<sup>[56]</sup> The Vienna Convention on the Law of Treaties<sup>[57]</sup> (“Vienna Convention”) says nothing about how to determine whether a particular right is absolute. The Vienna Convention defines, in Article 53, the term “peremptory norm of general international law,” as a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.

In conclusion, no universally accepted method exists for determining whether a right is absolute; however, it is clear how to identify non-absolute rights. This involves analysing the language of the rights. The ICCPR explicitly states restrictions, limitations, or exceptions for some rights, indicating they are not absolute. Article 6, sec. 1 uses the term “arbitrary,” suggesting the right is not absolute.

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<sup>55</sup> *Gonzalez del Rio v. Peru* (Views of 28 October 1992, Communication No. 263/1987, CCPR/C/46/D/263/1987), para 5.1. <https://juris.ohchr.org/casedetails/332/en-US>. [accessed: 5.9.2025].

<sup>56</sup> The term “absolute right” is mainly used by the European Court of the Human Rights regarding ECHR Art 3 (Prohibition of Torture), as in *Gäfgen v. Germany* (para 176) and *Saadi v. Italy* (para 127). Sometimes, other rights or elements are also considered absolute. For example, in *Ilașcu and Others v. Moldova and Russia* (para. 334), the ECtHR views the right not to be sentenced to death as an absolute aspect of ECHR Art 2 (Right to Life). The Court also uses “absolute rights” to show that some rights are not absolute, as in *John Murray v. The United Kingdom* (para 47).

<sup>57</sup> [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). [accessed: 5.9.2025].

## The Procedure for Derogating Human Rights in a Democratic State

The derogation clauses of the ECHR and the American Convention on Human Rights (“American Convention”)<sup>[58]</sup> differ in wording and in their non-derogable rights lists, with the American Convention having a more extensive list. These clauses are similar in purpose, structure, and specifics. The American Convention’s non-derogable rights include the right to marry, build a family, and have a name, unlikely to be affected by emergencies. The African Charter on Human and Peoples’ Rights<sup>[59]</sup> uniquely has no derogation provisions.<sup>[60]</sup>

Any positive impacts of these treaties on human rights observance are generally seen as conditional, depending on factors at the state level, such as democracy, which often initially promote good human rights practices. Furthermore, since some of these state-level traits believed to influence treaty effectiveness – like democracy – are also strong indicators of whether a state will ratify a human rights treaty<sup>[61]</sup>. In this context, one should agree with the standpoint presented in the literature by Norberto Bobbio,<sup>[62]</sup> who emphasises that the primary concern is not questioning the validity of human rights, but rather concentrating on the formidable task of their enforcement and, additionally, on educating the public regarding their significance.

Oona Hathaway<sup>[63]</sup> argues that democracies are more likely to uphold ratified human rights treaties due to public mobilisation and strong legal institutions that enable citizens to seek remedies for rights violations.

<sup>58</sup> American Convention on Human Rights, <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>. [accessed: 5.9.2025].

<sup>59</sup> <https://leap.unep.org/en/countries/national-legislation/african-charter-human-and-peoples-rights#:~:text=This%20Charter%20sets%20standards%20and%20establishes%20the%20groundwork,duties%3B%20II%29%20Measures%20of%20safeguard%3B%20III%29%20General%20provisions>. [accessed: 5.9.2025].

<sup>60</sup> Eric Neumayer, “Do Governments Mean Business when they Derogate?: Human Rights Violations During Notified States of Emergency” *The Review of International Organizations*, No. 1 (2013): 7.

<sup>61</sup> Daniel W., Jr. Hill, “Estimating the Effects of Human Rights Treaties on State Behavior” *The Journal of Politics*, No. 4 (2010): 1168.

<sup>62</sup> Norberto Bobbio, *The Age of Human Rights* (Cambridge: Polity, 1996), 122.

<sup>63</sup> Oona Hathaway, “Do Human Rights Treaties Make a Difference?” *Yale Law Journal*, 111 (8) (2002), 1940.

This argument emphasises the importance of the rule of law, which fosters citizen confidence in the state. Democratic constitutions stress legal confidence, ensuring predictable conduct from state bodies and protection of rights.<sup>[64]</sup>

The issue of fulfilling democratic standards for emergency measures was examined by United Nations experts in 2020<sup>[65]</sup> during the Covid-19 pandemic. The expert forum emphasised that government responses must be “proportionate, necessary, and non-discriminatory.” In this context, it is also important to highlight the Guidelines of the United Nations Human Rights Office of the Commissioner on emergency measures and COVID-19.<sup>[66]</sup> These guidelines outline the limits that may be implemented during a state of emergency. Certain rights, such as freedom of movement, expression or peaceful assembly, may be restricted for public health reasons, even without a formal declaration of a state of emergency. Such limitations must meet specific criteria. The first is the principle of legality: restrictions must be “provided by law,” meaning they should be included in a current national law of general application. The law must not be arbitrary or unreasonable, and should be clear and publicly accessible. The second criterion is necessity: restrictions must be essential to protect the permissible grounds specified in the ICCPR. The third stresses that restrictions are justified only if necessary to safeguard those grounds. Finally, restrictions must be proportionate to the interest involved, meaning they should be suitable to achieve their purpose. Authorities are responsible for justifying any restrictions imposed on rights.

Supervising the exercise of emergency powers is essential for democracy and the rule of law. Emergency measures, including rights derogation or suspension, should be subject to regular, independent legislative review and scrutiny. Judicial oversight of exceptional measures or a state of emergency is necessary to ensure adherence to these limits.

<sup>64</sup> Jerzy Oniszczuk, “The Concept of the State of Law” *Studia z Polityki Publicznej*, 2 (2015): 62.

<sup>65</sup> United Nations Experts COVID-19: States Should not Abuse Emergency Measures to Suppress Human Rights (2020). <https://www.ohchr.org/en/press-releases/2020/03/covid-19-states-should-not-abuse-emergency-measures-suppress-human-rights-un>. [accessed: 5.9.2025].

<sup>66</sup> United Nations Human Rights Office of the Commissioner, Covid-19 Response, Topics in focus, 27.04.2024; [https://www.ohchr.org/sites/default/files/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/sites/default/files/Documents/Events/EmergencyMeasures_COVID19.pdf). [accessed: 15.7.2025].

The General Comment No. 29<sup>[67]</sup> of the ICCPR states that, for a state to invoke Article 4 of the ICCPR, two conditions must be satisfied: a public emergency threatening the nation's life and an official proclamation of a state of emergency. This requirement upholds legality and the rule of law, especially when derogations may occur. When declaring an emergency, states must act within their legal and constitutional frameworks. States should provide detailed information on their laws and practices regarding emergency powers in their reports under Article 40 of the ICCPR.

In the Polish Constitution, the legislator has limited the conditions for declaring a state of emergency to three specific elements.

Firstly, a state of national emergency may be declared if there are particular threats and normal constitutional measures are inadequate (Article 228, sec. 1 of the Polish Constitution). This regulation aligns with ICCPR General comment No. 29, which states that not all disturbances qualify as a public emergency threatening the nation's life under Article 4, paragraph 1. States should carefully justify and verify the necessity of invoking Article 4 outside armed conflict cases. The Committee has raised concerns about States parties that derogate from rights protected by the ICCPR, especially when domestic laws allow such actions without justification under Article 4 of the ICCPR<sup>[68]</sup>. Any derogation must be strictly limited to what is necessary, considering duration, geographical scope, and material extent.<sup>[69]</sup> This differs from standard restrictions allowed under the ICCPR. States must provide careful justification for declaring a state of emergency and any specific measures taken. In situations like natural disasters or major accidents, they must prove the situation poses a genuine threat to the nation, and typically, restrictions on rights such as freedom of movement

<sup>67</sup> International covenant on civil and political rights, Distr. GENERAL, CCPR/C/21/Rev.1/Add.11, 31 August 2001, General Comment No. 29 states of emergency (article 4) of 31 August 2001. <https://digitallibrary.un.org/record/451555/?v=pdf> [accessed: 3.9.2025].

<sup>68</sup> Example of review of reports submitted by States parties under article 40 of the ICCPR: United Republic of Tanzania (1992), CCPR/C/79/Add.12, paragraph 7. <https://digitallibrary.un.org/record/183158?v=pdf>. [accessed: 6.9.2025]; Dominican Republic (1993), CCPR/C/79/Add.18, paragraph 4, <https://docs.un.org/en/CCPR/C/79/Add.18>, accessed: 5.09.2025; Bolivia (1997), CCPR/C/79/Add.74, paragraph 14, <https://docs.un.org/en/CCPR/C/79/Add.74>. [accessed: 5.9.2025]; Israel (1998), CCPR/C/79/Add.93, paragraph 11, <https://docs.un.org/en/CCPR/C/79/Add.93>. [accessed: 5.9.2025].

<sup>69</sup> See Articles 12 and 19 of the ICCPR.

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(Article 12 of the ICCPR) and assembly (Article 21 of the ICCPR), are adequate without needing derogations.

Secondly, an appropriate state of emergency, from those specified in (Article 228 sec. 1 of the Polish Constitution), should be declared regarding the identified threats, namely: a state of war, a state of emergency, or a natural disaster.

Thirdly, a state of emergency can only be imposed by law. Poland has three laws covering different emergency states, including the Act of 29 August 2002 on Martial Law and the Powers of the Commander-in-Chief, detailing their subordination to constitutional bodies.<sup>[70]</sup> The Act details procedures for introducing and lifting martial law, principles guiding public authorities, scope of restrictions on liberties, powers of the Commander-in-Chief and his subordination to constitutional bodies (see Article 1).

Another law is the Act of 18 April 2002 on the state of natural disaster.<sup>[71]</sup> It outlines the procedure for declaring and lifting a natural disaster, along with public authorities' actions and restrictions on liberties during such a state (see Article 1). Another law is the Act of 21 June 2002 on the state of emergency, which sets the procedure for initiating and lifting a state of emergency, rules of public authorities' actions, and the extent of restrictions on human and civil rights during an emergency (see Article 1).<sup>[72]</sup>

Fourthly, according to Article 228, sec. 2 of the Polish Constitution, a state of emergency may be declared by a decree and must be publicly announced. Restrictions on individual freedoms and rights during states of emergency are governed by Article 233 of the Polish Constitution.

The epidemic state in Poland lasted from 20 March 2020<sup>[73]</sup> until 16 May 2022<sup>[74]</sup> after which it was replaced by a state of epidemic emergency. This measure was implemented in response to the spread of the SARS-CoV-2 virus, which led to the COVID-19 pandemic. The declaration of an epidemic

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<sup>70</sup> Consolidated text, Journal of Laws 2025, item 504.

<sup>71</sup> Consolidated text, Journal of Laws 2025, item 112.

<sup>72</sup> Consolidated text, Journal of Laws 2017, item 1928.

<sup>73</sup> Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic state in the territory of the Republic of Poland (Journal of Laws of 2020, item 491, as amended).

<sup>74</sup> Ordinance of the Council of Ministers of 13 May 2022 amending the Ordinance on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic state (Journal of Laws of 2022, item 1025).

significantly disrupted government operations and public services, including the State Sanitary Inspectorate.<sup>[75]</sup>

The beginning of the COVID-19 outbreak in Poland triggered a unique form of lawmaking, often called a “hybrid state of emergency.” The primary legal framework governing the actions to address this crisis was the Act of 2 March 2020 on special measures for the prevention and combat of COVID-19, other infectious diseases, and related crisis situations.<sup>[76]</sup> The provisions of this Act<sup>[77]</sup> led, *inter alia*, to a significant amendment of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans.<sup>[78]</sup> As a result of the amendments, Articles 46a and 46b were added to it, which – by means of regulations of the Council of Ministers – made it possible to introduce a broad catalogue of restrictions, obligations, and orders, constituting the basis for public administration actions under conditions of a pandemic. However, the statutory authorisation granted to the Council of Ministers, based on the provisions of Articles 46a and 46b of the Act on Preventing and Combating Infections, to limit, by way of a regulation, the exercise of constitutional freedom of economic activity was contrary to Article 92 of the Polish Constitution, as well as Article 22 in conjunction with Article 31(3) of the Polish Constitution (cf. judgment of the Supreme Administrative Court of 4.03.2022, II GSK 38/22<sup>[79]</sup>).

Articles 22 and 31, sec. 3 of the Polish Constitution, explicitly prohibit any exceptions to the rule that legislative measures are the only means to restrict the freedom of economic activity. The declaration of a state of epidemic, even when preceded by an epidemic emergency, does not qualify as an emergency under Article 228, sec. 1 of the Polish Constitution. Consequently, the principle that only an Act can regulate human freedoms and rights – particularly those of a sanctioning and disciplinary nature – remains in force.<sup>[80]</sup> The broad statutory authorisation given to

<sup>75</sup> Act of 2 March 2020 on specific solutions related to the prevention, prevention and control of COVID-19, other infectious diseases and emergencies caused by them (i.e. Journal of Laws 2021, item 2095, as amended).

<sup>76</sup> Consolidated text, Journal of Laws 2025, item 764.

<sup>77</sup> See Article 25(4) of the Act of 2 March 2020 on special solutions related to the prevention, prevention and control of COVID-19, other infectious diseases and emergencies caused by them, Journal of Laws 2020 item 374

<sup>78</sup> Consolidated text Journal of Laws 2024, item 924, as amended.

<sup>79</sup> Judgment of the Supreme Administrative Court of 4.03.2022, II GSK 38/22, Lex No. 3333821.

<sup>80</sup> see, for example, the Supreme Court judgment of 16 March 2021, ref. No. II KK 64/21, OSNK 2021/4/18.

the Council of Ministers indicates that the formal requirement – namely, that restrictions on economic freedom must be established by law – has not been fulfilled. Regulations issued by the executive should be directly and substantively linked to the Act, as their purpose is to implement the law (see Constitutional Tribunal judgment of 16 February 1999, ref. No. SK 11/98<sup>[81]</sup>).

This principle cannot be fulfilled if the statutory authorisation is only understood as indicating the scope of matters delegated for regulation by a sub-statutory executive act. The legal provision that grants the authority to issue such an act must be interpreted strictly in language, and cannot be extended through purposive interpretation to include matters not explicitly mentioned (see, e.g., judgments of the Constitutional Tribunal from: 11 May 1999, ref. No. P 9/98<sup>[82]</sup>; 5 October 1999, ref. No. U 4/99<sup>[83]</sup>; 22 November 1999, ref. No. U 6/99<sup>[84]</sup>).

During the pandemic, certain legislative changes ignited intense controversy. One notable example was the mandatory vaccination policy, which underscored a fundamental clash of constitutional principles. On one side, Article 68, sec. 4 of the Polish Constitution mandates public authorities to combat epidemic diseases. Conversely, Articles 41 and 47 safeguard citizens' personal inviolability, personal freedom, privacy, honour, reputation, and the right to make decisions regarding their personal lives. Amid the COVID-19 crisis, where authorities had a clear duty to establish systems to prevent and treat infectious diseases, the debate over patients' rights to consent or refuse medical treatment became especially significant.

Under the Act of 5 December 2008, relating to the prevention and control of infections and infectious diseases in humans, compulsory vaccination can be enforced to protect public health. Although this measure is justified by epidemiological safety concerns, it has sparked numerous disputes, even before the pandemic, including parents challenging the mandatory vaccination of their children.<sup>[85]</sup>

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<sup>81</sup> Judgment of the Constitutional Court of 16.02.1999, SK 11/98, OTK 1999, No. 2, item 22.

<sup>82</sup> Judgment of the Constitutional Court of 11.05.1999, P 9/98, OTK 1999, No. 4, item 75.

<sup>83</sup> Judgment of the Constitutional Court of 5.10.1999, U 4/99, OTK 1999, No. 6, item 118.

<sup>84</sup> Judgment of the Constitutional Court of 22.11.1999, U 6/99, OTK 1999, No. 7, item 159.

<sup>85</sup> Dorota Michalska-Sieniawska, „Obowiązek szczepień – nowe wyzwanie dla praw człowieka” *Medyczna Wokanda*, No. 14 (2020): 52-53.

Similar concerns were also raised regarding the ban on public gatherings of more than five people. This regulation infringed upon the freedom of assembly, protected by Article 57 of the Constitution of the Republic of Poland, which states that “everyone shall be granted the freedom to organise peaceful assemblies and to participate in them [...].” Any restrictions on this right may only be implemented through legislation.<sup>[86]</sup>

## 6 | Conclusions

Constitutional governance is one aspect of the rule of law. It cannot be concluded, simply from the fact that a state has laws, that laws govern in that state.<sup>[87]</sup> The principle of a democratic state of law implementing the principles of social justice, as set out in Article 2 of the Polish Constitution, is comprehensive. It entails the need to ensure the legal security of individuals, certainty regarding the law, predictability of established laws, and the loyalty of the state towards its citizens, which should foster trust in the government. At the same time, legal security for citizens should be understood not only as formal predictability of public authority actions, but also as the effective protection of their life, goods, and interests.<sup>[88]</sup> During the Covid-19 pandemic in Poland, the authorities did not choose to declare a state of emergency under Article 4 of the ICPPR or national law. Instead, a “hybrid state of emergency” was in effect. Due to legislative amendments, it became possible, through regulations of the Council of Ministers, to impose a wide array of restrictions, obligations, and orders that formed the legal basis for public administration actions during the pandemic. However, these restrictions violated the order of a democratic rule of law, leading to challenges in court. For this reason, the judiciary can play a crucial role in democratic systems, functioning as part of the tripartite division of powers. It functions as an internal oversight body that holds the authorities accountable for discrepancies between their promises

<sup>86</sup> Adam Wąsikowski, “Prawa i wolności obywatelskie w warunkach epidemii COVID-19” *Zbliżenia Cywilizacyjne*, No. 1 (2021): 22.

<sup>87</sup> Lech Morawski, „O tożsamości konstytucyjnej Polaków” *Prawo i Więź*, No. 1 (2012): 10.

<sup>88</sup> Judgment of the Supreme Court of 15.01.2025, II NSNC 123/24, Lex No. 3816699.

and actions. The principle of citizens' trust in the state, as derived from Article 2 of the Polish Constitution, is reflected in citizens' expectations that public authorities correctly apply the applicable laws, since, according to Article 7 of the Polish Constitution, they are obliged to act within and based on the law.<sup>[89]</sup>

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<sup>89</sup> Judgment of the Supreme Court of 29.01.2025, II NSNc 461/23, Lex No. 3831212.

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