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Regulatory Uncertainty Over Emergency Powers in Switzerland

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Democratic process and federalism concerns raise questions about the Swiss government's COVID-19 policies.

The COVID-19 pandemic, an unprecedented event that has triggered a range of drastic regulatory responses around the globe, is a moving target. Countries are clarifying and refining the legal scope, content, and implications of the measures they take to combat the pandemic, including those which pertain to sanitary issues, economic activities, the exercise of political rights, and many other areas of our lives.

Switzerland was one of the first European countries affected by the virus. Authorities [reported](#) the first case in the canton of Ticino, which borders Lombardy and Piedmont, on February 25. The canton

declared a state of emergency in its territory on March 11. The number of confirmed cases then continued to rise, spreading to the rest of the country.

On April 27, the 13th amendment to the [COVID-19 Ordinance 2](#)—the main regulatory instrument adopted by the federal executive to “flatten the curve”—entered into force, [providing](#) for the first easing of the measures.

In a press meeting on the easing of restrictions, Alain Berset, the head of the [Swiss Federal Department of Home Affairs](#), stated, “We wish to act as quickly as possible, but as slowly as necessary.” At the beginning of the crisis, the Swiss government’s strategy was met with a high degree of acceptance. Yet the more time that has passed, the more vocally concerned members of the public have become.

Was the Swiss legal order unfit to address the pandemic? Overall, the answer is “no,” even if the existing framework raises several interpretative questions. First, Switzerland [revised](#) its regulatory arsenal pertaining to the fight against infectious diseases—the [Federal Epidemics Act \(EpA\)](#)—in the aftermath of the SARS epidemic. The EpA’s three-tiered response model distinguishes between “normal,” “special,” and “extraordinary” epidemiological situations. The more serious the situation, the more restrictive the measures that the federal government is entitled to take.

Second, the [Swiss Federal Constitution](#) contains several provisions that empower the federal executive and the federal parliament to act swiftly in times of emergency. The Constitution [enables](#) the executive to “issue ordinances and rulings to counter existing or imminent threats of serious disruption to public order or internal or external security.” It also grants the legislature authority to adopt emergency legislation as well as ordinances and decrees, thereby overriding the measures taken by the executive. The executive—but not the legislature—also has emergency powers in foreign relations.

On February 29, the Swiss government adopted its first Ordinance on Measures to Combat the Coronavirus—[COVID-19 Ordinance 1](#)—the linchpin of which was a ban on events with more than 1,000 participants. The executive enacted the ordinance in accordance with Article 6(2)(b) of the EpA, which governs “special situations.” Following the government’s proclamation that an “extraordinary situation” [exists](#) in Switzerland, the executive adopted the [COVID-19 Ordinance 2](#) based on its emergency authority derived from the Constitution, as well as several provisions of the EpA. The ordinance’s measures apply to “the population, organizations and institutions and the cantons.” The ordinance is set to expire after six months, unless the executive [submits](#) a bill to parliament. Although some scholars [consider](#) this a short time frame, others [highlight](#) the importance of ensuring a democratic transition.

The past few weeks have shed light on some weaknesses in the existing Swiss regulatory framework. The uneasiness surrounding executive use of emergency powers is compounded by several features of the Swiss legal order, such as the fact that the federal parliament enjoys supreme authority under the Constitution, the centrality of direct democratic rights, and Switzerland’s federalist system of governance.

The first set of concerns pertain to democratic processes and executive oversight. [Andreas Kley argues](#) that the government’s measures should not [affect](#) democratic procedures. [Markus Schefer raises](#)

concerns that the parliament might struggle to take back its role, emphasizing that the “transition to the new reality” should not be left to the executive. Similarly, [Daniel Moeckli recalls](#) the authoritarian tendencies that materialized during the Swiss “Vollmachtenregime,” which lasted from 1939 to 1952 and took a popular vote to [force](#) the executive to relinquish its emergency powers. Member of parliament [Andrea Caroni](#) even [worries](#) about the emergence of anti-parliamentarian tendencies.

Several legal experts [criticize](#) the federal parliament for not convening between March 16 and May 4, violating the three-week deadline imposed by the [Financial Budget Act](#). Financial commitments made by the Swiss government exceeding 500 million Swiss francs require parliamentary approval in an extraordinary session. The delay in reconvening parliament may have been reinforced by the fact that members of parliament had conflicting priorities linked to their other professions, given that Switzerland [maintains](#) a “militia parliament” of non-professional representatives. The delay may also be due to legal uncertainties about teleconferences and videoconferences as well as the competences of the parliament’s chambers, offices, and committees, as [Felix Uhlmann](#) and Martin Wilhelm have [highlighted](#).

Still, parliament is more involved in times of crisis today than in the past. Following the Federal Council’s decision to adopt a controversial UBS rescue package in the wake of the 2008 financial crisis without consulting parliament, the federal legislature [adopted](#) measures to strengthen its role. Some authors [argue](#) that this framework remains insufficient, and that the power to proclaim the existence of an emergency should reside with the parliament. These scholars contend that it is inconsistent to require a formal devolution of legislative powers (Vollmacht) to the executive in the event of an extraconstitutional emergency, which is what Switzerland did before the Second World War, when an analogous mechanism does not exist for intraconstitutional emergency powers. Some cantonal constitutions, such as the [Constitution](#) of the Canton of Zurich, [state](#) that emergency ordinances adopted by the cantonal executive must be immediately submitted to the cantonal parliament for approval.

A second source of regulatory uncertainty with Switzerland’s COVID-19 response [relates](#) to federalism. Unless the COVID-19 Ordinance 2 provides otherwise, the cantons retain their responsibilities. The [Federal Office of Public Health](#) has [made](#) clear that the cantons have the power to regulate issues not addressed by the ordinance, including issues addressed in a non-exhaustive fashion. It is not always clear when a norm is exhaustive, which can lead to a patchwork of cantonal regulations. As a matter of fact, many cantons [adopted](#) far-reaching measures going beyond the requirements of the ordinance.

For example, the canton of Geneva [closed](#) all construction sites. The Federal Council subsequently amended the ordinance to avoid such piecemeal measures. The canton of Uri on March 19 [imposed](#) a curfew on persons aged 65 or older. The next day, the Federal Council amended the ordinance to regulate gatherings in public areas. The canton of Uri [accepted](#) this amendment and immediately revoked its curfew.

The canton of Ticino [took](#) several drastic steps, including the shutdown of construction sites and industrial enterprises providing non-essential services. Although the Head of the Federal Office of Justice [declared](#) the measures illegal, the cantonal government [refused](#) to revoke them. The Federal Council subsequently amended the ordinance and legalized this approach retroactively. The cantons can

now restrict or prohibit activities in specific economic sectors for a limited time. It remains unclear if the authorities in Ticino could sanction a person who disregarded a cantonal measure that, before this amendment, contradicted federal law.

Both areas of regulatory uncertainty I have highlighted above—democratic processes and federalism—partly relate to the fact that major legal questions remain unsettled in the literature. Legal scholars disagree as to whether the Federal Council can act against the Constitution and against legislation when relying on the executive’s emergency powers. Some contend that the executive should always respect both, while others argue that the executive should be able to curtail cantonal competences—thereby creating some tensions with constitutional law—and to override existing legislation.

Scholars also debate the type of interests that allow the Federal Council to step in. Most authors argue that, in addition to protecting traditional public interests (Polizeigüter), which include public health, the government should be able to [address](#) economic and social hardships, such as it did by adopting a package of measures to cushion the economic consequences of the pandemic. This approach aligns with the Federal Council’s controversial [Ordinance on the Recapitalization of UBS AG](#) in 2008 and with the Swiss Federal Supreme Court’s equally [criticized](#) UBS and Swiss Financial Market Supervisory Authority judgment.

Yet the government’s competence to address the indirect effects of the danger remains a legitimate question. For instance, was it appropriate for the Federal Council to [adopt](#) an Ordinance on the Standstill of Time Limits in Civil and Administrative Proceedings, or should such matters be left for the parliament to decide?

The current crisis sheds light on sources of regulatory uncertainty, some of which will likely be discussed further in the coming weeks and months. Switzerland urgently needs a democratic debate about the restrictions adopted by the executive and the subsequent easing of those restrictions.

Around the world, parliaments must assess whether citizens are indeed represented by their governments’ measures, and competing claims to democratic representation must be given the opportunity to be voiced. Without the possibility of contestation and deliberation, emergency laws risk exacerbating public distrust of government, providing fertile ground for populism.



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This essay is part of an ongoing series, entitled [Comparing Nations’ Responses to COVID-19](#).

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