

Emergency Powers, Human Rights and Rule of Law

Associate Prof. Dang Minh Tuan

Vietnam National University School of Law, Hanoi

I. What are Emergency Powers?

Definition

Emergency powers are those special prerogatives that a government or a president can resort to in extraordinary situations such as war, insurgency, terrorist attacks, or other severe threats to the state, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives. It is commonly agreed that these powers should only be used in such extraordinary circumstances, and even then only to the extent that the situation requires.¹ Emergency powers can also refer to powers brought in rapidly in a crisis but which are expected to be temporary.

Historical roots

Emergency powers are extraordinary powers historically invoked as a means of resolving a crisis or protecting a political regime. In the past, emergency powers have virtually always implied limits on individual human rights and, while intended to secure the survival of the state, such extensive executive powers have not always secured the survival of democracy.² The need for powers that exceed ordinary limits emerged along with the concept of limited republican or constitutional, government in ancient Rome. When confronted with a direct threat to the constitutional system itself, the Roman Senate could decide to appoint a dictator for a period of no more than six months. During that time, however, the dictator exercised unrestrained power, limited only by that individual's own commitment to the republic itself. The dictator was appointed not to destroy or replace the existing system but to save or conserve it. This provision was revived in the modern era first by Niccolò Machiavelli, who defended the assignment of extraordinary power to a ruler to make it possible to save a society as well as its political institutions. The conviction that a

¹ Anna Chakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper – No 30, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, 5.

² For a good introduction to the problems and issues surrounding emergency rule, see DCAF (2005). *States of Emergency* Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Centre for the Democratic Control of the Armed Forces), October.

constitutional system required the ability to cope with unexpected and immediate threats was embraced by John Locke and Jean-Jacques Rousseau.³

Types of emergency

Emergency situations differ greatly. The most common reasons for allowing the declaration of a state of emergency include war, invasion, unrest, insurrection, natural disaster, or a threat to national independence or the functioning of public institutions. Emergencies are necessarily unpredictable, there are types of emergency; therefore, many countries only define general references for a state of emergency, such as “extraordinary circumstances”, “international crisis”, “particular urgent situations”, or “times of war” as prescribed in many Western European constitutions.⁴ Similarly, the types of threats are not provided in detail, generally in formulas such as “threats to the constitutional order”, “serious and immediate threats to public order” or “threat to territorial integrity and independence”. Otherwise, the U.S Constitution provides limited emergency power, allowing for the suspension of ordinary judicial process in the event of war, invasion, or rebellion. Different types of emergency and threats have different effects and require different responses such as pandemics, natural catastrophes and insurgencies or coups d’état; terrorist attacks and economic crises or an armed aggression of a foreign state. In Vietnam, the proclamation of a state of emergency is proclaimed when in a whole country or in a number of localities there is a serious disaster caused by nature or human, a dangerous epidemic spread on a large scale, seriously threatening the properties of the state and organizations, people's lives, health and property of the people or in a situation seriously threatening national security and social security order (art 1 the Ordinance on the state of emergency).

Contents of emergency powers

Emergency powers usually refers to government extraordinary powers to respond rapidly to a public emergency by making regulations without an act of parliament, taking actions without complying with statutory duties that it would normally have to comply with and taking actions that it would not normally be to take.⁵ The declaration of a state of emergency usually grants additional authority in three main areas: (i) the temporary restriction or suspension of some (but usually not all) constitutional rights; (ii) the temporary concentration of power in the executive

³ Gordon Silverstein, *Emergency powers*. Available at: <https://www.britannica.com/topic/emergency-powers>

⁴ Anna Chakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper – No 30, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, 11.

⁵ Alex Nice, Raphael Hogarth, Joe Marshall, Catherine Haddon, *Emergency powers*. <https://www.instituteforgovernment.org.uk/explainers/emergency-powers>

branch at the expense of the legislature, and centralization of power in the central government at the expense of sub-national authorities; and (iii) in some cases, the postponement of elections.⁶ Examples of emergency measures or powers range widely, for example: * the restriction of press freedom and the prohibition of public meetings; * domestic deployment of the armed forces; evacuation of people from their homes and places of work; * searches of homes and other private places without a warrant; arrests without charges; * confiscation of private property (with or without compensation) and/or its destruction; * regulation of the operations of private enterprise; interference with financial transactions and export regulations; * special legislation to punish non-compliance with emergency regulations.⁷

Emergency powers effect on the role and powers of parliament, government, head of state, courts and local government. In general, emergency situations may require concentrated and decisive action, for which the executive is better suited than the legislature; therefore, many constitutions enable the executive (president and/or the government), during an emergency, to take actions – including issuing orders having force of law – which might be otherwise be the legislature’s responsibility.⁸ It is common as in Europe and other places all over around the world that some powers by parliament may be transferred to the government or the president, who has the right to issue regulations that go against existing laws. Germany and France constitutionally assigned emergency powers to the executive. Others, like Great Britain, Parliament exercise emergency powers through ordinary legislation, but it has formally delegated extraordinary to the executive on a number of occasions. In a few cases, like in the US, the emergency power is granted to the Congress rather than to the President.⁹ The normal legislature may be replaced by “mini-parliaments” such as Committee, Council or Delegation during war or similar situations. The Parliament and other constituents may be prohibited to alter the constitution and other pieces of important legislation such as the election laws and the laws governing the state of emergency. Meanwhile, there are some exceptions on the legislature such as the prolongation of parliamentary terms and the prohibition of dissolve the parliament in a serious emergency. The National Assembly of Vietnam may adopt laws in a shorten procedure (art 144 (1) Law on promulgation of legal normative documents). Parliament and other authorities commonly may suspend or restrict some constitutional rights. There is normally a few alterations in

⁶ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18, International IDEA, 2018. Available at: <http://aceproject.org/ero-en/emergency-powers-international-idea-2018>, 9.

⁷ DCAF (2005). *States of Emergency* Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Centre for the Democratic Control of the Armed Forces), October.

⁸ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18, International IDEA, 2018. Available at: <http://aceproject.org/ero-en/emergency-powers-international-idea-2018>, 24.

⁹ Gordon Silverstein, *Emergency powers*. Available at: <https://www.britannica.com/topic/emergency-powers>

the judicial system during emergencies, such as the establishment of extraordinary courts or the extension of jurisdiction of military tribunals. Independent and impartial courts must be allowed to continue functioning freely during an emergency situation for the purpose of exercising judicial review over emergency powers and ensuring the effective protection of legitimate rights. In an emergency, powers of local authorities and other sub-national agencies may be temporarily transferred to the central government to meet the requirement of a united response by the national authorities to protect life, property, public order and territorial integrity.¹⁰

Emergency declaration, termination and renewing process

Emergency declaration process is composed of two steps: a proposal or initial decision to declare a state of emergency; and approval or confirmation. In many countries, the executive normally exercises the authority to initiate or propose and declare a state of emergency, while the legislature usually debates, reviews, and approves or confirms the executive's decision. In some cases, the state of emergency comes into effect only after the grant of legislative approval, but in some other cases, a state of emergency can come into effect immediately after an executive decision, but will need to be approved later by the legislature. As in the US, under the National Emergency Act, the President has the power to declare a national emergency by following certain protocols. Once declared and announced properly to Congress, which includes publication in the Federal Register and outlining intended actions, the President can access additional authority in order to fulfill his or her duties in mitigating the emergency. Announced emergencies are reviewed by Congress, can be terminated by joint resolution or by the President, and can be extended. The expansive abilities of the President to issue emergencies, and as the U.S. has recently seen, to veto joint resolutions to end such emergencies, creates major constitutional concerns. Otherwise, under the Vietnamese Constitution, the proclamation and termination of a state of emergency are decided by the National Assembly Standing Committee (art 74 (10)). The President exercise this power only in case where the National Assembly Standing Committee cannot meet (art 88 (6)).

A state of emergency is temporary to respond to a particular urgent need, so that there is normally a time limit to any declaration of a state of emergency, and the time limit may be terminated and renewed by competent authorities. A temporary emergency under a time limit is supposed to the nature of the emergency and necessary to prevent the abuse of emergency powers by the government.

¹⁰ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18, International IDEA, 2018. Available at: <http://aceproject.org/ero-en/emergency-powers-international-idea-2018>, 25.

Emergency provisions in constitutions and laws

Most modern constitutions have provisions on emergency powers, but some others do not mention emergency provisions in the constitutional text. In the absence of constitutional provision, the legislature determines emergency powers.¹¹ Otherwise, the US Constitution has only one provision on the suspension of habeas corpus “when in cases of rebellion or invasion public safety shall require it”, but the Constitution do not provide emergency powers. Consequently, they are mainly regulated in the National Emergency Act. In Vietnam, the Constitution provide the competences of proclamation and termination. Emergency powers are regulated in the Ordinance on state of emergency and some other relevant laws such as Law of National Defense, Law on Network security, Law on Prevention and Control of Infectious Diseases. The making of law on state of emergency is on the law - making program of the National Assembly.

II. Why do Emergency Powers Matter Human Rights and Rule of Law?

The tension between emergency powers and the rule of law and liberalism

A fundamental tension exists in any constitutional order between the basic premise of government constrained by law and the perceived need for extraordinary power to confront dire emergencies and crisis. This is namely the tension between emergency powers and the rule of law and liberalism. In theory, there are two views on the current debate on emergency rule: the classical view of German pre-war philosopher Carl Schmitt and the view of “anti-Schmittians”. Under Carl Schmitt’s view, liberalism and exception cannot be reconciled; emergencies cannot be foreseen and constrained by law and will therefore require the exercise of absolute power: liberalism will always have to yield to authoritarian rule, especially in case of terrorism. In contrary with Carl Schmitt’s view, “anti-Schmittians” argue that emergency powers can, and should, be integrated into the state’s legal order in order to prevent the abuse of emergency powers¹². In practice, at Europe for example, some countries, such as Switzerland, Norway, and France have adopted a conception of emergency powers as largely external to the law, while others, such as Germany and Spain, carefully regulate and circumscribe emergency powers in their constitutions and other legislation.¹³ Meanwhile, development and international organizations have tried to propose requirements and principles to keep the exercise

¹¹ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18, International IDEA, 2018. Available at: <http://aceproject.org/ero-en/emergency-powers-international-idea-2018>

¹² Anna Chakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper – No 30, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, 6.

¹³ Anna Chakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper – No 30, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, 8.

of emergency powers within the rule of law and to protect rights and freedoms. the International Commission of Jurists in its Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism in 2004 (Berlin Declaration), which stated that: These [rule of law] principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. Under the view of these organizations, the odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.¹⁴

Limitation and Derogation of Rights in Emergencies

In a state of emergency, the government may take measures that may affect fundamental rights. Concretely, a state of emergency allow the government to suspend or restrict the exercise of human rights.

Not all human rights principles enjoy the same level of protection. Instead, they can have different legal characteristics, being absolute or non-absolute in nature or having inherent limitations. Some of the most fundamental human rights are "absolute". Such rights include the prohibitions on torture, on slavery and on retroactive criminal laws. The absolute character of these rights means that it is not permitted to restrict these rights by balancing their enjoyment against the pursuit of a legitimate aim. This principle is recognized in international human rights law and national laws. Most rights, however, are not absolute in character. Governments can limit the exercise of these rights for valid reasons, including the needs of countering terrorism, as long as they respect a number of conditions. In a state of emergency, these rights are restricted or even suspended. Otherwise, "non-absolute" rights may be safeguarded during emergencies, as under article 137 of the Peruvian constitution which provides that the right to *habeas corpus* and "amparo" (a remedy through the courts for acts of authority that violate fundamental rights, which also forms the basis of Inter-American Convention on Human Rights article 25 (right to judicial protection) (IACtHR, 1987(b), paras. 38-40) may never be suspended even in times of national emergency. In Vietnam, "absolute rights" are not constitutionally recognized, and every human rights may be restricted.

Limitation of rights is a necessity to pursue a legitimate aim such as respect of the rights or reputation of others, the protection of national security, the maintenance of public order or public health or morals. Emergency powers allows the government to limit fundamental rights to protect other legitimate interests threatened by the situation. However, *derogation of rights* is used only "in time of public emergency

¹⁴ Module 7: *Counter-Terrorism and Situations of Public Emergency*. Available at: <https://www.unodc.org/e4j/terrorism/module-7/index.html>

which threatens the life of the nation” (article 4(1) ICCPR) such as armed conflict, civil and violent unrest, a terrorist emergency, or a severe natural disaster, such as a major flood or earthquake. Derogation “refers to the legally mandated authority of states,” who are otherwise bound by the obligations of treaties or constitutions, “to suspend certain civil and political liberties – in response to crises” and “can be justified solely by the concern to return to normality.”¹⁵ Significantly, “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation”¹⁶, thereby permitting derogations to be made. This applies equally to terrorist acts which need to be assessed on a case by case basis to see if the criteria are fully met before any state of emergency may be declared, essentially whether they threaten the very independence and integrity of the nation. Moreover, in determining whether a derogation is proportionate, the question to be asked is whether there are other means, less restrictive of the rights in question, which would provide a similarly effective means of responding to the exigencies of the situation (principle of proportionality). International human rights provides other strict requirements on using emergency measuring derogating human rights, such as conformity with international obligations, non-discrimination, official proclamation and international notification.

In Vietnam, the Constitution has not provide any provisions of derogation of rights. The general principle of limitation of rights is confirmed in art 14 (1, 4): human rights and citizen’s rights shall not be restricted when prescribed by law in necessary circumstances for the reasons of national defense, national security, social order and security, social morality and community well-being; the exercise of human rights and citizens’ rights cannot infringe national interests and legal and legitimate rights and interests of others. Under the Ordinance on state of emergency and other related laws, freedom of movement, right to assembly and right to hold demonstrations are restricted in emergency situation.

Controlling Emergency Powers

As mentioned above, emergency powers are characterized by extraordinary concentrated powers of the executive, so there is a high risk of human rights abuses and rule of law violations. It is therefore important that emergency powers are kept under regular review and control. The control of emergency powers may be exercised through international, regional and national oversight mechanism.

¹⁵ Emilie M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 International Organization 673 (2011), 674.

¹⁶ United Nations, *Human Rights Committee* (2001). *General Comment No. 29: Article 4: Derogations during a State of Emergency*. 31 August. CCPR/C/21/Rev.1/Add.11. para. 3.

At international and regional level, international and regional oversight bodies such as courts and human rights protection bodies exercise the control of the conformity of international and regional laws.

At national level, the control of emergency powers is exercised by the legislature and judiciary. However, the strengthening of the executive means also the detriment of judicial authority and parliamentary oversight. Consequently, it is challenging for the legislature and judiciary to play their role of control over emergency powers.

The legislature must supervise emergency executive powers to ensure that they are not abused. As the Siracusa Principles envisage, “the national constitution and laws governing states of emergency shall provide prompt and periodic independent review by the legislature of the necessity for derogation measures”. There are different ways to exercise legislative oversight of emergency powers. As mentioned above, the legislature may review, approve or confirm the executive’s initiative and declaration of a state of emergency. Most parliaments also have the power to review the state of emergency at regular intervals and suspend it as necessary. The legislature must normally assemble automatically if a state of emergency is declared. Some constitutions provide the establishment of special legislative scrutiny and oversight mechanisms that operate in emergency situations.¹⁷ In the United States, States’ statutes defining executive authority during an emergency cannot be modified by executive order.¹⁸ In Vietnam, the National Assembly Standing Committee is competent to supervise the exercise of emergency powers.

The judiciary play a key role in reviewing the constitutionality and legality of a state of emergency. The judicial system must continue to ensure the right to fair trial. It also must provide individuals with an effective means of recourse in the event that government officials violate their human rights. National courts exercise judicial review over a state of emergency in relation to: a declaration or extension of a state of emergency and/or the exercise of emergency powers. Vietnamese laws do not provide specifically the role of the judiciary in the state of emergency.

¹⁷ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18, International IDEA, 2018. Available at <http://aceproject.org/ero-en/emergency-powers-international-idea-2018>, 29.

¹⁸ *Legislative Oversight of Emergency Executive Powers*. Available at: <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>