

The Principles and Criteria for Human Rights Derogation in States of Emergency

MENGGEN HAN and XINYU XIANG

ABSTRACT

In states of emergency, some citizens' rights are restricted and derogated to safeguard the public interest and restore social order. Although human rights derogation has legitimacy and necessity, the restrictions imposed by authorities cannot be unlimited. To better safeguard human rights and avoid abuse of derogation, this paper summarizes the basic principles of rights derogation, clarifies the boundaries, conditions, and extent of rights derogation, and advocates bringing the exercise of emergency powers into the rule of law, which embodies the spirit of respecting and protecting human rights under the rule of law and promote the construction of China's emergency legal system.

INTRODUCTION

The COVID-19 pandemic, a significant public health emergency, seriously threatened people's life, health, and property safety worldwide and was a severe test for all countries. China has made tremendous strategic achievements in the fight against the COVID-19 pandemic. Nonetheless, certain local governments blindly pursue epidemic prevention results, excessively infringing on the rights of individual citizens. Numerous governance problems exposed by epidemic prevention have attracted widespread attention.

The rights of individual citizens frequently give way to the State's public interests during times of emergency like epidemics, wars, and natural disasters. Nevertheless, China's relevant legislation is currently lacking, and the operation of emergency powers has not been regulated well. The rights of citizens may be seriously threatened if the government oversteps necessary boundaries when exercising its powers in an emergency. Therefore, clarifying the principles and criteria for rights derogation, safeguarding the rights of citizens in an emergency, and striking a balance between individuals and the State is an issue that is urgently needed to be studied by constitutional scholars.

Mengen Han, Xinyu Xiang
School of Public Affairs, Southwest Jiaotong University, Chengdu 610031, China

DEFINITION OF RELEVANT CONCEPTS AND THEORETICAL ANALYSIS

Studying the principles and criteria for human rights derogation in states of emergency begins with defining relevant concepts and analyzing relevant theories. Only by clarifying the connotation and extension of concepts and sorting out the ambiguities of theoretical doctrine can the overall research have a solid foundation.

The Concept of a State of Emergency

The term emergency has two meanings in the language system of Chinese legal circles. First, it refers to an actual state, which describes an objective and real emergency, such as a financial crisis or a severe pandemic. The second refers to a legal state, a particular state in the legal sense caused by an actual emergency state. From the perspective of the legal state, an emergency refers to a unique legal state declared by the State in the face of special events such as war, turmoil, economic crisis, severe natural disasters, and other special events that can endanger the security of the whole country or some regions. In such a state, the implementation of specific articles of the Constitution will be suspended, the legal order will be adjusted, and the rights of citizens will be restricted and damaged to a certain extent.

Nevertheless, the provisions of China's current legal system regarding states of emergency are relatively rough. Even in the face of a national pandemic in 2020, China legally has not declared a state of emergency. So, understanding the states of emergency from the dimension of the legal state is inevitably derailed from current practice in China. Therefore, this paper uses a *de facto* state of emergency to define it, that is, a particular situation that can threaten national security or regional stability.

The Concept of Human Rights Derogation

Human rights derogation is a temporary restriction on the fundamental rights of citizens stipulated in the Constitution when the State faces a state of emergency. Derogation differs from restrictions in general legal practice, such as fixed-term imprisonment and administrative fines. Although the consequence of the application of both is that citizens' rights are reduced accordingly, the degree of reduction is different. Due to the crisis's urgency and severe harm, the derogation degree is often greater, and individual rights have to make more significant concessions than usual. In essence, derogation is a particular restriction that complements the general limitations.

Human rights derogation is indispensable in safeguarding social stability and the interests of all citizens and improving the effectiveness of governance. Thus, derogation is not only a measure most invoked in domestic law but also written in many conventions, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights.

Justification of Human Rights Derogation in States of Emergency

In general, public power's violation of individual rights is illegal and unacceptable. Therefore, it is necessary to justify human rights derogation. The legitimacy of derogation in emergencies should be discussed from the purpose, theoretical and institutional basis.

Start by discussing the purpose of derogation. The logical starting point of the derogation is the balance and trade-off between social and individual interests, which is the lesser of two evils. In other words, its purpose is to protect as many outstanding interests as possible. Even if there is a conflict between social and personal interests, the two still coincide to a certain extent. The purpose of derogation in an emergency is to sacrifice individual interests temporarily to restore the standard order of social production and life, so its starting point and foothold are still the protection of human rights. As Beccaria said, people surrender some of their rights to state organs to exercise the remaining rights better.

Second, the theoretical basis for human rights derogation. Its theoretical origin is the same as the right of citizens to self-defense. Citizens naturally enjoy the right to self-defense when they suffer unlawful infringement. Accordingly, as an extraordinary collective, the State has its own will and ability to act, so it naturally enjoys the right to self-defense in the face of dangers that seriously threaten its survival and development. Self-defense is the primary rule of survival, so the State will also break through general restrictions and expand its power in self-defense to achieve the purpose of continued existence.

Third, the institutional basis for human rights derogation. In general, the conditions for derogation, the subjects for implementation, and the initiation procedures should be clarified in the law to provide the State with norms of conduct when facing emergencies. For example, article 56, paragraph 1, of the Constitution of the Russian Federation stipulates: "In conditions of a state of emergency in order to ensure the safety of citizens and the protection of the constitutional system and in accordance with the federal constitutional law certain limitations may be placed on human rights and freedoms with the establishment of their framework and time period." The Emergency Measures Act of the Russian Federation specifies the beginning and end of states of emergency, the measures to derogate, and the implementation subjects, which provides an institutional guarantee against derogation abuse.

PRINCIPLES OF HUMAN RIGHTS DEROGATION IN STATES OF EMERGENCY

Combined with relevant international conventions and China's practice, it is concluded that human rights derogations should follow the corresponding basic principles.

The Principle of Rule of Law

The principle of rule of law refers that the existence and exercise of emergency power should be governed by the law, which requires that administrative power shall be exercised strictly following the law, and administrative activities shall be carried out under the

explicit authorization given by law. Furthermore, The introduction of the initiation and lifting of a state of emergency, the conditions and procedures for the exercise of emergency powers, the limits to human rights derogation, and various supervision and relief measures into the track of legalization could ensure that citizens' rights are not illegally violated and also promote the effective exercise of emergency powers.

Nonetheless, China's current emergency legal system is still inadequate. At present, there is no legal system for rights derogations in China. Only laws such as the Emergency Response Law, the Law on the Prevention and Control of Infectious Diseases, and local emergency legislation serve as the country's only standards for emergencies. Besides, slip laws are not perfect and lack connection and complementarity between them. This problem leads to situations where civil rights may not be effectively protected. To overcome the constraints, it is indeed necessary for China to strengthen the construction of relevant legal systems, improve the construction of the rule of law in China's emergency state, and provide clear and practical legal guidance for the derogation.

The Principle of Proportionality

The principle of proportionality means that the administrative organ should pay attention to both realization of the administrative objective and the protection of the rights of the administrative counterpart. Specifically, the principle of proportionality includes three sub-principles.

First, the principle of appropriateness means that administrative acts can only be carried out if necessary to achieve the corresponding administrative objectives. So, in states of emergency, human rights derogation shall be essential for preserving social order and protecting public interests. As Chinese president Xi repeatedly emphasized, "We made it very clear that people's lives and physical well-being should come first in the face of a major epidemic. People and their lives are of the utmost importance, and we shall spare no effort to ensure their safety and physical well-being." Therefore, administrative organs must remain faithful to the original aspiration and adopt rational administrative actions.

Second, the principle of necessity, also known as the principle of most minor damage, means that administrative organs must select the action from alternatives that will cause minor damage to the rights of the administrative counterparts. According to this principle, the emergency measures taken by a State shall strictly align with the situation's actual needs and the degree of harm caused by the emergency. Article 11 of the Emergency Response Law also explicitly stipulates that: "The measures taken by the relevant people's government and its departments in response to an emergency shall be commensurate with the nature, seriousness and extent of the social harm that may be caused by the emergency; and where there are more than one options available for choice, the one that is advantageous to protection of the rights and interests of citizens, legal persons and other organizations to the maximum extent shall be chosen."

Third, the principle of balance refers that the implementation of an administrative act must first be weighed to ensure that the right is restricted or damaged to a lesser extent than the interest protected by the act. It is highlighted that the content and intensity of measures taken by authorities must be compatible with the public's interests. Additionally,

the principle of balance also involves issues of value judgment and balancing of legal interests, which makes this principle more complicated.

The Principle of Non-Discrimination

Equality of all persons before the law is a fundamental principle in China's legal system. Article 2, paragraph 1, of the International Covenant on Civil and Political Rights, provides that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Moreover, Article 26 states, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The principle of non-discrimination requires both formal equalities, which means the rights of different subjects should be equally guaranteed and remedied and substantive equality, which means the authorities are supposed to consider vulnerable groups and formulate corresponding corrective policies to protect the legitimate rights and interests of all citizens.

The Principle of Right Remedy

No remedy means no right. Rights may be violated even if rules are established because of their vulnerability in emergencies. Therefore, a prompt and effective rights remedy is supposed to be provided.

Both judicial and administrative remedies are included in the remedies mentioned above. Emergency measures, such as temporary expropriation, requisition, and other similar actions, are frequently implemented when a State is facing an emergency. Suppose the derogation adopted by authorities causes damage to the citizen's legitimate rights and interests. In that case, the citizen can request compensation and indemnification, ask for administrative review, or even file a lawsuit to stop the public authority's unfair derogation.

The fundamental guidelines for compensation and indemnification for damage caused by the expropriation and requisition of private property in states of emergency are outlined in several laws of China. The Constitution of China stipulates that: "The state may, in order to meet the demands of the public interest and in accordance with the provisions of law, expropriate or requisition citizens' private property and furnish compensation." Article 12 of the Emergency Response Law stipulates that: "To respond to an emergency, the relevant people's government and its departments may expropriate the property of units and individuals. After the use of the expropriated property or completion of the handling of the emergency, the property shall be returned to the owner in a timely manner. Where property is expropriated or the expropriated property is damaged or lost, compensation shall be made therefor."

In addition to the abovementioned basic principles, the authorities shall also pay attention to adapting to particular material and cultural conditions of the society in the case of derogation and scientifically and efficiently promoting emergency management and

economic development. The rights derogation shall not violate norms of international jus cogens and shall not cause damage to the vital interests of any other country.

CRITERIA FOR HUMAN RIGHTS DEROGATION

Human rights derogation is reasonable and justified. Nonetheless, this does not mean that derogations are boundless and unlimited. By clarifying the conditions for derogation, measuring the degree of derogation, and delineating the boundaries of derogation, the exercise of the State's emergency powers could be better regulated.

Conditions for Human Rights Derogation

The conditions for human rights derogation refer to the conditions under which derogation can be initiated. Defining the conditions for derogation is to prevent excessive expansion of public power and excessive reduction of private rights, which is of great significance for protecting fundamental human rights and improving modern governance. The conditions for derogation should be understood from the following three dimensions.

The period. The starting point for derogations is the declaration of an emergency state by authorities. Article 4 of the International Covenant on Civil and Political Rights provides that: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant." The covenant limits the application of derogation, which means States may not apply derogation measures in the absence of an emergency. Moreover, after the emergency has disappeared, the basis for human rights derogation is eliminated, so citizens' rights should return to normal, and the State should cease derogation.

The formal basis. As mentioned above, human rights derogation should follow the rule of law, meaning derogation must be based on legal provisions. It is a fundamental principle of the Constitution that the highest authority can only restrict the fundamental rights of citizens by making laws. Therefore, in China, only the National People's Congress (NPC) can enact laws to provide a legal basis for human rights derogation; documents formulated by any other authorities, such as the Standing Committee of the National People's Congress, the State Council, local people's congresses and governments at all levels, must not be the legal basis for derogation.

The implementation subjects. According to Articles 67, 80, and 89 of the Constitution of China, the Standing Committee of the National People's Congress and the State Council have the right to decide to enter a state of emergency, and the President of the State has the right to declare a state of emergency. However, the subjects of public power that specifically implement derogation remain unclear. Therefore, China needs to improve legislation further to clarify the rights and obligations of the implementation subjects.

The Extent of Human Rights Derogation

The extent of human rights derogation is the question of the degree to which the State deprives citizens of their rights during an emergency. Specifically, it means that after an emergency, all citizens should be restricted or citizens of specific areas should be restricted; which rights of citizens should and should not be restricted; to what extent an individual right should be restricted. Take the extent of restriction of personal freedom during the epidemic for example, whether the derogation should be a citywide lockdown or a lockdown for a particular community.

The extent of human rights derogation should be determined following the magnitude of the crisis. In other words, if the crisis is perilous, the public power used to eliminate the crisis should be more effective, and therefore the degree of derogation should be greater; if the severity of the crisis is low, the degree of derogation should be reduced accordingly. Nevertheless, determining the degree of crisis requires a specific analysis, so there is no universally applicable legal norm for limiting the derogation extent. There is a need to analyze the necessity of specific derogation measures according to the actual situation, considering many factors, such as the characteristics and the degree of emergency harm.

The control of derogation degree reflects the essential requirements of the principle of proportionality and embodies the connotation of the spirit of the rule of law. In essence, the grasp of the extent to derogation is an essential means of restricting public power and protecting individual rights. If the human rights derogation does not comply with the degree of constraint and is not limited by the elimination of emergency, then the legitimacy of the derogation will be lost, and the public interest, public safety, and basic human rights will be difficult to guarantee.

Boundaries of Human Rights Derogation

The boundaries of human rights derogation guarantee the rationality of its existence. Many national Constitutions, laws, and international conventions stipulate that even in times of emergency, some fundamental human rights may not be arbitrarily derogated and deprived. The understanding of the boundary of human rights derogation has two dimensions, one is which rights cannot be derogated, and the other is the extent to which the rights that can be derogated cannot be derogated.

Start by discussing which rights cannot be derogated. Individual rights can be broadly divided into fundamental, economic, and political. Among them, fundamental rights, including the right to life, equality, freedom of belief, and others, are the basis for human survival and the foundation of political and economic rights, which demonstrates that they should not be restricted under any circumstances. Although political and economic rights are necessary for human development, they pay more attention to the construction of high-level spiritual and material civilizations than fundamental rights. The two types of rights are based on the existence of life and freedom to act and think, and citizens can make appropriate concessions in states of emergency. As to what constitutes a fundamental human right, the provisions of several international conventions can be used as a reference.

Second, the extent to which the rights that can be derogated cannot be derogated. Generally, derogations should not result in the complete loss of individual rights but should only be unattainable or incompletely realized during an emergency. For example, when facing an emergency, a government's decision to expropriate the cultivated land of citizen A is a rights derogation measure. It is worth noting that when the government decides to expropriate, it should also decide to compensate the citizen accordingly. In this case, although citizen A loses his land ownership, his property rights are not entirely lost but are only converted from the form of land to the form of money.

CONCLUSION

A state of emergency serves as an exceptional period in which necessary derogation can be imposed on human rights. Regulating the operation of emergency power is a significant challenge for the current national governance system and governance capacity. In the context of comprehensively promoting the rule of law, the State's restrictions on human rights are not boundless and arbitrary. Therefore, it seems a good idea to reflect on the current practical dilemma, research the legal system's shortcomings, and explore the boundaries and criteria for human rights derogation in states of emergency. These steps will help provide legal protection for citizens' rights in emergencies, embody the spiritual connotation of human rights protection, and build the emergency rule of law under abnormal circumstances.

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