

HUMAN RIGHTS PROTECTION IN A STATE OF EMERGENCY IN THE LAWS OF SOME COUNTRIES AND OF VIETNAM

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Abstract: *The concept of “state of emergency”, “state of exception”, “state of alarm” or “state of siege”- collectively known as special situations, has long been recognized in the law of many countries, regardless of their political systems.¹ The paper presents the analysis of legal regulations on a state of emergency, especially the provisions on human rights protection in this context of some countries and of Vietnam. Based on that, the authors draw an initial comparison of the legal framework for this issue of Vietnam with other countries; then, propose some recommendations for Vietnam in perfecting the law on a state of emergency towards both protecting human rights and facilitating state agencies in addressing issues emerging in a state of emergency.*

Keywords: *State of emergency, human rights, restriction on human rights, derogation of human rights implementation.*

1. Human rights protection in a state of emergency in the law of the United States of America

The term “*state of emergency*” does not appear in the text of the U.S Constitution; nevertheless, the Constitution grants special powers to the President, who is the head of the executive branch, when the country is faced with crises. At the beginning of the Civil War between northern

states and southern states, President Abraham Lincoln issued an executive order suspending all public freedoms due to the state of war. Addressing the Congress, he attributed his action to the aim of upholding the Constitution and protecting the country in a state of emergency.² Accordingly, the concept of *emergency powers* was framed in the United States. This concept can be interpreted in two ways: (i) special

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powers are granted to the government/ the executive agency to suspend ordinary legislative procedures or judicial process; (ii) powers are extended to the U.S. President in accordance with Section 2 and Section 3, Article 2 of the Constitution because of the urgency of the situation, to deal with the ongoing problem.³

According to the law of the United States, the exercise of emergency powers then may be or not be reviewed by the Supreme Court. In the case of *Korematsu v. United States* (1944), the Supreme Court held that President Franklin D. Roosevelt's decision to intern American citizens of Japanese descent during the WWII compatible with the state of emergency at that time.⁴ However, the *Civil Liberties Act*, passed by the U.S Congress in 1988, apologized to Japanese Americans and their families who had been summarily relocated to internment camps under the President's decision during WWII, because the decision was seen as discriminatory against people of Japanese descent, and authorized a payment of \$20,000 to each victim.⁵

Contrary to the above incident, in the case of *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court rejected President Harry S. Truman's claim to be granted emergency powers to requisition private steel mills to ensure wartime output.⁶ Thus, the President could only implement other

measures to meet the demand for steel in the state of emergency because the use of power to requisition private steel mills was prevented by the judicial branch. Such cross-supervision helps to limit the President's potential abuse of power in a state of emergency, forcing him to use this power only when absolutely necessary.⁷

However, historical experiences and current situations in the US show that Congress's authority to declare war does not preclude the President from placing the country at a war that the country should have not been involved in. The authority to deploy troops and intervene in conflicts gives the U.S President the advantage of "*the one who comes first*". By deploying troops into war zones, the President can put Congress in a situation where they have no choice but to support him. This authority also gives the President great freedom to act in dealing with social issues. For instance, in 1861, within six months after the Confederate States Army started the war, President Abraham Lincoln suspended the implementation of Habeas Corpus Act to facilitate the arrest of citizens suspected of being spies or antiwar protesters without consulting Congress before suspending the implementation. The President also ordered the Navy to block southern seaports, increased service time in the armed forces to three years, expanded the Army and Navy, increased the purchase of war materials,

all without permission and authorization to spend by Congress. The President then justified his actions on the grounds of executive prerogatives as Commander in Chief of all the armed forces. He asserted that he only exercised the power conferred upon by the Constitution and the law to protect the government.⁸ He also added: “*These measures, whether strictly legal or not, were ventured upon.....trusting then, as now, that the Congress would readily rectify them.*”⁹ During the Korean War (1950-1953) and the Vietnam War that took place a decade later, U.S Presidents also made crucial domestic and foreign decisions without any declaration of war. This makes Congress’s authority to declare war, in many respects, merely a formality. Therefore, in 1973, the U.S Congress tried to reverse the situation by passing the *War Powers Act*, despite President Nixon’s veto. The Act requires the President to notify Congress within 48 hours of sending troops to participate in military operations abroad. In addition, this action must end after 60 days unless an extension is accepted by Congress. But neither the constitutionality of the Act nor its effect in restricting the U.S President’s military command has never been tested.

From a human rights perspective, the Constitution and laws of the U.S have almost no separate regulations on protecting human rights in a state of emergency. Nonetheless, human rights

are still quite effectively protected in this context through the Bill of Rights (the system of the first ten amendments to the Constitution on human rights). The ten amendments provide a very comprehensive range of protection of basic civic, political, economic, social and cultural human rights of Americans. Besides, the U.S. Constitution, which was written with strict adherence to the principles of the separation of powers and checks and balances among the legislative, executive and judicial branches, is also the basis for human rights protection in all situations, even in a state of emergency. Ultimately, the decentralized constitutional review model, which gives the authority to courts of all levels to strike down a bill of Congress or an executive order of the executive branch is also an effective tool for human rights protection in a state of emergency.

2. Human rights protection in a state of emergency in the law of the UK and the French Republic

In England in the late 19th century, in the midst of riots, the Government issued a special act called the *Peace Preservation Act*. The Act, which was later voted into law by the British Parliament in 1920 and renamed *Emergency Powers Act*¹⁰, is still in effect. This Act gives the Sovereign power to declare a state of emergency in the event of a mass strike or riots that paralyze normal social activities

or disrupt security. Besides, this Act also authorizes the Government to take all necessary measures to restore public order.¹¹

In France, according to the 1958 Constitution of the French Republic, the President, after formally consulting the Prime Minister, the President of the National Assembly, the President of the Senate, and the President of the Constitutional Council, can take measures required by circumstances where “*the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted*”. The President is under an obligation to declare a state of emergency and inform the nation of measures to be taken by public authorities to cope with the state of emergency.¹²

Similar to the United States, the legal systems of the UK and the French Republic have almost no separate regulation on human rights protection in a state of emergency. Nonetheless, human rights are still protected in this context through a number of effective legal tools.

Specifically, regarding regulations, the UK has the *Human Rights Act* issued in 1998 with very comprehensive content. Besides, the *Magna Carta Libertatum*,

which was issued in 1215, still remains in effect and is an institutional tool to protect rights in all circumstances, even in a state of emergency. Whereas, in France, the Constitution of 1958 affirms and supplements the well-known principles and human rights, civil and political rights that were already recognized in the Declaration of the Rights of the Man and of the Citizen of 1789, together with the provisions on economic, social and cultural rights previously recorded in the 1946 Constitution. All constitute a fairly comprehensive constitutional framework, which serves as the basis to protect human rights and citizens' rights in all circumstances, even in a state of emergency.

Regarding institutions, the *common law* legal system of England allows a more dynamic role of courts in protection of human rights and citizens' rights, especially in a state of emergency. Meanwhile, the law of France is a civil law legal system, so courts have a less dynamic role than those in the England, but in return France has a Constitutional Council with an effective model of constitutional review, so it can prevent abuse of power in a state of emergency which damages human rights. Besides, both England and France are signatories to the European Convention on Human Rights, so the citizens of these countries have another effective institution, that is the European Court of Human Rights, to file complaints when human

rights are violated in all circumstances, even in a state of emergency. In the spirit of the European Convention on Human Rights and the regulations of the European Court of Human Rights, citizens of member states, after using up all the domestic appeal mechanisms and are not satisfied with the results, can appeal to the European Court of Human Rights.

3. Human rights protection in a state of emergency in the law of the People's Republic of China

Although China's 1982 Constitution does not directly regulate states of emergency, there are provisions on curfew under which the Standing Committee of the National People's Congress (the National People's Congress of the People's Republic of China) has the authority to decide on the imposition of curfew throughout the country or in particular provinces, autonomous regions, or municipalities directly under the Central Government (Article 67). The President of China has the authority to proclaim curfew (Article 80). The State Council (Government) of China has the power to decide on the imposition of curfew in parts of provinces, autonomous regions, or municipalities directly under the Central Government (Article 89).

The 2004 amended Constitution of China extended provisions on curfew to "*state of emergency*". Accordingly, the Standing Committee of the National

People's Congress has the authority to decide on entering *the state of emergency* throughout the country or in particular provinces, autonomous regions, or municipalities directly under the Central Government (Article 67). The President, based on the decision of the Standing Committee of the National People's Congress, proclaims entering *the state of emergency* (Article 80). The State Council (Government) in accordance with the provisions of law, decides on entering the state of emergency in parts of provinces, autonomous regions, or municipalities directly under the Central Government (Article 89).

To specify the aforementioned provisions of the Constitution, there are also provisions on a state of emergency scattered in different legal documents of China, such as: Martial Law (1996), National Defense Law (2009), Law on Prevention and Treatment and Infectious Diseases (2013), Law on Protecting Against and Mitigating Earthquake Disasters (2008), Emergency Response Law (2007), etc.

Although the system of provisions in the Constitution and specialized legal documents has established a fairly comprehensive legal framework for states of emergency in China; there are still some provisions, including the definition of "*state of emergency*" and derogation of human rights and citizens' rights in a state of emergency, are not clearly specified, and explained,

therefore are not understood and applied consistently. Besides, regulations on a state of emergency in specialized legal documents of China have contradictions. These shortcomings have adversely affected the protection of human rights and citizens' rights in a state of emergency in China.

In fact, in the current law of China, the protection of human rights and citizens' rights in a state of emergency is only stated in the form of general regulations, without specific requirements and measures that are compatible with corresponding principles (between the adopted measure and the ongoing situation), or the principle of non-discrimination. For instance: regarding the responsibility to protect human rights and citizens' rights in a state of emergency, curfew stipulates generally as follows: *"The people's government of the area under martial law shall, in conformity with this Law, adopt measures necessary to bringing public order to normal as soon as possible and ensuring safety of people's lives and property and supply of their daily necessities"*(Article 5). Meanwhile, rights restriction measures are fully regulated without any explanation about the appropriateness of applying these measures, including: to ban or restrict gatherings, procession, demonstration, street speeches and other mass activities; to ban strikes of workers, shop assistants and students; to impose

press embargo; to enforce control over communications, postal services and telegram; to enforce control over entry into and exit from the country; to ban any activities against curfew. Besides, the prohibition on applying emergency measures to some non-derogable human rights such as the right to live or the right not to be subjected to torture is not specified.¹³

4. Human rights protection in a state of emergency in the Law of Japan¹⁴

Under the imperial era (1899-1947), the Japanese Constitution clearly regulated that the right to declare a state of emergency was granted to the supreme leader – the Emperor. Article 8 of the Japanese Constitution of this period stipulated that: "The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial ordinances in the place of law. Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future." Based on this Ordinance, the Government may enact martial law and temporary response measures.¹⁵

Article 14 of the Constitution of this period regulated that the "great power" to impose the martial law

and curfew was also granted to the Emperor. In particular, Article 31 on the “great power” of the Emperor in unusual circumstances and situations clearly stipulated “the rights and duties of subjects shall not affect the exercise of the powers appertaining to the Emperor, in times of war or in cases of a national emergency”¹⁶. Besides, the Japanese Constitution of this period also contained other provisions on financial management in a state of emergency (Article 70)¹⁷.

There were a total of 108 Ordinances issued under Article 8 and Article 70, but all have now been abolished, invalid, or included in other laws after Japan adopted the new Constitution in 1946 (took effect since 1947). Under the new Constitution, most of the political powers of the Emperor, including those stipulated in Article 8 and Article 70 of the previous Constitution, were removed.

The current 1946 Constitution of Japan contains no provision on a state of emergency. That has caused controversy over the urgency of this regulation. In the draft amendment to the 2005 Constitution submitted by the *Liberal Democratic Party of Japan* (LDP) to the National Diet, there was also no provision on emergency rights. It was not until 2012 when the Tohoku earthquake and tsunami happened that the official draft amendment to the Constitution presented by the *Liberal*

Democratic Party of Japan mentioned “the establishment a legal mechanism to cope with a state of emergency on the basis of specific provisions of the Constitution”¹⁸. The 2012 draft proposed two new articles to the 1946 Constitution: Article 98 - Declaration of a state of emergency and Article 99 - Consequences of the declaration of a state of emergency.

These two articles were expected to be included in Chapter 9 of the draft amendment to the Constitution, and have become a hotly debated issue in Japan until now. The draft Article 98 on declaration of a state of emergency stipulated that the authority to declare a state of emergency was granted to the head of the Cabinet, i.e. the Prime Minister, and the declaration would be made after it was approved in the meeting of the Cabinet, and in accordance with current legal documents (Article 98.1)¹⁹. The draft Article 99 stipulated that in a state of emergency, the Cabinet had the authority to issue decrees having the force of law, and the Prime Minister had the authority to issue financial rescue packages and necessary fiscal expenditures, as well as having the power to order autonomous regions to obey orders (Article 99.1). All these policies and orders must then be approved by the National Diet. The draft also stipulated that the House of Representatives would not be dissolved

during the time of declared state of emergency (Article 99.2, 99.4).

Even though states of emergency are not regulated in the Constitution, at present, Japan has a number of documents to deal with states of emergency, including: Japan Self-defense Forces Act, Police Law, Disaster Countermeasures Basic Act.

Recently, in response to the Covid-19 pandemic, Japan has enacted a new seven-chapter law regulating prevention measures as well as treatment of patients when a new strain of seasonal flu virus spreads quickly across the country and is potentially deadly, thereby upending people's lives as well as causing heavy damage to the economy. The law allows the Government to adopt appropriate policies, including declaring of a state of emergency in a region or nationwide.

It can be seen that the aforementioned regulations fully cover the possibilities (war, violence, natural disasters, epidemics, etc) and also grant enough power to the Prime Minister to cope with the situations. Therefore, in Japan there is a view that there is no need to amend the Constitution to supplement provisions on states of emergency. However, there is another viewpoint that those legal documents are not really "sufficient" and "solid", especially concerning the protection of human rights in a state of emergency. Specifically, at present, under the

aforementioned legal documents, the Prime Minister in fact has the authority to restrict or derogate the exercise of human rights without depending on the Constitution, i.e, the power of the Prime Minister is not limited and checked.

To deal with this issue, the aforementioned draft Article 99 to the Constitution regulated human rights protection in a state of emergency as follows: "When a state of emergency is declared, under current law, all people must comply with directives issued by the state or other public agencies to protect their life, body and property. In these cases, Article 14 (all of the people are equal under the law), Article 18 (no person shall be held in bondage of any kind), Article 19 (freedom of thought and conscience shall not be violated), Article 21 (freedom of assembly and association, as well as speech, press and all other forms of expression are guaranteed) of the Constitution as well as other regulations on basic human rights are still respected to the maximum extent"²⁰. However, this has raised the issue of which individual or agency and which method to be used to monitor the Government's compliance with those Constitutional provisions. Besides, as regulated in this article, compliance is only up to the "to the maximum extent", meaning that there are certain restrictions in the protection of human rights, so how the "maximum extent" is specified?

5. Protection of human rights in a state of emergency in the law of Vietnam²¹

In Vietnam, the 2013 Constitution is the first Constitution of our country that regulating states of emergency as well as the measure to be applied in this situation, that is suspension/derogation of rights. Accordingly, human rights and citizens' rights can only be restricted in necessary cases for reasons of national defense, national security, social order, social safety, social ethics, public health in accordance with the provisions of the law.²² The recognition of this principle is compatible with international human rights law and global trends, in order to perform the function of the state in protecting the common rights and interests of the community, the country, the nation in a balanced relationship with personal interests in the context of an emergency, threatening security and national independence.

Under the 2013 Constitution, Vietnam also has a number of legal documents regulating a state of emergency, especially the Ordinance on the State of Emergency of March 23, 2000. According to this Ordinance "*when the whole country or many localities suffer a major natural or human-made disaster, or a spreading dangerous disease, severely threatening the property of the country and organizations, the life, health and property of the people or a situation seriously threatening national*

security and social order and safety; the Standing Committee of the National Assembly or the President shall declare a state of emergency to implement special measures to promptly prevent, limit and overcome consequences and quickly stabilize the situation"²³. Thus, emergency situations defined under the Ordinance are major natural or man-made disasters or spreading dangerous diseases, which severely threaten the property of the country and organizations, the life, health and property of the public or national security and social order and safety. An emergency can occur at local or national level.

In addition to the Ordinance on the State of Emergency, the Law on Prevention and Control of Infectious Diseases 2007 also contains a number of relevant provisions, for example the provisions of Clause, Article 31 on isolating people with infectious diseases to prevent epidemics spreading in the community.

In Vietnam, the order of deciding and declaring a state of emergency is divided by phases: the decision phase falls under the jurisdiction of the National Assembly or the Standing Committee of the National Assembly, while the declaration phrase falls under the jurisdiction of the Head of State – the President. Specifically, according to the 2013 Constitution, the National Assembly has the authority to decide

issues of war and peace; regulate states of emergency and other special measures to ensure national defense and security (Article 70); the Standing Committee of the National Assembly has the authority to decide on general or partial mobilization; to declare or rescind a state of emergency nationwide or in each locality (Clause 10, Article 74); The President has the authority to declare or retract the decision on the state of war on the basis of resolutions of the National Assembly or of the Standing Committee of the National Assembly; to issue orders on general mobilization or partial mobilization, to declare or rescind a state of emergency on the basis of resolutions of the National Assembly or of the Standing Committee of the National Assembly; in the event that the Standing Committee of the National Assembly is unable to meet, to declare or rescind a state of emergency nationwide or in each locality (Clause 5, Article 88). Specifically, Article 2 of the Ordinance on the State of Emergency states that, at the request of the Prime Minister, the Standing Committee of the National Assembly issues a resolution on a state of emergency, in case the Standing Committee of the National Assembly is unable to meet, at the request of the Prime Minister, the President shall issue an order to declare a state of emergency. According to the principle whoever declares a state of emergency, that subject has the authority

to rescind, Article 16 of this Ordinance states that *“At the request of the Prime Minister, the Standing Committee of the National Assembly issues a resolution, or the President orders the rescind of a state of emergency, when a disaster has been prevented, limited or overcome, an epidemic has been controlled or eradicated, the state of national security and social order and safety has been stabilized.”*

Reviewing the provisions of the 2013 Constitution and the aforementioned legal documents, some gaps in the legal framework for protection of human rights and citizens' rights in a state of emergency can be identified as follows:

Firstly, the provisions of Clause 2, Article 14 of the 2013 Constitution can lead to the understanding that all human rights and citizens' rights can be restricted in a state of emergency; whereas in the spirit of international human rights law embodied in conventions to which Vietnam is a signatory, there are human rights that are considered absolute and cannot be suspended under all circumstances.

Secondly, provisions of Clause 2, Article 14 of the 2013 Constitution have not shown the correspondence between the adopted measures and the severity of the actual situation. Specifically, under international human rights law, the application of this principle is subject to a specific, recognized process

of law, and takes into consideration the following factors: (i) whether the suspension/derogation of rights reduce the severity of the issue in reality? (ii) are there any less severe measures? If so, have they been tested?; (iii) are those restrictions overriding or is there reasonable flexibility to handle specific cases differently? (iv) does the suspension/derogation of rights take into account the rights and interests of those affected?; (v) are there any measures to prevent errors and abuse of power?; (vi) is the suspension/derogation of rights contrary to the nature of the right, or in other words, does it undermine the core nature of the right related to the matter?; (vii) are the suspended/derogated rights compatible with a legal/legitimate objective/purpose?; (viii) is that issue of reasonable importance to justify the restriction of rights in a democratic society?²⁴

Thirdly, regulations on the authority to decide on a state of emergency are not really reasonable. According to the Ordinance on State of Emergency, there are two authorized subjects in this matter, which are the Standing Committee of the National Assembly and the President (Article 74). Provisions on the duties and powers of the Standing Committee of the National Assembly in Article 74 show that in this matter, the Standing Committee of the National Assembly is the more important subject. The Head of State has the power only in case which

the Standing Committee of the National Assembly is unable to meet. Meanwhile, the Standing Committee of the National Assembly is only an agency (even though it is a permanent body) of the National Assembly, not the Head of State. Moreover, this Committee operates under a legislative mechanism (conference, collective discussion, and majority decision), making it difficult to meet the need for promptness and timeliness in the application of emergency measures compared with the President.

Meanwhile, the exercise of rights in a state of emergency of the President, the Government, the Prime Minister and the Standing Committee of the National Assembly is not accompanied by an appropriate control mechanism. Under the current laws, the National Assembly has the authority to rescind documents of the President, the Government, the Prime Minister and the Standing Committee of the National Assembly which are contrary to the Constitution, laws and resolutions of the National Assembly; the Standing Committee of the National Assembly has the power to suspend the implementation of documents of the Government, the Prime Minister which are contrary to the Constitution, laws and resolutions of the National Assembly and submit to the National Assembly for decision on the annulment of such documents at the nearest meeting; to rescind documents of the Government, the Prime Minister which are contrary

to ordinances and resolutions of the Standing Committee of the National Assembly (Clause 4, Article 74 of the 2013 Constitution). However, these are the post-monitoring mechanisms (post-check), so it is difficult to meet the requirements to prevent the abuse of powers and violation of human rights in a state of emergency. As regards judicial oversight, the review of decisions on states of emergency of the executive branch is currently only possible by administrative courts and this is also post-check in nature.

Conclusion

After studying legal regulations on states of emergency and the protection of human rights and citizens' rights in a state of emergency of some countries and Vietnam, some conclusions can be drawn as follows:

Firstly, in a state of emergency, the executive branch of the state is often given priority to act over the other branches of power, which is reasonable as it helps to quickly neutralize the dangers that threaten the existence of the nation. However, it also poses great risks to the protection of human rights stemming from the abuse of power of the executive branch. Therefore, regarding the perfection of the law on a state of emergency, it is imperative to focus on establishing and strengthening a mechanism to monitor and control the power of the executive branch.

Secondly, in order to prevent and block the abuse of power of the executive branch in a state of emergency, it is necessary to establish clear constitutional rules and statutory rules regarding the authority, condition, content, scope, etc of the declaration and enforcement of a state of emergency. In particular, it is important to clearly define the principles that derogate human rights in a state of emergency, together with the rights to be derogated, non-derogable, and how to exercise the derogation.

Thirdly, there is a need to establish mechanisms (institutional and constitutional) to prevent and handle the abuse of power that violates human rights in a state of emergency. In this regard, the constitutional mechanism plays an essential role in handling violations that have occurred. Meanwhile, the mechanism of decentralization and mutual control among the executive, legislative and judiciary branches is meant to prevent actions that can happen in reality. All of these mechanisms needed to be used in order to improve the effectiveness of protecting human rights in a state of emergency.

Fourthly, it is important to strengthen democratic institutional and constitutional mechanism in the society (elected bodies, social organizations, non-governmental organizations, press agencies, civic forums, etc) to assist the State in exercising powers, and monitor power abuse in a state of emergency.

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