

# Analysis of restrictions on civil rights in a state of emergency - Based on the coronavirus pandemic

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**Abstract:** *Since entering the 21st century, non-traditional crises have occurred frequently, such as: in 2008, an 8.0-magnitude earthquake occurred in Sichuan, China; in 2011, an earthquake measuring 8.9 on the Richter scale occurred in Japan; in terms of biological viruses, the emergence of SARS, Ebola, Coronavirus pandemic, etc., has tested people's ability to deal with major crises time and again. How to face this crisis has become an important agenda for national governance on a global scale. This leads to the discussion of the proposition of "state of emergency".*

**Keywords:** *State of emergency; Fundamental rights of citizens; Constitutionality*

## 1. Introduction

In emergency situations, restrictions are placed on the fundamental rights of citizens in order to protect the public interest from infringement. What are the boundaries of civil rights control as to whether restrictions are lawful and what are the boundaries of civil rights control? While restricting the rights of citizens, we should pay attention to those issues and a series of other issues that deserve our exploration and study. With the help of the outbreak of the Coronavirus pandemic, a series of problems have been shown, which proves some problems in China's emergency laws and deserves our further study.

## 2. The conflict between state power and citizens' rights in a state of emergency

### 2.1. Definition of citizens' fundamental rights

The basic rights of citizens are the legal rights of all citizens, and such rights are protected by the Constitution and laws. The scope of citizens' basic rights often covers many aspects, including political, economic, cultural and so on. It is usually specified in the Constitution. This protection of citizens' rights reflects the breadth and equality of citizens' rights. Constitutional scholar Zhou Yezhong believes that it is the biological qualification or possibility of whether a certain act can be carried out according to the constitution, which is related to the indispensable interests, demands or freedoms of citizens.[1] The definition of fundamental rights should be laid down at the constitutional level, allowed to be enshrined in the text of the constitution, interpreted and deduced by the constitution and given the status of fundamental rights.

Scholars also have different views on the scope of citizens' fundamental rights. The determination of the scope of protection of fundamental rights is a prerequisite for the state to conduct constitutional review. Some scholars divide the relationship between basic rights and state power, dividing them into de facto rights and de jure rights, the former mainly including various natural rights, and the latter including legal rights created by the state, such as inheritance rights, property rights, political rights, and so on. In addition, some scholars divide basic rights into individual rights, political rights, social rights, and the rights of vulnerable groups. This article mainly analyzes it from the perspective of the constitution. Chapter II of our Constitution stipulates the scope of citizens' basic rights in an enumerative form, which as a whole reflects the universal requirements for the development of world rights and reflects the most fundamental position of power obtained by citizens in the constitutional system. The basic rights of citizens involved in the state of emergency include the right to life, the right to personal information, etc. How to properly deal with these rights in a state of emergency is the focus of this article.

## **2.2. General theory of a state of emergency**

The concept of emergency is a product of Western political civilization, and this concept can be understood from two dimensions: the factual state of emergency and the normative level of emergency. Chinese scholars did not realize that it is inaccurate to distinguish the positive state at the factual level from the normative state of emergency at the initial stage of the state of emergency, so it is easy to be chaotic at first. Others believe that it is an extreme danger or disaster situation based on nature or factors, and some scholars believe that it is a social state that requires urgent response. These definitions of the concept of a state of emergency are factual in their view. Its attributes as a legal dimension are ignored. From the perspective of law, the study of the state of emergency should be statutory, and a normative state of emergency that can be declared and can produce certain legal effects can be declared if certain legal conditions are met. The term emergency can be used in multiple senses, and the study of emergency in the field of law should make it clear that it is not a state of fact, but a state of law. Chen Cong believes that there is a clear difference between the state of emergency of the legal state and the state of emergency at the de facto level.[2] After the outbreak of the Coronavirus pandemic, the study of the state of emergency has been laid out again, some scholars have put forward new views on the state of emergency, Professor Xue Hui analyzed it from three levels, it is first a fact concept, followed by a normative concept, and through the normative concept, it is further transformed into the concept of system (rule of law, governance), that is, the emergency at the factual level, the emergency at the normative level and the emergency at the rule of law level for analysis.[3] At the international level, in the international human rights law system, the universal International Covenant on Civil and Political Rights, as well as the two regional conventions, the European Convention on Human Rights and the American Convention on Human Rights, contain provisions on states of emergency, and article 4 of the International Covenant on Civil and Political Rights. As can be seen from the three human rights conventions, international human rights law analyzes states of emergency from the perspective of public events. The term "state of emergency" itself is broad, and countries have no pain in its connotation, but most of them respond to the crisis they face by expanding the rights of citizens and expanding their rights. Therefore, at the level of the rule of law, a certain analysis is carried out to promote good social order.

Analysis of the constitutionality of restrictions on citizens' rights during the state of emergency

## **3. Analysis of the constitutionality of restrictions on citizens' rights during the state of emergency**

### **3.1. Restrictions on civil rights in a state of emergency**

Fundamental rights are due to everyone, and they do not presuppose the existence of the State. In the state of emergency, due to the expansion of emergency rights, the balance between power and rights under the normal situation is broken, and civil rights are thus derogated, which creates a relationship between conflict and balance. On the one hand, state power can restrict citizens' rights in a state of emergency, which makes it impossible to effectively implement citizens' basic rights; On the other hand, even if the restriction on citizens' basic rights is legal, how to further protect citizens' basic rights while restricting them? When the Coronavirus pandemic broke out, in order to curb the further spread of the virus, the state restricted citizens' freedom, privacy and other rights, the state did all to solve the crisis, the society has entered a state of emergency at this time, the threat level of this crisis to society has reached the point of using normal means and uncontrollable, only emergency means, special measures can control the crisis. Moreover, since the State no longer has the capacity to eliminate such crises, the State needs to take measures in a state of crisis to protect the basic rights of citizens. In order to control the social situation and avoid its collapse, it is necessary to concentrate power and limit power. Only in this way can we ensure that power has a strong integration force for the management of society and that emergency measures can be implemented smoothly.

As of April 14, 2020, the novel coronavirus has spread to 211 countries and regions, with nearly 1.5 million confirmed cases worldwide. Nearly two years have passed since the World Health Organization (WHO) officially designated it as a global pandemic, and countries have gradually upgraded prevention and control measures. At least 67 countries have declared states of emergency to contain the spread of the outbreak by guarding border crossings and restricting the movement of people within the country. Among the 67 countries, Italy and Argentina have been under martial law for months, 14 countries have been under 30 days, and more than half have not declared martial law, which will be adjusted according to the epidemic. On March 9, 2020, Italy announced its decision to impose a lockdown on

Lombardy and 11 other northern provinces in the north of the country, prohibiting people from entering or leaving these cities, affecting more than 10 million people. European media described Italy's move as "the most aggressive anti-epidemic measure outside China." Subsequently, Berlin, Paris, Jordan and other countries have also closed cities and countries one after another, and integrated operation of epidemic prevention. However, most countries have taken the most measures within their countries to restrict or prohibit gathering events, close or strengthen the management of public places, and close schools or schools. Among them, most of the countries that restrict the holding of gathering activities restrict gatherings of more than 10 people. These measures are a series of restrictions adopted by the state on the basic rights of citizens during the state of emergency, in order to curb the spread of the virus. In general, in times of emergency, citizens should have a corresponding derogation from their fundamental rights, both in terms of quantity and effect.

### ***3.2. Analysis of the justification of restrictions on citizens' rights in a state of emergency***

Any restriction of public power on fundamental rights shall be subject to constitutional review. After the outbreak of the Coronavirus pandemic, the state adopted a state of emergency in the severely affected area, and closed management of the area. It mainly involves the restriction of citizens' personality rights, such as the right to life and health, the right to personal freedom, the right to personal information, the right to privacy, and the right to know. These rights belong to the category of basic rights of citizens, and as analyzed above, in order to respond to the public crisis, the state has imposed certain restrictions on these rights, so it can be attributed to the state's public power to impose certain restrictions on basic rights and meet the conditions of the main premise. Then, from the constitutional level, the constitutionality of this restriction is analyzed. The final level of analysis on the limitation of fundamental rights is to determine whether there are "unconstitutional grounds for obstruction" in the State's restrictive conduct. To put it another way, it is to review the constitutionality of the restricted act.

#### ***3.2.1. Legal Reservation Principles***

The principle of legal reservation refers to the exclusive legislative matters of the Constitution on the restriction of people's basic rights, which must be prescribed by the legislature, and the administrative organ must not stipulate on its behalf, and the administrative organ must be authorized by law to carry out any administrative act, otherwise, its legality will be questioned, so the restriction of basic rights can only be made by the legislature. Articles 67 and 89 of our Constitution provide for states of emergency. The organs empowered to decide on the state of emergency are the Standing Committee of the National People's Congress and the State Council. The division of authority: The Standing Committee of the National People's Congress has the power to decide that the whole country or individual provinces, autonomous regions and municipalities directly under the Central Government have entered a state of emergency, and the State Council has the right to decide that some areas within the limits of provinces, autonomous regions and municipalities directly under the Central Government have entered a state of emergency in accordance with the law. In addition, in 2007, China formulated the Emergency Response Law of the People's Republic of China; In 1989, China enacted the Law of the People's Republic of China on the Prevention and Control of Infectious Diseases, and since then this law has undergone successive amendments and improvements, and these laws have been promulgated in the form of legislation by the National People's Congress and its Standing Committee. Explanations are made for the purpose of enacting this Law.

#### ***3.2.2. Constitutional grounds for restrictions***

The reason for illegal obstruction is the fundamental norm and basis for the restrictions on basic rights imposed by the constitutions of various countries. For example, Article 51 of our Constitution stipulates that citizens may not infringe on the rights of others and the State while having fundamental rights in form, of which the need for the public interest is the reason for obstruction. Moreover, the restrictions imposed on citizens' personal freedom and privacy rights by the outbreak of the Coronavirus pandemic are also restrictions that are necessary for the public interest, and are also part of the reasons for obstruction, and from the perspective of constitutional review of restrictions on basic rights, if the restrictions are in line with the constitutional reasons for restricting fundamental rights, their unconstitutionality may be blocked.

#### ***3.2.3. Essential Content Guarantee***

Regarding the limitation of fundamental rights, in German constitutional law, there is also a relevant theory on the guarantee of essential content, that is, it is held that some basic rights should

have some unrestricted content, and article 19, paragraph 2, of the German Basic Law "shall under no circumstances endanger the essence of fundamental rights". If the legislature's restrictions on fundamental rights penetrate into the core content of fundamental rights, they should be considered unconstitutional and should be prohibited by law. What is the core content of basic rights, that is, the universal nature and core values abstracted from things. According to this line of thinking, the essence and content of the so-called basic rights is the common inherent attribute of all basic rights, which is also the most fundamental and minimum content of basic rights, and if this content is restricted or deprived, the basic rights actually do not exist.[4] During the coronavirus pandemic in Xi'an, the Xi'an government imposed a lockdown to limit the further spread of the coronavirus. Citizens are restricted from going out, isolated at home, and if they enter hospitals and other places for special reasons, they must show a 48-hour accounting certificate. During this period, a pregnant woman was turned away from the hospital at the hospital gate because she did not have a 48-hour accounting certificate. As a result, the pregnant woman miscarries and loses her baby. The rationality of some extraordinary measures in the state of emergency needs to be further explored. When restricting basic rights, basic rights such as the right to life and health should not be jeopardized, and green channels for vulnerable groups should be opened in times of emergency.

The above aspects are the main aspects of the review of the constitutionality of basic rights, and if the state can meet the principle of legal reservation, the reasons for restriction stipulated in the constitution, the guarantee of essential content, etc., then the restriction of rights is constitutional, and vice versa. The State's restrictions on fundamental rights in a state of emergency are constitutional if they also meet the above circumstances.

#### **4. The legal principles that should be followed by the Coronavirus pandemic to restrict the basic rights of citizens**

##### ***4.1. Principle of proportionality***

The justification of the purpose, the reason for derogating from certain rights of citizens in the context of a public health emergency, is to enable the State to concentrate on the crisis through the suspension of the exercise of these rights. In the prevention and control of major epidemics, assuming that no prevention and control measures are taken, allowing everyone to isolate themselves, it may lead to more people infected with the virus, like some large countries in the West, in order to pursue freedom, do not wear masks in public places in accordance with national regulations, the result is that the novel coronavirus virus is getting more and more serious, and the number of people dying due to the novel coronavirus is increasing day by day. Professor Zhong Nanshan once said: human life is the first precious, human life is the most important human right, China only 76 days to contain the Coronavirus pandemic in Wuhan, and our country introduced the subway and other public transportation wearing masks to take the car, to a certain extent to block the spread of the virus, can concentrate on finding the cause of the virus and the means to treat the virus.

The appropriateness and necessity of the means. Article 4 of the International Covenant on Civil and Political Rights provides that derogations from human rights are commensurate with the gravity of the emergency. China's restrictions on the basic rights of citizens in emergency situations do not exceed the necessary means, such as the measures taken by the Chinese government to cut off the transmission chain of the virus, and the adoption of closed management is to carry out precise prevention and control and avoid cluster cross-infection. At the same time, hierarchical management is carried out, for closed areas, to solve the problem of shortage of materials for citizens, the allocation of resources is carried out, and the government distributes materials to residents free of charge. Ensure the supply of daily necessities. At the same time, in the face of large-scale nucleic acid testing, the government conducts free nucleic acid testing to reduce the burden of the masses. Use appropriate means to prevent and control the epidemic.

Minimization of damage to citizens requires that when governments have multiple means to respond to public health emergencies, they must weigh their values and choose the one that causes the least damage to citizens. For example, the Constitution of the country stipulates that in case of emergency, citizens shall be expropriated and requisitioned their land and property, and compensation shall be made accordingly at that time. These demonstrate that even if damage is to be done, it must be done to a minimum.

#### ***4.2. Non-derogable principle***

If some rights can be derogated, there will be rights that are not derogable. Derogation from rights is a special restriction of rights, while non-derogation is a counter-restriction on derogation from rights and the bottom-line principle of derogation from rights. According to this principle, even in a state of emergency in which a country in crisis exists, some fundamental rights cannot be restricted. Its basic characteristics are: in terms of scope, it should be a minimum guarantee of rights, such as basic rights such as the right to life and the right to health, and irreversible rights. On the one hand, the right of derogation weakens the effectiveness of citizens' basic rights, and on the other hand, it further restricts the fundamental rights of the State.

### **5. Suggestions on the protection of citizens' rights in emergency situations in our country**

#### ***5.1. Enact relevant laws under the state of emergency***

The inclusion of a state of emergency in the Constitution in the 2004 constitutional amendment further demonstrates that we have a legal basis in a state of emergency. And China has also promulgated a series of separate laws, such as mentioned earlier: in 2007, China formulated the Emergency Response Law of the People's Republic of China; In 1989, China enacted the Law of the People's Republic of China on the Prevention and Control of Infectious Diseases, but China still has not established a legal system under the state of emergency.

First of all, although there are corresponding provisions for the state of emergency in our constitution, its provisions are too general, and there are no specific provisions on what is the state of emergency, how to operate in the state of emergency, etc., because the state of emergency does not have a complete theoretical basis in China, so the relevant legal system provisions have not been completely established; Second, there is no clear legal remedy for violations of citizens' basic rights during a state of emergency, which is very lacking in protecting citizens' basic rights. How to carry out state compensation and state compensation in a state of emergency and other remedies requires relevant provisions from the national side of the Administrative Law so that it can be followed by law. Finally, in terms of punishment for infringing on citizens' rights, relevant laws also need to be stipulated, and the legal accountability mechanism should play a certain role in the blame between government departments and irresponsible behavior. National emergency response should focus on efficiency and improve the efficiency of fighting crises, and only by achieving efficiency can we better protect the basic rights of citizens. To be quick and effective, you need to be well prepared in advance. There is a clear plan, which requires detailed provisions such as laws so that all actions of the state power during the state of emergency have guidance to follow and laws to follow, so that there is a plan and a goal to resist the crisis. The above aspects need to be improved by law and a legal system for relief in a state of emergency is established.

#### ***5.2. Strengthen government action in times of emergency***

In the event of an emergency, government directives are a bellwether of public behavior. The correct guidance of the government is conducive to responding to emergency situations, such as the SARS period in 2003, the government took effective measures to deal with the crisis, reduce the social turmoil during the crisis, protect the safety of citizens' lives and property, and coordinate between various departments and places. Another example is the new coronavirus at the end of 2019, in order to curb the spread of the virus, the government blocked the severely affected areas, at this time, solving the problem of feeding the people has become the primary problem, and in some areas due to the insufficient reserves of some basic medical drugs, the price of drugs in the area has skyrocketed, and businesses illegally hoarded goods for profit. This requires the government to manage it, ensure the living materials of the people in the quarantined areas, and ensure the basic living rights of the people in the quarantined areas. At the same time, timely psychological counseling is provided to the quarantined people, their excessive tension is calmed, and a special psychological counseling hotline is arranged. In the face of sudden epidemics, the government should assume corresponding responsibilities, race against time to carry out nucleic acid testing, detect the transmission chain of the epidemic early, and detect positive cases. In this way, the virus can be stifled as soon as possible and the lives and health of the people can be protected. All of this requires a responsible government.

### 5.3. *Improve the methods of citizens' supervision and relief*

The modern government should be a government subject to citizen supervision, and corresponding supervision of state power can prevent excessive expansion of state power, although this supervision is carried out in a state of normalization, but in a state of emergency, this supervision cannot be abandoned, and should be implemented more resolutely. This is because in the state of emergency, due to the disorder of order, state power is more likely to be abused, state power is greatly expanded, thereby compressing citizens' rights, citizens' basic rights have been derogated to a certain extent, in order to protect these basic rights, state power should be supervised in the state of emergency so that it can be carried out reasonably. Due to China's ancient thinking of the official standard, China's supervision of the government is lagging behind and imperfect, and the supervision of the state in the case of emergency lacks legal constraints and norms, and should be supervised from the legislature, judicial organs and social levels. In the process of the outbreak of the epidemic, for example, the Xi'an government opened the 12345 citizen hotline, and in order to alleviate the pressure of the 12345 citizen hotline, it also opened the 10000, 10086 and other hotlines for citizens to provide consultation channels on epidemic prevention policies. For people living in difficulty, provide channels for online application for daily allowance supplies. Although these measures have eased the people's supervision channels, but in an emergency, everything is unknown, requiring the government to disclose information, consciously accept social supervision, protect citizens' right to know, during the epidemic there is epidemic prevention personnel beating the people's behavior, some community daily necessities can not be normally guaranteed, during this period citizens can evaluate the state behavior and put forward opinions, so as to urge the country's efficiency in dealing with problems, improve the image of the government, and enhance citizens' confidence in fighting the epidemic.

Without a right to remedy, it is not a real right. In the state of emergency, in order to restore normal order, state power will be expanded, and the basic rights of citizens will be restricted accordingly, such as restricting citizens from going out freely during the epidemic, in this case, many people have no way to go out to work, which requires the state to carry out corresponding subsidies, during which workers can be paid according to the minimum wage standard, which is a relief method of the state, but for personnel without formal work, this guarantee cannot be well implemented. At the same time, facilities that have been requisitioned during the epidemic period shall be compensated accordingly.

## 6. Conclusion

A state of emergency is different from a normal social state, which is a special state of special time, so many special measures in this period impose corresponding restrictions on the rights of citizens. However, this should not be the reason for the extreme expansion of government power to derogate from citizens' rights, even in special periods, the basic rights of citizens should be taken into account, and how to handle the relationship between the two well needs further research and discussion. The government should be able to protect the basic rights of citizens while handling the state of emergency. From the perspective of the constitution, its constitutionality is interpreted as conforming to the law. Since China's system for responding to emergencies is not perfect at this stage, it has caused serious obstacles to the protection of citizens' basic rights in the state of emergency, and various deficiencies should be improved in a targeted manner. Further improve the relevant laws and regulations, so that all actions are based on the law, so as to minimize the damage in emergency situations.

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