

# *The means of protecting citizens' basic rights from illegal infringement under a state of emergency in China*

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**Abstract:** To restore the normal social order as soon as possible, derogations from some citizens' basic rights in a state of emergency have a legitimate basis. For this reason, the state is supposed to grasp the emergency power carefully to protect basic rights from illegal infringement. Although China's emergency legal system has been valued and gradually developed by absorbing the experience of reform, there still exist several problems in China's emergency legal system, and only by solving them can we provide a solid guarantee for the basic rights of Chinese citizens under a state of emergency.

## 1. Introduction

The topic of how to protect the basic rights of citizens from illegal infringement in emergencies has received more attention recently. Since January 2020, in order to defend against large-scale acute infectious diseases, various measures (e.g. traffic control, mandatory home quarantine and so on) have been taken in lots of regions in China. There is no doubt that such measures are designed to prevent disease, but in the process of implementation, they will have a direct or indirect impact on the daily lives of an unspecified number of people. The normal exercise of many basic rights of citizens such as the right to personal liberty, the freedom of speech had to give way to the need to restore normal social order. At this moment, we can find the concept of "the state of emergency" in Chinese government documents as the basis for taking these measures [1]. Why can the Chinese government restrict the basic rights of citizens during a state of emergency? How can citizens' basic rights be protected from illegal infringement under such circumstances?

To answer these questions, the first step is to identify the meaning of basic rights and the states of emergency. As for basic rights, different scholars have different definitions. The definition accepted by most scholars in China is that basic rights are rights that people naturally have as human beings, not given by the Constitution or the Emperor, they have nothing to do with differences of race, gender and identity, but are rights that should be enjoyed by every human being [2]. As for the state of emergency, considering its essential characteristics, I agree that it refers to the social life state that public interests and national interests such as public order, public safety, public health and national unity need to be urgently dealt with due to sudden major events within a certain range and time. [3].

This paper will start with a discussion on whether it is legitimate for the government to restrict citizens' rights under a state of emergency, and then examine whether there are loopholes in the

Chinese legal system that may easily violate citizens' basic rights during a state of emergency. Finally, gives suggestions for improving the system of protecting citizens' basic rights under a state of emergency based on Chinese reality.

## **2. The theoretical basis of guaranteeing the basic rights of citizens under the state of emergency**

Under the state of emergency, the social order of the related region will be unusual, the public power has higher requirements for its exercise space, and the basic rights of citizens are more likely to be squeezed. The essence of basic rights is fixed, so we should start from the general principle of basic rights protection, and provide ideas for exploring solutions to realize the substantive protection of basic rights under the state of emergency.

On the one hand, the expansion of the government's power under a state of emergency is justified. The theory of national emergency power indicates that when it is difficult for the state to maintain or restore normal social order by simply exercising public power, the state is supposed to declare a state of emergency in the whole country or some regions in accordance with the provisions of the Constitution and laws and grant government organs a kind of emergency power different from that in normal times [4]. To a certain extent, this kind of power can break through the boundaries set by the Constitution and laws under normal conditions. But it should be noted that there is a certain risk of abuse in the exercise of national emergency power, as it may be "unconstitutional" under the pretext of "the state of emergency". Therefore, the national emergency power should be regulated and constrained by the Constitution, and must not violate the basic principles and spirit of the Constitution.

On the other hand, although it is necessary for the state to exercise national emergency power in the special period, protecting the basic rights of citizens is inevitable. Public power has been further strengthened under the state of emergency, and the expansion of state power has legitimacy. Power and rights are just like the two ends of the rope, one advances, the other must retreat, which means the expansion of power is often accompanied by the restriction of rights [5]. The control and restriction of public power under a state of emergency are reduced, and the legitimacy of its expansion can create a reasonable excuse to infringe on citizens' rights. Thus the risk of basic rights being infringed is increased. Therefore, the expansion of governments' power should be prevented from improperly infringing basic rights, and the basic rights of citizens should be guaranteed.

## **3. Reflection on the protection system of basic rights under the state of emergency in China**

An examination of China's system for protecting citizens' basic rights under a state of emergency can point to improvement measures in the future. I find that this kind of system mainly has the following two deficiencies.

### **3.1 Lack of a unified emergency legislation**

To begin with, China has not established a complete emergency legislation system until now. As for China's current emergency legal system, the Emergency Response Law and the Martial Law act as the basic law of the area of emergency, while other laws and regulations, such as the Earthquake Prevention Law and the Disaster Reduction Law, set provisions for emergencies occurring in specific fields. Definitely, these laws play an important role in responding to emergencies and also provide legal support for guaranteeing citizens' basic rights under a state of emergency.

Although China's emergency legal system has been initially formed, China has not yet issued a "state of emergency law" with a leading role, and the "emergency response law" and "martial law

" that temporarily occupy the status of the basic law in the field of emergency have been promulgated since 2007 and 1996, respectively. Only judicial interpretations have been issued and have not been revised intensively, which makes people wonder whether the legislative content of 20 or 30 years ago can meet the needs of the proper protection of the basic rights of today 's social citizens. Besides, most states of emergency are complicated by various situations, and such a scattered legal system cannot be comprehensively considered. Conflicts and poor connections between laws and regulations are inevitable, which will lead to the dilemma of being leaderless in emergencies. Therefore, there is still room for further improvement of the emergency legal system.

### **3.2 The imperfection of the relief mechanism for citizens' basic rights**

The relief system of basic rights is difficult to play its due role during a state of emergency. It is difficult for judicial power to supervise or intervene in the operation of emergency power by administrative organs, which leads to the even impossible relief of citizens ' basic rights. Besides, citizens could get effective relief through administrative litigation, administrative reconsideration, state compensation, petition and other channels when their rights are infringed under normal conditions in China. But during a state of emergency, the state organs are struggling to cope with the crisis, and usually do not accept administrative reconsideration or administrative litigation filed by citizens [6]. Even after the state of emergency, due to the administrative acts taken by government in the state of emergency are non-justiciable, the relief of the basic rights of citizens still cannot be fairly and reasonably solved. Therefore, it is necessary to improve the system to make judicial relief an effective way for citizens.

## **4. The future improvement of the protection system of citizens' basic rights under the state of emergency in China**

Given the weakness that exists in the protection system of basic rights under the state of emergency, combined with China's national conditions, the following aspects can be improved in the future.

### **4.1 Establish a unified legislative model**

We are supposed to make every effort to formulate a unified emergency law, not only to prevent abuse of administrative power, especially by multiple government departments, or actions exceeding their administrative authority, but also to ensure necessary oversight of the administrative emergency measures implemented by the government during an emergency period.[7] As mentioned above, China 's separate laws and regulations on the state of emergency are very scattered, besides laws and regulations are even conflicting or repetitive. It is not conducive to the convergence of laws and regulations, and it is easy to lead to unclear responsibilities of central and local government agencies. The lack of coordination between departments and the phenomenon of mutual prevarication or power struggle between departments due to power conflicts directly affect the quick and efficient handling of emergencies. Formulating a unified emergency law is the direction of future legislation. This kind of law should be formulated as the main trunk of the state of emergency legal system in China. Specifically, a technical ' emergency law ' should be formulated based on the constitution, and cover the following basic contents: the definition and characteristics of the state of emergency, procedures for the exercise of the state emergency power, the limitation and protection of the basic rights of citizens and the scope of relief, and the legal responsibilities of the relevant organs. At the same time, the existing emergency laws and regulations should be revised to form a complete legal system. A complete legal system is supposed

to include: the emergency provisions in the Constitution, the unified state of emergency law, the martial law, the Law of war, and other relevant disaster emergency laws.

#### 4.2 Perfecting the relief system of citizens ' basic rights

The premise of the validity of rights is whether they can be guaranteed, so the basic rights of citizens should inherently include the content of relief.[8] An efficient relief system for citizens ' basic rights not only enables citizens to receive timely and effective relief when their rights are infringed but also encourages relevant state organs to exercise their power seriously. To that end, the first step is to improve the compensation mechanism. State compensation is for the illegal abuse of state power to the basic rights of citizens. Citizens have sacrificed part of their rights in order to safeguard the overall security of the country and society in a state of emergency. If the exercise of national emergency power still fails to strictly abide by the provisions of the law, it will be a secondary injury to citizens' rights. In this case, it is legitimate and reasonable for citizens to demand compensation from the state. Furthermore, we can improve the relief system by strengthening the accountability mechanism. As an external supervisor, the judicial review can not only restrict the operation of the national emergency power but also be one of the main forces to relieve the infringed rights of citizens under the state of emergency. After the end of the state of emergency, a systematic judicial review should be carried out on the process of the national emergency power's operation.

#### 4.3 Clarify the principle of emergency power operation

Given the unpredictable characteristic of the occurrence of the state of emergency, the law hardly covers all situations in detail. Therefore, government agencies should firmly grasp the basic principles to use national emergency powers if the law fails to regulate in advance. For example, based on the principle of protecting human rights, fundamental rights are supposed to be divided into those that cannot be derogated from and those that can be derogated from in a state of emergency according to various natures of them. Based on the balance of legal interests, I believe that political rights such as the right to free speech should be considered as rights that can be derogated from in a state of emergency, while the right to be alive and healthy are non-derogable rights. The derogation and restriction of this kind of political rights can play a role in protecting the non-derogable rights of most other citizens. In a word, following basic principles can effectively create an invisible barrier for government agencies to exercise national emergency power.

### 5. Conclusion

In a state of emergency, citizens need to give up some of their rights to the government to help restore the social order as soon as possible, but the restrictions on the basic rights of citizens must be within reasonable limits. Although China's protection system of basic rights under the state of emergency still has some deficiencies, hoping that China's capacity for human rights protection under the state of emergency can be significantly enhanced by improving insufficient.

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