Emergency Powers and Executives: An Ever-Present Danger of Abuse?

https://www.e-ir.info/2019/01/05/emergency-powers-and-executives-an-ever-present-danger-of-abuse/

CALLUM ROSS, JAN 5 2019

Introduction

The use of emergency powers by executives has been surrounded by intensive scholarly debate since the Second World War. Victor Ramraj has previously stated with clear conviction that there "will always be a danger that executives, even well-meaning ones, could abuse emergency powers, which has been demonstrated by historical and contemporary events".[1] Upon examination of Ramraj's statement, it will be argued that he is correct in his assertion that emergency powers can be abused by executives. On this basis, a two-strand argument will evolve, which will be split into two parts.

Firstly, in relation to all types of executives, it is submitted that an ever-present danger of abuse of emergency powers is apparent, demonstrated by historical and contemporary events. It is further argued that this ever-present danger will always be apparent, owing to the power that is afforded to executives via emergency provisions. On this basis, it is contended that *ex ante* and *ex post* safeguards are a necessary implementation in attempting to constrain executive abuse of emergency powers.

Secondly, it will be argued that when specifically considering well-meaning executives, there is still an ever-present danger of abuse, because of the power afforded to the executive by emergency provisions. However, it will also be contended that well-meaning executives will not always abuse emergency provisions in every case, and that judicial oversight is an important legal safeguard in preventing well-meaning executives from abusing emergency powers.

Governing Legislation

Article 15 of the European Convention on Human Rights (henceforth 'ECHR'), governs derogations in emergency situations.[2] This legislation affirms that the emergency must "threaten the life of the nation", which if satisfied, allows the state to derogate from its obligations under the Convention "to the extent strictly required by the exigencies of the situation".[3] The legislation also states under Article 15(2) that there can be no derogation "from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7".[4] Finally, the legislation requires states that are derogating to notify the Council of Europe when and why they are derogating.[5]

Ever-Present Danger of Abuse: An Inherent Element of Emergency Powers

Emergency Powers: A Necessary Threat?

It will be argued that emergency powers will always provide scope for abuse by the executive. However, it will also be contended that emergency provisions are a necessity in times of public emergencies. Historically, emergency powers have experienced abuse by executives. The most infamous being the abuse of Article 48 of the Weimar Constitution, with Mueller contending this "led to a steady shift of decision-making power from parliament to the President between 1918 and 1933".[6] There can be no clearer example of where emergency provisions have provided scope for abuse.

More recently, the Canadian ‘October Crisis’ of 1970 further demonstrates the scope for abuse that emergency provisions can grant an executive, leading Clément to argue that, “the aftermath of the crisis produced disturbing precedents for restricting human rights”.[7] Evidently, based on these historical examples, as well as many others, emergency powers can be a threat, because there will always be a danger that they could be exploited abusively.

In contrast, it is submitted that despite the danger highlighted above, emergency provisions are a necessity. Lazar encapsulates this argument, asserting that if states do not utilise emergency provisions in emergencies, “the state might well cease to be”.[8] This makes for a strong argument as to the necessity of emergency powers. Furthermore, Article 15 of the ECHR allows for emergency provisions, with the courts clearly giving a “wide margin of appreciation” to states in deciding when an emergency has been constituted, because states are ‘best placed to decide’.[9]

The breadth of Article 15 has not been without criticism, with El Zeidy asserting its breadth has caused the Court and Commission to utilise “an elaborate rhetoric, in a feeble attempt to smoke screen the great level of deference they gave to the decisions of national Governments”.[10] However, it is argued that despite this valid consideration from El Zeidy, customary international law states that, under the doctrines of necessity and force majeure states can derogate anyway, and therefore, it is contended, in agreement with Duffy, to be better to have some governance of state derogation, under Article 15 of the ECHR, rather than nothing.[11] This point further substantiates the submission that emergency powers are a necessity.

Clearly, the weaknesses of the breadth of Article 15 have been highlighted. However, regardless of these weaknesses, emergency powers are a necessity for states, despite the fact they also present a danger of abusive exploitation. The challenge is how to effectively limit the scope for abuse of emergency provisions whilst allowing those provisions enough breadth to overcome emergencies in an efficient manner.

Establishing Safeguards as Preventative Measures Against Abuse of Emergency Powers

There is extensive academic debate on what constitutes effective safeguards for prevention of abuse of emergency provisions, and in agreement with Mueller, appropriate safeguards are needed in order to minimise any scope for misuse.[12] Much of this discussion revolves around the use of *ex ante* and *ex post* safeguards. It is submitted that a balance of both is necessary in the creation of an effective web of safeguards to limit exploitation of emergency powers. Clearly, effective safeguards will make emergency provisions less vulnerable to abuse. Duffy highlights that there are “procedural safeguards” contained within Article 15 itself.[13] These include notifying the Council of Europe of the derogation, allowing the Council to supervise the emergency, and referral of a situation to the judiciary.

Evidently, the *ex post* safeguard of judicial oversight has weaknesses. Cole states, “judges have generally been overly deferential to executive national security claims”.[14] Gross supports this contention, arguing that in states of emergency, courts assume a deferential attitude when reviewing decisions of the government.[15] This deferential treatment can be clearly seen in the *Aksoy v Turkey* decision, where the court considerably widened the scope for what constitutes an “emergency that threatens the life of a nation”.[16] It can also be identified in the *A and Others v UK* ruling, where the court identified that a “wide margin of appreciation” was given to states in relation to identifying emergency situations.[17] Based on this, it is submitted that although useful, *ex post* safeguards cannot fundamentally be trusted to restrict states’ use of emergency powers on their own. On this basis, it is contended *ex ante* safeguards are also needed, to attempt to avoid abuse of emergency provisions.

Ramraj argues that *ex ante* safeguards “enhance certainty and predictably in times of heightened fear and attenuated emotions”.[18] This statement simultaneously addresses both the issue with *ex post* safeguards, as well as highlighting the strength of *ex ante* safeguards. *Ex post* safeguards are incapable of enhancing certainty or predictability, for the simple fact that these safeguards come into being after the occurrence of the situation, meaning that, although they have the benefit of hindsight, they can only punish retrospectively. Conversely, *ex* ante safeguards provide the benefit of constraining emergency provisions prior to their use, meaning the executive knows what it can and cannot do, hence limiting the availability of emergency provisions to be abused.

However, Ramraj does concede that *ex ante* safeguards limit “flexibility to enable the state to respond and adapt quickly to the unique challenges of any particular emergency".[19] This is considered a serious weakness by Mueller, who believes the lack of flexibility could lead to further legislation being enacted because "emergency legislation drawn up in advance of emergencies may not sufficiently empower the executive".[20] Clearly, if this occurred, any future legislation would, "vest broader powers into the executive, thus opening the powers up to abuse", entirely defeating the point of the safeguard.[21] Therefore, *ex ante* and *ex post* safeguards both have strengths and weaknesses in protecting emergency provisions from abuse.

Despite these issues with both *ex post* and *ex ante* safeguards, it is contended that when incorporating a balance of both into emergency provision frameworks, effective safeguards can be established to prevent utilisation of emergency provisions for abusive means, by balancing the strengths and weaknesses of the various safeguards available.

The Inherent Danger of Abuse Paradox

It has been submitted that emergency provisions are a threat, but a necessary one. It has also been contended that effective safeguards can constrain the use of emergency provisions for abusive means. On this basis, it is evident that with emergency provisions, comes an inherent and ever-present danger of abuse because of the power that emergency provisions confer onto an executive. The paradox is thus; on one hand, there needs to be enough scope in emergency provisions to allow executives to combat emergencies effectively, whilst on the other hand, constraining that scope to limit abuse as far as possible.

Various ways of controlling the power of emergency provisions have been highlighted. It is submitted that utilising these safeguards to constrain the ability of executives to exploit emergency provisions is key to limiting the inherent danger. Lazar contends that states have, under the cover of emergency, gone beyond what is necessary.[22] This is a clear illustration of the ever-present risk of abuse of emergency powers. On this point, El Zeidy believes that one way to limit the scope for abuse is to introduce a new principle: "the longer the emergency, the narrower, not wider, ought the margin of appreciation allowed the state to be"[23]. This suggestion directly conflicts with the current "wide margin of appreciation" afforded to states by the judiciary.[24] El Zeidy's suggestion makes sense because, as demonstrated above, this wide discretion conveyed to states only serves to exponentially increase the scope for executive abuse of emergency provisions. The disproportionate use of detention control in *A and Others* being a clear demonstration of this.[25]

In summary, a necessary threat must be controlled. However, this is not a simple task. Lazar contends that because "emergencies are fundamentally dangerous", any emergency provisions are "safer still than no emergency powers at all".[26] This is true to an extent. However, it is uncontentious to assert that poor emergency legislation will always be more prone to abuse than well written provisions. Therefore, the more effective the safeguards, and the more time spent drafting provisions, the less chance there will be for abusive exploitation of emergency powers. Thus, it is submitted, in agreement with Mueller, that the most important aspect of the constitutional system in relation to emergency provisions must be "the robustness of the system itself".[27]

Well-Meaning Executives and Emergency Powers: Use or Abuse?

Democracy Versus Dictatorships

It is submitted that well-meaning executives are liberal democracies, as opposed to authoritarian dictatorships. On this basis, it is contended that there is a clear difference between the use, and abuse, of emergency powers. This distinction can be clearly demonstrated by the different judicial approaches taken in, on one hand, *Lawless v Ireland* ***[28]*** and *Ireland v UK* ***[29]***, and on the other hand, *The Greek Case*. ***[30]*** In *Lawless v Ireland*, the court held that a public emergency could be "reasonably deduced".[31] In *Ireland v UK*, the existence of an emergency that threatened the life of the nation was held "perfectly clear from the facts".[32] Whereas, in *The Greek Case*, the court did not find a public emergency was constituted because the emergency must be "actual or imminent".[33] As Duffy correctly asserts, the court in *The Greek Case* demonstrates that derogation must be based on examination of the actual situation, rather than mere predictions of a future attack.[34] Based upon this, the courts clearly denounce exploitation of emergency powers to establish dictatorships. Whereas, when a well-meaning executive utilises emergency provisions, the courts are demonstrated to usually find favour with a state's reasoning. Thus, it can be contended that there is a lesser risk of abuse of emergency provisions by well-meaning executives, as opposed to dictatorships.

In support of this, El Zeidy contends that, "the purpose of Article 15 is derogation in exceptional cases and circumstances for the purpose of protecting democratic institutions rights and freedoms".[35] It is submitted, that the decisions in *Lawless* and *Ireland*, contrasted with *The Greek Case*, further evidence El Zeidy's contention.***[36]*** Article 15, alongside the adduced case-law, demonstrates that there is a much lower risk of abuse of emergency provisions by well-meaning executives. Clearly, Ireland and the UK, as well-meaning executives, used the emergency provisions, whereas the Greek dictatorship attempted to abuse them.

The Spectrum: From Use to Abuse

It has been contended that there is a lower chance of abuse of emergency powers from a well-meaning executive. However, it is conceded, in agreement with Ramraj, that there will still always be an ever-present danger of potential for abuse. Although, it is further submitted that judicial oversight, as an *ex post* safeguard, is key in helping to reduce this ever-present danger of abuse. In *A and Others v UK*, it was stated that although states are given a "wide margin of appreciation", they "do not enjoy an unlimited discretion".[37] Here, the court was referencing its own role as a supervisor of state discretion. Therefore, to safeguard executive use of emergency powers, it is not about constricting when states can invoke emergency powers within reason because a state is best placed to decide.[38] It is about managing the executives' use of the emergency powers. This is a fine distinction. Essentially, judicial oversight is best suited to considering not whether an emergency is constituted in the first place, but whether the emergency provisions utilised are necessary and proportionate to the emergency, or in the words of Article 15, are "strictly required by the exigencies of the situation".[39]

Judicial oversight adopts the "cross-cutting principles" of necessity and proportionality, to determine abuse of emergency provisions by executives.[40] In *A and Others v UK*, it was held that although a "public emergency threatening the life of the nation" was clear from the facts, the detention of foreign nationals "was a disproportionate response to that threat".[41] This is an example of a well-meaning executive abusing emergency powers. Importantly, it also highlights how the *ex post* safeguard of judicial oversight can help to reduce use of emergency powers passing into the threshold of abuse.

Furthermore, the use of stop and search powers under Sections 44 to 47 of the Terrorism Act 2000 is another clear example of abuse of emergency legislation by a well-meaning executive.[42] In *Gillan and Quinton v UK* it was held that stop and search powers were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse".[43] Thus, this ruling demonstrates the power being abused by a well-meaning executive, and further substantiates the dual argument that, firstly, there is a danger that well-meaning executives will abuse emergency provisions, and secondly, that the only way to reduce the risk of this occurring is by establishing effective safeguards. Ip highlights the changes made to stop and search powers under the Terrorism Act 2000[44] after the *Gillan****[45]*** ruling, stating that the "standard of necessity that must be satisfied before an authorisation can be issued is more onerous"[46]. Ip went on to further this point, believing the "impact of this change has been considerable".[47] This example serves to demonstrate how effective judicial oversight as an *ex post* safeguard can be in reducing the risk of well-meaning executives abusing emergency provisions. On this basis, it is contended that despite some potential weaknesses, judicial oversight is an "effective oversight mechanism" because it "ensures that security-related laws and policies are limited to those which are necessary".[48]

Evidently, it has been demonstrated, in agreement with Ramraj, that well-meaning executives do present a danger of abusing emergency provisions. It has also been argued that judicial oversight is key to constraining abuse by well-meaning executives. However, it must be highlighted that these examples do not demonstrate a clear-cut contention that every well-meaning executive will abuse emergency powers. In fact, it is conceded that it is quite the opposite. When considering cases such as *Lawless* and *Ireland*, where it appears that emergency powers have been utilised fairly, this substantiates the argument that not all well-meaning executives will abuse emergency provisions.[49]

Therefore, it has been argued merely that in agreement with Ramraj, there will always be an ever-present danger of exploitation, because despite the use of *ex post* and *ex ante* safeguards to reduce abuse, reduction can never be eradication. It is on this basis, that it is contended that eradication is an impossibility where the necessary threat of emergency powers occurs, and thus, there will always be an ever-present danger of abuse of emergency powers.

Conclusion

Overall, two strands of argument have arisen. Firstly, it has been submitted that there is, and always will be, a danger of all types of executives abusing emergency powers. Historical and contemporary events such as the Weimar Republic, the October Crisis, *The Greek Case* and the situation in *A and Others* all serve to illustrate this danger.[50] Although, despite this ever-present danger, it has been demonstrated via discussion of Article 15 and customary international law, that emergency powers are a necessity.[51] It was also contended that the most effective way to reduce the scope for abuse of emergency powers is via a combination of *ex post* and *ex ante* legal safeguards, including but not limited to judicial oversight, notification of derogation to supervising institutions, and permission to supervising institutions to continually assess the situation in question.

The above findings led to the contention of an 'abuse paradox'. This paradox displays the tension between enabling states to effectively tackle emergencies and limiting the scope for abuse of emergency powers. This balancing act, if exercised properly, can successfully limit executive abuse of emergency powers. However, it has been noted throughout that limiting the scope for abuse will never eradicate it entirely. In short, the necessity of emergency powers will always bring with it the risk of abuse.

Secondly, it has been argued that well-meaning executives of liberal democracies still carry with them a danger of abuse of emergency powers. Although, it is illustrated through a contrast of *Lawless* and *Ireland*, with *The Greek Case* that the danger of abuse of emergency powers is lower in situations involving well-meaning executives as opposed to ill-meaning ones.[52] However, through discussions of *A and Others* and stop and search powers under Sections 44 to 47 of the Terrorism Act 2000, it can be gleaned that an ever-present danger, although reduced, is still clearly present in cases involving well-meaning executives.[53] In relation to this discussion, judicial oversight has been demonstrated to play an effective role in restricting well-meaning executives to the use of, rather than abuse of emergency provisions. Furthermore, in comparing *Lawless* and *Ireland* with *A and Others* and *Gillan and Quinton*, it has been demonstrated that not all well-meaning executives will abuse emergency powers.[54]

Finally, it has been illustrated via both historical and contemporary events, that there will always be a danger of abuse of emergency provisions from well-meaning executives, because regardless of legal safeguards, reduction is not eradication. On this basis, it is demonstrated that the danger of abuse of emergency powers will always be present.

Bibliography

Case Law

A and Others v UK App no 3455/05 (ECHR, 19 February 2009)

Aksoy v Turkey App no 21987/93 (ECHR, 18 December 1996)

Gillan and Quinton v UK App no 4158/05 (ECHR, 12 January 2010)

Ireland v UK App no 5310/71 (ECHR, 18 January 1978)

Lawless v Ireland App no 332/57 (ECHR, 1st July 1961)

The Greek Case (1969) 12 YB 1

Legislation

European Convention on Human Rights

Terrorism Act 2000

Secondary Sources

Clément D, '*The October Crisis Of 1970: Human Rights Abuses Under the War Measures Act* ' (2008) 42 Journal of Canadian Studies

Cole D, '*The Priority of Morality: The Emergency Constitution's Blind Spot*' (2004) 113 Yale Law Journal

Duffy H, *The 'War on Terror' And the Framework of International Law* (1st edn, Cambridge University Press 2005)

El Zeidy M, '*The ECHR And States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations*' (2003) 4 San Diego International Law Journal

Gross O, '*Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* ' (2003) (112) Yale Law Journal 1011

Ip J, '*The Reform of Counterterrorism Stop and Search After Gillan V United Kingdom* ' (2013) 13 Human Rights Law Review

Lazar N, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009)

de Londras F and Davis F, *'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*' (2010) 30 Oxford Journal of Legal Studies

Mueller S, '*Turning Emergency Powers Inside Out: Are Extraordinary Powers Creeping into Ordinary Legislation* ' (2016) 18 Flinders Law Journal

Ramraj V, *Emergencies and The Limits of Legality* (Cambridge University Press 2012)

Endnotes

[1] Victor Vridar Ramraj, *Emergencies and The Limits Of Legality* (Cambridge University Press 2012), 3.

[2] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Art 15, 1950.

[3] ECHR (n 2) Article 15(1).

[4] ECHR (n 2) Article 15(2).

[5] ECHR (n 2) Article 15(3).

[6] Sascha Mueller, '*Turning Emergency Powers Inside Out: Are Extraordinary Powers Creeping into Ordinary Legislation*' (2016) 18 Flinders Law Journal, 301.

[7] Dominique Clément, '*The October Crisis Of 1970: Human Rights Abuses Under the War Measures Act* ' (2008) 42 Journal of Canadian Studies, 176.

[8] Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009), 2.

[9] *A and Others v UK* App no 3455/05 (ECHR, 19 February 2009), [173], *Aksoy v Turkey* App no 21987/93 (ECHR, 18 December 1996), [68].

[10] Mohamed El Zeidy, '*The ECHR And States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations*' (2003) 4 San Diego International Law Journal, 316.

[11] Helen Duffy, *The 'War on Terror' And The Framework Of International Law* (1st edn, Cambridge University Press 2005), 298.

[12] Mueller (n 6), 318.

[13] Duffy (n 11), 294.

[14] David Cole, '*The Priority of Morality: The Emergency Constitution's Blind Spot* ' (2004) 113 Yale Law Journal, 1760.

[15] Oren Gross, '*Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* ' (2003) (112) Yale Law Journal 1011, 1034.

[16] *Aksoy* (n 9), [70].

[17] *A and Others* (n 9), [173].

[18] Ramraj (n 1), 16.

[19] Ramraj (n 1), 16.

[20] Mueller (n 6), 306.

[21] Mueller (n 6), 306.

[22] Lazar (n 8), 4.

[23] El Zeidy (n 10), 317.

[24] *A and Others* (n 9), [173].

[25] *A and Others* (n 9).

[26] Lazar (n 8), 8-9.

[27] Mueller (n 6), 318.

[28] App no 332/57 (ECHR, 1st July 1961).

[29] App no 5310/71 (ECHR, 18 January 1978).

[30] (1969) 12 YB 1.

[31] *Lawless* (n 28), [28].

[32] *Ireland* (n 29), [205].

[33] *Greek Case* (n 30), [117].

[34] Duffy (n 11), 293.

[35] El Zeidy (n 10), 307.

[36] *Lawless* (n 28), *Ireland* (n 29), *Greek Case* (n 30).

[37] *A and Others* (n 9), [173].

[38] *Aksoy* (n 9), [68].

[39] ECHR (n 2) Article 15(1).

[40] Duffy (n 11), 331.

[41] ECHR (n 2) Article 15(1), *A and Others* (n 9), [20].

[42] Terrorism Act 2000, Sections 44-47.

[43] App no 4158/05 (ECHR, 12 January 2010), [87].

[44] Terrorism Act (n 42) Sections 44-47.

[45] *Gillan and Quinton* (n 43).

[46] John Ip, '*The Reform of Counterterrorism Stop And Search After Gillan V United Kingdom* ' (2013) 13 (4) Human Rights Law Review, 743.

[47] Ip (n 46), 743.

[48] F. de Londras and F. F. Davis, '*Controlling the Executive In Times Of Terrorism: Competing Perspectives On Effective Oversight Mechanisms*' (2010) 30 Oxford Journal of Legal Studies, 23.

[49] *Lawless* (n 28), *Ireland* (n 29).

[50] *Greek Case* (n 30), *A and Others* (n 9).

[51] ECHR (n 2) Article 15.

[52] *Lawless* (n 28), *Ireland* (n 29), *Greek Case* (n 30).

[53] *A and Others* (n 9), Terrorism Act (n 42) Sections 44-47.

[54] *Lawless* (n 28), *Ireland* (n 29), *A and Others* (n 9), *Gillan and Quinton* (n 43).

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Date written: March 2018