



# **Law and Emergencies: A Comparative Overview**

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# **Emergency Laws and Regulations in Argentina: Executive Summary**

## **Legislative Framework**

The Argentine Constitution is the main piece of legislation that deals with a state of emergency. The Constitution allows the declaration of a state of siege within the Argentine Republic and the suspension of rights and liberties under certain conditions. The last constitutional reform in 1994, granted the President greater powers allowing, inter alia, the issuance of "necessity and urgency" decrees (NUDs), a common emergency legislative measure taken in Argentina. Aside from the Constitution and the NUDs, Argentina's legal framework regarding emergencies also consists of specific legislation and international treaties incorporated into domestic law, such as The International Covenant on Civil and Political Rights and the American Convention on Human Rights. Between the years 1854 to 2001, a state of siege was declared in Argentina 57 times.

## **Entrance into a State of Emergency**

The Constitution defines the conditions that need to be met in order to declare a state of emergency. According to the Constitution, a domestic disorder or foreign attack that endangers the enforcement of the Constitution or the territory which is in turmoil, will be declared as a state of siege. In the event of foreign attacks, the power of declaration is given to the President, with the consent of the senate. Regarding domestic disorders, the power of declaration is generally given to the Congress, whereas the President can exert this power if Congress is in recess.

## **Legal Powers**

During a general state of emergency, the President has the power to issue "necessity and urgency" decrees. This extensive legislative

power is granted when exceptional circumstances occur (meaning, a situation that do not allow the exercise of "ordinary procedures foreseen by this Constitution for the enactment of laws"). Delegation of legislative powers to the Executive is possible only in regard to issues concerning administration and public emergency. In a general state of emergency, Congress is empowered to order loans and credit transactions.

### **Rights in a State of Emergency**

The Constitution allows for the suspension of constitutional guarantees in a state of siege, which is declared either by the Congress or by the President. Such suspension of rights is, however restricted as the Constitution states that the President "shall not pronounce judgment or apply penalties of his own" and that his powers are limited. Additional specific limitations are also stated, inter alia, that "Congress may not vest on the National Executive Power - nor may the provincial legislatures vest on the provincial governors - extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever."

## Emergency Laws in Argentina: Synopsis

### *Introduction*

The Argentine Nation is a federal constitutional republic, consisting of 23 provinces and an autonomous city. Argentina gained her independence from Spain in 1816. Through its history Argentina had known great conflicts between Federalists and Unitarians and between military and civilian parties. In 1976 a military Junta took power over the nation, following a time of Peronist populism and military involvement in governments. Only in 1983 Democracy returned to Argentina. It stayed ever since, despite the occurrence of several crises that might have jeopardized it, above all the financial emergency in 2001-2002 that gave rise to violent public protests and that caused the continuous resignations of Argentina's presidents.<sup>1</sup> Argentina's legal system is a civil law system.<sup>2</sup> The Argentine Constitution is based primarily upon the Constitution of the United States, but it was also greatly influenced by European public law with regard to its interpretation and development.<sup>3</sup>

### **1. The Legislative Framework**

The main piece of legislation dealing with states of emergency is the Argentine Constitution, which allows declaring a state of siege within the Argentine Republic. Argentina's Constitution was amended several times through its history. The last constitutional reform occurred in 1994. But even before the 1994 reform, the constitution of Argentina allowed for the Argentine government to declare a state of emergency and to suspend rights and liberties. The constitutions of 1819 and 1826 empowered the government to exercise emergency powers that restricted rights, and the 1853 constitution allowed the legislative branch (the Congress in case of a domestic commotion and the Senate in the event of a foreign attack) to suspend individual rights, when met certain conditions, and to declare a state of siege. From 1854 to 2001, a state of siege was declared in Argentina 57 times,<sup>4</sup> ranging from a period of 6 weeks to 9 years.<sup>5</sup> A common emergency (legislative) measure taken in Argentina is the issuance of emergency decrees (for conditions to be met when

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<sup>1</sup> Argentina, *THE WORLD FACTBOOK*, CIA <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html>.

<sup>2</sup> Id.

<sup>3</sup> Manuel Jose Garcia-Mansilla, Separation of Powers Crisis: The Case of Argentina, 32 *GA. J. INT'L & COMP. L.* 307, 309 (2004).

<sup>4</sup> Carlos Rosenkrantz, Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution, 89 *TEX. L. REV.* 1557, 1558 (2010-2011).

<sup>5</sup> William C. Banks and Alejandro D. Carrio, *Presidential Systems In Stress: Emergency Powers In Argentina And The United States*, 15 *MICH. J. INT'L L.* 1, 30-31 (1993-1994), p. 30. Data is correct as of the years 1993-1994. For more reading see Frederick E. Snyder, *State of Siege and rule of law in Argentina: the Politics and Rhetoric of Vindication*, 15 *LAW. AM.* 503, 508-509, 511 (1983-1984).

exercising the power see "Emergency Powers" table below. It should be noted that no formal declaration of emergency or state of Siege is needed). Up until the 1994 constitutional reform, the President of Argentina was not given, by any piece of legislation, the power to issue "necessity and urgency" decrees (NUD) (see Article 99(3) of the amended 1994 Constitution below). Despite this lack of legal authority at the time, the presidents of Argentina had issued NUDs on various occasions through the years. For example, between the years 1853-1983, even though there was no textual support for the NUDs in the 1953 Constitution,<sup>6</sup> approximately 20 NUDs were issued by constitutional presidents in times of emergencies, including political and economic crises<sup>7</sup> (in fact, this power was used mainly by military governments).<sup>8</sup> Furthermore, in 1990, the Supreme Court of Argentina endorsed the use of NUDs and deemed them constitutional,<sup>9</sup> thus allowing the abuse of this measure during the presidency of Menem, in which Menem succeeded from 1989 until 1994 to bypass the Congress several times due to the legislation of NUDs.<sup>10</sup> It should be mentioned that the Argentine Supreme Court has accepted a de facto doctrine regarding NUDs back in 1930, during the 1930 military coup.<sup>11</sup> Nowadays, presidents are given great power because of the aforementioned 1994 constitutional amendment that allows, explicitly, presidents to exercise a de facto unconstitutional practice: the issuance of NUDs.<sup>12</sup> Aside from the Constitution and the NUDs, Argentina's legal framework regarding emergencies also consists of specific legislation. While some emergency legislation is still valid and provides for the declaration of (economic) state of emergency somewhat independently of the Constitution (see below), other statutes, demonstrating the abuse of power, are merely historical:

"After President General Jorge Rafael Videla promised to safeguard the "highest interests" of the nation and to "develop[] a genuine spirit of social justice," the junta issued the Statute for the Process of National Reorganization,' in which it dissolved federal and provincial legislative bodies; fired the principal government officials; prohibited political party and union activities; and declared that the Constitution would remain in force only "to the extent that it does not oppose the main

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<sup>6</sup> FN 3, Manuel Jose Garcia-Mansilla, at 322.

<sup>7</sup> Delia M. Ferreira Rubio and Matteo Goretti, *Executive-Legislative relationship in Argentina: From Menem's Decretazo to a new style?*, 1, 1 (Annual conference, Argentina 2000: Politics, Economy, Society and International Relations, Oxford, May 15-17, 2000).

<sup>8</sup> FN 3, Manuel Jose Garcia-Mansilla, at 322.

<sup>9</sup> Susan Rose-Ackerman, Diane A. Desierto and Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT'L L. 246, 261 (2011).

<sup>10</sup> FN 3, Manuel Jose Garcia-Mansilla, at 322-323.

<sup>11</sup> Id. Manuel Jose Garcia-Mansilla, at 348-349.

<sup>12</sup> Id. at 323.

objectives set forth by the military junta or the provisions" of its law. Soon thereafter, the junta put into place a series of statutes and decrees restricting individual liberties. The Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation permitted the government to scrutinize negligence in the exercise of a public, political, or social interest, acts or omissions that facilitate subversion, tolerance of corruption, and failure to observe basic moral principles in activities that involve the public interest."<sup>13</sup>

Later on, during 2001 Argentina suffered from a major economic meltdown. As a response to the crisis, the President issued Decree 1570/01 "to reorder the economy, avoid the collapse of the financial system and pacify the country ravage by a deep social crisis".<sup>14</sup> In January 2002 the Congress approved "The Public Emergency and Exchange Regime Reform Act No. 25.561" (which was enacted by Executive Order No. 50/2002).<sup>15</sup> Its first Article, by virtue of Section 76 of the Constitution, which stipulates that the "legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency", declares "a state of public emergency in the social, economic, administrative, financial and exchange areas, and delegates to the Executive all the powers indicated in such Act until December 10<sup>th</sup>".<sup>16</sup> The Act (and the presidential decree that followed it):

"de-linked the US dollar and the Argentine peso, thereby allowing the peso to float. It also established an exchange rate of 1.40 peso per US dollar for bank deposits, 'pesified' certain existing foreign currency contracts at a 1 peso per US dollar rate and prohibited indexation of peso obligations. Rates and tariffs under existing public work and public utility contracts were also re-denominated at a rate of 1 peso per US dollar and escalation or price adjustment clauses based on foreign currency fluctuations were eliminated."<sup>17</sup>

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<sup>13</sup> FN 5, Banks and Carrio.

<sup>14</sup> FN 4, Rosenkrantz, at 1564.

<sup>15</sup> Pablo Hourbeigt, 03.08.2002, *The Public Emergency Act No. 25.561 and its impact on the Argentina's power sector*, LEXUNIVERSAL, <http://lexuniversal.com/en/articles/913> (last visited 12/24/2015)

<sup>16</sup> Id.

<sup>17</sup> Jeanne C Olivier, *Political risk insurance: a valuable product?*, 4(1) *LATINLAWYER* 1 (2005) [http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/02/Political-Risk-Insurance-A-Valuable-Product/Files/Download-PDF-Political-Risk-Insurance-A-Valuable-FileAttachment/pdf\\_latinlawyer.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/02/Political-Risk-Insurance-A-Valuable-Product/Files/Download-PDF-Political-Risk-Insurance-A-Valuable-FileAttachment/pdf_latinlawyer.pdf). According to Rosenkrantz (FN 4), at 1565, these financial measures dealing with the emergency derive also from Decree 214/02 issued by the President of Argentina. See also ICSID Case No. ARB/02/1 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, para. 63-67 (Decision on Liability, Oct 3, 2006) <http://www.italaw.com/cases/documents/624>. For more economical legislation (including Decree 293/02; Decree 311/03 and Law No. 25, 790) see Id. at para. 68-71.

This national emergency law concerning economic crises is still in force today, as are the powers delegated by it, since the emergency situation declared by this law has been extended until December 31, 2015.<sup>18</sup> In addition, Argentina incorporated into its domestic law some international treaties concerning a state of emergency and human rights in emergencies, e.g.: the International Covenant on Civil and Political Rights (ratified in 1986)<sup>19</sup> and the American Convention on Human Rights (ratified in 1984),<sup>20</sup> thus not only expanding her legal framework to some international aspects but also constitutionalizing international human rights treaties<sup>21</sup> (see Section 75(22) of the Argentine constitution.)

Below is a non-comprehensive list of laws dealing with emergencies and extreme conditions in Argentina:

Law	Dealing with
Constitution of the Argentine Nation	Domestic disorder, foreign attacks and war; also covers "public emergency", including financial emergencies
Law No. 25561, Jan. 6, 2002 ("The Public Emergency and Exchange Regime Reform Act No. 25.561")	Declaration of "a public emergency in "social, economic, administrative, financial and currency exchange matters"". <sup>22</sup>

<sup>18</sup> See UNITED STATES SECURITIES AND EXCHANGE COMMISSION ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 For the fiscal year ended December 31, 80, 2013. <http://www.sec.gov/Archives/edgar/data/904851/000119312514119270/d699006d20f.htm> (last visited 12/24/2015)

<sup>19</sup> The office of the United Nations High Commissioner for Human Rights, status of ratification, Argentina <http://indicators.ohchr.org/>.

<sup>20</sup> Organization of American States, American Convention on Human Rights, Signatures and Current Status of Ratification [http://www.oas.org/en/iachr/mandate/basic\\_documents.asp](http://www.oas.org/en/iachr/mandate/basic_documents.asp); [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>21</sup> See Janet Koven Levit, The Constitutionalization of Human Rights in Argentina: Problem or Promise?, 37 COLUM. J. TRANSNAT'L L. 281, 291 (1998-1999).

<sup>22</sup> FN 4 at 1564-1565.

## 2. Declaration of a State of Emergency: A Table of Analysis

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
<p>Generic emergency: state of siege</p>	<p>Although the constitution does not define an "emergency" explicitly or formally, Section 23 of the constitution provides such definition, while setting the conditions for the declaration:            "In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution and of the authorities hereby established, the province or territory which is turmoil shall be declared in a state of siege and the constitutional guarantees shall be suspended therein..."</p>	<p>Regarding events of foreign attacks, the power of declaration is given to the President of the Nation.</p> <p>Section 99(16) of the constitution stipulates that "In the event of foreign attack, he [the President of the Nation] declares, with the consent of the senate, one or more places of the Nation in state of siege for a limited period..."</p> <p>In accordance, Section 61 of the constitution states that "In case of foreign attacks, the Senate is also empowered to authorize the President of the Nation to declare in state of siege one or several places of the Republic".</p> <p>Regarding domestic disorders, the power of declaration is given, in general, to the Congress. The President can exert this power when Congress is in recess.</p> <p>Section 75(29) of the constitution states that Congress "is empowered: [...] To declare in state of siege one or several parts of the Nation in case of domestic commotion, and to approve or suspend the state of siege declared by the Executive Power during a recess of congress".</p> <p>In correspondence, Section 99(16) of the constitution stipulates that in the case of domestic disorder, the President of the Nation "only exerts this power [of declaration] when Congress is in recess, since this is a power pertaining to this body. The President exercises it</p>	<p>According to Section 75(29) of the constitution, in the event of domestic disorder, the Congress is empowered to "... suspend the state of siege declared by the Executive Power during a recess of Congress".</p>

Situation	Definition of an "emergency"	Who may declare the state of emergency and under what conditions?	How does a state of emergency end?
		under the limitations prescribed in Section 23".	
War	Such formal definition does not exist under the constitution, but see under section 127 (following) for events considered as acts of civil war.	<p>According to Section 99(15) of the constitution, the President of the Nation has the following power: "He declares war and orders reprisals with the consent and approval of Congress".</p> <p>In accordance, section 75(25) of the constitution states that "Congress is empowered: [...] To authorize the Executive Power to declare war or make peace".</p> <p>In addition, Section 127 of the constitution states that "No province shall declare or make war against another province. Their claims must be submitted to the Supreme Court and settled by it. Their de facto hostilities are acts of civil war, considered as sedition or mutiny, which the Federal Government must suppress and punish in accordance with the law".</p>	

### 3. Legal Powers

**(General emergency powers provided by the constitution)**

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power
<p>Generic emergency</p>	<p>When exceptional circumstances which interfere with normal legislation proceedings exist, the President has the power to issue "necessity and urgency" decrees, according to Section 99(3) of the constitution:            "Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he [the President] shall issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet.            Within the term of ten days, the Chief of the Ministerial Cabinet shall personally submit the decision to the consideration of the Joint Standing Committee of Congress, which shall be composed according to the proportion of the political representation of the parties in each House. Within the term of ten days, this committee shall submit its report to the plenary meeting of each House for its specific consideration and it shall be immediately discussed by both Houses."            For the explicit powers vested in the Chief of the Ministerial Cabinet see Section 100 of the</p>	<p>The President of the Nation</p>	<p>The existence of "exceptional circumstances" that do not allow to exercise "ordinary procedures foreseen by this Constitution for the enactment of laws" and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties. The decrees should be issued on grounds of "necessity and urgency" and be decided by a general agreement of ministers as aforementioned.</p>

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power
	constitution. <sup>23</sup>		
	Section 76 of the constitution stipulates that "The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress. The expiration of the term foreseen in the previous paragraph shall not imply the revision of the legal relationships emerging from the rules issued as a result of the powers delegated by Congress."		Delegation of legislation powers to the Executive is possible only with issues concerning administration and public emergency
Generic emergency (cont.)	In addition, it is important to note that "if the legislature declares an emergency (economic, social, sanitary, etc.), it usually delegates to the President broad power to take measures designed to overcome the crisis, including the discretionary use of budgeted public funds." <sup>24</sup>  For example, the delegation of state-reform and privatization powers to President Manem under a declared economic emergency. <sup>25</sup> It is also important to remember that, as		(Formal) Declaration of emergency by the legislative branch  Formal declaration of state of siege.

<sup>23</sup> Section 100(13) of the Constitution empowers Chief of the Ministerial Cabinet to: "countersign, together with the other ministers, decrees of necessity and urgency and decrees on partial promulgation of laws. Within ten days of their approval, he shall personally submit these decrees to the consideration of the Joint Standing Committee."

<sup>24</sup> FN 9, Rose-Ackerman, Desierto and Volosin, at 258.

<sup>25</sup> Id. ; Gabriel Bouzat, *Presidential Power and Political Crisis in Argentina* 24 (Yale Law School Latin American Legal Studies, SELA 2006).

Situation	Powers	Who is the power conferred to	Conditions to be met when exercising the power
	aforementioned, under Section 23 of the constitution the President has the power to suspend constitutional guarantees (rights and liberties), when a state of siege is declared.		
Generic emergency (cont.)	Section 4 of the Constitution refers to the power of the Congress to order loans and credit transactions during emergencies: "The Federal Government provides for the expenditures of the Nation with the funds of the National Treasury, composed of the proceeds of export and import duties, the sale or lease of lands owned by the Nation, the revenues of the Posts, other taxes equitably and proportionally levied on the population by the National Congress, and of whatever loans and credit transactions Congress may order in case of national emergencies or for enterprises of national interest."	The Congress	The existence of a national emergency
War	The Congress is empowered, according to section 75(26) of the constitution to "empower the Executive Power to order reprisals and to make rules concerning the booty". Also, the Congress is empowered to "establish the Armed Forces in times of peace and war; and to make rules for their organization and government".	The Congress	

## 4. Rights in a State of Emergency

Section 23 of the constitution allows the suspension of the constitutional guarantees in a state of siege (declared either by the Congress or by the President of the Nation). However, this section imposes some restrictions on the President: "...during such a suspension the President of the Republic shall not pronounce judgment or apply penalties of his own. In such case, his power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave Argentine territory". Also, section 43 of the constitution (dealing with summary proceeding) states that "When the right damaged, limited, modified, or threatened affects physical liberty, or in case of an illegitimate worsening of procedures or conditions of detention, or of forced missing of persons, the action of habeas corpus shall be filed by the party concerned or by any other person on his behalf, and the judge shall immediately make a decision even under state of siege". In addition, section 29 of the Constitution stipulates that: "Congress may not vest on the National Executive Power - nor may the provincial legislatures vest on the provincial governors - extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland."

### Judicial Review

Courts in Argentina have been playing an important role regarding the aspect of the rule of law in emergencies, as there were times when they have not done much to enforce it.<sup>26</sup> Although during the early stages of Argentina's history the courts limited the type of rights that could be suspended under states of siege, "the restrictive trend changed" in the beginning of the 1930s as the courts allowed in 1931, only a couple of month after the coup, to restrict the freedom of the press.<sup>27</sup> In fact, in 1930, after the military coup, which formed an illegitimate government (since no constitutional processes were followed or elections conducted), the Supreme Court of Argentina declared "that "de facto" the new government was capable of carrying out any of the ends of the elected government and would be recognized as legally valid notwithstanding the unconstitutionality of its origin."<sup>28</sup> Although the Court's

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<sup>26</sup> <sup>26</sup> FN 5, Banks and Carrio.. 27-28, 30 (1993-1994); See also Janet Koven Levit, FN 21, at 331.

<sup>27</sup> FN 4 at 1558-1559.

<sup>28</sup> <sup>28</sup> FN 5, Banks and Carrio, pp. 27-28.

later decisions tried to restrict the powers of a de facto government, "the lawless character of emergency powers has rendered judicial controls ineffectual even concerning executive usurpations of the basic right to rule Argentina."<sup>29</sup> The Supreme Court's doctrinal line regarding states of siege changed somewhat once again in 1978, a time when military political power reached its peak. The Court ruled against government decisions under Section 23 of the Constitution regarding detainees and stated, inter alia, that governmental actions during states of siege were always subject to judicial review.<sup>30</sup> In 1985, at last, the Supreme Court ruled that "during an emergency the executive could curtail liberties in a limited way for a short period of time."<sup>31</sup> It should be mentioned that the power of the legislator during emergencies (mainly to approve statutes) and the power of the President to issue decrees were also subject to judicial review for many times during emergencies.<sup>32</sup> This involvement of the courts established the boundaries of legitimate emergency measures that could be taken and constitutional infringement of rights during times of emergency.

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<sup>29</sup> Id. at 28.

<sup>30</sup> FN 4 at 1560.

<sup>31</sup> Id.

<sup>32</sup> Id. at 1560-1567.