



## Decree With Legislative Content in Comparative Constitutional Law

 Pablo Luis Manili<sup>1\*</sup>

<sup>1</sup>Universitas Buenos Aires, Argentina

\*Corresponding Author, *Email:* [pablo.manili@gmail.com](mailto:pablo.manili@gmail.com)

Received: 2024-03-23

Revised: 2024-04-15

Accepted: 2024-06-10

### Abstract

This study examines the regulation of Emergency and Urgency Decrees (DNU) in various international constitutions to identify common patterns and differences. The research aims to compare DNU regulations in various international constitutions, identifying common patterns, similarities, and differences. The primary focus is to understand how different countries regulate the use of DNUs, including approval procedures, material limitations, and legislative oversight mechanisms. This study employs normative juridical research with a statutory and comparative approach. The countries compared in this study include the United Kingdom, the United States, Paraguay, Prussia, Austria, Spain, Italy, Sweden, Brazil, Colombia, Peru, Ecuador, and Argentina. The data used are secondary data comprising primary legal materials, including the constitutions of the respective countries and their statutory regulations. Secondary legal materials include research articles and journals, while tertiary legal materials include dictionaries. The results indicate that although many constitutions do not explicitly regulate DNUs, parliamentary systems are more likely to have DNU-related regulations than presidential systems. All constitutions that regulate DNUs require immediate legislative approval and set specific time limits for this process. Some countries impose strict limitations on the material that can be regulated through DNUs, ensuring that fundamental rights and government structures are not affected. The study concludes that stringent legislative oversight is necessary to prevent the misuse of executive power in the use of DNUs, and balancing the need for swift action with the protection of human rights is crucial for the effectiveness and accountability of DNUs.

Keywords: Urgency Decree; Comparative Constitutional Law; Legislative Decree



Open access under a [Creative Commons Attribution-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-sa/4.0/). Copyright © 2024 by Authors

## Introduction

The executive power to issue decrees with legislative content is a topic that generates significant debate in the study of constitutional law. This phenomenon reflects the dynamics and tensions between various branches of power in democratic governance systems.<sup>1</sup> Legislative decrees, known by various names such as emergency decrees, necessity decrees, or decrees of necessity and urgency, often arise in crises or urgent needs where the conventional legislative process is deemed inadequate. In this context, examining the background and implications of using legislative decrees in different legal systems is crucial.

In recent decades, research has shown that overly broad executive power can threaten democratic principles and the rule of law. The expansion of executive power in emergencies often undermines the essential checks and balances in a democratic system.<sup>2</sup> This view aligns with the analysis by Austin Bussing and Michael Pomirchy, who emphasize that legislative and judicial oversight of executive actions is critical for maintaining accountability and government legitimacy.<sup>3</sup>

The history of legislative decrees shows that although they are intended to address extraordinary circumstances, abuse often occurs, negatively impacting democratic systems.<sup>4</sup> In England, the case of "Rex vs. Hampden" (1637) is an early example where executive power was used to levy taxes without parliamentary consent, violating the fundamental principle of "no taxation without representation" established in Magna Carta 1215.<sup>5</sup> This illustrates that even in early times, there was tension between the need for swift action and adherence to constitutional principles.

---

<sup>1</sup> Valeria Palanza, *Checking Presidential Power: Executive Decrees and the Legislative Process in New Democracies* (Cambridge: Cambridge University Press, 2019), <https://doi.org/10.1017/9781108573580>.

<sup>2</sup> William E. Scheuerman, "Emergencies, Executive Power, and the Uncertain Future of US Presidential Democracy," *Law & Social Inquiry* 37, no. 3 (Juli 2012): 743–67, <https://doi.org/10.1111/j.1747-4469.2012.01311.x>.

<sup>3</sup> Austin Bussing dan Michael Pomirchy, "Congressional Oversight and Electoral Accountability," *Journal of Theoretical Politics* 34, no. 1 (1 January 2022): 35–58, <https://doi.org/10.1177/09516298211061516>.

<sup>4</sup> Jelena von Achenbach, "Separation of powers and the role of political theory in contemporary democracies," *International Journal of Constitutional Law* 15, no. 3 (30 Oktober 2017): 861–65, <https://doi.org/10.1093/icon/mox072>.

<sup>5</sup> Jorge A. Diegues, *Decrees of Necessity and Urgency* (Buenos Aires: La Ley, 2012), 806.

In the modern context, the United States faces similar challenges. The case of "Youngstown Sheet & Tube Co. v. Sawyer" (1952)<sup>6</sup> is a landmark in U.S. jurisprudence, where the Supreme Court overturned executive actions that exceeded the president's constitutional authority. Justice Black<sup>7</sup> asserted that "in our constitutional system, the president's power to see that the laws are faithfully executed refutes the idea that he can be a lawmaker". This case underscores the importance of judicial oversight in limiting executive power and ensuring that emergency actions do not deviate from constitutional principles.

Argentina offers another example of how legislative decrees are used in the context of economic crises. The 1994 constitutional reform allowed the president to issue decrees of necessity and urgency (DNU), though this practice has often been contested. The Argentine Supreme Court has repeatedly annulled decrees that were found to violate the principle of separation of powers, such as the decree cutting public employees' salaries in 2001. This indicates that even with constitutional mechanisms, their implementation often sparks controversy and requires stringent oversight.

As Fombad highlighted, the use of emergency powers must be accompanied by strong oversight mechanisms to prevent abuse.<sup>8</sup> Li-ju<sup>9</sup>, Bari<sup>10</sup>, and Wilde<sup>11</sup> Fombad emphasizes the need for effective controls to prevent the abuse of emergency powers, particularly in the absence of legislative oversight and judicial control.<sup>12</sup> Li-ju underscores the importance of statutory "emergency

---

<sup>6</sup> "Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)," Justia Law, t.t., <https://supreme.justia.com/cases/federal/us/343/579/>.

<sup>7</sup> "Youngstown CO. v. SAWYER, 343 U.S. 579 (1952)," t.t., <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/youngstown.html>.

<sup>8</sup> Charles Manga Fombad, "Cameroon's Emergency Powers: A Recipe for (Un)Constitutional Dictatorship?" *Journal of African Law* 48, no. 1 (April 2004): 62–81, <https://doi.org/10.1017/S0021855304481042>.

<sup>9</sup> Deng Li-ju, "On the Emergency Monitoring from the Perspective of Discretionary Power," *Northern Legal Science*, 2009, <https://www.semanticscholar.org/paper/On-the-Emergency-Monitoring-from-the-Perspective-of-Li-ju/069fcc059eccb7f74a0245bd9737899b66f5054c>.

<sup>10</sup> M. Ehteshamul Bari, "The Unjust Exercise of Emergency Powers in Bangladesh and Heir Consequent Impact on the Fundamental Rights: A Critical Appraisal," *Jurisprudencija* 21, no. 2 (2014): 578–98, <https://doi.org/10.13165/JUR-14-21-2-12>.

<sup>11</sup> Marc de Wilde, "Uncertain futures and the problem of constraining emergency powers: temporal dimensions of Carl Schmitt's theory of the state of exception," dalam *Temporal Boundaries of Law and Politics* (Routledge, 2018).

<sup>12</sup> Fombad, "Cameroon's Emergency Powers."

circumstances" and establishing an emergency monitoring system to prevent abuse.<sup>13</sup>

Landau's research<sup>14</sup> underscores that emergency powers must be accompanied by robust oversight mechanisms to prevent abuse. Landau argues that the legitimacy of executive actions in emergencies heavily depends on how much these actions are supervised and restricted by other state institutions. This is consistent with Fiona de Londras and Fergal F. Davis argue that "the legitimacy of executive actions in emergencies heavily depends on the extent to which those actions are overseen and constrained by other state institutions."<sup>15</sup>

Research on decrees with legislative content is not a novel topic; several previous studies have addressed this issue. Among them are, Firstly, the article by Bruce Ackerman,<sup>16</sup> explores the impact of expanded executive power during emergencies and underscores the importance of maintaining checks and balances to prevent abuses. Similarly, the paper by Tom Ginsburg and Mila Versteeg<sup>17</sup> discusses the necessity of legislative and judicial oversight of executive actions during crises to ensure government accountability and legitimacy. Furthermore, Landau's<sup>18</sup> research highlights the risks of executive overreach during emergencies and the need for robust oversight mechanisms to prevent abuses. Additionally, Guillermo O'Donnell's<sup>19</sup> research emphasizes the role of transparency and accountability in executive actions, especially in the context of emergency powers. Finally, the article by John Ferejohn and Pasquale Pasquino.<sup>20</sup>

---

<sup>13</sup> Li-ju, "On the Emergency Monitoring from the Perspective of Discretionary Power."

<sup>14</sup> David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47, no. 1 (2013), <https://lawreview.law.ucdavis.edu/archives/47/1/abusive-constitutionalism>.

<sup>15</sup> F. De Londras dan F. F. Davis, "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms," *Oxford Journal of Legal Studies* 30, no. 1 (1 Maret 2010): 19–47, <https://doi.org/10.1093/ojls/gqp031>.

<sup>16</sup> Bruce Ackerman, "The Emergency Constitution," *The Yale Law Journal* 113, no. 5 (2004), <https://www.yalelawjournal.org/essay/the-emergency-constitution>.

<sup>17</sup> Tom Ginsburg dan Mila Versteeg, "The bound executive: Emergency powers during the pandemic," *International Journal of Constitutional Law* 19, no. 5 (1 December 2021): 1498–1535, <https://doi.org/10.1093/icon/moab059>.

<sup>18</sup> Landau, "Abusive Constitutionalism."

<sup>19</sup> Guillermo O'Donnell, "Delegative Democracy," *Journal of Democracy* 5, no. 1 (1994), <https://www.journalofdemocracy.org/articles/delegative-democracy/>.

<sup>20</sup> John Ferejohn dan Pasquale Pasquino, "The law of the exception: A typology of emergency powers," *International Journal of Constitutional Law* 2, no. 2 (1 April 2004): 210–39, <https://doi.org/10.1093/icon/2.2.210>.

This article categorizes different types of emergency powers and their implications for democratic governance, providing a comparative perspective.

The difference between this research and previous studies lies in its broader and more in-depth comparative approach to regulating legislative decrees in various countries with presidential systems, including the United States, Guatemala, Brazil, Colombia, Peru, Ecuador, Argentina, and Paraguay. In a comparative analysis, it is essential to understand that despite varying contexts and mechanisms, the challenges faced by different countries in managing executive power share fundamental similarities. In democratic systems, balancing the need for swift action in emergencies and maintaining constitutional principles is crucial. Therefore, this study aims to provide in-depth insights into the use of legislative decrees across various legal systems, focusing on how oversight mechanisms can be optimized to preserve the integrity and legitimacy of the governance process.

### **Research Method**

This research is a normative juridical study using a legislative and comparative approach. The legislative approach is employed to explore and discover the regulations and jurisprudence in comparative constitutional law regarding these decrees. In contrast, the comparative approach compares the regulation of these decrees across various countries.

The countries used for comparison in this study include the United Kingdom, the United States, Paraguay, Prussia, Germany, Austria, Spain, Italy, Sweden, Brazil, Colombia, Peru, Ecuador, and Argentina. These countries were selected based on the diversity of their governmental systems, the presence of DNU (decrees with legislative content) provisions in their constitutions, and the relevance of significant cases or precedents involving DNUs. The data used are secondary data consisting of primary legal materials, including the constitutions of each country and relevant legislation. Secondary legal materials include research articles and journals, while tertiary legal materials include dictionaries.

Data were collected through documentation methods and will be analyzed descriptively.

## **Regulation of Presidential Decrees with Legislative Content in Countries with a Presidential System**

The countries with a presidential system outlined in this article include the United States, Guatemala, Brazil, Colombia, Peru, Ecuador, Argentina, and Paraguay. The following sections will detail the regulations.

### **1. United States of America**

The incursion into the legislative domain by the executive has been a concern since the early days of constitutional law. In "The Federalist No. XLVII," James Madison asserted that "the legislative, executive, and judiciary departments are by no means wholly separate and distinct from each other." Rather there is always "partial agency in, and control over the acts of each other." However, he firmly added that "the magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law."

The 1787 Constitution does not explicitly address this issue in the United States. In numerous cases where the President has claimed legislative functions, this has been done under the doctrine of "inherent presidential powers," but the courts have often deemed such actions invalid. For example:

In the case of "Youngstown Sheet & Tube Co. v. Sawyer."<sup>21</sup> in 1952, the validity of a presidential decree ordering the seizure of steel mills to end a strike threatening essential production during the ongoing war against Korea was contested. Despite existing laws that subjected union activities to national control and allowed the President to halt strikes endangering public health or national security, the District Court nullified the decree, ruling it exceeded such powers. Justice Black of the Supreme Court opined that "In our constitutional system, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"; "the Founders entrusted the law-making power solely to

---

<sup>21</sup> "Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)."

Congress in both good and bad times.”<sup>22</sup> Another Justice added, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum... but when he acts without any congressional grant or denial of authority, he can only rely upon his own independent powers. There is a zone of twilight in which the President and Congress may have concurrent authority or in which its distribution is uncertain.”<sup>23</sup> Conversely<sup>24</sup> dissenting opinions argued that precedents demonstrated that “Presidents have often exemplified leadership envisioned by the Founders when making him Commander-in-Chief and imposing upon him the duty to ensure the laws are faithfully executed. With or without explicit legislative authorization, Presidents have dealt with national emergencies by acting swiftly and decisively to execute legislative programmes; therefore, they concluded that the President was acting within his authority." The majority arguments nullifying the decree had more substantial legal content than the dissenting arguments validating it, which were more factually based on precedents than legal reasoning.

Some authors<sup>25</sup> cite in the case of “*Dames & Moore vs. Reagan*”<sup>26</sup> in 1981 is related to legislative-type decrees, but it is not. The case was as follows: in December 1979, during the hostage crisis at the US Embassy in Iran, and knowing Iran would withdraw all deposits from US banks, President Carter decided to freeze those funds under the International Emergency Economic Powers Act. The plaintiff company sued the Iranian government and several of its entities and banks, successfully seizing funds from their accounts. After both governments reached an agreement, they decided to submit their disputes to arbitration with the commitment that the US would "terminate all legal proceedings in US courts by US citizens or companies against Iran and its state-owned enterprises and vacate all attachments and judgments that had been rendered..." This international

---

<sup>22</sup> “*Youngstown CO. v. SAWYER*, 343 U.S. 579 (1952).”

<sup>23</sup> “*Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)* | Constitution Center,” National Constitution Center – constitutioncenter.org, t.t., <https://constitutioncenter.org/the-constitution/supreme-court-case-library/youngstown-sheet-tube-co-v-sawyer-steel-seizure-case>.

<sup>24</sup> Composed of Judges Vinson, Reed y Minton

<sup>25</sup> Lugones Sergio O., Corcuera, Santiago H., Narciso J., Garay, Alberto F., Dugo, *Emergency Laws. Decrees of Necessity and Urgency* (Buenos Aires, La Ley, 1992), 99.

<sup>26</sup> “*Dames & Moore v. Regan*, 453 U.S. 654 (1981),” Justia Law, t.t., <https://supreme.justia.com/cases/federal/us/453/654/>.

commitment involved the President performing a judicial function. Still, the Act above implicitly allowed him to do so, leading the Supreme Court to rule that the burden of proof to rebut the presumption of the constitutionality of the President's actions lay with the plaintiff, which they failed to meet, thus validating the President's actions. The Court also considered congressional actions before and after the agreement with Iran. The case was essentially assessed as legislative delegation, not as the President independently exercising legislative functions.

## **2. Guatemala**

The 1985 Constitution of Guatemala states in Article 183(f) that the president has the authority to "Issue the necessary provisions in cases of serious emergency or public disaster, and must report to Congress at its next session." Although this provision is brief, it refers to cases of "serious emergency" or "public disaster" and mandates immediate reporting to Congress.

## **3. Brazil**

The 1988 Brazilian Constitution, influenced by the Italian constitution, states in Article 62: "In cases of relevance and urgency, the president of the Republic may adopt provisional measures with the force of law, and must immediately submit them to the National Congress, which, if in recess, shall be convoked to meet within five days. Provisional measures shall lose their effectiveness from the date of their issuance if they are not converted into law within thirty days from their publication, and the National Congress shall regulate the legal relationships arising therefrom." In summary:

- a. Establishes the extraordinary nature of these measures: "in cases of relevance and urgency."
- b. Sets the deadline for submitting the measure to Congress: "immediately."
- c. Sets the deadline for Parliament to process it: one month.
- d. Grants Parliament the authority to annul it.

## **4. Colombia**

The 1991 Constitution of Colombia regulates this type of decree only in cases of emergency. Article 212 states: "The President of the Republic, with the



signature of all ministers, may declare a State of External War. Through such a declaration, the Government shall have the necessary powers to repel aggression and defend sovereignty... Legislative decrees issued by the Government will suspend laws that are incompatible with the State of War, valid for the specified duration, and will lose their validity immediately once normalcy is declared restored. Congress may, at any time, modify or repeal them with the affirmative vote of two-thirds of the members of both chambers." Article 213 refers to the state of internal emergency: "In the event of a serious disturbance of public order that directly threatens the institutional stability, security of the State, or the lives of citizens, and that cannot be controlled by the ordinary use of the Police authority, the President of the Republic, with the signature of all ministers, may declare a State of Internal Commotion, throughout the Republic or in part of it, for a period not exceeding ninety days, which may be extended up to two similar periods, the second requiring the prior opinion and approval of the Senate of the Republic. Through such a declaration, the Government shall have the necessary powers to address the causes of the disturbance and prevent its spread. Legislative decrees issued by the Government may suspend laws that are incompatible with the State of Commotion and will cease to be valid immediately once public order is declared restored..." Article 214 regulates the details of decrees issued under this framework: "1. Legislative decrees will be signed by the President of the Republic and all his ministers and can only refer to matters directly and specifically related to the situation that led to the declaration of the State of Emergency. 2. Human rights and fundamental freedoms cannot be suspended. In any case, the rules of international humanitarian law shall be respected. A statutory law shall regulate the Government's powers during states of emergency and establish judicial controls and guarantees to protect rights in accordance with international treaties. Actions taken must be proportional to the severity of the events..."

The Colombian constitutional system has the following characteristics regarding emergency decrees:

- a. Material restrictions: only actions to be taken in the case of external war or internal commotion (a state of emergency in other countries).
- b. Formalities: Must be signed by the President and all Ministers.
- c. Prohibited matters: Human rights and international humanitarian law cannot be suspended.
- d. Delegation to specific law: regulate government powers during such states of emergency.
- e. Expiry limit: Decrees will lose their validity immediately once normalcy is declared restored (in the case of war) or when public order is restored (in the case of internal commotion).
- f. Legislative control guidelines: Congress can modify or repeal decrees with the affirmative vote of two-thirds of the members of each chamber.

## **5. Peru**

The 1993 Constitution of Peru, in Article 118, paragraph 19, grants the president the authority to "Issue extraordinary measures, through emergency decrees with the force of law, in economic and financial matters, when the national interest requires it and report them to Congress. Congress may modify or repeal emergency decrees." Though limited, the interesting aspect of this provision is its restriction to economic and financial matters.

## **6. Ecuador**

The 2008 Constitution of Ecuador, in Article 140, stipulates that the executive power can send to the National Assembly a draft law considered urgent in economic matters. "The Assembly must approve, modify, or reject it within a maximum period of thirty days from its receipt... If within the specified period the Assembly does not approve, modify, or reject the project considered urgent in economic matters, the President will enact it as a decree-law... The National Assembly may at any time amend or repeal it, following the usual procedure provided in the Constitution..."

Key points of this constitution are:

- a. Material Restriction: The legislative content of the decree is limited to economic issues
- b. Initial Legislative Process: This process provides the National Assembly with the opportunity to pass the president's project into law, and only if this is not done within 30 days can the president enact the decree.
- c. Legislative Control: The National Assembly retains the authority to repeal or amend the decree

## 7. Argentina

Emergency Decrees (DNU) have long existed as a sporadic tool rulers use without constitutional regulation. However, *in 1990, in the case "Peralta v. National State,"*<sup>27</sup> the Supreme Court legitimized their use, and since then, the use of DNUs has been excessive. The 1994 constitutional reform adopted Article 99, paragraph 3, similar to several previously mentioned foreign norms (from Austria, Italy, Spain, and Brazil): "... Under any circumstances, the Executive Power may not issue legislative provisions under the threat of absolute and irreparable nullity. Only when exceptional circumstances make it impossible to follow the procedures established in this Constitution for the enactment of laws, and not concerning norms regulating criminal, tax, electoral, or political party regime matters, may it issue decrees based on necessity and urgency, which shall be decided in a general meeting of ministers, who must sign it along with the chief of the cabinet of ministers. The chief of the cabinet of ministers must personally and within ten days submit the measure to the Bicameral Permanent Commission, whose composition must respect the political representation proportions of each Chamber. This commission will issue a decision within ten days to the plenary of each Chamber for explicit consideration, which the Chamber shall immediately address. A special law approved by an absolute majority of each Chamber's members will regulate the procedure and scope of Congress's intervention.

Key aspects are:

- a. General Prohibition: "The Executive Power may not under any circumstances, with the threat of absolute and irreparable nullity, issue legislative provisions.
- b. Exception: "Only when exceptional circumstances make it impossible to follow the procedures established in this Constitution for the enactment of laws" can a DNU be issued.
- c. Prohibited Matters: Four matters that this norm cannot regulate: "...and not concerning norms regulating criminal, tax, electoral, or political party regime matters...". This is an exception within the exception, meaning that even if exceptional circumstances exist, it cannot legislate on these four matters.
- d. Formal Requirements: "...shall be decided in a general meeting of ministers, who must sign it along with the chief of the cabinet of

---

<sup>27</sup> *Fallos* 313: 1513.

ministers." There are three requirements: (i) decided in a general meeting of all ministers; (ii) signed by all ministers; (iii) also signed by the Chief of Cabinet (JGM).

- e. Follow-Up Process: The JGM must send the DNU to the bicameral commission, which will issue a decision within ten days to the plenary of each Chamber, which must immediately be considered by the Chamber.

Delegation to Congress: A special law approved by an absolute majority of all the members of each Chamber will regulate the procedure and scope of Congress's intervention

## **8. Paraguay**

The 1844 Constitution, in Title VII, Article 1, states: "The President of the Republic shall have extraordinary powers in cases of invasion, internal unrest, and whenever it is necessary to maintain order and public tranquility in the Republic." These and other provisions led Juan B. Alberdi, an Argentine, to deem the constitution as "terrifying," criticizing it as follows: "it is a constitution of dictatorship or an almighty presidency in a definitive and stable institution; that is, it is an antithesis, a constitutional error... Title 1 enshrines the liberal principle of the separation of powers, declaring that the power to make laws is the exclusive right of Congress. But all that is worthless because Title 4 demolishes it... Strong power is indeed needed in America, that is true; but in Paraguay, this power is exaggerated, brought to a ludicrous and unjust level.

## **Regulation of Presidential Decrees with Legislative Content in Countries with a Parliamentary System**

The countries with a presidential system outlined in this article include the United Kingdom, Italy, Greece, Spain, Germany, Austria, Sweden, and Czechoslovakia. The following sections will detail the regulations.

### **1. England**

The first recorded case concerning an executive decision encroaching upon the legislative domain occurred in England.<sup>28</sup> In the case of "Rex vs. Hampden"

---

<sup>28</sup> Diegues, *Decrees of Necessity and Urgency*, 806.

in 1637, several decrees signed by King Charles I were contested. These decrees imposed extraordinary contributions without Parliament's consent on the pretext of a possible war (not an actual war, but merely the possibility). It should be noted that Parliament had been dissolved by the King himself in 1629. These decrees violated the principle of "no taxation without representation" enshrined in Magna Carta 1215, and thus Hampden opposed them in the Exchequer Chamber. By a narrow margin of 7 votes to 5, the court upheld these actions, stating that "for the safety and defence of the kingdom, the King could levy taxes on his subjects notwithstanding any parliamentary laws to the contrary, and the King could override any law in times of emergency." A few years later, these taxes were repealed by Parliament. The lesson we can draw from this ruling is limited, as, during this period, the King had dissolved Parliament, effectively creating a *de facto* period where legislative power was absent. However, it demonstrates that Parliament had the authority to annul such decrees once restored.

## **2. Prussia**

The Prussian Constitution of 31 January 1850 permits the issuance of legislative decrees in Article 63, which states: "When public security demands it, or due to the critical nature of the circumstances, decrees may be issued that have the force of law, provided they do not conflict with the Constitution, and must be presented to the Assembly at its next meeting if it is not in session at the time." In other words, this constitution establishes the grounds for exception ("When public security demands it, or due to the critical nature of the circumstances"), a limitation (that the decrees do not conflict with the Constitution), and a mechanism of subsequent control ("must be presented to the Assembly at its next meeting").

## **3. Alemania**

The Constitution of the German Reich of 1919, known as the "Weimar Constitution," includes provisions for legislative decrees in Article 48: "...When public security and order in the Reich are seriously disturbed or endangered, the President may take the necessary measures to restore order, including, if

necessary, with the assistance of the armed forces. For this purpose, he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153. The Reich President must immediately inform the Reichstag of all measures taken in accordance with paragraphs 1 and 2 of these articles. At the request of the Reichstag, these measures must be revoked... A Reich law will establish the details.” This provision was often flagrantly abused in the country, transforming the system of government into a dictatorship. Several notable characteristics can be identified:

- a. Grounds for exception: "When public security and order in the Reich are seriously disturbed or endangered."
- b. Limitation of presidential power: only able to take “necessary measures”
- c. Parliamentary control: “must immediately inform the Reichstag of all measures taken in accordance with paragraphs 1 and 2 of this article. At the request of the Reichstag, these measures must be revoked...”
- d. Regulation by law: “A Reich law will establish the details.”

#### **4. Austria**

In the 1920 Austrian Constitution, the executive power is regulated as follows, article 18 Paragraph (1) mention that all administration of the federal state may only be exercised on the basis of the laws. Then Paragraph (2) Every administrative authority can issue decrees within its jurisdiction based on provisions in the law.

Furthermore paragraph (3) when immediate action is required, which under the Constitution necessitates a decision by the National Council, to prevent irreparable public harm, and when the Federal Council is not in session, cannot convene in time, or is hindered by a greater force from performing its functions, the Federal President, upon the proposal of the Federal Government, with his and the Government’s responsibility, may approve such action through provisional decrees amending the law. The Federal Government must submit its proposal in accordance with the Permanent Subcommittee (paragraph 2 of Article 55), which must be appointed by the Main Committee of the National Council. Such a decree requires the approval of the Federal Government.

Every decree issued under paragraph 3 must immediately be presented by the Federal Government to the National Council, which the Federal President must convene if it is not in session; if it is in session, the President of the National Council must call a meeting within eight consecutive days following the proposal. Within four weeks of the proposal, the National Council must enact a federal law to replace the decree or declare by resolution that the Federal Government must immediately revoke the decree. In the latter case, the Federal Government must comply immediately. To ensure the National Council can make a timely decision, its President must submit the proposal for voting no later than the second to last day of the four-week period. Domestic regulations will determine the implementation process. If the decree is revoked by the Federal Government as mentioned above, the legal provisions repealed by the decree will become effective again on the same day as the revocation.

Regarding this constitutional provision, Hans Kelsen, its inspirer, stated that “in certain extraordinary situations, the constitution permits the government to issue, in place of the parliament, all or part of the necessary general norms. General norms that do not originate from the parliament but from the administrative authority are called regulations, which detail or complement a law. In this latter case, it is said that such a regulation has 'the force of law.'<sup>29</sup>

Some important notes from the Austrian system are as follows:

- a. Starting with the general rule: “All administration of the federal state may only be exercised on the basis of the laws.”
- b. Outlining the exceptions to this rule: “When immediate action is required, which under the Constitution necessitates a decision by the National Council, to prevent irreparable public harm, and when the Federal Council is not in session, cannot convene in time, or is hindered by a greater force from performing its functions...”
- c. Specifying matters that cannot be regulated through this norm: (i) amendments to federal constitutional provisions, (ii) the creation of permanent financial burdens on the Federation, States, parties, municipalities, or citizens, (iii) the sale of state assets, (iv) labour rights (Article 10, number 11), (v) changes to association rights or tenant protections.

---

<sup>29</sup> Hans Kelsen, *Pure Theory of Law*, trans. by Moisés Nilve (Buenos Aires: Eudeba, 1981), 150.

- d. Establishing the formal requirements for its application: “The Federal Government must submit its proposal in accordance with the Permanent Subcommittee (paragraph 2 of Article 55), which must be appointed by the Main Committee of the National Council. Such a decree requires the approval of the Federal Government.”
- e. Creating a mechanism for follow-up on the decree: “Every decree issued must immediately be presented by the Federal Government to the National Council, which the Federal President must convene if it is not in session; if it is in session, the President of the National Council must call a meeting within eight consecutive days following the proposal. Within four weeks of the proposal, the National Council must enact a federal law to replace the decree or declare by resolution that the Federal Government must immediately revoke the decree. In the latter case, the Federal Government must comply immediately. To ensure the National Council can make a timely decision, its President must submit the proposal for voting no later than the second to last day of the four-week period.”

## 5. Czechoslovakia

The 1920 Czechoslovak Constitution, inspired by the Austrian Constitution, exhibits similarities regarding the authority to establish emergency norms. This constitution's power to establish emergency norms is not vested in the executive but rather in a parliamentary committee. Article 54 of this constitution stipulates that, during the period of parliamentary dissolution and until a new parliament is constituted, a committee consisting of 16 members of parliament and eight senators will be selected to act on "urgent matters, even those which under normal circumstances would require the enactment of a law" (paragraph 1). Paragraph 11 of the article adds, "Urgent decisions that under normal circumstances can only be announced through the enactment of a law will only be accepted upon the recommendation of the President of the Republic." Paragraph 12 complements this rule by stating that these decisions have provisional legal force as laws only if published in the official bulletin and signed by the President, Prime Minister, and half of the government members. The decision will not be recorded or published if the President does not approve.<sup>30</sup> In summary:

---

<sup>30</sup> Traducciones del inglés del autor de este trabajo.



- a. There is a time limitation: it can only be issued during parliamentary dissolution.
- b. It is extraordinary: "urgent matters".
- c. It is a complex action: the decision is made by the Standing Committee upon the recommendation of the President of the Republic and must be signed by the Prime Minister and half of the cabinet members.

## 6. Spain

Regarding this country, we will analyze two consecutive constitutions:

### a. The 1931 Spanish Republic Constitution

Article 76(d) authorizes the President to "order the necessary emergency measures to maintain the integrity or security of the Nation, immediately reporting to the Cortes." Article 80 states: "When the Congress is not in session, the President, upon the proposal and unanimous agreement of the Government and with the approval of two-thirds of the Standing Committee, may issue decrees on matters reserved for the authority of the Cortes, in extraordinary cases requiring urgent decisions or when requested by the defense of the Republic. Such decrees will be provisional and their validity will be limited until Congress decides or legislates on the matter." This means:

- 1) There are restrictions on the permitted matters for these norms: maintaining the integrity or security of the Nation in Article 76 and "extraordinary cases requiring urgent decisions or when requested by the defence of the Republic" in Article 80.
- 2) There are substantive requirements: the Congress is not in session.
- 3) There are formal requirements: "upon the proposal and unanimous agreement of the Government and with the approval of two-thirds of the Standing Committee."
- 4) There is a time limit for validity: valid until Congress legislates on the matter.

### b. The 1978 Spanish Constitution

In this constitution, such actions are referred to as "decree-laws", and Article 86 sets the following rules: "In cases of extraordinary and urgent need, the Government may issue provisional legislative provisions in the form of decree-laws which must not affect the regulation of the basic institutions of the State, the rights, duties, and freedoms of citizens regulated in Title I, the

system of the Autonomous Communities, or the general electoral law. 2. The decree-law must be immediately submitted for debate and a comprehensive vote in the Congress of Deputies, which shall be convened for this purpose if not in session, within thirty days of its promulgation. The Congress must expressly pronounce within this period on its ratification or repeal, for which the rules will provide a special and expedited procedure. 3. During the period established in the previous paragraph, the Cortes may process it as a draft bill through the emergency procedure." In short:

- 1) Determined as extraordinary situations: an extraordinary and urgent need.
- 2) Prohibited from affecting certain matters: the basic institutions of the State, the rights, duties, and freedoms of citizens, the system of the Autonomous Communities, and the general electoral law.
- 3) Determined time frame for sending the norm to parliament: "immediately".
- 4) Determined time frame for parliamentary handling: thirty days.
- 5) Granted authority to parliament to repeal it.

The Spanish Constitutional Court (hereinafter "TC") has stated that decree-laws are subject to dual oversight: (i) by Parliament, which will analyze both political and legal criteria, and (ii) by the TC, which will examine, using purely legal criteria, whether the requirements for their issuance were respected and whether they do not infringe on prohibited matters.<sup>31</sup> The TC will exercise this oversight over whether the decree-law is still in force because "the integrity of the legal system is at stake" before the TC.<sup>32</sup>

## 7. Italia

Article 77 of the 1947 constitution stipulates: "The Government may not, without delegation from the Chambers, issue decrees having the force of ordinary law. In cases of extraordinary necessity and urgency, the Government adopts, under its own responsibility, provisional measures having the force of law, it must present them on the same day for conversion into law by the Chambers, which, even if dissolved, shall be summoned for that purpose and shall meet

---

<sup>31</sup> Sentencia del TC n° 29/1982 y 6/1983

<sup>32</sup> Sentencia del TC n° 60/1986. Puede verse su análisis en Lugones, N., Garay, A., Dugo, S., Corcuera, S., *Leyes de Emergencia. Decretos...*, cit., pág. 41

within five days. The decrees lose all effect from the outset if they are not converted into law within sixty days of their publication. The Chambers may, however, regulate by law legal relationships arising out of unconverted decrees."

The distinctive characteristics of this system are:

- a. General rule announced: "The Government may not, without delegation from the Chambers, issue decrees having the force of ordinary law."
- b. Exception to the rule determined: "in cases of extraordinary necessity and urgency."
- c. The time limit for sending the norm to parliament was determined on the same day.
- d. The time limit for parliament to address it is determined to meet within five days, and it will expire within sixty days if not converted into law.
- e. The authority granted to parliament to annul it.

## **8. Sweden**

The constitution of this country consists of four instruments, with the "Instrument of Government" dating from 1974 being one of them. In Chapter 13, Article 6, there is a rule governing a category of decrees that combine Emergency Decrees with Executive Decrees: "When the Realm is at war or under threat of war or is in such extraordinary circumstances as are caused by armed conflict or the threat of war that endangers the Realm, the Government, with the authorization of law, may issue decrees on certain matters that should be regulated by law. If necessary, in other situations, for the organization of defense, the Government may, with the authorization of law, decree that provisions laid down in law regarding requisition or similar measures shall come into force or cease to apply. Every law granting such authorization as referred to in the first paragraph shall precisely state the conditions under which the authorization may be used, which shall not include the right to enact, amend, or repeal fundamental law, the Riksdag Act, or the Electoral Law."

This norm, in our view, contains the appropriate regulations regarding this institution:

Decrees may only be issued in "war or threat of war or extraordinary circumstances caused by armed conflict." It must be preceded by a law authorizing its issuance and precisely stating what is permitted. Prohibited from amending the constitution, the Riksdag Act, and the Electoral Law.

## 9. Greece

The 1975 Greek Constitution, in Article 44 mention that "In extraordinary circumstances requiring extremely urgent and unforeseen need, the president... upon the proposal of the Council of Ministers, may issue acts of legislative content. These acts must be submitted to the Parliament for ratification within forty days from their issuance or within forty days from the convocation of the Parliament if it is not in session at the time of issuance; if they are not submitted to the Parliament within the aforementioned time limit or if the Parliament does not ratify them within three months from their submission, they shall cease to be in force for the future." Key points of this provision are:

- a. Prior procedure: proposal from the Council of Ministers.
- b. Subsequent control: by the Parliament within 40 days.
- c. Expiration: if not submitted to Parliament or if not ratified by Parliament within three months

### **Analysis of Similarities and Differences in Decree Regulations with Legislative Content in Various Countries**

The regulation of decrees with legislative content in various countries reflects diverse approaches aimed at balancing the need for swift action in emergencies with the protection against potential abuse of executive power. Furthermore, the regulation of decrees with legislative content can be examined from several aspects to identify the similarities and differences in decree regulations across various countries.

#### 1. Legislative Oversight

Countries such as Italy, Brazil, Argentina, and Colombia emphasize the importance of legislative oversight over executive decrees. These regulations

require that decrees receive parliamentary approval within a specified timeframe after issuance. For example, in Italy, the parliament must approve a decree within 60 days, whereas in Brazil, the timeframe is 30 days. This arrangement ensures that even though the executive can act quickly in emergencies, there remains a legislative check to prevent misuse of power.

## 2. Formal Requirements

Most countries, including Italy, Brazil, Argentina, and Colombia, require the president and the entire cabinet or relevant ministers to sign decrees. These formal requirements ensure that the decision to issue a decree has the consensus of the entire executive branch, not just the president. This enhances the legitimacy of the decree and ensures that the action is genuinely considered necessary by the entire government.

## 3. Material Restrictions

Several countries impose strict limitations on matters that can be regulated through decrees. For instance, Argentina prohibits using decrees to regulate criminal, tax, electoral, or political party matters. Colombia emphasizes that human rights and international humanitarian law cannot be suspended. These material restrictions aim to protect fundamental rights and prevent the executive from completely usurping the legislative function, particularly in highly sensitive areas.

## 4. Time Constraints

The existence of time constraints for legislative approval of decrees is a critical element in most systems described. In Ecuador, if the National Assembly does not approve or reject a decree within 30 days, the president automatically enacts it. This creates a mechanism that compels the legislature to act swiftly and avoids delays that could exacerbate an emergency situation. However, there is also a risk that decrees may be enacted without adequate legislative oversight if the time limit is not properly monitored.

## 5. Emergency Conditions

The regulation of emergency conditions that allow decrees to be issued varies across countries. Colombia regulates decrees in foreign war and internal unrest cases, whereas Sweden and Greece focus on situations of war or imminent danger and other extraordinary conditions. Brazil regulates the issuance of decrees in situations of necessity and urgency. These specific regulations on emergency conditions demonstrate that each country has clear definitions and limitations on when decrees can be used, preventing the misuse of executive power in non-emergency situations.

From the above aspects, the similarities and differences in decree regulations will be illustrated in the following tables.

Table 1: Similarities in Emergency Decree Regulations

<b>Aspect</b>	<b>Countries</b>	<b>Description</b>
Legislative Oversight	Italy, Brazil, Argentina, Colombia	Requires parliamentary approval of decrees within a specified timeframe to ensure legislative control over executive actions.
<b>Formal Requirements</b>	Italy, Brazil, Argentina, Colombia	Decrees must be signed by the president and all relevant ministers, indicating a consensus within the executive branch.
<b>Material Restrictions</b>	Sweden, Colombia, Argentina	Restrictions can be regulated on the types of matters that decrees, such as human rights, electoral laws, and constitutional matters.
<b>Time Constraints</b>	Italy, Brazil, Colombia, Greece, Ecuador	The legislature must approve decrees within a certain period (e.g., 30-60 days), or they expire, ensuring timely legislative oversight.

Sources: Processed by the author

Table 2: Differences in Emergency Decree Regulations

<b>Aspect</b>	<b>Countries</b>	<b>Description</b>
Scope and Conditions	Colombia, Sweden, Guatemala	Different degrees can be issued in different conditions, such as foreign

		war, internal unrest, or severe public emergencies.
<b>Legislative Involvement</b>	Argentina, Peru, Ecuador	There are varied processes for legislative review and approval, such as requiring submission to a bicameral commission or automatic enactment if the legislature does not act within a set period.
<b>Material Prohibitions</b>	Argentina, Colombia	Specific prohibitions on regulating certain matters by decree, even in emergencies, such as criminal, tax, electoral matters, and human rights.
<b>Emergency Situations</b>	Greece, Brazil	Specific definitions and limitations on emergency conditions that justify the issuance of decrees prevent misuse of executive power in non-emergency situations.

Source: Processed by the author

Although there are similarities in the basic framework for regulating emergency decrees across various countries—particularly regarding legislative oversight, formal issuance requirements, material restrictions, and time constraints—there are significant differences in the details of their implementation. Countries adopt these regulations according to their legal, political, and historical contexts. All the countries discussed aim to balance the need for swift action in emergencies with the prevention of executive power abuse, employing robust legislative control mechanisms and stringent material restrictions to protect fundamental rights and the integrity of the legal system.

## Conclusion

Various constitutions from the countries above provide a legal framework for issuing decrees by the executive in emergencies, each setting specific limits and procedures. Italy and Brazil, for instance, emphasize the requirement for parliamentary approval and discussion within a set timeframe to ensure legislative oversight. Sweden, Greece, Colombia, and Argentina have provisions detailing the specific conditions and formalities required for issuing decrees, including material restrictions and legislative approval. Meanwhile, Guatemala, Peru, and

Ecuador illustrate how decrees can be utilized in emergencies or specific economic issues, with reporting or ratification requirements by the legislative body. Overall, these constitutions strive to balance the need for swift action in extraordinary situations with the protection against potential abuse of executive power by instituting mechanisms for legislative control and stringent material limitations.

### Authors' Contributions

As the main author of this article, P.L.M was responsible for the research activities, such as data collection, presentation, and writing of the report and manuscript.

### References

- Achenbach, Jelena von. "Separation of powers and the role of political theory in contemporary democracies." *International Journal of Constitutional Law* 15, no. 3 (30 Oktober 2017): 861–65. <https://doi.org/10.1093/icon/mox072>.
- Ackerman, Bruce. "The Emergency Constitution." *The Yale Law Journal* 113, no. 5 (2004). <https://www.yalelawjournal.org/essay/the-emergency-constitution>.
- Bari, M. Ehteshamul. "The Unjust Exercise of Emergency Powers in Bangladesh and Heir Consequent Impact on the Fundamental Rights: A Critical Appraisal." *Jurisprudencija* 21, no. 2 (2014): 578–98. <https://doi.org/10.13165/JUR-14-21-2-12>.
- Bussing, Austin, dan Michael Pomirchy. "Congressional Oversight and Electoral Accountability." *Journal of Theoretical Politics* 34, no. 1 (1 Januari 2022): 35–58. <https://doi.org/10.1177/09516298211061516>.
- De Londras, F., dan F. F. Davis. "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms." *Oxford Journal of Legal Studies* 30, no. 1 (1 Maret 2010): 19–47. <https://doi.org/10.1093/ojls/gqp031>.
- Diegues, Jorge A. *Decrees of Necessity and Urgency*. Buenos Aires: La Ley, 2012.
- Ferejohn, John, dan Pasquale Pasquino. "The law of the exception: A typology of emergency powers." *International Journal of Constitutional Law* 2, no. 2 (1 April 2004): 210–39. <https://doi.org/10.1093/icon/2.2.210>.
- Fombad, Charles Manga. "Cameroon's Emergency Powers: A Recipe for (Un)Constitutional Dictatorship?" *Journal of African Law* 48, no. 1 (April 2004): 62–81. <https://doi.org/10.1017/S0021855304481042>.



- Ginsburg, Tom, dan Mila Versteeg. "The bound executive: Emergency powers during the pandemic." *International Journal of Constitutional Law* 19, no. 5 (1 Desember 2021): 1498–1535. <https://doi.org/10.1093/icon/moab059>.
- Justia Law. "Dames & Moore v. Regan, 453 U.S. 654 (1981)," t.t. <https://supreme.justia.com/cases/federal/us/453/654/>.
- Justia Law. "Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)," t.t. <https://supreme.justia.com/cases/federal/us/343/579/>.
- Kelsen, Hans. *Pure Theory of Law*, trans. by Moisés Nilve. Buenos Aires: Eudeba, 1981.
- Landau, David. "Abusive Constitutionalism." *UC Davis Law Review* 47, no. 1 (2013). <https://lawreview.law.ucdavis.edu/archives/47/1/abusive-constitutionalism>.
- Li-ju, Deng. "On the Emergency Monitoring from the Perspective of Discretionary Power." *Northern legal science*, 2009. <https://www.semanticscholar.org/paper/On-the-Emergency-Monitoring-from-the-Perspective-of-Li-ju/069fcc059eccb7f74a0245bd9737899b66f5054c>.
- National Constitution Center – [constitutioncenter.org](http://constitutioncenter.org). "Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case) | Constitution Center," t.t. <https://constitutioncenter.org/the-constitution/supreme-court-case-library/youngstown-sheet-tube-co-v-sawyer-steel-seizure-case>.
- O'Donnell, Guillermo. "Delegative Democracy." *Journal of Democracy* 5, no. 1 (1994). <https://www.journalofdemocracy.org/articles/delegative-democracy/>.
- Palanza, Valeria. *Checking Presidential Power: Executive Decrees and the Legislative Process in New Democracies*. Cambridge: Cambridge University Press, 2019. <https://doi.org/10.1017/9781108573580>.
- Scheuerman, William E. "Emergencies, Executive Power, and the Uncertain Future of US Presidential Democracy." *Law & Social Inquiry* 37, no. 3 (Juli 2012): 743–67. <https://doi.org/10.1111/j.1747-4469.2012.01311.x>.
- Sergio O., Corcuera, Santiago H., Lugones, Narciso J., Garay, Alberto F., Dugo,. *Emergency Laws. Decrees of Necessity and Urgency*. Buenos Aires,: La Ley, 1992.
- Wilde, Marc de. "Uncertain futures and the problem of constraining emergency powers: temporal dimensions of Carl Schmitt's theory of the state of exception." Dalam *Temporal Boundaries of Law and Politics*. Routledge, 2018.
- "Youngstown CO. v. SAWYER, 343 U.S. 579 (1952)," t.t. <https://law2.umkc.edu/faculty/projects/ftrials/conlaw/youngstown.html>.