

Regulation of and by emergency

Martin Lodge and **Andrea Mennicken** consider political and systemic challenges of emergencies for regulation

‘Sovereign is he who decides on the exception’ – this statement by Carl Schmitt has regained prominence in contemporary debates about the future of democratic governance, regardless of Schmitt’s hostility towards liberal democracy and support for the German Nazi regime. The question of the use and legitimacy of powers during states of emergency, ‘the governing by exception’, has become increasingly relevant in the world of regulation. After all, regulatory bodies are not just powerful actors during ‘normal times’, but play also significant roles during times of emergency, for instance in relation to the organization and rationing of access to medicine, allocation of energy and water supplies, or management of failing banks.

What defines an emergency in the context of regulation? What types of emergency deserve specific regulatory attention? How does a discussion focusing on emergencies differ from regulatory conversations about crises or failure? For one, emergencies need to be understood in terms of systemic challenges to the functioning and legitimacy of existing institutions, and normal, routine ways of life. Further, we need to distinguish between different types of emergency: emergencies can occur on regular, if unpredictable bases (such as hurricanes), or they might come as ‘rude surprises’ (such as 9/11 as a novel form of terrorism); yet other types of emergency may not at all be event-based, but materialize over time, in unpredictably linear and non-linear ways (such as climate change; see also the article on ‘the new twilight zone between crisis and risk management’ by Boin and Lodge in this issue). What unites these different phenomena is the systemic threat that they pose to the survival of systems, for instance, essential infrastructures or entire civilizations. In doing so, an emergency is not just challenging the capacities of state (and non-state) regulatory actors to mitigate effects that are seen as a threat to systemic survival (including survival of the state itself); it also challenges the very foundations on which the authority of these actors is based.

It is this existential threat to survival that is often said to justify the use of exceptional forms of authority. In the context of war, the use of exceptional authority is linked to military force and the ability to constrain civil liberties. Such uses, however, are usually checked and legitimized through ex-ante approval and ex-post accountability provisions. Underpinning such commitments is a supposedly shared understanding of the limited and exceptional nature of these ‘states of exception’. It is therefore not just the power to decide on the state of excep-

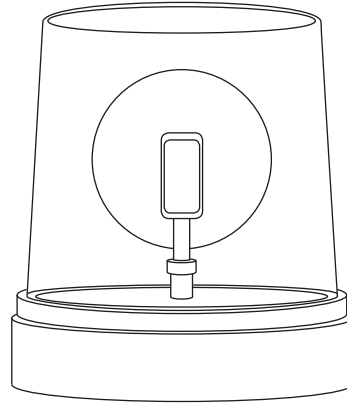
tion that is important, the power to end states of exception is equally central to contemporary debates about liberal democratic governance.

These debates are also highly relevant for the world of regulation. After all, regulators are called upon to commit to ‘do whatever it takes’ to deal with emergency situations, whether these concern pandemics, bank runs or natural disasters. Yet, the governance of such moments of emergency, the regulation (and governance of regulation) of emergencies, is far less frequently discussed. Such discussions relate, firstly, to the inherent redistributive consequences of regulatory decision-making during emergency situations, and the problems these pose. On what justificatory basis should a regulator, for instance, make decisions about the rationing of electricity supplies? Emergencies might require a redirection of regulatory efforts towards different target populations. Take the example of vulnerable populations. New populations might become vulnerable as access to essential services (such as water) becomes restricted during an emergency, whereas those already recognized as ‘vulnerable’ might be ‘protected’ by existing emergency provisions relating, for instance, to hospitals and care homes. In contrast, other parts of the population might suddenly become vulnerable – for example, infant formula feeding where access not just to various types of formula, but also drinking water needs to be provided.

Secondly, there are questions of how the use of exceptional authority is granted and held accountable. It might be desirable to establish procedural mechanisms that grant regulatory actors the authority to use exceptional powers, such as restrictions on civil liberties. While such mechanisms might work in the context of military invasions and other security threats, it is less clear whether such mechanisms can be that easily deployed in the context of regulation. An official granting of emergency powers might not just require considerable time, it might also involve significant political conflict and disagreement. Even where political consensus on the need to grant emergency powers to regulators might exist, the actual act of granting these powers might still involve controversy.

At the same time, there is also a need to consider provisions defining how states of emergency and the use of exceptional powers are ended. Normalizing the exception can easily turn into an abuse of these powers. The notion of ‘crisisfication’ of decision-making draws attention to the biases that occur when decisions are made in a setting of crisis and emergency rooms. It also points to the diagnosed rise in decision-making





undertaken in explicit crisis settings. These settings are characterized by limited information flows (especially from the frontlines), and a sense of immediacy that stands in the way of debate and a long term, broader perspective. A reliance on exceptional powers allows for the continued sidelining of opposition to particular measures. The normalization of a state of emergency with the continued use of exceptional powers might therefore become a convenient political strategy. And it does raise considerable concerns for those interested in constitutional safeguards against discretionary state power.

Emergencies present exceptional stress-tests for existing regulatory frameworks. They can quickly turn into emergencies for the regulators themselves, as capacities are found wanting, frameworks become contested, and authorities delegitimized. After-the-event enquiries into the use and abuse of emergency powers can support some degree of restoration and ‘coming together’ at regulatory level, yet they might also further deteriorate relationships within society, especially when the use of emergency powers is seen to have had asymmetric effects. Similarly, extensive catalogues of recommendations following an enquiry invite tick-box responses rather than reflective consideration, with complex recommendations being long-grassed in view of more immediate priorities.

Preparing for emergencies represents a particular challenge for both regulators and political systems more generally. The financial crisis and the pro-active role of regulators in it, particularly central banks, have been much discussed. In our view, such discussions should not be limited to the world of financial regulation. Regulatory experiences during the financial crisis have highlighted more generally that it is important for regulators to have a good understanding not just of their technical and legal capacities (and the limits thereof), but also a capacity to improvise and use discretion in (self-)disciplined ways. Put differently, regulators need to develop

their professional comprehension of what their ‘appropriate’ position within the wider political system is. This implies the development of an understanding of the political implications of a (potential) reliance on exceptional authority, including constitutional implications. It also requires a broadened understanding of regulators’ footprints on wider society during ‘normal’ and ‘exceptional’ times.

Likewise, an advanced conversation about emergencies requires a better understanding by the wider political system as to what the role of regulatory institutions during times of (potential) emergency can and should be. Such a conversation, amongst other things, needs to address questions related to the blurred boundaries between democracy and technocracy, and it needs to query the relative balance between professional autonomy and political control. In short, conversations about emergencies should not merely be about anticipatory regulation, and the development of regulatory regimes that can deal with emergency situations; they should equally encompass a far more general debate about the role of regulatory bodies within constitutional liberal democracy.

AUTHORS

Martin Lodge is **carr** Director.

Andrea Mennicken is **carr** Deputy Director.