# Introduction

The terrorist attacks of September 11, 2001 and the ensuing "war on terror" have focused much attention on issues that have previously lurked in a dark corner at the edge of the legal universe. Politicians and academics alike are now preoccupied with a wide range of questions about the possible responses of democratic regimes to violent challenges. The resort to emergency powers at both the national and international level has been so extensive and penetrating that the exercise of these powers and the complex questions that arise in that connection now play a critical role in discussions about the rule of law, legitimacy, and legality.

Despite repeated statements that the events of September 11 have forever changed the world,[1] much of the discussion around matters dealing with terrorism, the structuring of counter-terrorism measures, extraordinary governmental powers to answer future threats, and fashioning legal responses to terrorist threats is not new. As this book illustrates throughout, the quandaries posed by defining and structuring responsible responses to crises did not begin with the events of September 11. They have faced nations embroiled in wars against external enemies, as well as those responding to violent movements within their own borders. They have haunted countries powerful and weak, rich and poor. How to allow government sufficient discretion, flexibility, and powers to meet crises while maintaining limitations and control over governmental actions so as to prevent or at least minimize the danger that such powers would be abused? How to allow government to act responsibly, i.e., "with sufficient vigor to meet the nation's challenges, but without

[1] See, e.g., Anthony Lewis, "A Different World," *New York (NY) Times*, Sept. 12, 2001, p. A27; "President Bush's Address on Terrorism Before a Joint Meeting of Congress," *NY Times*, Sep. 21, 2001, p. B4; W. Michael Reisman, "Editorial Comments: In Defense of World Public Order" (2001) 95 *American Journal of International Law* at 833.

intruding on protected liberties"?[2] How to balance security and liberty? These questions are as ancient as the Roman republic and as new as the realities wrought by the terrorist attacks on London's public transportation system on July 7 and July 21, 2005.

Yet, prior to al Qaeda's attacks in New York, Washington, and Pennsylvania, violent crises and emergencies and their implications for legal systems had not attracted much attention in legal scholarship. Writing in 1972, Ian Brownlie perceptively observed: "Books on constitutional law find little to say about emergency powers."[3] This observation, made in the context of English constitutional law, could also be applied with as much force to other jurisdictions. Prior to the attacks of September 11, discussion of emergency powers in general, and counter-terrorism measures in particular, had been relegated to a mere few pages, at most, in American constitutional law texts. Nor had the situation been much different in other countries. Emergencies have been conceptualized as aberrations, rare and uninteresting exceptions to the otherwise ordinary state of affairs. As Frederick Schauer suggests in another, yet related, context, the exception has been "an invisible topic in legal theory."[4] For those steeped in the liberal legal tradition, principles of generality, publicity, and stability of legal norms form part of the bedrock of the rule of law. Violent emergencies challenge those tenets since they often call for particularity and extremely broad discretionary powers, while the forces they bring to bear on the relevant society are inherently destabilizing. Moreover, in the context of the United States, its particular geopolitical position and unique history have facilitated the externalization of conflict. Violent emergencies have been regarded as falling within the realms of foreign affairs and national security, which, as we discuss in chapter 4, have traditionally been viewed as deserving special treatment and as standing outside the normal realm of constitutional legal principles, rules, and norms.

Be that as it may, in recent years the exception has become as "invisible as a nose on a man's face, or a weathercock on a steeple."[5] Thus, in this book we seek to place historical and theoretical ideas about

[2] Mark Tushnet, "Controlling Executive Power in the War on Terrorism" (2005) 118 *Harvard Law Review* 2673 at 2673.
[3] Ian Brownlie, "Interrogation in Depth: The Compton and Parker Reports" (1972) 35 *Modern Law Review* 501 at 501.
[4] Frederick Schauer, "Exceptions" (1991) 58 *University of Chicago Law Review* 871 at 872.
[5] William Shakespeare, *The Two Gentlemen of Verona*, in Stephen Greenblatt (ed.), *The Norton Shakespeare* (New York: W.W. Norton, 1997), act 2, sc. 1, II. 120–21.

emergency powers in a contemporary context that has been substantially influenced and shaped by the terrorist attacks of September 11, 2001, and more recently by the attacks in Madrid and London. We pay particular attention to the panoply of counter-terrorism measures that have been activated by international legal obligations and put in place across jurisdictions since September 11. We also suggest that, despite their traditional invisibility, emergency powers across jurisdictions have had pervasive and insidious effects on law and legal institutions, the patterns of which bear remarkable similarity across jurisdictions and time. These similarities have largely gone untracked, mostly because much of the writing on emergency powers has tended to be jurisdiction specific, with emphasis on country or case studies or on particular counter-terrorism measures.

The book focuses on responses by democratic regimes to crises and emergencies. Dealing with such crises is not, of course, limited to democracies. However, authoritarian regimes are not faced with the tragic choices that violent emergencies present to democracies. For the former, the only significant parameters by which to evaluate the state's response to the violence are efficiency, allocation of resources, and the political and perhaps physical survival of the regime. No real tension exists, nor can one exist, between liberty and security, because security is everything and liberty does not count for much, if at all. Such authoritarian regimes are motivated by reason of state arguments that are reminiscent of those put forward by political realists. For democracies, however, the story and calculus are different. Writing during the early days of the Cold War, Carl Friedrich, a Harvard University professor of political science, described the tension between national security and civil rights and liberties as arising "wherever a constitutional order of the libertarian kind has been confronted with the Communist challenge, and with the Fascist response to that challenge."[6] In other words, to what extent, if any, can violations of liberal democratic values be justified in the name of the survival of the democratic, constitutional order itself; and if they can be so justified, to what extent can a democratic, constitutional government defend the state without transforming itself into an authoritarian regime? The tension between self-preservation and defending the "inner-most self" of the democratic regime – those attributes that make the regime worth defending – is what presents democracies

[6] Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, RI: Brown University Press, 1957), p. 13.

with tragic choices. This tension, which is at the heart of all discussions of emergency powers, can only be captured by those who share the belief in the viability and desirability of a constitutional and democratic regime while taking cognizance of the fact that emergencies require special treatment that may deviate from the ordinary norms.

We do not examine responses of democracies to all types of crisis. Rather, our focus in this work is on violent crises and emergencies, by which we mean such events as wars and international armed conflicts, rebellions, and terrorist attacks as distinguished from economic crises and natural disasters.[7] We note that emergency powers have been used in times of great economic consternation and in situations of severe natural disasters as frequently as, and perhaps even more than, in the context of violent crises.[8] We also note that the distinction between the various categories of crises and emergencies may not always be so clear cut: violent emergencies may lead to the development of emergency powers that are then extended and used in the context of emergencies of an economic nature as the example of the Defence of the Realm Act and the subsequent Emergency Powers Act in Britain shows (discussed in chapter 4). Economic emergencies may be, and have been, equated with violent crises leading to governmental demands for similar broad powers to fight off the threat to the nation.[9] Conversely, economic crises may lead to the routine use of emergency powers that are then employed

[7] "Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency," UN Commission on Human Rights, 35th Sess., Agenda Item 10, at 8–9, UN Doc. E/CN.4/Sub.2/1982/15 (1982); Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London: Pinter, 1989), p. 15; Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), p. 6; Aaron S. Klieman, "Emergency Politics: The Growth of Crisis Government" (1976) 70 *Conflict Studies* 5.

[8] For discussion of emergency powers in the economic context see, for example, William E. Scheuerman, "The Economic State of Emergency" (2000) 21 *Cardozo Law Review* 1869; Rebecca M. Kahan, "Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell was a Harsher Blow to Liberty than Korematsu" (2005) 99 *Northwestern University Law Review* 1279; Michal R. Belknap, "The New Deal and the Emergency Powers Doctrine" (1983) 62 *Texas Law Review* 67; Daniel J. Hulsebosch, "The New Deal Court: Emergence of a New Reason" (1990) 90 *Columbia Law Review* 1973; Daniel W. Levy, "A Legal History of Irrational Exuberance" (1998) 48 *Case Western Reserve Law Review* 799; Aaron Perrine, "The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle" (2001) 76 *Washington Law Review* 635 at 654.

[9] Belknap, "The New Deal," 70–76; William E. Leuchtenburg, "The New Deal and the Analogue of War" in John Braeman, Robert H. Bremner, and Everett Walters (eds.), *Change and Continuity in Twentieth-Century America* (Columbus, OH: Ohio State University Press, 1964), p. 81 at 81–82.

in the context of violent crises, at times with disastrous consequences as the experience of article 48 of the Weimar Constitution amply shows (chapter 1. We address some of the connections between violent emergencies and emergencies of an economic nature in chapters 1 and 4). Yet, while parts of the arguments that we develop below are also applicable to non-violent types of emergency situations, we believe that such a distinction is warranted in light of the different categorical requirements for action that each situation may raise. A violent conflict often requires the executive branch of government to act immediately without the benefit of consultation with other institutions and other branches of government. Economic crises may, but do not have to, allow for longer response periods, thus enabling a more sustained inter-branch action.[10]

The difficulties of distinguishing between economic and violent emergencies are part of a bigger problem of definitions. Exigencies provoke the use of emergency powers by governmental authorities. The vast scope of such powers and their ability to interfere with fundamental individual rights and civil liberties and to allow governmental regulation of virtually all aspects of human activity – as well as the possibility of their abuse – emphasize the pressing need for clearly defining the situations in which they may be invoked. Yet, defining what constitutes a "state of emergency" is no easy task, as both chapter 1 (discussing the experiences of national constitutions) and chapter 5 (looking at the international and regional human rights law) point out. The term "emergency" is, by its nature, an "elastic concept,"[11] which may defy precise definition.[12] As the International Law Association suggested: "It is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits

[10] See, e.g., Rossiter, *Constitutional Dictatorship*, pp. 9–11, 290–94; Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (4th edn, Waltham, MA: Blaisdell, 1968), pp. 563–66; Frederick M. Watkins, "The Problem of Constitutional Dictatorship" (1940) 1 *Public Policy* 324 at 368–79.

[11] H.P. Lee, *Emergency Powers* (Sydney: Law Book Co., 1984), p. 4.

[12] Bhagat Singh and Others v. The King Emperor, A.I.R. 1931 P.C. 111, 111. See also Ningkan v. Government of Malaysia (1970) A.C. 379 at 390; Alex P. Schmid and Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (Amsterdam: North-Holland, 1988), pp. 1–38; Oren Gross, " 'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies" (1998) 23 *Yale Journal of International Law* 437 at 438–39; Keith E. Whittington, "Yet Another Constitutional Crisis?" (2002) 43 *William and Mary Law Review* 2093 at 2096–98.

taking into account the overriding concern for the continuance of a democratic society."[13] Whatever the tools employed to attend to this definitional problem, some of the terms that will eventually be used are inherently open-ended and manipulable. Consider, for example, the understanding of the concept of "public emergency" under article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question."[14]

The difficulty of defining "emergency" in advance was cogently captured by Alexander Hamilton when he wrote that "it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite." It was for this reason, he argued, that "no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[15]

Hamilton was surely right in the sense that the difficulties in determining when a state of emergency exists in fact, coupled with the tendency of acute violent crises to result in the expansion of governmental powers and the concomitant contraction of individual freedoms and liberties, make it all the more important to focus on such questions as who determines that an emergency exists? Who may exercise emergency powers when such circumstances materialize and what might those powers be? What legal, political, and social controls are there on the exercise of such powers? Who determines when and how the emergency is over and what the legal effects of such determination are? As chapters 1 through 3 discuss at greater length, Hamilton's solution to the problem – "no constitutional shackles can wisely be imposed on the power to which the care of it is committed" – is but one possible answer.

[13] ILA Paris Report (1984), p. 59, quoted in Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992), p. 31.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sep. 3, 1953), art. 15; Lawless v. Ireland, 1 Eur. Ct. HR (ser. B) (1960–1961) (Commission report), p. 56 at 82 (para. 90).

[15] Clinton Rossiter (ed.), *The Federalist Papers* (New York: New American Library, 1961), No. 23, p. 153 (Alexander Hamilton). See also John Hatchard, *Individual Freedoms and State Security in the African Context: The Case of Zimbabwe* (Athens, OH: Ohio University Press, 1993), p. 2; Lee, *Emergency Powers*, p. 5.

Violent crises pose the greatest and most sustained danger to constitutional freedoms and principles.[16] In such times, the temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir. In times of crisis, it is often argued, legal niceties may be cast aside as luxuries to be enjoyed only in times of peace and tranquility. Those who argue about civil rights and liberties are often chided as having an "airy-fairy" view of the world.[17] At the same time, a commitment to preserving and maintaining rights, freedoms, and liberties must be reconciled with the caution against turning the constitution into a suicide pact.[18] As Justice Robert Jackson wrote more than fifty years ago:

> Temperate and thoughtful people find difficulties in such conflicts which only partisans find no trouble in deciding wholly one way or the other. It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security. Also, it is easy, by contemptuously ignoring the reasonable anxieties of wartime as mere "hysteria," to set the stage for by-passing courts which the public thinks have become too naïve, too dilatory and too sympathetic with their enemies and betrayers . . . if the people come deeply to feel that civil rights are being successfully turned against their institutions by their enemies, they will react by becoming enemies of civil rights.[19]

Thus, there exists a tension of "tragic dimensions" between democratic values and responses to violent emergencies.[20] Democratic nations faced with serious crisis by way of terrorist threats or other fundamental political challenges must "maintain and protect life, the liberties necessary to a vibrant democracy, and the unity of the society, the loss of which can turn a healthy and diverse nation into a seriously divided and violent

[16] See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 US 646 at 686 (1995) (O'Connor, J., dissenting); Skinner v. Ry. Labor Executives' Ass'n, 489 US 602 at 635 (1989) (Marshall, J., dissenting).

[17] See, e.g., Brian Groom, "Detaining Suspects not Abuse of Human Rights, Says Blunkett," *Financial Times* (London), Nov. 12, 2001, p. 3 (quoting the British Home Secretary, David Blunkett).

[18] Haig v. Agee, 453 US 280 at 309–10 (1981); Kennedy v. Mendoza-Martinez, 372 US 144 at 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact"); Terminiello v. Chicago, 337 US 1 at 37 (1949) (Jackson, J., dissenting).

[19] Robert H. Jackson, "Wartime Security and Liberty under Law" (1951) 1 *Buffalo Law Review* 103 at 116.

[20] Pnina Lahav, "A Barrel without Hoops: The Impact of Counterterrorism on Israel's Legal Culture" (1988) 10 *Cardozo Law Review* 529 at 531.

one."[21] At the same time, exigencies and acute crises directly challenge the most fundamental concepts of constitutional democracy.

Consider the notion that a government must be of limited powers, a government of laws, not of men (or women).[22] Crises tend to result in the expansion of governmental powers, the concentration of powers in the hands of the executive, and the concomitant contraction of individual freedoms and liberties. Enhanced and newly created powers are asserted by, and given to, the government as necessary to meet the challenge to the community. Concepts such as separation of powers and federalism are likely to be among the first casualties when a nation needs to respond to a national emergency.[23] The executive branch assumes a leading role in countering the crisis, with the other two branches pushed aside (whether of their own volition or not). The increase in governmental powers leads, in turn, to a contraction of traditional individual rights, freedoms, and liberties. The government's ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights.[24] While such expansions and concentrations of powers are not unique to times of crisis, but rather are part of the modernization of society and the need for governmental involvement in an ever-growing number of areas of human activity, it can hardly be denied that such phenomena have been accelerated tremendously (and, at times, initiated) during emergencies.

[21] Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge, MA: MIT Press, 1998), p. ix; Ruth Wedgwood, "Al Qaeda, Terrorism, and Military Commissions" (2002) 96 *American Journal of International Law* 328 at 330.

[22] Aristotle, *The Complete Works, ed*. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984), p. 2051; Marbury v. Madison, 5 US (1 Cranch) 137 at 163 (1803).

[23] Edward S. Corwin, *Total War and the Constitution* (New York: A.A. Knopf, 1947), pp. 35–77; Peter Rosenthal, "The New Emergencies Act: Four Times the War Measures Act" (1991) 20 *Manitoba Law Journal* 563 at 576–80.

[24] See, e.g., Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran–Contra Affair* (New Haven, CT: Yale University Press, 1990), pp. 117–49; Rossiter, *Constitutional Dictatorship*, pp. 288–90; Pitirim A. Sorokin, *Man and Society in Calamity: The Effects of War, Revolution, Famine, Pestilence upon Human Mind, Behavior, Social Organization and Cultural Life* (New York: E.P. Dutton, 1942), pp. 122–44, 275–76; Arthur S. Miller, "Constitutional Law: Crisis Government Becomes the Norm" (1978) 39 *Ohio State Law Journal* 736 at 738–41; Michael Linfield, *Freedom under Fire: US Civil Liberties in Times of War* (Boston: South End Press, 1990); Charles de Secondat Montesquieu, *The Spirit of Laws* (1748) (Berkeley: University of California Press, 1977), p. 154; Jules Lobel, "Emergency Power and the Decline of Liberalism" (1989) 98 *Yale Law Journal* 1385 at 1386; Watkins, "Constitutional Dictatorship," 343–44; Itzhak Zamir, "Human Rights and National Security" (1989) 23 *Israel Law Review* 375.

Two seemingly antithetical vectors are in a constant tug-of-war. The existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes. The ideals of democracy, individual rights, legitimacy, accountability, and the rule of law suggest that even in times of acute danger, government is limited, both formally and substantively, in the range of activities that it may pursue and powers that it may exercise to protect the state. However, grave violent emergencies challenge this organizing principle. In extreme cases, the reason of state and what Bruce Ackerman calls "the existential rationale" may call for the exercise of unfettered discretion and practically unlimited powers by the government in order to protect the nation.[25] The question then arises as to what extent, if any, violations of fundamental democratic values can be justified in the name of the survival of the democratic, constitutional order itself, and if they can be justified, to what extent a democratic, constitutional government can defend the state without transforming itself into an authoritarian regime.

Part I of the book (chapters 1–4) introduces and analyzes several distinct models that have dominated both the theory and the practice concerning responses to acute national crises. Each model is explained and analyzed both from a theoretical perspective and through concrete examples that range across time and jurisdictions. Indeed we argue that these theoretical frameworks are applicable across legal systems and provide an equally relevant conceptual framework to assess international legal responses to crisis.

Chapter I focuses on a group of models that we call "models of accommodation," which have dominated the discourse concerning emergency regimes in democratic societies. All those models countenance a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible. According to the models of accommodation, when a nation is faced with emergencies, its legal, and even constitutional, structure must be somewhat relaxed (and perhaps even suspended in parts). This compromise, it is suggested, enables continued adherence to the principle of the rule of law and faithfulness to fundamental democratic values, while providing the state with adequate measures to withstand the storm wrought by the crisis.

[25] Friedrich, *Constitutional Reason of State*, pp. 4–5; Maurizio Viroli, *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics, 1250–1600* (Cambridge: Cambridge University Press, 1992), pp. 238–80; Bruce Ackerman, "The Emergency Constitution" (2004) 113 *Yale Law Journal* 1029 at 1037–38.

The chapter analyzes the classical models of accommodation, first and foremost of which is the institution of the dictatorship that was used in the Roman republic, before it goes on to discuss three broad categories of models of accommodation, namely constitutional, legislative, and interpretive accommodations. These categories correspond to somewhat different equilibria between maintenance of the ordinary system of rules and norms and accommodation for emergency, as well as to different mechanisms by which such equilibria are established. The relative strength of the models of accommodation inheres in their flexibility and in their accommodation within the constitutional system of shifting and expanding the powers needed to meet exigencies and crises. Yet, these models may be innately susceptible to manipulation and to the challenge that accommodation of counter-emergency responses within the existing legal system starts us down a slippery slope toward excessive governmental infringement on individual rights and liberties while undermining constitutional structures and institutions in the process.

Such challenges have led to the development of an alternative constitutional model of emergency regimes which we discuss in chapter 2, namely the Business as Usual model. This model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace. In fact, not only do ordinary constitutional norms remain unchanged in times of emergency, but so too does the nature of the substantive outcomes when applied to specific cases. While its appeal is found in its insistence upon clear rules and upon maintaining the ideal that the constitutional framework is not affected by crises and exigencies, the model's main weakness lies in its rigidity in the face of radical changes in the surrounding context. This model is often criticized as being either naive or hypocritical in the sense that it disregards the reality of governmental exercise of extraordinary measures and powers in responding to emergencies.

Both the Business as Usual model and the models of accommodation are constitutional models in as much as they rely on an assumption of constitutionality that tells us that whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution. This assumption of constitutionality is challenged by the realist school of international relations. An extreme version of the challenge would read as follows: there is no room for any kind of "legalistic-moralistic" approach in dealing