Introduction

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No doctrine more pernicious? Emergencies and the limits of legality

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1.1 Introduction

Most modern states turn swiftly to law in times of emergency. The global response to the 11 September 2001 (9/11) attacks on the United States was no exception and the wave of legislative responses, encouraged by the United Nations Security Council (UNSC) through its Counter-Terrorism Committee, is well-documented.[1] Yet there is an ever-present danger, borne out by historical and contemporary events, that even the most well-meaning executive, armed with emergency powers, will abuse them. And this inevitably leads to another common tendency in an emergency: to invoke law not only to empower the state, but also in a bid to constrain it. This volume explores law's capacity to do so.

Those who are interested in the use of law solely as an instrument of counter-terrorism policy might be inclined at this stage to put this volume promptly back on the shelf. But there are good reasons not to. For one, even in appropriating law as an instrument of counter-terrorism power, states commit to governing through law – and thus commit, in some fashion, to the principle of legality. Understanding the implications of this commitment is one of the primary objectives of this volume. Of course,

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[1] The Counter-Terrorism Committee, which was set up in the wake of the 9/11 attacks to monitor implementation of United Nations Security Council Resolution 1373, requires states to implement a range of legislative counter-terrorism measures. Its country reports, available through its website, provide a useful overview of the range of counter-terrorism legislation enacted after 9/11. See www.un.org/sc/ctc/. For a survey of counter-terrorism law and policy post-9/11, see V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005).

the concept of legality (which is used in this volume interchangeably with the 'rule of law') is itself contentious. For some, it means formal legality, the idea that law implies clear, consistent, stable, prospective rules that are capable of being obeyed and are faithfully applied by public officials; others see legality as encompassing the minimum requirements of the formal account, but also substantive requirements of justice, whether in relation to the economic or political structure of the state or in relation to human rights.[2] Central to both of these conceptions of legality, however, is the notion that any power exercised by the state must be authorised by law.[3] This is the essence of modern, constitutional government.

Emergencies, especially violent emergencies, challenge the state's commitment to govern through law. Can a state confronted with a violent emergency take steps necessary to suppress the emergency while remaining faithful to the demands of legality? Nazi philosopher Carl Schmitt argued, notoriously, that it cannot. In times of crisis, Schmitt insisted, 'the state remains, whereas law recedes'.[4] At most, law could spell out *who* was to exercise emergency powers; it could not, however, set out in advance what would be a necessary or permissible response.[5] Even John Locke's theory of constitutional government, Schmitt observed perhaps with some justification, could not escape the conclusion that the state, faced with an emergency, required the prerogative to act even 'against the direct Letter of the Law, for the publick good'.[6] Yet others, also sceptical of maintaining legality in a crisis, have looked further back, to the Ancient Roman institution of dictatorship, to find inspiration for a constitutional mechanism that temporarily transfers expansive emergency powers to the executive,

[2] See, for instance, P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467–87. The variations on these two basic models are extensive, and my brief descriptions here are not intended to be exhaustive.

[3] A.V. Dicey, in *Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1920) at 179–201.

[4] G. Schwab (trans.), *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005), p. 12.

[5] According to Schmitt, 'The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily by unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such as case' (*ibid.* at 6–7). See also W.E. Scheuerman, 'Emergency Powers and the Rule of Law After 9/11' (2006) 14 *Journal of Political Philosophy* 61 at 65.

[6] J. Locke, *Two Treatises of Government*, Peter Laslett (ed.) (Cambridge: Cambridge University Press, 1988), p. 377.

which is entrusted with the task of ending the emergency and restoring constitutional order.[7] Even in the absence of a formal constitutional mechanism, many wartime courts have produced the same result, deferring to the executive's determination of what is necessary in an emergency.[8]

All the same, the importance of upholding legality in times of crisis has been eloquently defended by judges around the globe, sometimes in lone dissent,[9] at other times in unanimous resistance to a determined executive. 'In our view', the judges of the Singapore Court of Appeal once held, in reviewing the power of executive detention without trial under the Internal Security Act in *Chng Suan Tze*, 'the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power'.[10] Such acts of judicial resistance resonate with the now-famous decision of the US Supreme Court in the Civil War case, *ex parte Milligan*:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[11]

But such eloquence is not always successful in checking emergency powers. It is often met with a swift executive or legislative response restoring those powers (as in *Chng Suan Tze*)[12] or comes well after the height of the

[7] C.L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (New Brunswick: Transaction Publishers, 2002). See also B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029; *Before the Next Attack* (New Haven: Yale University Press, 2006).

[8] See, for example, *Liversidge* v. *Anderson*, [1942] AC 206 (HL); *Korematsu* v. *United States*, 323 US 214 (1944), esp. at 223–4.

[9] *Per* Lord Atkin in *Liversidge*, at 225–47, dissenting.

[10] *Chng Suan Tze* v. *Minister of Home Affairs*, [1988] SLR 132 (Singapore CA).

[11] *Ex parte Milligan*, 71 US 2 (1866), at 120–1.

[12] M. Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas' in Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy*, pp. 273–94; V.V. Ramraj, 'The *Teh Cheng Poh* Case' in A. Harding and H.P. Lee (eds.), *Constitutional Landmarks in Malaysia* (Kuala Lumpur: LexisNexis 2007), pp. 145–55.

conflict, when a measure of normality has returned (as was the case in *Milligan*).[13] Even the least controversial legal principles, which are regarded in international law as *jus cogens*, such as the prohibition on torture, can begin to unravel in the face of an emergency.

Many questions have been asked about a state's legal response to an emergency. Are new laws strictly necessary to address the emergency? Do the state's counter-terrorism measures strike the right balance between national security and human rights? What specific legal limits should be placed on the state's response and which rights, if any, are non-derogable even in times of emergency? These are important and contentious questions about which much has been and will continue to be said. But there is good reason to step back and ask a prior question, whether and to what extent *legality* can be preserved[14] when the state responds to an emergency. This is a prior question because, unless legality remains intact, those other important questions – about the need for new laws, the proportionality of the laws to their objectives, and the limitations on those laws – all become moot. It is perhaps for this reason that Schmitt has attracted such close attention in recent years – not because many sympathise with his views on political power, but rather because of the challenge he poses for liberalism particularly in times of crisis. Can law constrain the state in an emergency or must the state at times act outside the law when its existence is threatened? If it must act outside the law, is such conduct necessarily fatal to aspirations of legality? In short, can liberalism survive an emergency?[15]

The essays in this volume confront these difficult questions and explore a range of theoretical and practical responses to them. They take their inspiration from two attempts to answer these questions by distinguished legal theorists who have studied and written extensively on emergencies

[13] Arguably, the belated interventions of the United States Supreme Court in *Hamdi* v. *Rumsfeld*, 124 SCt 2633 (2004), the House of Lords in *A.* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, and the Supreme Court of Canada in *Charkaoui* v. *Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 2007 SCC 9, all post-9/11, fall into the same category. On the historical record of the courts, see: G.J. Alexander, 'The Illusory Protection of Human Rights by National Courts during Periods of Emergency' (1984), 5 *Human Rights Law Journal* 1; O. Gross and F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625–49.

[14] Framing the issue as one of preservation is itself problematic, for it assumes that the state and its legal and political institutions are largely established. This, however, is not always the case.

[15] Scheuerman, 'Emergency Powers'.

and the limits of legality well before 9/11: David Dyzenhaus and Oren Gross. These authors have attempted, both independently and by engaging with one another's work, to articulate in a theoretical and practical way competing models for preserving legality in times of emergency.

In a provocative article in the *Yale Law Journal*,[16] Gross articulates his extra-legal measures model, arguing that it may occasionally be necessary for public officials to step outside the constitutional order to deal with grave dangers and threats, but that doing so need not undermine, and may in fact strengthen, the legal order. Gross explains: 'The model is premised on three essential components: official disobedience, disclosure, and ex post ratification. The model calls upon public officials having to deal with catastrophic cases to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions. If a public official determines that a particular case necessitates her deviation from a relevant legal rule, she may choose to depart from the rule'.[17] But Gross insists, and this is crucial to the model, that the rule prohibiting the conduct continues to apply in general, so 'rule departure constitutes, under all circumstances and all conditions, a violation of the relevant legal rule.[18] The consequences of the rule departure, however, are a different question. It is up to 'the people' to decide *ex post* whether to punish the disobedient official for the illegal conduct or to ratify her conduct retrospectively.[19] The uncertainty that public ratification will be forthcoming and the uncertainty of the personal consequences for the official in question even if the conduct were ratified, are together sufficient to deter public officials from abusing their power.

Dyzenhaus challenges the extra-legal measures model arguing that it would permit egregious departures from the principle of legality.[20] He proposes instead that we not give up 'on the idea that law provided moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress'.[21] Judges, he insists, have a duty

[16] 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; for further development of his ideas, see 'Stability and flexibility: A Dicey business' in Ramraj, Hor, and Roach (eds.), *Global Anti-Terrorism Law and Policy*, 90–106; O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), especially ch. 3.

[17] Gross, 'Stability and Flexibility', at 92. [18] *Ibid.* [19] *Ibid.*

[20] D. Dyzenhaus, 'The State of Emergency in Legal Theory' in Ramraj, Hor, and Roach, eds., *Global Anti-Terrorism Law and Policy*, 65–89. See also *The Constitution of Legality: Law in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

[21] See also *The Constitution of Legality*.

to 'uphold a substantive conception of the rule of law'[22] in an emergency. Even when considerations of national security and confidentiality of intelligence sources require a departure from ordinary trial procedures, modern administrative law shows how, through 'imaginative experiments in institutional design',[23] we can deal with emergencies in a way that is consistent with the rule-of-law project and which transcends a rigid separation of powers by developing solutions that include the legislature and the executive. But, maintains Dyzenhaus, 'judges always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project, and they have an important role when such cooperation wanes or ceases in calling attention to that fact'.[24]

The Gross–Dyzenhaus debate provides a useful starting point for a collection of essays on emergencies and the limits of legality because it sets out, in a compelling and theoretically sophisticated way, two competing approaches to the issue. One approach attempts to subordinate the state's emergency response to principles of legality while attempting to ensure, through the careful and sophisticated redesign of institutions, that the legal regime remains relevant and responsive to the exigencies of the emergency; the other aims to preserve the rule of law in the long-term by subjecting extra-legal measures to democratic and political, not judicial, checks on executive power to ensure that the inevitable exercise of such powers is not legally affirmed and thereby normalised.

This introduction seeks to unpack and clarify the central issues that emerge from the challenge posed to legality in times of emergency. Specifically, and with reference to the essays in this volume, it identifies three sets of issues that arise from this challenge. First, it explores the tension between normative theories that see law as providing a comprehensive and autonomous response to emergency powers and legal realist accounts that point to the limits of the law and the need for other, non-legal constraints. Second, in respect of those theories that affirm law's capacity to constrain emergency powers, it considers the divergence between those theories that emphasise *ex ante* constraints, typically in the form of framework emergency statutes, and those that stress *ex post* constraints, usually through judicial review. Third, it examines the lessons to be learnt from expanding our perspective beyond a contemporary and largely domestic perspective on legality, to include historical approaches to the role of law under

[22] *Ibid.*, at 64. [23] Dyzenhaus, 'The State of Emergency,' at 67.
[24] The Constitution of Legality, at 201.

colonialism, and the international dimensions of the politics of law. The final section considers how our methodological and theoretical assumptions affect our response to the problem of legality, examining how the assumptions we make about the nature of theoretical inquiry and the intended audience affect our substantive conclusions on the scope and limits of legality in times of emergency.

1.2 Normative, political and sociological theories

Accounts of legality in times of crisis range from normative theories that defend law's capacity to constrain emergency powers, where legality serves as a 'regulative assumption' that informs and influences practice,[25] to those theories that, wary of law's ability to do so and mindful of the fine line between law and politics, emphasise instead the importance of alternative, non-legal or informal means of constraining the state. As will become clear in the discussion that follows, we can usefully approach these theories by inquiring into the *scope* and *autonomy* of law in a state of emergency. How comprehensive is the law's response to the exercise of emergency powers (does law, to paraphrase Mark Tushnet, fill the entire normative universe[26]) and how independent is law's control over these powers from social and political pressures?

1.2.1 Conceptual and normative theories

Consider, for example, normative theories of the rule of law. These theories might begin, as do several of the essays in this collection, with the assumption that a state is committed to governing through law, and then explore the conceptual and normative implications of that commitment. Dyzenhaus argues, for instance, that unless we commit to governing through law in an emergency, we are forced into either an internal or external realist position, neither of which is satisfactory, even for legal positivists.[27] An internal realist position undermines law's claim to authority by creating a veneer of legality over what is really the exercise of power by the political elite; an external realist position holds that the sovereign's power is not ultimately constrained by law. For the external legal realist, the state's

[25] Dyzenhaus, 'The compulsion of legality', Chapter 2, this volume, p. 000.
[26] 'The constitutional politics of emergency powers: some conceptual issues' (Chapter 6), this volume, p. 000.
[27] Dyzenhaus, Chapter 2.

authority comes from a political, not a legal constitution. But this position is problematic, because it undermines the assumption shared by positivists and non-positivists alike that the state is 'completely constituted by law'.[28]

In his contribution to this volume, Terry Nardin advances a similarly non-instrumental conception of the rule of law, according to which the rule of law 'implies a moral standard, one derived not from an arbitrary notion of the good but from the idea of human beings as autonomous persons who articulate their own conceptions of the good'.[29] Distinguishing this conception of morality 'from theories like political realism or utilitarianism, which understand rules in instrumental terms as expedients for bringing about desired ends',[30] Nardin argues that an 'escape clause for emergencies, by allowing moral rules to be overridden by prudential considerations, obscures what is distinctive of the moral point of view'.[31] Laws forbidding torture cannot be set aside, 'because they express a moral rule' which cannot be 'altered or nullified by an act of will'[32] and, argues Nardin, public officials have no authority to waive them. For Nardin, the rule of law as a moral idea constrains the ability of public officials to justify extra-legal conduct taken for the public good since the justification for doing so is neither legal nor moral, but instrumental or prudential. But prudential reasons 'cannot "justify" illegal or immoral action if that word is to retain its core meaning as making an act just within a framework of legal or moral prescriptions'.[33] The argument here is a conceptual one, and Nardin insists that the idea of illegal action in an emergency cannot be reconciled *conceptually* with the rule of law.[34]

Along similar lines, Rueban Balasubramaniam,[35] using the experience of indefinite detention in Malaysia and Singapore by way of illustration and drawing on Lon Fuller's work, argues that liberal democracies, in attempting to reconcile indefinite detention with the rule of law, risk undermining the values of 'liberal political morality' to which they are otherwise committed.[36] Specifically, Balasubramaniam argues that an 'attempt to construct and maintain legal order as a stable framework for the

[28] *Ibid.*, p. 000.
[29] 'Emergency logic: prudence, morality, and the rule of law' (Chapter 4), this volume, p. 000.
[30] *Ibid.*, p. 000. The act of founding a legal order, however, is 'necessarily extra-legal, a matter of expediency for the sake of a substantive end (in this case, establishing the rule of law itself), not a matter of legality (governing within the rules of an established legal order)' (at 000).
[31] *Ibid.*, p. 000. [32] *Ibid.*, p. 000. [33] *Ibid.*, p. 000. [34] *Ibid.*, p. 000.
[35] 'Indefinite detention: rule by law or rule of law?' (Chapter 5), this volume.
[36] *Ibid.*, p. 000.

guidance of conduct involves a moral dimension that constrains the lawgiver's capacity to use law for authoritarian purposes, because legal order is a reciprocal enterprise requiring cooperation between lawgiver and legal subject'.[37] Once a government commits to operating 'on the rule-of-law continuum, it cannot assert rule *by* law without contradicting its commitment to legality'.[38]

Nardin and Balasubramaniam share with Dyzenhaus a common goal, to draw out the implications for emergency governance of a state's commitment to govern through law. They also share Fuller's belief that a commitment to legality includes, but goes beyond, a commitment to clear, stable, accessible, prospective, consistent rules that are capable of being obeyed and faithfully enforced.[39] And their conception of legality also involves – whether conceptually, as Nardin explicitly argues, or normatively, as Balasubramaniam implies – a model of the rule of law that includes a substantive commitment to respect the rights of legal subjects, even in times of emergency. Normative theories would tend to regard law as providing a comprehensive and autonomous response to emergency powers, but they need not collapse in the face of a legal black hole.[40] Rather, confronted with this reality, says Dyzenhaus, judges should strive to resist any attempt by the executive to govern beyond the reaches of the law.[41] Law is not necessarily comprehensive in its scope, but aspires to be so; it aspires to be autonomous, at least in the sense that it is independent from other considerations, including political ones.[42]

This picture of legality might be challenged in several ways, which variously question law's claim to comprehensive and autonomous control of the state in an emergency. For example, it might be challenged on the ground that black holes do not violate every aspect of the rule of law since the perimeters of the black hole and the conduct that places one into it might be clearly defined in advance. In this case, argues A.P. Simester, the requirement of prospectivity would be met, so those held

[37] *Ibid.*, p. 000. [38] *Ibid.*, p. 000 (emphasis added).
[39] L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).
[40] J. Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.
[41] Dyzenhaus, Chapter 2, p. 000.
[42] This aspirational quality may well be a positive feature of the rule of law, as Johan Geertsema observes in 'Exceptions, bare life, and colonialism' (Chapter 14), this volume: 'Like democracy, the rule of law is a project that can in principle never arrive, for the political process of actively interrogating, negotiating, and reflecting that is constitutive of democracy if it were, or were thought, to have arrived' (p. 000).