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## Introduction

*The invocation of emergency powers by the state in response to a perceived crisis is the subject of considerable controversy in liberal democracies because these powers appear on their face to pose a direct challenge to the liberal ideal of constitutional government.*

Victor V. Ramraj and Arun K. Thiruvengadam (eds) *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010) 1.

### 1.1 Emergency Powers: Some General Themes

Many countries will occasionally be confronted with crises of such magnitude that they will pose a threat to the stability, and even possibly the existence, of the state if not contained. These crises or emergencies can arise from any of a multitude of causes: political, financial, large-scale natural disasters<sup>1</sup> and armed insurrection. Today many countries, including Australia, are engaged in an ongoing ‘war on terror’. It has been asserted:

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

<sup>1</sup> ‘The Indian Ocean earthquake and tsunami of 26 December 2004 was one of the most catastrophic events of its kind’: C Raj Kumar and DK Srivastava (eds) *Tsunami and Disaster Management: Law and Governance* (Sweet & Maxwell Asia 2006) vii (Foreword). They added: ‘The sheer magnitude of the impact, affecting a number of countries in south and South-east Asia, killing nearly 300,000 and displacing thousands of people, was beyond anyone’s wildest expectation’: *ibid.*

complex questions that arise in that connection now play a critical role in discussions about the rule of law, legitimacy, and legality.<sup>2</sup>

The horrendous 9/11 attacks on the World Trade Center towers in New York, the bomb blasts in Bali nightclubs in Indonesia, the bombing of a train in Madrid in 2004 and other terrorist attacks in recent times in a number of cities<sup>3</sup> around the world have compelled liberal democracies to devise new forms of legislation to provide the authorities ample emergency powers to counter the activities of these terrorists, and to ensure the safety of the people. This hurried burst of legislative activity in countries around the world has posed the vexing question of how to strike the proper balance between public safety and the rule of law. Exegesis on this difficult question by eminent scholars has resulted in an increased output of works, with the result that emergency powers may no longer be regarded as an esoteric subject.<sup>4</sup> Professor Robert Martin wrote:

<sup>2</sup> Oren Gross and Fionuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 1. Herbert V Morais wrote:

Even before September 11, 2001, international terrorist attacks have been carried out for many years, albeit on a smaller scale, in several parts of the world. He provided the following examples of some major terrorist attacks: Attack on the U.S.S. Cole in Aden, Yemen, in October 2000, which killed 17 American sailors and wounded more than twice that number. Bombings of the United States embassies in Nairobi, Kenya and Dar-es-Salam, Tanzania, in August 1998, which killed more than 200 people and injured several thousand. Attack on the Khobar Towers air base in Saudi Arabia in June 1996, which resulted in the deaths of 19 Americans, the hospitalization of 64 others, and the treatment of about 200. Tokyo subway nerve gas attack in March 1995, which resulted in the hospitalization of more than 600 subway passengers and 12 deaths. Pan Am 103 explosion and crash in Lockerbie, Scotland in December 1988, which killed 270 passengers, mostly Americans.

See Herbert V Morais, 'The War against Money Laundering, Terrorism, and the Financing of Terrorism' (2002) *Lawasia J* 1, 14–15.

<sup>3</sup> The recent attacks include attacks in Paris (7 January 2015 – on the newspaper *Charlie Hebdo*; 13 November 2015 – Bataclan and Stade de France); Brussels (22 March 2016 – airport and metro station); Istanbul (28 June 2016 – Atatürk Airport; 1 January 2017 – nightclub); Nice (14 July 2016 – attack using a truck); London (22 March 2017 – using a car on Westminster Bridge; 3 June 2017 – London Bridge); Stockholm (7 April 2017 – attack using a truck); Manchester (22 May 2017 – Ariana Grande concert); Barcelona (16–18 August 2017).

<sup>4</sup> See as examples Gross and Ni Aolain (n 2); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006); Austin Sarat (ed), *Sovereignty, Emergency, Legality* (CUP 2010); Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP 2005); Victor V Ramraj (ed), *Emergencies and the Limits*

## 1.1 EMERGENCY POWERS: SOME GENERAL THEMES

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The very notion of emergency powers is contradictory. The defining principle of constitutional government is the Rule of Law. This principle requires that the state always act in accordance with the law. . . The notion of emergency powers contradicts the Rule of Law because it posits that, in times of national crisis, the state may act outside constitutional norms. The idea is that whenever the existence of the state is imperilled, it may take extraordinary steps in order to save itself.<sup>5</sup>

In vibrant democracies, where the rule of law prevails, the invocation of exceptional powers poses a significant conundrum of how to balance the preservation of public safety with the maintenance of the rule of law. This conundrum is particularly accentuated when national security is claimed by governments to be at stake. It is generally accepted that in a time of crisis the panoply of legal powers available to the authorities trusted with protecting the state will be amplified commensurate with the intensity of the emergency. The remarkable trait of a liberal democracy is that while the powers to cope with the emergency provide the potential for authoritarian rule, such powers are terminated with the restoration of normalcy.

### 1.1.1 Definition of 'Emergency'

The word 'emergency' is elastic. Lord Dunedin, delivering the judgment of the Privy Council in *Bhagat Singh & Ors v. The King Emperor*,<sup>6</sup> said: 'A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action. . .' Lord MacDermott, delivering the advice of the Privy Council in *Stephen Kalong Ningkan v. Government of Malaysia*,<sup>7</sup> observed that the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods and the collapse of civil government. Professor Robert Martin said:

While there is no universally accepted definition of emergency, it is generally understood that an emergency is, and must be, temporary. This is because an emergency involves conditions which are aberrant, atypical,

*of Legality* (CUP 2008); Victor V Ramraj and Arun K Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (CUP 2010).

<sup>5</sup> Robert Martin, 'Notes on Emergency Powers in Canada' (2005) 54 UNBLJ 161, 162.

<sup>6</sup> AIR 1931 PC 111.

<sup>7</sup> (1968) 2 MLJ 238, 242; [1970] AC 379, 390.

and extreme powers intended to deal with unusual situations must, by definition, be unusual and temporary.<sup>8</sup>

This general understanding must now yield to the reality that in today's on-going 'war on terror' many societies are placed on an unending 'emergency' footing, in which exceptional powers are given long leases of life.

In those countries that have an entrenched framework of emergency powers, the invocation of emergency powers depends on the claimed existence of a state of emergency. The controversial issue for the courts in these countries is the role of the courts in exercising judicial review over this claim. Hence, it is of importance to have criteria for identifying the existence of a genuine emergency. The danger of allowing the executive arm of government an unconstrained power to proclaim a state of emergency was put aptly by Heydon J in *Pape v. Commissioner of Taxation*:<sup>9</sup>

Modern linguistic usage suggests that the present age is one of 'emergencies', 'crises', 'dangers' and 'intense difficulties', of 'scourges' and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, 'wars' must be waged, 'campaigns' conducted, 'strategies' devised and 'battles' fought. Often these problems are said to arise suddenly and unexpectedly. Sections of the public constantly demand urgent action to meet particular problems. The public is continually told that it is facing 'decisive' junctures, 'crucial' turning points and 'critical' decisions. Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use. The great maxim of governments seeking to widen their constitutional powers would be: 'Never allow a crisis to go to waste.'<sup>10</sup>

Heydon J added:

[I]t is far from clear what, for constitutional purposes, the meanings of the words 'crises' and 'emergencies' would be. It would be regrettable if the field were one in which the courts deferred to, and declined to substitute their judgment for, the opinion of the Executive or the legislature. That

<sup>8</sup> Martin (n 5) 161.

<sup>9</sup> [2009] HCA 23; (2009) 238 CLR 1.

<sup>10</sup> Ibid [551].

would be to give an ‘unexaminable’ power to the Executive, and history has shown, as Dixon J said, that it is often the Executive which engages in the unconstitutional supersession of democratic institutions. On the other hand, if the courts do not defer to the Executive or the legislature, it would be difficult for the courts to assess what is within and what is beyond power.<sup>11</sup>

In a 1991 report, the New Zealand Law Reform Commission<sup>12</sup> identified a number of distinguishing characteristics of emergencies in which extraordinary powers are made available to the authorities to respond to them:

Scale: The emergency will pose a serious danger to the safety or welfare of the . . . public or a serious threat to the security of the [country] as a whole, it will have a widespread impact or potential impact, and it will require substantial resources to counter the danger effectively.

Urgency: Generally the emergency threat will be an immediate one, although an event which is imminent or likely to occur may justify the taking of emergency measures. A common perception, clearly accurate in the case of an emergency such as a serious earthquake, is that emergencies occur suddenly and are unexpected. But an emergency situation, such as a drought, may develop gradually over a period of time.

Temporary character: Generally the emergency will be temporary, although a drought or a lengthy war both illustrate that this is not invariably the case.

Inadequacy of normal measures: The emergency will be a situation that cannot be dealt with without recourse to extraordinary measures.<sup>13</sup>

In a number of the constitutions promulgated after the end of the Second World War, the word ‘emergency’ has taken on a special meaning as a result of the entrenchment of a framework of emergency powers within these constitutions.<sup>14</sup> The main concern of the framers of these post-World War II constitutions was to ensure an appropriate balance between the protection of fundamental liberties and the preservation of national safety. The high-powered Reid Commission which crafted the Malaysian (later, Malaysian) Constitution said:

<sup>11</sup> Ibid [552].

<sup>12</sup> NZLC R22 (*Final Report on Emergencies*).

<sup>13</sup> Ibid 8 para [1.20].

<sup>14</sup> Article 150, Malaysian Constitution. The Malaysian Constitution, for example, provides that the Malaysian King is empowered to issue a proclamation of emergency if the King ‘is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened’.

Neither the existence of fundamental rights nor the division of power between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life. The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion, infringement of fundamental rights or of State rights is only justified to such extent as may be necessary to meet a particular danger which threatens the nation. We therefore recommend that the Constitution should authorize the use of emergency powers by the Federation but that the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined.<sup>15</sup>

It is the standpoint of this book that, as the Australian Constitution does not embody an explicit framework of emergency powers, it is unnecessary as of now to attempt a formulation of an all-embracing definition of the term ‘emergency’. Exceptional powers, whenever needed, are provided in ordinary legislation. A pragmatic approach is to identify the nature of an emergency: by doing so, it would enable a proper evaluation of the response by the authorities to cope with the emergency. Thus, the panoply of emergency powers which should be made available to the relevant authorities should vary with the type of emergency involved. The New Zealand Law Commission rejected the approach of ‘a single general statute dealing with a wide range of emergencies’ and confirmed its support for a ‘sectoral approach to emergency legislation’, in the sense of support for ‘a series of separate statutes, each concerned with a particular emergency situation’.<sup>16</sup>

Emergencies can be broadly classified into ‘wartime’, emergencies pertaining to ‘serious civil disturbances’,<sup>17</sup> and ‘civil’ emergencies. A wartime emergency poses the gravest threat to the life of a nation. Emergencies pertaining to serious civil disturbances relate largely to ‘widespread public disorder, or actions threatening the security of the State such as treason, sabotage or terrorism’.<sup>18</sup> Civil emergencies vary in

<sup>15</sup> *Report of the Federation of Malaya Constitutional Commission* (1957) 74 para [172].

<sup>16</sup> *Final Report on Emergencies* (NZLC R22) 9 para [1.22]. Originally, the Public Safety Conservation Act 1932 (NZ) was available as a general statute but it never defined ‘those threats to public safety or public order that were sufficiently serious to justify the declaration of emergency’. Concerned that the broad regulation-making power vested too much discretion in the executive, the Act was repealed in 1987: see *Final Report on Emergencies* (NZLC R22) 184 para [7.3].

<sup>17</sup> Adopting the description of this category of emergency by the New Zealand Law Commission: NZLC R22, 60 para [3.16].

<sup>18</sup> *Ibid* 60 para [3.16].

magnitude and severity. They can be short-lived or of a lengthy duration. Conditions giving rise to civil emergencies can range from natural and industrial disasters, strikes in essential services, to economic emergencies.

In Australia, the executive arm of government cannot resort to a 'constitutionalised' framework of emergency powers. In other words, the Australian Constitution does not contain a set of provisions providing for a power to declare a state of emergency, the circumstances justifying the invocation of emergency powers, express safeguards circumscribing the use of such powers or the scope of judicial review. Similarly, emergency powers are not set out expressly in the constitutions of the States. However, a broad spectrum of emergency powers is contained in ordinary statutes at both Commonwealth and State levels.

One of the reasons why it has not yet been necessary to define 'emergency' is because that question has traditionally fallen to the States to answer. Because State Parliaments exercise plenary legislative powers, and are not bound to adhere to their own constitutions, they are generally free to define 'emergency' as they see fit, and confer emergency powers in conformity with that definition, without any significant boundaries. To the extent that there are constitutional limits on State emergency powers, they are imposed by the limited freedoms guaranteed by the Australian Constitution and, at the margins, the requirement that Parliaments not permanently abdicate their legislative powers. This means, essentially, that a State Parliament may redistribute legislative and executive power as it deems necessary in response to a state of emergency that it is free to define.

However, the increasingly national character of Australian emergency laws, in the face of existential dangers posed by epidemics, terrorism and massive environmental disasters, may yet require a constitutionally satisfactory definition of 'emergency' to be implied from the Australian Constitution. Moreover, any legislative or executive powers that derive from that definition being satisfied would have to contend with the fact that the Commonwealth is a government of limited powers, with certain obligations to preserve the federal and representative character of the Australian constitutional system of government.

If emergency does become 'nationalised', the risk, here as in elsewhere, is that an approach to emergency which simply sweeps the ordinary constitutional framework aside risks doing extensive damage to the underlying constitutional structure that empowers the government to deal with emergency on the people's behalf in the first place.

## 1.2 Dangers of Over-Reaction

When a country without a well-thought out framework of emergency powers is suddenly confronted by a crisis, there is a danger that the authorities, in responding, may adopt disproportionate measures, causing excessive encroachments upon fundamental liberties. When there is an outbreak of war between countries, governments are compelled to counter the perceived threat to national survival by placing the country in a state of emergency.

A controversial episode which provides a neat illustration of the difficulties in balancing national security and civil liberties was when members of an extremist separatist group known as *Le Front de Liberation du Quebec* (or 'FLQ') kidnapped the Quebec Labour Minister, Pierre Laporte, and the British Trade Commissioner, James Cross. At the request of Quebec provincial authorities, the Prime Minister invoked a piece of legislation called the War Measures Act<sup>19</sup> to deal with the crisis. This legislation was enacted in 1914 as a response to wartime conditions. Though used extensively in both World Wars, this was the first occasion for its use in peacetime. Initially, there was some political opposition to the invocation of the Act, but that opposition faded out after it was discovered that the Quebec Labour Minister had been murdered by the FLQ.<sup>20</sup>

The War Measures Act provided:

The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order or welfare of Canada. . .

To exercise these powers, all that was required was a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, existed. Significantly, section 2 of the Act stated:

The issue of a proclamation . . . shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

<sup>19</sup> RSC 1970, c. W-2.

<sup>20</sup> John J McGonagle, Jr, 'Emergency Detention Acts: Peacetime Suspension of Civil Rights – With a Postscript on the Recent Canadian Crisis' (1970) 20 *Cath U L Rev* 203, 233–36.

Pursuant to the Act, the Governor in Council made regulations which declared the FLQ an unlawful association, and rendered membership in or support of it a criminal offence, punishable by imprisonment for up to five years. The regulations also provided for heavy penalties for knowingly assisting persons in the FLQ or providing accommodation for the organisation. The regulations conferred on the authorities special powers of search and detention of persons arrested for alleged violation of the regulations. In November 1970, the Canadian Parliament enacted the Public Order (Temporary Measures) Act 1970 to come into effect upon the termination of the proclamation of the War Measures Act.

Cheffins and Tucker, in commenting on the crisis, said:

Viewed in hindsight, it is hard to say that there existed the ‘war, invasion, or insurrection, real or apprehended’ required for the proclamation of the War Measures Act. There seems to be little doubt, however, that the government was justified in taking the position that it needed some special temporary powers, but the fact remains that these could probably have been obtained by the quick passage by Parliament of a special powers act designed specifically to deal with the FLQ crisis.<sup>21</sup>

Craig Forcese and Aaron Freeman have remarked:

What Canada learned from the October Crisis is that during political emergencies, the executive branch is typically strengthened at the expense of the legislative and judicial branches. Urgency tends to trump sober second thought, and the rule of law may be suspended for a perceived greater good.<sup>22</sup>

A stark illustration of an overreaction which resulted in staining the democratic credentials of the United States was provided by the Korematsu affair.<sup>23</sup> The launching of a surprise attack on Pearl Harbor on 7 December 1941 (described by President Franklin Roosevelt as ‘a date which will live in infamy’<sup>24</sup>) led to a response by the US authorities which today has been acknowledged to be gravely erroneous.

<sup>21</sup> Ronald Cheffins and Ronald Tucker, *The Constitutional Process in Canada* (2nd ed., McGraw-Hill Ryerson Ltd 1976) 133. See also Herbert Marx, ‘The Apprehended Insurrection of October 1970 and the Judicial Function’ (1972) 7 UBC L Rev 55.

<sup>22</sup> Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundation of Canadian Democracy* (Irwin Law 2005) 577.

<sup>23</sup> *Korematsu v. United States* 323 US 214 (1944). See also HP Lee, ‘Of Lions and Squeaking Mice in Anxious Times’ (2016) 42(1) Monash LR 1, 8–10.

<sup>24</sup> President Franklin D Roosevelt, ‘A Date Which Will Live in Infamy’ (Speech delivered at a joint session of Congress, Washington DC, United States, 8 December 1941).

On 19 February 1942, President Franklin Roosevelt signed Executive Order 9066. Pursuant to this executive order, over 110,000 Japanese-Americans were rounded up and sent to a number of internment camps. Those interned included ‘immigrants, citizens, men, women, children and infants’.<sup>25</sup>

The constitutionality of Executive Order 9066 was challenged by Fred Korematsu, who was born and raised in California. The constitutionality of the executive order was upheld by a 6–3 decision of the Supreme Court. Black J, delivering the opinion of the Court, acknowledged that the compulsory exclusion of large groups of citizens from their homes, would be inconsistent with American basic governmental institutions, ‘except under circumstances of direst emergency and peril’. He added: ‘But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger’.<sup>26</sup>

Jackson J, one of three dissenting justices, pointed out that Korematsu had been born in the United States and, under the *Constitution*, he was a citizen of the United States. He added:

No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.<sup>27</sup>

Jackson J warned that ‘the principle of racial discrimination in criminal procedure and of transplanting American citizens’ would ‘[lie] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes’.<sup>28</sup>

A report published in 1983 by a commission set up by Congress stated that the decisions that followed the executive order were shaped by ‘race

<sup>25</sup> Neil Gotanda, ‘The Story of Korematsu: The Japanese–American Cases’ in Michael C Dorf (ed), *Constitutional Law Stories* (Foundation Press 2004) 249.

<sup>26</sup> 323 US 214, 219–20 (1944).

<sup>27</sup> *Ibid* 242–43.

<sup>28</sup> *Ibid* 246.