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978-0-521-44969-4 - States of Emergency in Liberal Democracies

Nomi Claire Lazar

Excerpt

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I

The Problem of Emergency

Tensions between order and justice are inherent in any constitutional regime. Order requires constraint and justice suggests rights and freedoms. While the everyday struggles between these two values often escape our notice, they clash spectacularly in times of emergency. Nurtured in security and stability, contemporary liberal theory, in the absence of an immediate crisis, has been mostly silent on this subject.¹ Nonetheless most liberal democracies² have standing constitutional or

¹ There are two classic studies of the related concept of reason of state in the history of political thought: C. J. Friederich, *Constitutional Reason of State*; and Friederich Meinecke, *Machiavellism: The Doctrine of Raison D'état and Its Place in Modern History*. Also, there is a voluminous legal literature on emergency rights derogations that includes Jaime Oraà, *Human Rights in States of Emergency in International Law*; Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception*; Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights"; Allan Rosas, "Emergency Regimes: A Comparison"; and M. Radin, "Martial Law and the State of Siege." More recent work, primarily among legal scholars, has included Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*; and Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*.

² For the purposes of this book, a liberal democracy is a state that meets criteria, loosely adapted from J. Denis Derbyshire and Ian Derbyshire, *Political Systems of the World*, p. 29, as follows: 1) Regular free elections of candidates from multiple parties to representative institutions; 2) limited government; 3) an independent judiciary that guarantees core rights connected with human dignity such as freedom of assembly, freedom of expression, and due process of law.

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special legal powers to derogate rights and the rule of law for the sake of order in times of crisis; and when a crisis arises, those states that do not have such powers use impromptu ones anyway. This is no ivory tower puzzle, and these powers are exercised more often than we think.³ This book aims to help theory touch its feet to the ground.

Given that liberal democracy is essentially bound up with the division of powers and the preservation of rights and freedoms, how could emergency powers, which impose order through constraint of these features, *ever* be justly constituted and exercised? How can liberal democratic values accommodate powers or institutions that seem inherently illiberal? And, given that emergencies are common and often unpredictable, how can a liberal democratic state survive without them? On the one hand, in resorting to such powers the state ceases to be liberal, while on the other, in not resorting to them, the state might well cease to be.⁴ At a minimum, failing to effectively confront a crisis results in a significant loss of life and property. The dilemma is an old one. It is a concrete manifestation of the tensions between order and justice, between the enablement and constraint of power, tensions that are inherent in any constitutional regime.

While contemporary neo-Kantian philosophical liberalism lacks sufficient resources from which to draw argument or inspiration for confronting this puzzle, many absolutists make the problem central to their conceptions of politics, and hence set the terms of the debate. Carl Schmitt in particular dominates the field of emergency powers, and his

³ Two recent examples are the flooding of New Orleans and the riots in France. President Bush declared a state of emergency for the state of Louisiana on August 27, 2005. The French Government also declared a state of emergency, on November 9, 2005. Bangladesh was under a state of emergency in January 2007. And these are just a small handful of examples. Indeed, there was a *de facto* or *de jure* state of emergency declared in more than 90 countries between 1985 and 1995, including such strong Western democracies as France, the United Kingdom, Canada, and the United States. See United Nations Commission on Human Rights, *Eighth Annual Report and List of States which, since 1 January 1985 Have Proclaimed, Extended, or Terminated a State of Emergency*.

⁴ Ronald Dworkin characterizes the problem in a similar way in his article "Terror and the Attack on Civil Liberties."

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legacy is the assimilation of emergency to the exception and suspension of rules and norms.⁵ This is evident, for instance, in the current fashion for Giorgio Agamben, whose work, despite himself, is fundamentally Schmittian. Overwhelmingly, emergencies and emergency powers are treated with reference to this dichotomy between norms and exceptions, which John Ferejohn and Pasquale Pasquino have called “the structure of emergency powers.”⁶ The exceptionalist view is that norms apply only in normal situations; in a real crisis, emergency powers do not violate rights and the rule of law because these rules are simply not in effect at such exceptional times. Emergency powers are thus amoral and beyond the usual norms: one cannot violate a rule that is not in effect. Carl Schmitt is an amoralist about emergency powers, but so, arguably, are Richard Posner and former U.S. Chief Justice William Rehnquist.⁷ In arguing that we cannot make exceptions from moral *or* legal norms, even liberals who hold emergency powers to be unjust speak in these terms. William Scheuerman argues that “the rule of law was designed for bad times as well as good ones,” and Michael Ignatieff has worried that “If laws are rules, and emergencies make exceptions to these rules, how can their authority survive once exceptions are made?”⁸ David Dyzenhaus argues that law that compromises is necessarily not only morally but legally compromised. Law cannot be law if it makes room for exceptions.⁹ Emergency powers are immoral if making exceptions to laws and moral rules is always immoral. Franz Neumann has claimed that emergency powers allow the state to “annihilate civil liberties altogether.”¹⁰ And Jules Lobel has argued, from the American case, that the problem of exceptions has meant that liberals – among whom we might perhaps

⁵ It is true that emergencies were understood as ‘exceptions’ before Schmitt. Constitutions sometimes term special powers ‘*pouvoirs exceptionnels*’ or speak of an ‘*Ausnahmezustand*’ – an exceptional situation. But it is Schmitt’s particular language that has been assimilated into most contemporary legal and theoretical discussions.

⁶ John Ferejohn and Pasquale Pasquino, “The Law of Exception: A Typology of Emergency Powers,” p. 221. See also Philip B. Heymann, *Terrorism, Freedom, and Security: Winning without War*, xii.

⁷ Richard Posner, *Not a Suicide Pact*, p. 12. William H. Rehnquist, *All the Laws but One*.

⁸ William Scheuerman, “Rethinking Crisis Government,” p. 492. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, p. 25. See also Giorgio Agamben, *State of Exception*.

⁹ Dyzenhaus, *The Constitution of Law*, e.g., p. 7.

¹⁰ Franz Neumann, “The Concept of Political Freedom,” p. 917.

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count Oren Gross – have aimed to “separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form.”¹¹ Both those who claim that emergency powers are amoral and those who claim that they are immoral rely on a dichotomy between norms and exceptions, whether those norms are legal-institutional, moral, or descriptive. One aim of this book, then, is to escape from this essentially Schmittian conceptual framework in both its left and right permutations.

I argue that a theoretical framework for thinking about emergencies grounded in the norm/exception dichotomy is empirically and ethically suspect. This is true regardless of whether one accepts or rejects exceptions to norms. And this is not just a matter for abstract concern: those who embrace the exception as a discrete category in the first place provide a *carte blanche* for politicians. If norms are suspended, anything goes. Under cover of emergency and armed with such a license, statesmen have gone well beyond what is strictly necessary to cope with an emergency in order to reach ends that are themselves unnecessary or even abhorrent. But if we accept the norm/exception dichotomy and reject the license that the idea of *exception* provides, the remaining option is to join with those who hold that emergency powers are not justifiable. This view is self-defeating. Justice and order are inextricable. And because threats to order, and hence to justice, are real, it follows that, to the extent that we value the protection of human rights and the rule of law, we cannot ignore the exigencies that emergency presents. At the extreme, destruction of the state would mean the destruction of justice and liberal values too, and states have a responsibility to work to protect their citizens from serious harm.

In developing an alternative conceptual framework, I aim specifically to undermine the norm/exception perspective in order to show how emergency powers might be exercised while liberal norms remain in force. I argue that understanding emergency powers in terms of their continuities with everyday institutions and values is more accurate both descriptively and normatively. It helps us to see how such powers could *ever* be justified, and it points to directions for making them a little safer. If our eyes are opened by what I will call ‘an ethics of experience’ to descriptive, moral, and institutional continuities, we can

¹¹ Jules Lobel, “Emergency Power and the Decline of Liberalism,” p. 1390.

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see that, under states of emergency, normal ethics do not cease to function. There is no exception; rights do not lose their force, and the values underlying the rule of law do not lose their power. Political leaders may be held to the same standards of moral and institutional accountability to which they are always held in executing their duties.

Emergency powers are justified – when they are justified – because they embody principles that already function under normal circumstances. Order is a value also, and it animates the day-to-day life of the state alongside liberal values, for instance in the workings of the criminal justice system, which every liberal democratic state requires. Rights are derogated for the sake of order every day.

Emergency provisions that concentrate power also show salient continuities. To the extent that the rule of law is instrumental to more fundamental values, and to the extent that a shift in formal and informal power and constraint does not preclude furthering those values, mitigating the rule of law is not *exceptional*. So long as emergency powers are well designed and exercised within the limits of international law, they need no *special* justification. Elements of urgency and scale cause a shift in the relationship between principles of justice and principles of order, and between formal and informal constraints on power. But this is a shift and not a sea change. Normal and emergency values are continuous. Normal and exceptional institutions have important elements of continuity also. By decentering the norm/exception dichotomy, we can see how liberal democracies might remain such, even as they derogate rights and the rule of law.

My arguments have several practical and theoretical implications. Practically, a clearer understanding of the ethics of emergency can illuminate debates about emergency institutions and their use in particular cases. Ideally, clarity would reduce the potential for dangerous rhetoric and executive excess. Emergencies are inherently dangerous regardless, but throughout the book, I present principles instrumental in improving safety.

Theoretical implications are many. First, the arguments in the chapters that follow provide an answer to Carl Schmitt's charge that liberal parliamentary government is incapable of addressing "the exception." I call into question a number of Schmittian claims and conceptual categories, including his understanding of sovereignty and of dictatorship, and I show how the Schmittian problem of "the exception" can be avoided by removing emergency from its purview.

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Second, a study of emergency powers has important ramifications for our understanding of liberal theory in general. Emergency illuminates epistemological elements of liberalism as well as liberal conceptual geography. Often, problems at the periphery of theories can illuminate much at the center. Emergency seeds antinomies in a purely rational-deductive political ethics. Hence I will argue that those liberalisms grounded in synthetic a priori principles alone are in trouble. Instead, political ethics must grow from an interaction between rationally grounded principles and those induced from experience. While rational-deductive political ethics may help in establishing moral ends, experience is necessary to understand what might constitute fulfilling those ends and how we might go about doing so. An ethics should help guide our actions and help us in judging the actions of others, and this must remain true even in situations that are incredibly complex, and even in those that are simply squalid. Ultimately, ethics must be elaborated on the ground from a mixture of principles that rest both on abstract axioms and on the experience of concrete application. Stuart Hampshire and Ian Shapiro have pointed out the fairytale-like quality of philosophical work on ethics and politics in recent years, and this book aligns itself with their pragmatic approach.¹² Along these lines I will argue that institutions ought to represent the ‘most moral means’ to normative ends, a perspective that relies on an understanding of the relationship between deontological and consequentialist conceptions of ethics.

A further ramification concerns the field of application of liberal principles, which, I will argue, are not coextensive with the political ethics that animate liberal democracies in general. Those derogations of civil and political rights that states of emergency allow are justified on the basis of countervailing values related to order. Rights are derogated for the sake of order every day, too. It follows from this that liberal values are not alone in providing moral animation to political life. I will argue for a kind of ethical-political pluralism that obviates the need for the logical gymnastics of some recent philosophical liberals who wish to recognize the value of culture or patriotism.

Before I turn to an overview of the chapters that follow, some elements of my approach, both methodological and conceptual, as well as

¹² Stuart Hampshire, *Innocence and Experience*; Ian Shapiro, *The Flight from Reality in the Social Sciences*.

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matters of definition deserve attention. The central concept of emergency in particular warrants some clarification. It is important to keep in mind that no set of characteristics *precisely* defines an emergency. There is no exact definition that could be provided that would leave no grey edges. This is widely recognized, and political thinkers have sometimes accused these grey edges of providing room for politicians to abuse emergency powers, a concern that is well founded. But this is not a reason to reject the entire category of emergency, or to fault those whose definitions have proved imprecise. Emergency is among those words that Wittgenstein has taught us to think of as naming not one but a family of concepts, which resemble each other in much the manner that families do.

Just as we can't say precisely what constitutes love or liberty, and just as most diseases are diagnosed by a critical mass of symptoms, rather than by means of a definitive binary determination, the fact that we cannot describe with any precision what constitutes an emergency does not leave us entirely without resources.

What we can do is to describe a family of characteristics that emergencies are likely to display, and when a critical mass of these manifest, people are likely, independently, to come to the conclusion that an emergency is in progress. Of course, some cases will be clearer than others, and, as I argue, those who design institutions would do well to make the calculus favor extra caution when cases are extra ambiguous.

The key characteristics or 'symptoms' of emergencies are urgency and scale. To say that a situation is urgent is to say that it poses an immediate threat, one too pressing to be dealt with through the normal, years-long process of policy and legislation making. An urgent threat is one that must be dealt with immediately, if it is to be eliminated or mitigated. Citizens cannot wait for lengthy bicameral debate to decide on the best way to confront an epidemic, at the risk of allowing the epidemic to spread exponentially, with exponentially greater loss of life.

It is noteworthy that the idea of urgency does not necessarily entail temporal containment. Conceivably, something can remain urgent for a while. A person who is fighting cancer urgently needs medical attention, but that medical attention may be needed on an ongoing basis. The urgency is not just at T₁, as it might be, for instance, with a broken bone. It continues through time until the cancer is cured or in remission.

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At the same time, the longer a threat continues, the more opportunity a government has to pass well-considered legislation to deal with new circumstances, or to update existing legislation as the need may be. Hence, time limits on emergency powers make sense.

The second characteristic is what I have called ‘scale.’ Scale refers to the range of people likely to be affected by the event. A man who has had a heart attack is experiencing an emergency, but it is not an emergency from the perspective of the state. If a power grid disaster shuts down all the hospitals so that he and others cannot receive care, it becomes a matter of emergency for the government, at whatever level of jurisdiction.

While the focus in much recent work has been on terrorist emergencies, there is no principled reason to make an ontological distinction between terrorist threats and other kinds of threats. Infrastructure disasters, epidemics, floods, earthquakes, indeed anything that poses a real and urgent threat on a grand scale is an emergency, insofar as one aspect of a government’s job is to keep its citizens safe.

Probably, we would all agree that the tsunami of December, 2004, was an emergency. And, likely, any nation undergoing an invasion is suffering an emergency. Perhaps we’d all agree that a cholera outbreak is an emergency as well. These are clear cases. But what about SARS? What about the Mississippi floods in 2008, or a snowstorm in Connecticut? What scale must an event take on before it can count as an emergency?

This is not a matter that can be laid out with any certainty in advance. What we can do is lay out principles that should be taken into account in emergency declaration and decision making. This is one task of this book. Definition is necessarily political and contested, but that no more removes it from democratic sway than is the case for any other matter of policy or approach. The meaning of equality is equally contested, but no one demands a sovereign decision. Following the naming of an event as an emergency, some form of deliberation and accountability can be engineered.

To prevent misdirection, I want now to turn attention to what I am not arguing. First, I am not arguing that emergency powers can be made completely safe or just. Scholars constantly point to dangers in each other’s institutional accounts as a mode of critique. But emergencies are fundamentally dangerous. Even the most genius emergency institutions can be subverted by a cunning and charismatic leader, and the lack of

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emergency powers has proved no safer. Emergency powers are only more or less safe: a good set of emergency powers is safer than a bad set, and safer still than no emergency powers at all. Hence an effective critique must go beyond a charge of ‘unsafe’ to outline what is safer.

Second, despite my intention to show that emergency powers might be justifiable, I do not mean to suggest that any particular exercise of emergency powers is justified. Hence, it is no objection to my arguments to point to cases of ill-use. I mean only to show how emergency powers could *ever* be justified. If we can point to even one use of emergency powers that seems justifiable, it makes sense to ask how.

Asking how necessitates clarity about what exactly requires justification. A political ethics of emergency governs both the design of emergency institutions and emergency decision making, and these are not so distinct. The design of institutions, emergency and otherwise, is a normative endeavor, because institutions embody moral values and because institutions contribute to morally relevant outcomes. But institutions are partly made up of offices, and these offices are inhabited by individuals. Because office holders are also individuals, their decisions have a two-fold moral character. For example, when, in the United States, a Governor decides whether to grant a pardon to a condemned person, he or she is responsible for that person’s life both as an individual human being with the same moral duties as any other person, and as a political leader who has taken on certain official responsibilities, including the duties to uphold and execute the law. For our purposes, it is primarily the official aspect of ethical-political decision making that is salient. In politics generally, and in times of emergency particularly, decision making is itself an institution, and the decisions of office holders have an institutional character.

We often think of institutions as largely constituted by rules. But while politics might, to a great extent, be rule governed, it is not rule determined. Office holders are agents and the agency they exercise is on our behalf. Just as we might send an agent to conduct some business on our behalf with a mandate and a set of limitations only, our political representatives are not automatons. Their agency is of a creative and interpretive variety. They exercise judgment. And this is not an externality. Most offices are explicitly designed for agents and the agency of an office holder is itself part of the institution; it is an element – indeed a core element – of the office itself.

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Hence, when we speak about whether it is right to do wrong with respect to emergency rights derogations, and when we consider how emergency powers might be justified, we should recognize that these are *both* institutional questions, because the office holder's capacity to make decisions on political matters is itself an institutional function. Whether the existence of emergency powers can be justified and whether an office holder is ever justified in using them are, though not the same question, at least intrinsically related. Having emergency powers in the first place assumes the agency of the office holder.

In a similar vein, I want to underline the salient similarities between varieties of legal and moral rights for the purposes of the arguments that follow. Many theorists stress exception from *either* legal or moral norms, while others stress myriad varieties of interconnectedness between the two. Here the two are connected with respect to modes of justification. Sometimes, a declaration of emergency is necessary not because constitutionally enshrined civil rights prevent certain actions, but rather because the activities instigated under the declaration of martial law violate the moral rights of colonial denizens, enshrined in the common law, rather than in a constitution. There are *both* moral and legal prohibitions against killing people and torching their houses, even where there is no constitutional sanctification of life and property. I do not mean to suggest that all these kinds of violations – constitutional, legal, and moral – are interchangeable. However, for the purposes of the problem under investigation, their differences are less important than their similarities. Whatever justification we might find for the derogation of one kind of right could serve as justification for the others also.

The core of the arguments in this book concern the justice of doing wrong, and there are good reasons for understanding law breaking as wrong both to the extent that, other things being equal, abiding by the law is a moral duty, and because legally enshrined rights share moral content with the same rights outside a state context, even if such rights are not actual. Moral rights are a way of talking about moral claims of particular weight. Enshrining them in legal documents serves both to actualize them by making them enforceable and to signal that the moral claims embodied in those rights constitute fundamental values of the state in question. But the moral information is the same regardless of whether these rights are legislated, constitutional, or moral, actual or potential.