

## Introduction: emergency powers and constitutionalism in Asia

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### I. 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.<sup>1</sup> Although emergency powers were the subject of constitutional theory long before the 11 September 2001 terrorist attacks in the United States,<sup>2</sup> the 9/11 attacks and their aftermath have reignited debates about how established liberal democracies should respond to terrorist attacks and other sorts of emergency, leading to the development of sophisticated theories of emergency powers.<sup>3</sup> Some of these theories defend a prominent, but qualified, role for the courts in checking the use of these powers. Others, mindful of the apparent deference to the executive shown by the courts in times of crisis, prefer to use constitutional or statutory emergency powers provisions to delimit the powers of the executive, often by subjecting them to stringent legislative procedures and oversight. Yet other theories stress the importance of extra-legal checks and the underlying social and political culture in preventing the abuse of executive power in an emergency. But what is the relevance of these debates and theories to the invocation of emergency powers in constitutional orders beyond the liberal democracies of ‘the West’?

<sup>1</sup> See, for instance, Carl Schmitt’s challenge to liberalism in *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Chicago: University of Chicago Press, 2005).

<sup>2</sup> For an overview, see A. H. Y. Chen, ‘Emergency Powers, Constitutionalism and Legal Transplants: The East Asian Experience’ (Chapter 3), this volume, pp. 57–65.

<sup>3</sup> These theories are summarised and referenced in V. V. Ramraj, ‘The Emergency Powers Paradox’ (Chapter 2), this volume, pp. 23–8. For survey and analysis, see V. V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008).

The essays in this collection address this question, directly or implicitly, by drawing on the diverse emergency situations in Asia as a ready-made laboratory for exploring the relationship between emergency powers and constitutionalism. The volume therefore rests squarely at the intersection of two debates – a debate over the ability of law to constrain the invocation and use of emergency powers by the executive in times of crisis, and a debate over the nature and viability of constitutionalism in Asia. At this intersection are fundamental questions about constitutionalism and the nature of the modern state. In this introduction, we seek to show why this is so, framing the issues in a way that, we hope, facilitates our understanding of the two broad debates. First, however, two points of clarification are in order: What do we mean by emergency powers? And why do we focus on Asia?

At the symposium that inspired this collection, we deliberately refrained from defining ‘emergency powers’. Had we defined emergency powers from the outset, we might have precluded, unnecessarily, an examination of powers that fall outside the stipulated definition, but function in the same way as ‘formal’ emergency powers, such as internal security legislation<sup>4</sup> or undeclared or informal ‘*de facto*’ emergency regimes.<sup>5</sup> Refraining from providing a definition signalled that we invited disagreement about whether a particular law or action ought to have been included in or excluded from the scope of this study. Having said all this, the essays in this volume typically interpret ‘emergency powers’ to refer to coercive powers, claimed or invoked by or on behalf of the state, the purpose of which is to address a serious threat (usually to persons, property or social order) which, in the view of those who invoke it, cannot be addressed by ‘ordinary’ law. Whether this working definition covers all instances of emergency powers remains an open question. The central concern, though, is whether state powers exercised under this banner can be meaningfully constrained through law.

The second question concerns the category ‘Asia’. Why define the scope of the inquiry in this way? In choosing this category, are we assuming that there is something different or unique about Asia? Are we engaged in an

<sup>4</sup> Internal security legislation has in some jurisdictions become a standing power to deal with subversion: see, for instance, the Internal Security Act in Singapore and Malaysia, discussed in M. Hor, ‘Law and Terror: Singapore Stories and Malaysian Dilemmas’, in V. V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 278–9.

<sup>5</sup> On the distinction between *de jure* and *de facto* emergencies, see J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia: University of Pennsylvania Press, 1994), pp. 3–21.

orientalist, and therefore suspect, exercise? We do not mean to imply that there is anything special or unique about the Asian societies considered in this volume (though neither do we repudiate this possibility). However, there are several reasons why a study of emergency powers in Asia is important. For one, as a vast continent, Asia contains a plurality of legal forms and systems of government, as well as a diversity of experiences with European and Asian colonialism (and in the case of Thailand, an absence of colonial rule altogether). It consists of states in the midst of or emerging from conflict, single-party communist states, economically successful semi-authoritarian or formally democratic states, and both nascent and aspiring democracies. A second reason is the depressingly large number of emergencies in Asia canvassed in this volume. Indeed, the range of emergencies is so broad that we can hardly do justice to them in these pages. We do not, for instance, examine recent states of emergency in Russia, Turkey, Iraq, Bangladesh, Nepal, the Middle East or Central Asia.<sup>6</sup> But our objective in this volume is not to provide a comprehensive survey of the actual experiences of emergency powers in Asia; rather, it is to use the particular instances of emergency powers recounted here as a vehicle for exploring the relationship between emergency powers and aspirations of constitutional government more generally. With this goal in mind, we have brought together a collection of essays which take as their starting points the experiences of emergency powers in Aceh, Afghanistan, Brunei, Burma/Myanmar, Cambodia, China, East Timor/Timor-Leste, Hong Kong, India, Indonesia, Japan, Laos, Malaysia, Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand and Vietnam. Finally, although this volume is grounded in Asia, our firm conviction is that this study holds lessons for *any* constitutional order that is struggling to come to terms with emergency powers, whether in Asia or elsewhere.

In this introduction, we identify four overarching themes that emerge from the chapters in this volume and correspond to the four parts of this book. There is, of course, some risk and artificiality in doing so. Most of the chapters in this volume examine a range of cross-cutting themes, and to classify them according to one main theme does not do them justice. Yet

<sup>6</sup> Websites maintained by the UN Security Council's Counter-Terrorism Committee ([www.un.org/sc/ctc/](http://www.un.org/sc/ctc/)) and the International Commission of Jurists ([www.icj.org/](http://www.icj.org/)) provide useful resources and databases for tracking the use of emergency powers in Asia and elsewhere. Though no longer updated, the Queen's University Belfast's States of Emergency Database is a useful historical resource: [www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/StatesofEmergencyDatabase/](http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/StatesofEmergencyDatabase/).

there is some analytic clarity to be gained from this exercise, and so, with some apprehension, we group the chapters according to four main themes: perspectives from legal and political theory; postcolonial and post-conflict transitions; emergencies, executive power and constitutional order; and the role of the courts.

## II. Perspectives from legal and political theory

As Albert Chen astutely observes in his contribution to this volume, the ‘concept and theory of emergency powers are . . . inseparable from the concept and theory of constitutionalism’.<sup>7</sup> What then, is the impact of the transplantation of emergency powers in a constitution? For Victor V. Ramraj (looking at East Timor,<sup>8</sup> Thailand and Malaysia),<sup>9</sup> and Chen (referring to Hong Kong, Taiwan, South Korea and the People’s Republic of China), this question makes sense only if we first distinguish between established liberal democracies and developing or aspiring constitutional orders. According to Ramraj, there is a crucial distinction in theory and practice between situations in which emergency powers are used to preserve or restore constitutionalism in established states, and situations in which they are used ‘to bring about the basic conditions of stability upon which a constitutional order can take hold’.<sup>10</sup> Similarly, in many countries in Asia and elsewhere, argues Chen, the ‘discourse of emergency may be no more than a substitute or surrogate for the idea that the prevailing circumstances make it impossible or impracticable to practise the liberal constitutional democratic system prescribed . . . for “normal” circumstances’.<sup>11</sup>

Ramraj and Chen are conscious of the potential for emergency powers to be abused. Ramraj argues that in developing constitutional orders, especially post-conflict ones, an ‘emergency powers paradox’ is apparent; emergency powers are ‘seen as necessary to establish the conditions of relative stability needed for legal, political and economic reforms to take hold, and yet a propensity to invoke these powers . . . casts doubt on a government’s commitment to constitutionalism in the first place’.<sup>12</sup> In his view, emergency powers are sometimes justified to establish stability,

<sup>7</sup> Chen, Chapter 3, p. 58.

<sup>8</sup> Officially, East Timor is known in Portuguese as República Democrática de Timor-Leste. However, since we have rendered the names of other countries in this volume by their names in English, we refer to Timor-Leste, for short, as ‘East Timor’.

<sup>9</sup> Ramraj, Chapter 2. <sup>10</sup> *Ibid.*, p. 43.

<sup>11</sup> Chen, Chapter 3, p. 64. <sup>12</sup> Ramraj, Chapter 2, p. 29.

provided that (as in East Timor), the government remains committed to legality and constitutionalism. At the same time, however, he acknowledges the danger of abuse of such powers (as in Malaysia and Thailand), but argues that the struggle for constitutional constraints on emergency powers is more political than legal, at least until a constitutional culture is entrenched. Chen too is conscious that the use and discourse of emergency powers can become ‘instruments for subverting constitutionalism’, but argues that emergency powers laws can sometimes play an important role in constraining their use (as in Hong Kong and China<sup>13</sup>) and, in some circumstances, can serve to galvanise public support against authoritarian rule when those powers are abused or have outlived the events that justified their invocation in the first place (as in Taiwan and South Korea<sup>14</sup>).

In contrast with Chen and Ramraj, Anil Kalhan<sup>15</sup> and Vasuki Nesiah<sup>16</sup> are more overtly concerned about the potential for abuse in light of the experience of those powers in India, Pakistan and Sri Lanka. For example, Kalhan shows how Pakistani President and General Pervez Musharraf (in 2007) and Indian Prime Minister Indira Gandhi (in 1975) both invoked emergency powers, albeit in constitutionally distinct and contentious ways, to consolidate political power. In Pakistan, Musharraf proclaimed an emergency in part to neutralise what he considered an activist judiciary working ‘at cross-purposes with the executive and the legislature’.<sup>17</sup> Musharraf used the emergency to purge the judiciary of potentially ‘disloyal’ judges and to detain political opponents, including ‘opposition lawyers, judges and politicians’.<sup>18</sup> What was particularly remarkable about this emergency was the lack of a clear legal basis for it in the Constitution and the ‘extraconstitutional’ order it ushered in. In contrast, although Gandhi’s emergency in 1975 was formally in accordance with the Constitution, it was motivated by similar concerns about the judiciary and had similar political consequences, rendering ‘the distinction between constitution and extraconstitution largely formal’<sup>19</sup> and demonstrating ‘that non-legal or political factors can loom large under both constitutional and extraconstitutional emergency powers regimes’.<sup>20</sup> So for Kalhan, rather than paving the way for the accountability of modern

<sup>13</sup> Chen, Chapter 3, pp. 65–8, 79–82.      <sup>14</sup> *Ibid.*, pp. 68–72, 72–9.

<sup>15</sup> A. Kalhan, ‘Constitution and “Extraconstitution”: Colonial Emergency Regimes in Post-colonial India and Pakistan’ (Chapter 4), this volume.

<sup>16</sup> V. Nesiah, ‘The Princely Imposter: Stories of Law and Pathology in the Exercise of Emergency Powers’ (Chapter 5), this volume.

<sup>17</sup> Kalhan, Chapter 4, p. 96.      <sup>18</sup> *Ibid.*, p. 99.      <sup>19</sup> *Ibid.*, p. 111.      <sup>20</sup> *Ibid.*, p. 115.

constitutional government, ‘emergency and emergency-like powers [are] in part designed precisely to avoid such accountability’.<sup>21</sup>

Nesiah is similarly sceptical. Drawing on the experience of Sri Lanka, she warns of the dangers that arise when emergency powers are normalised. For Nesiah, the usual remedies of liberal constitutionalism – ‘better laws, institutions and norms’<sup>22</sup> – are problematic because of the way in which they conceive the problem. For liberal constitutional law theorists, the danger of emergency powers arises from the lack of adequate constraints, so they seek to refine emergency powers and fix doctrinal gaps, improve the political-legal institutional architecture and reform the ‘political culture of constitutionalism’.<sup>23</sup> But the Sri Lankan example points to a deeper problem – a problem that arises when emergency powers become part of normalised, ‘crisis constitutionalism’<sup>24</sup> that Nesiah claims (drawing on Giorgio Agamben<sup>25</sup>) is characteristic not only of the “Sri Lankas” of the world<sup>26</sup> but of constitutionalism more generally.

On one point, Ramraj, Chen, Kalhan and Nesiah seem to agree: the law of emergency powers is deeply political; law cannot play the same kind of constraining role in developing constitutional orders that it seeks to play in developed, liberal constitutional orders. Where they differ is on the potential for law to do so. In this respect, Ramraj and Chen are more optimistic concerning law’s prospects; while conscious of the potential for abuse, they both see emergency powers as capable of securing a foundation on which a liberal constitutional order might eventually be built. In contrast, Kalhan sees emergency powers, whether constitutional or extraconstitutional, as undermining efforts to establish accountable government; Nesiah sees them as essentially uncontainable. Contexts of extreme power, she argues, show that ‘more law can itself enable, exacerbate and authorise such abuse’ and that ‘exceptions are not outside of law but are themselves its products’.<sup>27</sup>

The deep tension between emergency powers and the constitutional order reverberates through this volume in different contexts. Two contexts have already been identified. The first is the link between emergency powers and colonialism, which emerges indirectly in Ramraj’s account of Malaysia and Chen’s discussion of Hong Kong. It is also confronted squarely in Kalhan’s recognition of the ‘shared origins’ of

<sup>21</sup> *Ibid.*, p. 120.      <sup>22</sup> Nesiah, Chapter 5, p. 121.

<sup>23</sup> *Ibid.*, pp. 121, 129 and (in quotes) 131.      <sup>24</sup> *Ibid.*, p. 124.

<sup>25</sup> G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

<sup>26</sup> Nesiah, Chapter 5, p. 139.      <sup>27</sup> *Ibid.*, p. 144.

emergency powers in India and Pakistan ‘in the British colonial state’<sup>28</sup> and Nesiah’s claim that the normalisation of emergency powers ‘stretches back into the country’s colonial history as a central component of colonial governance’.<sup>29</sup> The second is the important and contentious role of emergency powers in transitional, post-conflict states, such as East Timor. In the next part of this chapter, we consider the role that emergency powers play in mediating legal transitions in postcolonial and post-conflict contexts.

### III. Postcolonial and post-conflict transitions

The invocation of emergency powers often straddles formal changes in the legal and political order. Here we consider two such changes: the first occurs when former colonial powers withdraw; the second takes place in the transition from conflict to peace. Kevin Tan’s chapter provides an overview of the use of emergency powers during transitions of the first kind – through the process of decolonisation and its immediate aftermath in Southeast Asia.<sup>30</sup> Maitrii Aung-Thwin examines the use of emergency powers by British colonial authorities in Burma between 1930 and 1932 and explores its implications for contemporary Myanmar and postcolonial societies in Asia.<sup>31</sup> The contributions by Simon Chesterman<sup>32</sup> and by Michelle Miller and Michael Feener<sup>33</sup> examine the role of emergency powers as societies embark on a transition from conflict to peace, but show strong connections to the problems of colonialism highlighted by Tan and Aung-Thwin.

In his chapter, Tan describes the transfer of power between colonial authorities and indigenous leaders across Southeast Asia, focusing on the use of emergency powers by the four colonial regimes: the American regime (in the Philippines); the British (in Burma, Malaya, Singapore, Borneo and Brunei); the French (in Vietnam, Laos and Cambodia); and

<sup>28</sup> Kalhan, Chapter 4, p. 116.

<sup>29</sup> Nesiah, Chapter 5, p. 123. See also M. Aung-Thwin, ‘Discourses of Emergency in Colonial and Postcolonial Burma’ (Chapter 7), this volume. Colonialism figures prominently in the history of emergency powers in Southeast Asia and Hong Kong as well: see K. Y. L. Tan, ‘From Myanmar to Manila: A Brief Study of Emergency Powers in Southeast Asia’ (Chapter 6), this volume; Chen, Chapter 3.

<sup>30</sup> Tan, Chapter 6. <sup>31</sup> Aung-Thwin, Chapter 7.

<sup>32</sup> S. Chesterman, ‘UNaccountable? The United Nations, Emergency Powers, and the Rule of Law in Asia’ (Chapter 9), this volume.

<sup>33</sup> M. A. Miller and R. M. Feener, ‘Emergency and Islamic Law in Aceh’ (Chapter 8), this volume.

the Dutch (in Indonesia). The nationalist leaders who came to power often denounced the use of emergency powers by colonial rulers, Tan shows, but were quick to accept and adopt those same powers to maintain a stronghold over their new nations. Most political leaders argued that this was necessary to preserve their new constitutional orders, even if this meant sacrificing elements of constitutionalism, thereby reinforcing the paradox on which Ramraj focuses. Tan appears sympathetic to this development. He argues that basic law-and-order issues were not settled by the formal adoption of constitutions, and the nations in Southeast Asia constantly have had to face challenges to their survival; attempts at insurrection and subterfuge were regular features of the history of these post-colonial nations. Faced with such challenges, explains Tan, most nations used one of two constitutional options: to constitutionally eradicate opposition to power (an option exercised by Vietnam, Laos and Burma, and by Indonesia until the Suharto era), or to retain and use emergency powers when necessary (the option chosen by the Philippines, Malaysia and Singapore). Thailand, Cambodia and Brunei did not fit into these two models, and were exceptional on account of specific circumstances within each nation.

Like Tan, Maitrii Aung-Thwin is equally concerned about the understudied impact of colonialism on current legal regimes in Asia. His chapter focuses on a single instance of the use of emergency powers in Burma between 1930 and 1932, in what came to be known as the ‘Burma Rebellion’. This one event at the height of colonial rule in Burma shows how the colonial authorities employed emergency powers in dubious ways, often with full knowledge that there was no justifiable basis for their use, in order to maintain control over colonial subjects. Aung-Thwin traces the worldview that influenced the colonial authorities’ use of emergency powers; in his view, this mindset went on to affect the thinking of leaders in post-independence Burma. Aung-Thwin is less accepting of the legitimacy of the use of emergency powers in postcolonial Asia. He suggests that at least in postcolonial Burma, the political elite’s perception of Burma as being continuously under siege and the Burmese people as not being ‘ready to embrace alternative forms of government’<sup>34</sup> had strong parallels with the perspectives of the colonial authorities who imposed the emergency to quell the Burma Rebellion.

Simon Chesterman takes us from the colonial context to what some have called our neo-imperial era<sup>35</sup> – specifically, recent exercises of emergency

<sup>34</sup> Aung-Thwin, Chapter 7, p. 211.

<sup>35</sup> J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (New York: Cambridge University Press, 2006), esp. pp. 1–17.



powers by the United Nations in Asia under international law.<sup>36</sup> How does the rule of law, an important dimension of constitutionalism, apply to the state-building activities of the United Nations? More specifically, how does the UN Security Council use the rule of law as a tool, and to what extent are its own actions constrained by the rule of law in its operations in East Timor and Afghanistan? Chesterman begins and ends his chapter with references to colonialism in Asia, and his overall analysis is persuasive in making the connection between UN operations and some of the mistakes of colonialism: the uncritical use of foreign legal models without making efforts to adapt those models to local conditions, and the extensive use of preventive detention to bring peace, often in violation of widely accepted international norms. Reflecting the colonial legacy highlighted by Tan and Aung-Thwin, Chesterman concludes that ‘the contradictions between what international administrators say and . . . do have complicated [the task of governing these societies] and left an uncertain legacy for those who inherit it’.<sup>37</sup>

In their chapter, Miller and Feener examine the interplay between the use of emergency powers and the introduction of religious law (specifically, Shari’a law) in the Indonesian province of Aceh, where an armed separatist movement was active for decades.<sup>38</sup> Like East Timor, Aceh is a post-conflict society, but the devastation of the 2004 tsunami added a further layer of complexity to the governance of postcolonial Aceh, leading to intervention by international aid authorities. Miller and Feener describe attempts by successive governments in Jakarta to contain the separatist movement in Aceh by imposing emergency rule and simultaneously offering Shari’a law to the Acehnese – moves that have both strengthened and constrained Indonesian authority within Aceh in different ways. Drawing parallels to Northern Ireland, Miller and Feener argue that while the formal imposition of harsh emergency laws led to greater Indonesian control over the territory of Aceh, it also alienated and radicalised the Acehnese, providing popular support for the separatist movement. The introduction of Shari’a law, they argue, though unsuccessful when first introduced alongside military measures, later proved useful for embedding stable political authority in post-conflict Aceh, instilling hope for many Acehnese that there will be ‘an alternative legal order for post-conflict Aceh as a special autonomous region within Indonesia’.<sup>39</sup> This analysis draws attention to a common problem in postcolonial societies: tensions between the centre and the periphery that are articulated as disputes over

<sup>36</sup> Chesterman, Chapter 9. <sup>37</sup> *Ibid.*, p. 262.

<sup>38</sup> Miller and Feener, Chapter 8. <sup>39</sup> *Ibid.*, p. 236.

federalism. What makes these cases so intractable is that many are a direct result of the messy arrangements left when colonial powers withdrew and borders were redrawn based on considerations other than national identity. Taken together, these chapters reinforce the need to study more closely the impact of colonialism on the contemporary use of emergency powers in Asia.

#### IV. Emergencies, executive power and constitutional order

Emergency powers evidently play a controversial role in transitions from colonial rule to independence and from conflict to relative tranquillity. They also raise critical questions about constitutionalism in states with a history of strong executive government, but where colonial rule is distant or non-existent. The chapters by Nadirsyah Hosen (Indonesia),<sup>40</sup> Andrew Harding (Thailand),<sup>41</sup> Mark Fenwick (Japan),<sup>42</sup> and Jacques deLisle (China),<sup>43</sup> though dealing with societies vastly different in terms of their political and legal structures and their social and economic conditions, provide a useful lens to examine the complex relationship between emergency powers and strong executive government.

In his contribution, Hosen traces the development of emergency powers in post-independence Indonesia through Presidents Sukarno and Suharto into the modern era, alongside the evolution of a substantive conception of *negara hukum* – a concept akin to the rule of law. In particular, he shows how the shift away from authoritarian government toward a more substantive conception of the rule of law in Indonesia has taken place in response to internal political changes and external pressure from international financial institutions. Hosen also demonstrates how this shift toward the rule of law stands in sharp contrast with the post-9/11 pressure, again both internal and external, to strengthen and invoke emergency powers in response to terrorist bombings in Bali and Jakarta. Hosen observes, however, that these powers have also been used, controversially, to issue permits to mining companies in protected forests, renewing concerns about the

<sup>40</sup> N. Hosen, 'Emergency Powers and the Rule of Law in Indonesia' (Chapter 10), this volume.

<sup>41</sup> A. Harding, 'Emergency Powers with a Moustache: Special Powers, Military Rule and Evolving Constitutionalism in Thailand' (Chapter 11), this volume.

<sup>42</sup> M. Fenwick, 'Emergency Powers and the Limits of Constitutionalism in Japan' (Chapter 12), this volume.

<sup>43</sup> J. deLisle, 'States of Exception in an Exceptional State: Emergency Powers Law in China' (Chapter 13), this volume.