The Constitution of Law

Legality in a Time of Emergency

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Geneviève Cartier gave me comments and the influence of her doctoral thesis 'Reconceiving Discretion: From Discretion as Power to Discretion

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TABLE OF CASES

TABLE OF STATUTES

CONTENTS

Introduction

Is the rule of law optional for liberal democratic societies? In the wake of the attacks on the United States on 11 September 2001, the Bush administration seemed to say that it is. And in the wake of the attacks on London in July of 2005, Tony Blair has indicated that the rule of law is a luxury, dispensable when the going gets rough. In particular, he has indicated that judges have to be reined in from their disposition to enforce the rule of law against the executive, even if this requires both legislating how they are to balance liberty against security and amending the Human Rights Act 1998. In contrast, the Spanish government elected in the immediate aftermath of the attacks on Madrid on 11 March 2004 did not see fit to renege on a commitment to the rule of law.

Blair's comments fit within a trend whereby many liberal democracies since 9/11 have used either legislation or executive order to create a variety of legal black holes, situations in which individuals suspected of being threats to national security are detained indefinitely. In the United Kingdom, they were detained because, while they were aliens who would ordinarily be deported after a determination that they threatened security, the government is committed to not deporting anyone to a country where that person faces a serious risk of torture. In this situation, the government's respect for one human right – the right not to be tortured – leads to an individual being stripped of another human right, that is the right not to be detained except for certain legitimate purposes, for example, that one is awaiting trial on a criminal charge or that one's deportation is imminent. Thus, when the United Kingdom amended its anti-terrorism law to provide for this kind of situation, it also expressly derogated in advance from its domestic and international human rights commitments in regard to detention.

In some respects, those detained were not altogether in a legal black hole, a lawless void, as they were able to contest the validity of the determination that they were risks to national security before the Special Immigration Appeals Commission (SIAC), a tribunal with expertise

in law, immigration, and security. Moreover the anti-terrorism statute required periodic reviews by SIAC of the particular decisions to detain and the statutory provisions allowing for indefinite detention expired unless renewed on a set date. But, given the assumption of the government that the terrorist threat it faces is permanent and that threats do not have to be imminent to justify emergency measures, the detainees were in a legal black hole in that they faced detention without criminal charge for the foreseeable future.

Even more dramatic are the legal black holes created by the government of the United States. Notorious here is the situation of aliens detained offshore at Guantanamo Bay, which the government claimed to be beyond the jurisdiction of the federal courts. These individuals are not detained because the US government refuses to deport them to face torture. Indeed, the government of the United States has deported people in order that they will be tortured in countries in which torture is condoned. Moreover, its own treatment of detainees has raised questions about whether it practises torture, spurred by signals from the highest reaches of the Bush administration that torture is acceptable, given the severity of the emergency. Rather, they are detained because it is alleged that they fall into the category of 'enemy combatants', a category which is beyond the reach of both domestic and international law. In addition, there is the situation of those citizens who are detained within the United States, but who are by executive order placed in the same enemy combatant category.

It is hardly a new claim that in a time of emergency even liberal democracies have to suspend the rights which those subject to the law enjoy in ordinary times in order to preserve themselves. All that is new is the prevalence of the claim that this emergency has no foreseeable end and so is permanent. For those who are troubled by the trend towards permanent emergency powers, that is the normalization of the exceptional, the central question has become how such a trend might be resisted.

I will argue that a response to emergencies, real or alleged, should be governed by the rule of law. My conception of the rule of law is substantive: the rule of law is a rule of fundamental constitutional principles which protect individuals from arbitrary action by the state. Substantive conceptions of the rule of law are often contrasted with procedural ones, where the contrast is between what kinds of decisions are made and how they are made. For example, the procedural right to a hearing before a decision is made is not a substantive right to a particular decision. But I will argue there is more to the rule of law than principles that are procedural in the sense that all they protect is rights to how decisions are made. The

principles do constrain the decisions of those who wield public power in a way that protects the interests of the individuals subject to those decisions.

While a substantive conception gives a significant role to judges, it also requires the cooperation of the legislative and executive branches of government[1] in what I call the rule-of-law project. There are limits to judicial competence and it will sometimes take imaginative exercises in institutional design to craft solutions to problems about how to impose the rule of law on certain kinds of executive decisions. Decisions about national security considerations, for example, decisions to detain individuals as risks to security, starkly pose such problems and SIAC, the tribunal just mentioned, is an attempt at a solution. A substantive conception of the rule of law has to find a way of coordinating the roles of the judiciary and the other branches of government, when the latter are productively engaged in the rule-of-law project.

But what is the judicial role when such cooperation ceases altogether or is half-hearted? An example of total cessation is when the statute that responds to the emergency either explicitly exempts the executive from the requirements of the rule of law or explicitly excludes judicial review of executive action. Half-hearted cooperation comes about when a tribunal is put in place to police decisions about security, but its procedures make it look more like a rubber stamp for executive decisions than a forum in which executive claims are properly tested. In the first example, the legislature seeks to create a legal black hole, a situation in which there is no law. In the second, the legislature seeks to create a hole that is grey rather than black, one in which there is the façade or form of the rule of law rather than any substantive protections. As we will see, the appropriate judicial reaction to a black hole will vary according to the way in which it is created. But judges should avoid any part in the creation of grey holes; indeed, they should try their hardest to turn the form of the rule of law into something substantive, to turn grey holes into situations which are properly governed by the rule of law. For grey holes are disguised black holes, and if the disguise is left in place governments will claim that they govern in accordance with the rule of law and thus garner the legitimacy that attaches to that claim.

These concerns might, as I have already suggested, seem misplaced if the thought is right that a substantive conception of the rule of law has no or little role in an emergency situation. It would follow that responses to emergencies have in the nature of things to be partly or even wholly

[1] I will at times use 'government' and 'executive' interchangeably.

exempted from the requirements that we associate with the rule of law in ordinary or normal times. The government or the legislature or both in tandem cease to cooperate in the rule-of-law project, not out of ill will, but because of a good faith judgment about necessity. Necessity has no law, as the saying goes; and we will see that the fascist legal theorist Carl Schmitt challenged liberal theories of the rule of law on the basis that even liberals have to recognize that the rule of law has no application in a state of emergency.

I will respond to that challenge in arguing that judges have a constitutional duty to uphold the rule of law even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project. Indeed, the legislature and the executive have that same duty to uphold the rule of law in emergency times no less than in ordinary times, which is why judges are entitled to assert the rule of law in the face of what seem to be legislative or executive indications to the contrary.

My claim that judges have this duty because of a shared commitment of all three branches of government to the rule of law is questionable, not only because of the issue about necessity. It might also seem viable only when judges are explicitly given the constitutional resources by their legal order to stand up to a legislature or executive which chooses to depart from the rule of law. If, that is, one equates the rule of law with the rule of fundamental constitutional principles, it might seem that a duty exists to protect those principles against the legislature and the executive only when judges have the resource of an entrenched bill of rights which makes them guardians of those principles. While judges might have a moral duty always to uphold the rule of law, only the existence of a bill of rights can turn that moral duty into a legal one, let alone a constitutional one.

However, if the argument about necessity is right, the existence of a bill of rights is irrelevant during a state of emergency. The thought that the law applicable in normal times has no or little application during a time of emergency extends to all law, including a bill of rights. Moreover this book is titled 'The Constitution of Law' because my argument is that, in circumstances when a society chooses to rule through law, it also chooses to subject itself to the constitutional principles of the rule of law, whether or not it articulates those principles in a bill of rights.

Law presupposes the rule of law, in the substantive sense. Therefore, if there is no written constitution, these principles will be unwritten or implicit; in common law legal orders, they will be part of the common law constitution. For this reason, my argument will rely for the most part on

cases drawn from jurisdictions where there is or was no bill of rights which protects the principles of the rule of law, from, that is, countries which belong to the common law family of the Commonwealth. My overall argument is that what we might think of as the Commonwealth constitution exhibits the values of a substantive conception of the rule of law and that these values make the exercise of legal authority legitimate.

At one level, then, my ambition is to sketch the basis for a productive account of the relationship between the three powers – the legislature, the government, and the judiciary. I will try to show that it is better to understand their relationship in terms of what they share and not in terms of what separates them, since their separation is in the service of a common set of principles. The powers are all involved in the rule-of-law project. They are committed to realizing principles that are constitutional or fundamental, but which do not depend for their authority on the fact that they have been formally enacted. In order to count as law or as authoritative, an exercise of public power must either show or be capable of showing that it is justifiable in terms of these principles.

The countries from which most of my examples are drawn are the United Kingdom, Canada, and Australia. Together they present a fertile ground for testing my claims because, until quite recently, Canada and Australia had what I will refer to as a 'division of powers constitution', a constitution which set out the parameters of the country's federal structure. Even today, Australia has not decided to adopt a bill of rights and the move into the era of domestic human rights documents by the United Kingdom through the enactment of the Human Rights Act 1998 does not give judges the authority to invalidate legislation. Instead, that Act requires them to interpret statutes in such a way that they are rendered consistent with the United Kingdom's human rights commitments. If a statute cannot be so rendered, then the judges are entitled only to declare it incompatible with the human rights commitments, a declaration which leaves it up to the government and the legislature to decide whether to amend the statute. Moreover, the Canadian Charter of Rights and Freedoms explicitly gives Canadian legislatures the power to override most judicial determinations that legislation is unconstitutional. So my argument is that there are continuities across the United Kingdom, Australia, and Canada that transcend in importance orthodox distinctions based on (a) an unwritten constitution, (b) a federal constitution but no enacted bill of rights, (c) an enacted but not entrenched bill of rights, and (d) a federal constitution and an entrenched bill of rights. That is why I speak of the Commonwealth constitution.