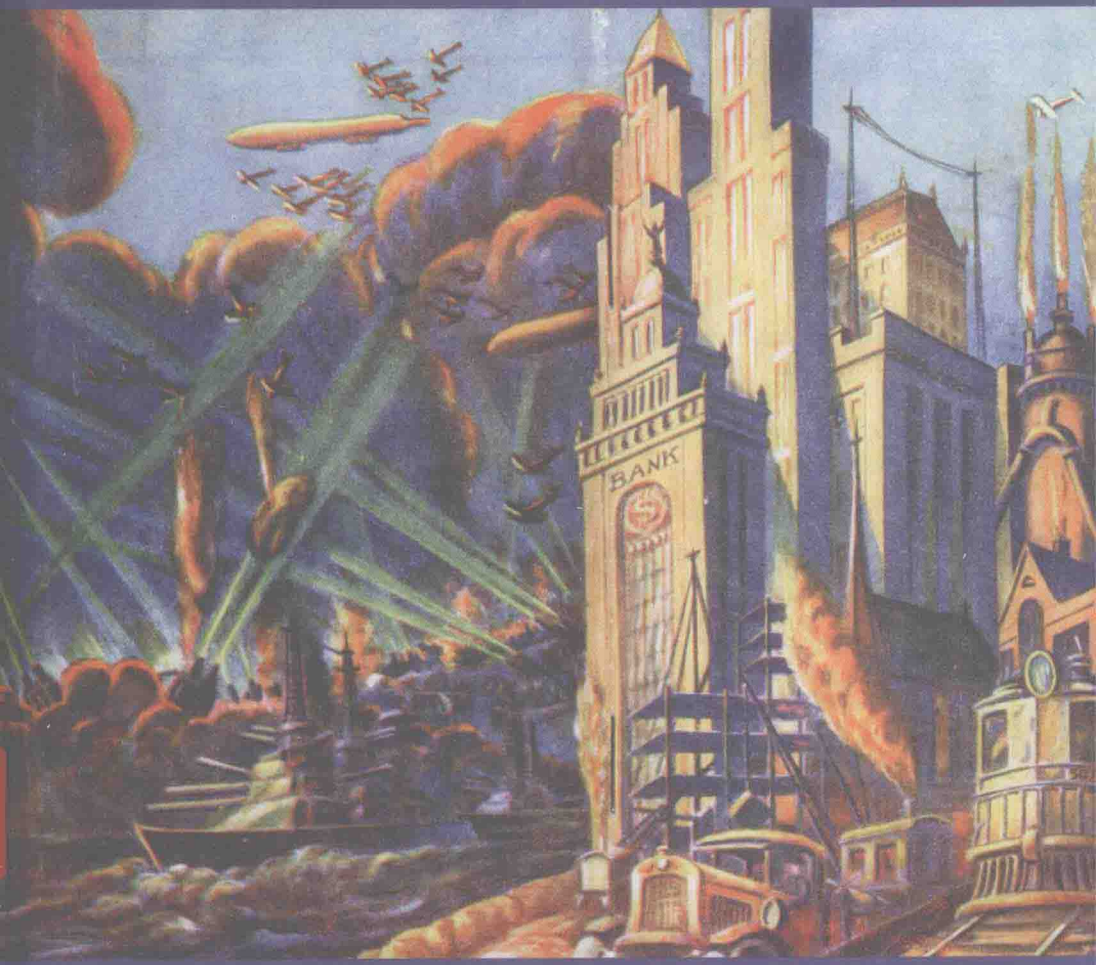
Emergencies and the Limits of Legality



Edited by
Victor V. Ramraj

CAMBRIDGE

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521895996

First published 2008

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Emergencies and the limits of legality / edited by Victor Ramraj.
p. cm.
Includes index.
Includes bibliographical references and index.
ISBN 978-0-521-89599-6
1. War and emergency powers. I. Ramraj, Victor Vridar, 1968– II. Title.
K4700.E42 2008
342′.062 – dc22 2008033577

ISBN 978-0-521-89599-6 hardback

EMERGENCIES AND THE LIMITS OF LEGALITY

Most modern states turn swiftly to law in an emergency. The global response to the 11 September 2001 attacks on the United States was no exception, and the wave of legislative responses is well-documented. Yet there is an ever-present danger, borne out by historical and contemporary events, that even the most well-meaning executive, armed with extraordinary powers, will abuse them. This inevitably leads to another common tendency in an emergency, to invoke law not only to empower the state but also in a bid to constrain it. Can law constrain the emergency state or must the state at times act outside the law when its existence is threatened? If it must act outside the law, is such conduct necessarily fatal to aspirations of legality? This collection of essays – at the intersection of legal, political and social theory and practice – explores law's capacity to constrain state power in times of crisis.

Victor V. Ramraj is an Associate Professor in the Faculty of Law at the National University of Singapore, where he also serves as Vice-Dean for Academic Affairs.

'Combining a subtle appreciation of the complexities with brilliant insights into their resolution, together these essays form an important contribution and an intellectual feast.'

Lucia Zedner, Professor of Criminal Justice, University of Oxford

'This is an unusually fine collection of essays on one of the most important questions in legal and constitutional theory – the propriety of violating legal norms in times of emergency. What makes it especially illuminating is the way that the various essays are very much in dialogue – and sometimes in tension – with one another, as well as the ability of the international cast of essayists to draw from a very broad range of examples.'

Sanford Levinson, Professor of Government, University of Texas at Austin

For Eli and Satchel

CONTRIBUTORS

R. RUEBAN BALASUBRAMANIAM,
Assistant Professor, Department of Law, Carleton University

COLM CAMPBELL,
Professor of Law, University of Ulster

TOM CAMPBELL,
Professor, Centre for Applied Philosophy and Public Ethics (CAPPE), Charles Sturt University

SIMON CHESTERMAN,
Associate Professor, Faculty of Law, National University of Singapore and Global Professor, New York University School of Law

DAVID DYZENHAUS,
Professor of Law and Philosophy, University of Toronto

OREN GROSS,
Irving Younger Professor of Law, University of Minnesota Law School

JOHAN GEERTSEMA,
Assistant Professor, University Scholars Programme, National University of Singapore

KANISHKA JAYASURIYA,
Principal Senior Research Fellow, Asia Research Centre, Murdoch University

NOMI CLAIRE LAZAR,
Canadian Bicentennial Visiting Assistant Professor, Department of Political Science, Yale University

C.L. LIM,
Professor of Law, University of Hong Kong

TERRY NARDIN,
Professor of Political Science, National University of Singapore

VICTOR V. RAMRAJ,
Associate Professor, Faculty of Law, National University of Singapore

KENT ROACH,
Professor of Law, Prichard and Wilson Chair in Law and Public Policy, University of Toronto

WILLIAM E. SCHEUERMAN,
Professor of Political Science and West European Studies, Indiana University, Bloomington

A.P. SIMESTER,
Professor of Law, National University of Singapore and Fellow, Wolfson College, Cambridge

MARK TUSHNET,
William Nelson Cromwell Professor of Law, Harvard Law School

PREFACE

This volume was inspired by a debate at a symposium in Singapore in 2004 between David Dyzenhaus, who attended the symposium in person, and Oren Gross, who spoke by teleconference. Their debate was later published in a volume I had the privilege of co-editing with Michael Hor and Kent Roach, *Global Anti-Terrorism Law and Policy,* published by Cambridge University Press in 2005. Reflecting on their debate, I became more and more convinced that the legal-theoretical issues they were confronting were likely to become the defining theoretical issues of our generation, and would preoccupy legal theorists for years, and probably decades, to come – in much the same way that the atrocities of World War II were the backdrop against which much of the subsequent twentieth-century jurisprudence developed. The more I reflected on the Gross–Dyzenhaus debate, the more determined I was to provide a forum in which the parameters of this debate could be fully examined, critiqued and challenged by a group of eminent legal, political and social theorists. And so the idea for this project was conceived.

I am especially grateful to David Dyzenhaus and Oren Gross for their enthusiasm from the very start, when I first broached the idea with them in late 2005. Their continued support for this project has been crucial to its completion. Convening an international symposium requires significant financial support, and the funding for this project came from a generous grant from the Ministry of Education, administered by the National University of Singapore (NUS). Thanks are due to NUS, the members of the Faculty Research Committee in the Faculty of Law and to my Dean, Tan Cheng Han, for their support of, and confidence in, this project.

I am also grateful for excellent research and editorial help from a superb team of students – Liu Huijun, Nishan Muthukrishnan, Li Daming, Dennis Tan Chuin Wei, Zhang Rui – and especially Cheryl Fung Shuyin, Teo Jin Huang and Crystal Tan Yan Shi, who provided invaluable assistance at critical stages in the project. I am indebted to my NUS colleagues Michael Hor, Arun Thiruvengadam, C.L. Ten and Alan Khee-Jin Tan for chairing

sessions and for their thoughtful interventions at the symposium. Michael also kindly provided a guiding editorial hand on one of the chapters. I also owe Elizabeth Chua and Connie Yew an enormous debt of gratitude for their tireless logistical and administrative support, and their attention to detail.

My parents, Ruby and Victor, and my sister, Sharon (and her then-fiancé, now-husband Rob), graciously agreed to move our family holiday celebrations forward a month so that I could return to Singapore in time for the symposium. I am thankful for this small act of kindness – and deeply appreciative of their love and steadfast support over the years. My wife Sandy was especially understanding and encouraging when this project was at its most demanding. But my gratitude to her also extends much further back. Sandy's probing questions have prompted me to refine my thinking and the beauty of her prose has inspired me – since the day thirteen years ago when our respective interests in legal theory and the printed word brought us together. As E.B. White once wrote, it 'is not often that someone comes along who is a true friend and a good writer'. Like Wilbur, I am lucky to have found someone who is both.

Above all, the flying, no-holds-barred, bowl-me-over hugs that I get from my sons, Eli and Satchel, when I return home from the office – and the hours of uninhibited play, belly-splitting laughter and wondrous conversation that follow – remind me daily of what is most important in life, and help me to keep everything else in perspective.

Victor V. Ramraj
Singapore
December 2007

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No doctrine more pernicious? Emergencies and the limits of legality

VICTOR V. RAMRAJ

I. Introduction

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

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

I am most grateful to all who made the time to comment on drafts of this introduction, especially Tom Campbell, Simon Chesterman, David Dyzehaus, Johan Geertsema, Sandy Meadow, Terry Nardin, Ruby Ramraj, Victor J. Ramraj, Sharon Ramraj-Thompson, Kent Roach, William E. Scheuerman, A.P. Simester, François Tanguay-Renaud and Arun K. Thiruvengadam.

[1] The Counter-Terrorism Committee, which was set up in the wake of the 9/11 attacks to monitor implementation of Security Council Resolution 1373, requires states to implement a range of legislative counter-terrorism measures. Its country reports, available through its website, provide a useful overview of the range of counter-terrorism legislation enacted after 11 September 2001 (9/11). See www.un.org/sc/ctc/. For a survey of counter-terrorism law and policy post-9/11, see V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] Scheuerman, 'Emergency Powers'.