



9-19-2008

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"Emergency Powers and Constitutional Theory" (2008). *Legal Philosophy between State and Transnationalism Seminar Series*. 40.  
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## Emergency Powers and Constitutional Theory†

Victor V. Ramraj\*

One reason why the law of the constitution is imperfectly understood is, that we too rarely put it side by side with the constitutional provisions of other countries. Here, as elsewhere, comparison is essential to recognition.<sup>1</sup>

On either side of the North Atlantic, constitutional theory has become increasingly parochial. Far too often, constitutional theorists have been so distracted by local controversies and local debates that the broader aspiration of constitutionalism—subordinating arbitrary political power to law—is taken for granted.<sup>2</sup> Surprisingly, this parochialism is also evident in contemporary debates over emergency powers. I say ‘surprisingly’ because we might reasonably expect that tension between the aspirations of liberal legalism and the exercise of emergency powers to point directly to the foundations of the legal order. Whatever else we might think about Carl Schmitt’s political philosophy, he was surely right to accord to the ‘exception’ a central theoretical importance: ‘[A] philosophy of concrete life,’ Schmitt argues, ‘must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree.’<sup>3</sup>

For Schmitt, emergencies expose a fundamental weakness in liberalism; the most law could do is to spell out *who* may exercise emergency powers. It cannot, however, set out in advance what would be a necessary or permissible response.<sup>4</sup>

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† Working paper presented at the Nathanson Centre Legal Philosophy Series, Osgoode Hall Law School, York University, Toronto, 19 September 2008. Please do not cite without permission of the author. Comments are welcome: [lawvvr@nus.edu.sg](mailto:lawvvr@nus.edu.sg).

\* Associate Professor & Vice-Dean (Academic Affairs), Faculty of Law, National University of Singapore. I am grateful to the participants in the Osgoode Hall Seminar for their thoughtful comments on this paper (which remains subject to revision), and to Johan Geertsema, Andrew Simester and Arun K. Thiruvengadam for helpful discussions on its central thesis. I also owe an intellectual debt to David Dyzenhaus, whose works, including unpublished drafts he has sent me, have honed my understanding of the issues.

<sup>1</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1920), at 200-201.

<sup>2</sup> I have in mind, here, the contemporary debate over the legal and political constitution in the United Kingdom and the ongoing controversy surrounding the interpretation of the constitution in the United States: *infra* notes 124 to 126. There are, however, some notable exceptions: see, for instance, Ruti Teitel, *Transitional Justice* (Oxford: OUP, 2000).

<sup>3</sup> Carl Schmitt, *Political Theology*, George Schwab, trans. (Chicago: University of Chicago Press, 1985; originally published in 1922 and revised in 1934), at 15.

<sup>4</sup> 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 as case’ (*ibid* at 6-7). See

And so, in an emergency, ‘the state remains, whereas law recedes’.<sup>5</sup> Responding directly or indirectly to Schmitt’s challenge to liberalism, the contemporary literature on emergency powers examines whether and how judicial or formal political institutions are able to constrain emergency powers invoked by the state. Yet framed in this way, the theoretical response to emergency powers is a parochial one that oscillates between assuming its relevance beyond the liberal democracies of the developed West and, vaguely recognizing its limits, restricting its application to those very liberal democracies. Both of these moves are problematic. The former ignores the unique character, in liberal democracies, of legal and political institutions and the culture that sustains them, and thus fails to take seriously the difficulties posed in transplanting them elsewhere. The latter tends toward parochialism, in as much as it declines to confront important challenges to constitutionalism posed by emergencies in developing legal systems—challenges that cast a new light on the emergency powers debate in the West and illuminate, in important ways, the relationship between legal and political responses to emergency powers.

My goal in this paper is to engage constitutional theory from the Southeast Asian shores of the Pacific Basin, using the experiences of developing constitutional orders with emergency powers in an attempt to shift the attention of constitutional theorists away from parochial debates, toward an understanding of constitutional theory and emergency powers that extends beyond its familiar domain of liberal democracy. In so doing, I seek to shed light on the relationship between law and politics (or in terms of the contemporary discourse, between the legal and the political constitution) a relationship that is best understood when the struggle for legality in developing constitutional orders is brought into view and the relationship between the legal and the political is conceived in dynamic, rather than static, terms.

Drawing on the experience of emergency powers in Southeast Asia, I demonstrate the importance of distinguishing between the distinct goals of *establishing* and *preserving* a constitutional order, goals which have important ramifications for the role that law and politics ought to play in constraining the state in times of crisis. Such distinction in turn supports three further claims. The first is that, in a nascent constitutional order, particularly in a post-conflict one, the main justification for invoking emergency powers—stabilizing a volatile political situation so as to *establish* viable legal and political institutions—will not be available in a stable, mature constitutional democracy. A second claim is that the development of a liberal constitutional order requires a social and political struggle to subordinate politics to law, which, once accomplished, has implications for the manner in which emergency powers are regulated through law. Finally, reflecting on the broader implications of these claims, I argue that contemporary debates in constitutional theory—particularly those that emphasize the importance of the *political* constitution—should not lose sight of the

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also W.E. Scheuerman, ‘Emergency Powers and the Rule of Law After 9/11’ (2006) 14 *Journal of Political Philosophy* 61 at 65.

<sup>5</sup> *Supra* note 3 at 12.

fundamental importance of law as a constraint on arbitrary power, even in liberal democracies. I begin with an overview of the debate over emergency powers in contemporary constitutional theory. I then consider the challenges posed to constitutionalism by experience of emergency powers in Southeast Asia before examining the implications of those challenges for emergency powers and constitutional theory in liberal democracies, defending the three claims I have outlined.

## I. EMERGENCY POWERS, LAW, AND POLITICS

The debate over emergency powers is, in many respects, a debate over the role of law and politics in constraining the state, and thus tracks broader debates in legal, political, and constitutional theory. Contemporary theories of emergency powers may be divided into three models, according to the type of check on emergency powers they favour. At the risk of some degree of simplification, these models might be described as legal-judicial, legal-procedural, and socio-political. The first model emphasizes the importance of the courts and of judicial review as a check on emergency powers in times of crisis. On this view, emergencies pose a serious threat to *legality* – the notion that sovereign power is subject to law – and, to counter this threat, the courts continue to play an important role in preserving the legal order. A second model stresses the importance of *ex ante* procedural checks on emergency powers. Those who advocate this model often express some concern about the ability of the courts to check executive powers in times of crisis; they argue instead that a procedural check on executive power, typically involving the legislative branch, would be more effective. A third model is also sceptical of the ability of the courts to limit executive power. It advocates instead a socio-political check on power, typically one that sees the final check on executive power as resting in ‘the people’ and in the social norms and values that sustain the legal order. In this part of the paper, I examine each of these models of emergency power, situating them within the broader debates in constitutional theory. I then reframe the debate over emergency powers so as to open up another line of inquiry, one that has not, thus far, been adequately explored.

### *(a) Legal-Judicial Models*

Legal-judicial models rely on the judiciary as the main institution for checking the exercise of emergency powers by the executive. The courts, it is argued, are well-suited to constraining emergency powers for three reasons: they have the advantage of hindsight; they take up issues relating to emergency powers ‘not in the abstract ... but in the context of specific cases’; and they are required to give reasons for their decisions thereby restricting what can be done in the next emergency.<sup>6</sup> But an unqualified reliance on the courts is problematic because, as the courts often argue, national security matters fall outside their institutional

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<sup>6</sup> David Cole, ‘The Priority of Morality: The Emergency Constitution’s Blind Spot’ (2004) 113 *Yale Law Journal* 1753 at 1762.

expertise and because the national security cases typically involve sensitive security intelligence information that governments are unwilling to furnish in open court.

The most sustained contemporary defence of the legal-judicial model is found in the work of David Dyzenhaus. The starting-point of his approach is that judges have a duty to 'uphold a substantive conception of the rule of law'<sup>7</sup> in an emergency. We should not, he insists, give up 'on the idea that law provides moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress'.<sup>8</sup> Dyzenhaus is therefore critical of attempts to respond to emergencies through exceptional legal regimes that operate alongside the ordinary legal system, and which in effect give the executive a free hand to act in a manner unconstrained by law.<sup>9</sup> Thus, he seeks to show how the concerns of national security actors about the lack of judicial expertise and the confidentiality and sensitivity of intelligence sources can be addressed through 'imaginative experiments in institutional design',<sup>10</sup> drawing on modern administrative law principles to deal with emergencies in a manner consistent with the rule of law. So a specialized administrative tribunal such as the Special Immigration Appeals Commission (SIAC), which was created by the United Kingdom to deal with national security cases involving foreign terrorist suspects, shows in principle how this can be done. Its three-person panel, consisting of a former judge, a former administrative adjudicator, and a national security expert, would have the necessary expertise to review national security decisions and would be able, where necessary in the interests of confidentiality, to conduct closed sessions in the presence of a special advocate.<sup>11</sup> A tribunal of this sort could, in theory, uphold rule of law values while recognizing the unique concerns that arise in national security cases. And although a measure of judicial deference would be afforded to such tribunals, the courts, though their review jurisdiction, would continue to play an important role in safeguarding the rule of law. According to Dyzenhaus, 'judges always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project, and they have an important role when such cooperation wanes or ceases in calling attention to that fact'.<sup>12</sup>

### *(b) Legal-Procedural Models*

This brings us to the second model, which, sceptical of the ability of the courts to serve as a check on emergency powers, emphasizes the importance of procedural checks and, specifically, of a constitutional framework for such checks. Those

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<sup>7</sup> Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: CUP, 2006), at 65. Dyzenhaus relies extensively on A.V. Dicey's understanding of the rule of law in *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1920).

<sup>8</sup> *Ibid.* at 19.

<sup>9</sup> *Ibid.* at 53.

<sup>10</sup> Dyzenhaus, 'The State of Emergency in Legal Theory' in Victor V. Ramraj, Michael Hor, and Kent Roach eds., *Global Anti-Terrorism* at 67; see generally, *ibid.* Chapter 3, 121-73.

<sup>11</sup> *Supra* note 7 at 163.

<sup>12</sup> Dyzenhaus, *The Constitution of Law*, *supra* note 7 at 201.

who defend this model typically draw inspiration from the constitutional practice during the Roman Republic of appointing a dictator with virtually unlimited powers, for a fixed, six-month tenure, with the mandate of dealing swiftly with the emergency and restoring the normal constitutional order as quickly as possible. They also turn to the modern version of this model, defended by Clinton Rossiter in his influential work, *Constitutional Dictatorship*.<sup>13</sup> Prominent among these theorists is Bruce Ackerman, who argues for an constitutionally entrenched state of emergency provision that would allow, after short period of unilateral executive action, that any emergency powers that accrue to the executive (say, to detain terrorist suspects) would be subject to the support of ‘an escalating cascade of supermajorities’ in Congress: ‘sixty percent for the next two months; seventy for the next; eighty thereafter.’<sup>14</sup> Ackerman calls this the ‘supermajoritarian escalator’ and explains its rationale as follows:

The need for repeated renewal at short intervals serves as a first line of defence against a dangerous normalization of the state of emergency. The need for a new vote every two months publicly marks the regime as provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?<sup>15</sup>

To the supermajoritarian escalator, Ackerman adds another key feature. The executive will be under a duty to compensate all innocent persons that have been detained in an anti-terrorism dragnet. The assumption here is that these procedural mechanisms—the supermajoritarian escalator, combined with the duty to give just compensation— will effectively contain the damage caused by the necessary, but regrettable, invocation of emergency powers, by providing a range of political and institutional incentives that would make emergency powers increasingly difficult to sustain. ‘The constitutional order places the extraordinary regime on the path to extinction,’ Ackerman tells us, because ‘[m]odern pluralist societies are simply too fragmented to sustain this kind of politics—unless, of course, the terrorists succeed in striking repeatedly with devastating effect.’<sup>16</sup> One important virtue of this model, according to William E. Scheuerman, is that it ‘provides for demanding institutional tests by means of which the polity can at least minimize the executive’s tendency to monopolize such judgments [about what measures are necessary]: emergency rulers are made strictly dependent on other institutional actors and their potentially competing conceptions of necessity.’<sup>17</sup>

Ferejohn and Pasquino come to a similar conclusion concerning constitutionally entrenched emergency powers, albeit from a different starting point. Their aim is

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<sup>13</sup> *Constitutional Dictatorship – Crisis Government in Modern Democracies* (New Brunswick: Transaction Publishers, 2002; originally published in 1948).

<sup>14</sup> Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 *Yale Law Journal* 1029 at 1047.

<sup>15</sup> *Ibid.* at 1048.

<sup>16</sup> *Ibid.*

<sup>17</sup> ‘Presidentialism and Emergency Government’ in Victor V. Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge: CUP, 2008), at 283.

to show why, as between two sorts of emergency powers regimes – a legislative model (which uses ‘ordinary statutes that delegate special and temporary powers to the executive’<sup>18</sup>) and a constitutional or neo-Roman model (which, permits the ‘delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and right’<sup>19</sup> with a view to restoring the constitutional order to its pre-emergency state) – the latter is preferable. Ferejohn and Pasquino favour the neo-Roman model because, first, unlike ordinary emergency legislation, which tends problematically toward permanence, the neo-Roman model conceives emergency powers as fundamentally conservative; its purpose is to restore the constitutional order to its original state and the powers that accrue during an emergency are fixed constitutionally in advance.<sup>20</sup> Ordinary legislation is more likely to lead to permanent changes to the law, they argue, and ‘if the justices on the Supreme Court are willing, this possibility of permanent transformation is even more likely.’<sup>21</sup>

These models of emergency powers are one step removed from the legal-judicial model because, although they rely on the formal legal frame of the constitution, they do not see the courts as the primary check on executive power. The solution, for these theorists, to the problem of emergency powers is to craft an array of *ex ante* constitutional procedures to reduce the likelihood that emergency powers would be abused. Those theorists who defend this model tend to share with the political constitutionalists a scepticism of legal liberalism; they prefer to rely on a formal constitutional procedures as the first line of defence against executive abuse of emergency powers. But although these mechanisms are not judicial, ‘well conceived constitutional emergency powers help realize the rule of law by subjecting them to legal devices manifesting the classic legal virtues of clarity, publicity, generality, prospectiveness, and stability.’<sup>22</sup>

### *(c) Socio-Political Models*

Another step removed from judicial checks on emergency powers is what I have called, collectively, socio-political models of emergency powers. These models may incorporate elements of the two other models—accepting that the courts and the legislature may at times have a role to play in constraining the emergency state—but they locate the ultimate constraint on executive power elsewhere, in the informal, social and political realities of the society that is subject to emergency rule. Oren Gross therefore begins an essay, defending his extra-legal measure model, with the following epigraph from Justice Jackson’s dissenting judgment in *Korematsu v. United States*: ‘The chief restraint upon those who command the physical forces of the country ... must be their responsibility to the

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<sup>18</sup> John Ferejohn and Pasquale Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *International Journal of Constitutional Law* 210 at 217.

<sup>19</sup> *Ibid* at 210.

<sup>20</sup> *Ibid* at 234.

<sup>21</sup> *Ibid* at 236.

<sup>22</sup> Scheuerman, *supra* note 4 at 76.

political judgments of their contemporaries and to the moral judgments of history.’<sup>23</sup> And while he is quick to distinguish his own view from Gross’s, Mark Tushnet also regards the ultimate check on emergency powers as emanating from a social and political, not a legal, source. Concepts such as the rule of law, he argues, ‘cannot succeed at all without sociology and politics at their back.’<sup>24</sup> I turn now to the details of their arguments.

Gross is sceptical of the ability of the courts to check executive power in times of crisis, noting the tendency of courts to defer to the executive in the heat of any emergency.<sup>25</sup> And while he does not, as Ferejohn and Pasquino do, consider constitutional emergency powers separately from ordinary emergency legislation, he regards them both as problematic since officials are able to ‘mold and shape the legal system, including the constitutional edifice, under the pretence of fighting off an emergency.’<sup>26</sup> It may be that Gross has underestimated the ability of constitutional mechanisms to hold the executive in place (and for the courts to interpret these provisions in like fashion), but what is significant about Gross’s model, and what I wish to focus on, is his reliance on deliberative democracy (‘public deliberation and ... the taking of responsibility by each and every member of the community’<sup>27</sup>) as the ultimate check on executive power. Drawing on John Locke’s account of the prerogative,<sup>28</sup> Gross’s extra-legal measures model posits that in times of crisis, when public officials believe they must act contrary to law to prevent a catastrophe, they should do so, but then publicly acknowledge their extra-legal conduct and leave it to the people to decide their fate—either by ratifying their conduct or condemning it. According to this model, the ‘society retains the role of making the final determination whether the public official who acted extra-legally ought to be punished and rebuked or rewarded and commended for his actions.’<sup>29</sup> Gross recognizes that extra-legal conduct may be ratified in a number of ways, ‘formal and informal, legal as well as political or social.’<sup>30</sup> He specifically mentions prosecutorial discretion not to prosecute, jury nullification, mitigation, and pardon or clemency as legal forms of ratification; but he also specifically includes political and social ratification, such as the withholding of honorific awards and decorations. But behind these modes of ratification, Gross sees an ‘ethic of responsibility, not only on the part of officials,

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<sup>23</sup> ‘Stability and Flexibility: A Dicey Business’ in Victor V. Ramraj, Michael Hor, and Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: CUP, 2005), 90-106 at 90.

<sup>24</sup> ‘The Political Constitution of Emergency Powers: Some Conceptual Issues’ in *Emergencies and the Limits of Legality*, *supra* note 17, 145-55 at 155.

<sup>25</sup> Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’ (2003) 112 *Yale Law Journal* 1011 at 1034.

<sup>26</sup> *Ibid* at 1068.

<sup>27</sup> *Ibid* at 1126.

<sup>28</sup> John Locke, *Second Treatise on Government* in P. Laslett, ed., *Two Treatises on Government* (Cambridge: CUP, 1988), esp. Chapter XIV, ‘Of Prerogative’, 374-381.

<sup>29</sup> Oren Gross, ‘Extra-Legality and the Ethic of Political Responsibility’ in *Emergencies and the Limits of Legality*, *supra* note 17, 60-94 at 64.

<sup>30</sup> *Ibid* at 65.



but also of the general public.’<sup>31</sup> It is here, at the level of public debate and political responsibility, that he locates the ultimate check on errant officials.

Tushnet takes this argument even further, criticizing Gross for being committed to the proposition that ‘law occupies the entire institutional of normative evaluation of emergency powers.’<sup>32</sup> Whatever we might make of Tushnet’s critique of Gross, Tushnet’s own position is clear: ‘Politics is the obvious alternative to law as a means of regulating the exercise of emergency powers – not politics as a mere preference or the exercise of power for its own sake, but a principled or moralized politics.’<sup>33</sup> Tushnet argues, using the combatant status review tribunals developed by the United States in Guantánamo Bay post 9-11 as an example, that the move toward more formal, due process requirements can be explained not by the prospect of judicial review, but rather by ‘bureaucratic pressures and professional interests’ on the part of lawyers and military officers which point in the direction of greater procedural formality.<sup>34</sup> He argues:

These bureaucratic and professional interests are the proximate reason for the adoption of procedures generally consistent with rule-of-law requirements for CSRTs. Behind them, though, lies what I have called a moralized politics. Bureaucrats and, even more, professionals, define their roles with reference to norms that have internalized. And, empirically, among those norms for the relevant bureaucrats and professionals is some degree of commitment to the rule of law. The legal back holes may be law-free zones, but they are not rule-of-law free zones, because they are created and sustained in part by a moralized politics.<sup>35</sup>

So for Tushnet, the rule of law is not simply a matter of judicial review and can well exist in the absence of it, provided that an institutional culture is in place that nevertheless supports rule-of-law values. Just as Gross relies on a particular kind of democratic political culture that stands outside law as a check on state powers, so too does Tushnet argue that institutional and sociological factors might operate together with formal legality, to constrain state power in times of crisis.

#### *(d) Assumptions of Institutional Stability*

These theories show us the range of approaches within liberal democracies for constraining the state in an emergency. They also reveal a tension within liberal democratic constitutional theory between those who hold faith in the ability of legal constitutionalism or legal liberalism to check state power and those who prefer less court-centred means of constraint, relying instead on constitutionally-entrenched procedural mechanisms or on informal social or political constraints on power. What is clear, however, is that these models all rest on assumptions

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<sup>31</sup> *Ibid* at 66.

<sup>32</sup> *Supra* note 24, 145-55 at 146.

<sup>33</sup> *Ibid* at 147.

<sup>34</sup> *Ibid* at 154.

<sup>35</sup> *Ibid* at 155.

about the stability of public institutions committed to the ideals of liberal-democracy and the presence of the right kind of social and political culture.

Consider, first, the assumption in the theories we have examined regarding the stability of the courts and formal political institutions. This assumption is evident in David Dyzenhaus's account of constitutionalism in much of his work on emergency powers. In the introduction to his recent treatise on legality in times of crisis, Dyzenhaus makes it clear that his arguments are directed at societies that are committed to the rule of law, for which certain normative consequences follow: '[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.'<sup>36</sup> He then proceeds to substantiate his argument, drawing on examples primarily from the United Kingdom, Canada, and Australia.<sup>37</sup> But a commitment on the part of a society to 'subject itself to the constitutional principles of the rule of law' is itself complex, not simply because a constitution might be written or not, but because the commitment is only meaningful if it is grounded on stable institutions and sustained by a particular kind of social and political culture.

Assumptions about the stability of legal and political institutions are equally evident in Bruce Ackerman's account. Although his arguments are informed by the experience of other countries, including South Africa and Canada, and his work demonstrates a solid appreciation of constitutional principles in Europe and elsewhere, the core of his thesis rests on assumptions about how institutions, particularly legislative institutions, function in a liberal democracy and he illustrates his proposal, quite naturally, by reference to the United States. So whatever the merits of his proposal might be, it is grounded in the assumption that democratic politics will work in a particular way<sup>38</sup> and that minority interests will be adequately protected through the operation of stable institutions, whose dynamics are relatively predictable.<sup>39</sup> By the same token, Scheuerman, who supports Ackerman's proposal in principle, makes similar assumptions, while acknowledging his own focus on the peculiar institutional dynamics of emergency powers within the US presidential system.<sup>40</sup> Similarly, Ferejohn and Pasquino concede that the countries spoken of in their analysis 'are very stable

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<sup>36</sup> Dyzenhaus, *supra* note 7 at 4.

<sup>37</sup> Elsewhere, Dyzenhaus suggests that his argument extends to 'well-ordered societies' that do more than 'pay mere lip service to the rule of law' ('The State of Emergency in Legal Theory', *supra*, note 10 at 88). As I argue in this paper, the extension of Dyzenhaus's legality model is problematic without a corresponding shift in the underlying social and political culture.

<sup>38</sup> 'Modern pluralist societies are simply too fragmented to sustain this kind of politics' (so as to sustain emergency powers with eighty-percent support): see *supra* note 16 and accompanying text.

<sup>39</sup> See, for instance, Ackerman's account of 'minority control of information', *supra* note 14 at 1050-53.

<sup>40</sup> Scheuerman, *supra* note 17 at 258-59.

and entrenched democracies that have little need to invoke extreme constitutional measures to protect their regimes'.<sup>41</sup>

Now consider Gross and Tushnet, whose arguments are, to different degrees, removed from the experience of formal legal institutions and practices. For his part, Gross insists that his is 'not an "American" study, nor is it a post-September 11<sup>th</sup> one' and should be 'treated as generally applicable to constitutional democratic regimes faced with the need to respond to extreme violent crises.'<sup>42</sup> His argument, in short, is that in liberal democracies, political responsibility for abuse of emergency powers rests ultimately in the hand of the people.<sup>43</sup> But again, this assumption rests of a particular understanding of democratic politics and, implicitly, on civil society – a body politic that, at its core, would not (or perhaps should not), stand idly by while the government abused its powers in an emergency. As we have seen, Tushnet's arguments likewise rest on assumptions about the institutional and social culture that supports rule-of-law values.

All three of these models assume that the institutions are stable and the main issue is which institution, formal or informal, is in the best position to preserve the constitutional order in an emergency; the aim is, as Ferejohn and Pasquino argue, a conservative one.<sup>44</sup> This point is not lost on critics of judicial activism in times of crisis, such as Eric A. Posner and Adrian Vermeule, who argue that although the courts often adopt a deferential posture toward the executive, 'the basic constitutional remains unaffected by the emergency' and in 'the United States, like other countries, the constitutional structure has never collapsed during an emergency'.<sup>45</sup> We could, of course, take issues with the last point; presumably, the authors have only contemporary liberal democracies in their sights and have not considered the experience of Weimer Germany. But their basic insight calls for some reflection. What is it about contemporary liberal democracies that make them resistant, more or less, to a slide toward authoritarianism in an emergency? And what is it that might yet make them potentially vulnerable?

Those who take the legal-judicial approach maintain their faith in the ability of the judiciary, perhaps in collaboration with the other branches of government, to do so; others, sceptical of the courts, stress the importance of formal political mechanisms and democratic checks within a broad constitutional framework; yet others stress the importance of political, institutional, and social factors. All appeal, in different ways, to democracy or constitutional ideals, but all too rarely does the debate confront squarely the fundamental justification for the liberal

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<sup>41</sup> *Supra* note 18 at 216.

<sup>42</sup> Gross, 'Chaos and Rules,' *supra* note 25 at 1027.

<sup>43</sup> Gross's extra-legal measures model is explicitly premised on assumptions about public political engagement: 'In a democratic society, where such values as constitutionalism, accountability, and individual rights are entrenched and are traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if such actions have been taken, arguably, in the public's name' (*ibid* at 1123).

<sup>44</sup> *Supra* note 6.

<sup>45</sup> *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: OUP, 2007), at 4.

democratic constitutional order; they focus instead on how to better calibrate and optimize current institutional or political arrangements in the face of an emergency. Liberal democracies therefore suffer from an embarrassment of riches—those riches being the multiple layers of checks on political power, even in an emergency—which diverts scholarly attention from the core values of a legal order premised on the rule of law, and the political struggle that is needed to establish and sustain it. Considering the experience of developing constitutional orders with emergency powers helps to bring these basic questions back into focus, and to shed new light on the emergency powers debate and constitutional theory in liberal democracies and beyond.<sup>46</sup>

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<sup>46</sup> Tom Ginsburg and Tamir Mustafa make a similar case for studying the experience of courts in authoritarian regimes: 'By looking at the extreme environment of a dictatorship, then, we may better understand the limited ability of courts to safeguard individual rights and the rule of the political game in democracies facing extraordinary circumstances' (see 'Introduction: The Function of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Mustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: CUP, 2008), 1-22 at 3.

## II. EMERGENCY POWERS IN DEVELOPING CONSTITUTIONAL ORDERS

If, as I have argued, emergencies pose a challenge within liberal democracies of *preserving* the constitutional order, they pose a distinct challenge in developing constitutional orders—the challenge of *establishing* a constitutional order in the first place. The project of establishing a constitutional order will of course vary with the circumstances in which the constitution comes into being – whether it is a negotiated and gradual post-colonial transfer of power, a re-drafting of a document by a transitional military government, or a post-conflict constitution negotiated and drafted in haste in the interest of maintaining political stability. In each of these situations (and others involving developing constitutional orders), the project of establishing a constitutional order is a complex one—and it is one that becomes even more complicated when emergency powers are invoked. Here we see in sharp relief the interplay between law, politics, and power, and, in particular, the role that political power must sometimes play in supporting a nascent constitutional order which, in turn, must subordinate sheer political power to law. In this part of the paper, I consider, with reference to examples in Southeast Asia, three challenges faced by developing constitutional orders—the challenge of establishing a post-conflict constitutional order while limiting resort to emergency powers to maintain political stability; the challenge of nurturing a social and political culture to sustain the constitutional order, one that channels political disputes into legal and political mechanisms that have broad public support; and the challenge of making a transition from a regime based on personal and political power to one based on impersonal and constitutional forms of power.

### *(a) Emergency Powers in Nascent Democracies*

States emerging from conflict face a broad range of transitional justice problems, the most prominent of which is the fate of those accused of committing atrocities under the old regime. This has been the focus of much of the scholarly literature on transitional justice, hailing back to the Hart-Fuller debate following World War II.<sup>47</sup> More recent scholarly work has focussed on another set of transitional justice problems in post-conflict and post-revolutionary contexts, problems relating to transitional constitutionalism more broadly.<sup>48</sup> The general question is how to facilitate a social, political, and legal transformation that will extend legitimacy to the new constitutional order. Seeking accountability for past wrongs is the important backward-looking part of this process; but there is a forward-

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<sup>47</sup> The original debate can be found in H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593-629 and Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630-72; both authors refined their positions in their subsequent work. See Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1961), esp. Chapter IX, 181-207, and Fuller, 'The Morality that Makes Law Possible' in *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), esp. 33-94.

<sup>48</sup> See, for example, Bruce Ackerman, *The Future of Liberal Revolution* (New Haven and London: Yale University Press, 1992), and Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009, later expanded into a treatise, *Transitional Justice* (Oxford: OUP, 2000).

looking dimension as well.<sup>49</sup> Especially in a post-conflict situation, legal and political institutions must aspire to become impartial public venues in which political disagreements can be resolved through the rule-of-law ideal of 'adherence to known rules, as opposed to arbitrary government action.'<sup>50</sup> But this aspiration to legality is complicated because, in many transitional situations, nascent governments are tempted to invoke constitutional emergency powers to address political volatility, throwing into question their commitment to the rule of law, a phenomenon I have described elsewhere as the 'emergency powers paradox.'<sup>51</sup>

The paradox is this: in nascent democracies, especially fragile, post-conflict ones, governments are often torn between the aim of establishing a constitutional order in which political disputes are resolved non-violently, according to rules accepted by most (the goal of legality) and the apparent need to invoke emergency powers at odds with the demands legality to bring about conditions of political stability upon which a culture of legality can be built.<sup>52</sup> In Southeast Asia, East Timor provides an illuminating example of the paradox. Emerging from twenty-five years of Indonesian occupation, and thrown into a period of intense political violence, East Timor, with the assistance of a UN-backed peace-enforcement mission and a UN transitional administration,<sup>53</sup> sought to stabilize the political situation and start the process of rebuilding state institutions, including its legal system.<sup>54</sup>

In the immediate aftermath of the 1999 independence vote, thousands of lives were lost in violent clashes between pro-Indonesian groups backed by the Indonesian military, and pro-independence groups. During this period, the international forces found it necessary to detain without trial many individuals, until an interim legal mechanism, the Detainee Management Unit, was set up to process their cases and the political situation was stabilized and civilian authorities could take over.<sup>55</sup> But now, after the initial period of instability amid the reconstruction, the political situation remains volatile. On 30 May 2006, as violent protests by disgruntled rebel soldiers began to escalate and the death toll began to rise, East Timor declared its first formal state of emergency. The emergency ended within weeks, after international forces were deployed to help

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<sup>49</sup> As Teitel argues, 'in periods of radical change ... constitutions are simultaneously backward- and forward-looking' ('Transitional Jurisprudence', *ibid.*, at 2015).

<sup>50</sup> *Ibid.* at 2016-17.

<sup>51</sup> See 'The Emergency Powers Paradox' in Victor V. Ramraj & Arun K. Thiruvengadam, eds., *Emergency Powers in Asia* (Cambridge: CUP, forthcoming).

<sup>52</sup> *Ibid.*

<sup>53</sup> Respectively, the Australian-led International Force for East Timor (INTERFET) and UN Transitional Authority in East Timor (UNTAET).

<sup>54</sup> See, generally, Damien Kingbury, 'East Timor: The Difficult Birth of a New State' in *Southeast Asia: A Political Profile*, 2nd ed. (Melbourne: Oxford University Press, 2005), 393-413; Hilary Charlesworth, 'The Constitution of East Timor, May 20, 2002' (2003), 1 *International Journal of Constitutional Law* 325.

<sup>55</sup> See Simon Chesterman, 'UNaccountable? The United Nations, Emergency Powers, and the Rule of Law in Asia' in *Emergency Powers in Asia*, *supra* note 51.

stabilize the situation. More recently, following an assassination attempt on its President and Prime Minister in February 2008, the East Timorese declared a state of emergency under Article 25 of its new constitution<sup>56</sup> and took steps to integrate its police and military forces under a central command to better address the threat of political violence. Once again, the formal emergency ended in a matter of weeks. In declaring a state of emergency, East Timor took a considerable risk; neighbouring Brunei, Indonesia, Malaysia, and the Philippines have all spent a significant part of their post-colonial existence under emergency rule. To its credit, East Timor lifted its state of emergency two months later, in April 2008, but the political situation remains fragile while institution-building efforts continue.

In the context of a nascent constitutional democracy struggling to emerge from decades of conflict, the invocation of emergency powers, although paradoxical, might yet be reconciled with a longer-term aspiration of constitutionalism. Emergency powers, if used with moderation, can provide a sufficient degree of stability to enable political and legal institutions to take hold. East Timor and other nascent constitutional orders are confronted with what Bernard Williams calls ‘the first political question’—by which he means ‘the securing of order, protection, safety, trust, and the conditions of cooperation.’<sup>57</sup> Until this basic ‘question’ (or, perhaps, pre-condition of organized government) is addressed, nuanced debates about legal and political mechanisms for accountability and principles of constitutional interpretation are premature; the challenge that emergency powers pose for constitutional orders brings into focus the fundamental challenge of constitutionalism – that of subordinating political violence and the arbitrary exercise of coercive state power to law.

But even if a tolerable level of political stability were established for long enough to rebuild the basic institutional infrastructure, to enable the state to function, two challenges would remain. One is the challenge to aspiring democracies to create a legal and political culture of accountability, in the face of competing social and political structures premised on different understandings of political authority and accountability. Another is the challenge to strong executive governments to entrust political power in other institutions or branches of government.

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<sup>56</sup> Article 25 permits the President, in the event of ‘effective or impending aggression by a foreign force, of a serious disturbance or treat of serious disturbance to the democratic constitutional order, or of a public disaster’, after consulting key government bodies and with the approval of the legislature, to declare of a state of siege or state of emergency. The emergency, though subject to renewal, is limited to 30 days and Article 25(5) provides that certain specified rights (the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defence in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination) cannot be suspended. Article 25(6) requires that the authorities ‘restore constitutional normality as soon as possible.’

<sup>57</sup> ‘Realism and Moralism in Political Theory’ in Geoffrey Hawthorn, ed. *In the Beginning was the Deed* (Princeton: Princeton University Press, 2005), 1-17 at 3.

*(b) A Legal and Political Culture of Accountability*

Assuming that some degree of political stability is present in the early stages of political development toward constitutional government, the absence of a strong constitutional *culture* remains problematic, particularly when emergency powers are invoked in response to resurgent political violence. In times of constitutional development or transition, other, traditional forms of political accountability may yet be able to supplement newer forms of legal accountability. But when legally authorized emergency powers are invoked in the midst of a constitutional transition, traditional forms of political accountability may not be strong enough to keep the constitutional transition on track.

Consider the experience of constitutionalism and emergency powers in Thailand. In the decade before the bloodless military coup in September 2006, Thailand's constitutional reforms showed much promise. The 1997 Constitution could readily be seen in a positive light, as part of 'the new constitutionalism in Asia and the developing world more generally.'<sup>58</sup> Not only did the constitution guarantee rights that would not be 'out of place in a European or North American constitution,'<sup>59</sup> it also created institutions, including a constitutional court and a national human rights commission, to protect and implement those rights. In the midst of this constitutional transition, the government of Thaksin Shinawatra unleashed the coercive power of the state in two ways that called into question the government's commitment to genuine constitutional reform. The first was a 'war on drugs' launched in 2003, which resulted in the arbitrary killing of thousands of alleged drug traffickers.<sup>60</sup> The second was its role in and violent response to the escalation of political violence in the Southern Provinces since early 2004, including the 'Krue Se' incident in which security forces killed 32 militants in a mosque and the 'Tak Bai' incident in which, some 86 protesters suffocated after being piled into army trucks.<sup>61</sup> In 2005, the government declared a formal state of emergency in the South;<sup>62</sup> the killings by both sides in this conflict number in the thousands.<sup>63</sup>

Although the wave of popular protests in 2006, which later culminated in the military coup, were inspired by a number of other grievances against the Thaksin government, the war on drugs and the violence in the South form an important background to the coup.<sup>64</sup> While it may never be known with certainty what role King Bhumibol Adulyadej, who has reigned since 1946, had in relation to the

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<sup>58</sup> Andrew J. Harding, 'Thailand's Reforms: Human Rights and the National Commission' (2006) 1 *Journal of Comparative Law* 88 at 95.

<sup>59</sup> *Ibid* at 97.

<sup>60</sup> Human Rights Watch estimates the death toll from this campaign at 2800: see 'Thailand's "War on Drugs"' (available at: <http://hrw.org/english/docs/2008/03/12/thaila18278.htm>).

<sup>61</sup> *Supra* note 58.

<sup>62</sup> *Ibid*.

<sup>63</sup> One grim narrative of the conflict is recounted by Human Rights Watch in its report, 'No One is Safe: Insurgent Attacks on Civilians in Thailand's Southern Border Provinces' (August 2007), volume 19, no. 13(C).

<sup>64</sup> Thongchai Winichakul, 'Toppling Democracy' (2008) 38 *Journal of Contemporary Asia* 11.



coup, those who supported the coup had called for the King's intervention; the coup has been described as a royalist coup, engineered by pro-monarchy elements in the military and the political elite, and supported by prominent Thai academics and others.<sup>65</sup> Although the King is seen by many as standing above ordinary Thai politics, few would dispute that he is widely revered in Thailand and has thus for decades played a critical role at crucial moments in contemporary Thai politics.<sup>66</sup>

Contemporary Thailand is torn between two models of government: a Western-style constitutional democracy in which legal and political institutions play a critical role in moderating government power and a more traditional Buddhist conception of democracy, which 'requires a ruler always to be mindful of the *dharma*, i.e., the teachings of the Buddha concerning the worldly responsibility of a leader in a society, as the principal guidance of his rule',<sup>67</sup> and to provide for the welfare of his people. While the period of constitutional development ushered in by the 1997 Constitution witnessed the establishment of several key constitutional and human rights institutions, Western-style liberal democracy is by no means entrenched in Thailand,<sup>68</sup> as the 2006 coup and the recent turmoil in September 2008 demonstrate. As one scholar of Thai constitutionalism observes, the 'Thai mindset reveals a strong preference for more tangible but extra-constitutional sources of power – the military collective and individuals, manipulated and appointed Houses in Parliament, and the monarchy – all of which claimed, with some justification no doubt, to know what was best of the people [better] than the people themselves.'<sup>69</sup> The legal constitution in Thailand has so far been unable to constrain abuses of state power, whether in the context of a formal emergency or otherwise. According to the royalist view, it is a 'cultural constitution' premised on the legitimacy of the King that is of primary importance and reflects the reality of Thai political culture.<sup>70</sup> To the extent that the role of holding the government in check is currently played by the King and the military, however, the problem is that the power that the monarchy (in particular) wields is a deeply personal one; it is 'overly dependent on the charisma of King Bhumibol'<sup>71</sup> and does not provide 'a truly viable political system that could withstand the changes of time and personalities.'<sup>72</sup>

### *(c) Beyond Formal Legality*

The examples considered thus far involve jurisdictions where the political situation is volatile and public institutions remain under-developed, as in East

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<sup>65</sup> *Ibid* at 30.

<sup>66</sup> See generally: Kobkua Suwannathat-Pian, *Kings, Country and Constitutions: Thailand's Political Development 1932-2000* (London and New York: Routledge-Curzon, 2004).

<sup>67</sup> *Ibid* at 20.

<sup>68</sup> *Ibid* at 29.

<sup>69</sup> *Ibid* at 29.

<sup>70</sup> *Supra* note 64 at 28.

<sup>71</sup> *Supra* note 64 at 33.

<sup>72</sup> *Supra* note 66 at 29.

Timor, or where legal constraints are not fully embraced and the constitutional order is chronically unstable, as in Thailand. In some parts of Southeast Asia, however, the legal order is highly developed, at least as measured by the standard of legal education<sup>73</sup> and professionalism, as well as anti-corruption based governance indicators.<sup>74</sup> On these measures, Singapore and Malaysia rate very highly indeed. Moreover, as far as conformity by public authorities with the demands of *formal* legality is concerned, Singapore is exemplary; rare is the instance in Singapore where executive power is exercised without formal legal authority.

Even so, neither Singapore nor Malaysia can claim a strong tradition of judicial activism in public law matters. In Singapore, the only case in which legislation has been invalidated on constitutional grounds was quickly overturned by the Court of Appeal.<sup>75</sup> In Malaysia, the judicial crisis of 1988, in which several activist judges were removed from the bench for questionable reasons,<sup>76</sup> still looms large over the courts. Although the courts do intervene from time to time to reverse administrative lower-level administrative decisions, when it comes to national security cases involving the formal invocation of emergency powers or detention without trial under the Internal Security Act, the courts have been extremely slow to intervene.<sup>77</sup> In the few rare instances where they have shown some interest in scrutinizing the basis for the detention, the government's reaction has been swift and unequivocal.

For example, in post-independence Malaysia, the government resorted to emergency powers to deal first with the Indonesian Confrontation in 1964 and again in 1969, in response to ethnic riots and political violence in the wake of a general election on May thirteenth of that year.<sup>78</sup> The Proclamation of Emergency and the Emergency (Essential Powers) Ordinance of 15 May 1969 have not been rescinded and the government continued to issue emergency regulations under

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<sup>73</sup> For an overview of legal education in Asia, see Tan Cheng Han et al., 'Legal Education in Asia' (2006), 1 *Asian Journal of Comparative Law* 184-207.

<sup>74</sup> According to Transparency International's corruption perceptions index, Singapore is the fourth least corrupt in the world; Malaysia ranks 43rd out of 179 countries See: *Annual Report 2007* (June 2008), available online at: [www.transparency.org/publications/publications](http://www.transparency.org/publications/publications).

<sup>75</sup> In *Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR 410, [1998] 1 SLR 943, Justice Karthigesu held that a provision of the Prevention of Corruption Act extending the reach of the act extra-territorially, but only in respect of Singapore citizens, was inconsistent with the guarantee of equality in Article 12(1) of the Constitution. On a criminal reference, the Court of Appeal disagreed, arguing that the classification was reasonable for reason, among others, of Parliament's intention to respect international comity: see *Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR 410, [1998] SGCA 37 at para. 71.

<sup>76</sup> For an overview, see Visu Sinnadurai, 'The 1988 Judiciary Crisis and its Aftermath' in Andrew J. Harding and H.P. Lee, eds., *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007* (Kuala Lumpur: LexisNexis, 2007), 173-95.

<sup>77</sup> For an overview of these cases, see Michael Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas' in Victor V. Ramraj, Michael Hor, and Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: CUP, 2005), 273-94.

<sup>78</sup> For a detailed account of this incident and its legal consequences, see Cyrus V. Das, 'The May13th Riots and Emergency Rule' in Harding & Lee, eds., *supra* note 76, 103-113.

these instruments well after Parliament resumed sat on 20 February 1971. This was a problem because the constitution provided that in a formal state of emergency the Yang di-Pertuan Agong (the King) could 'until both Houses of Parliament are sitting, promulgate ordinances having force of law, if satisfied that immediate action is required.'<sup>79</sup> In a death penalty case arising out of emergency regulations issued in 1975, the Judicial Committee of the Privy Council, in one of its last decisions on the Malaysian Constitution, held in December 1978 that the Yang di-Pertuan Agong's emergency powers had lapsed once Parliament had sat in February 1971, thus invalidating all subsequent emergency regulations.<sup>80</sup> But the legal consequences of this ruling were minimal. Parliament quickly enacted the Emergency (Essential Powers) Act, 1979, which retroactively validated every piece of subsidiary legislation made under the 1969 Emergency Proclamation after Parliament sat in 1971, and it later amended the Constitution to make the proclamation of any emergency, its continued operation, and the validity and continuation in force of emergency ordinances all non-justiciable.<sup>81</sup>

Similarly, a bold 1989 case in Singapore, *Chng Suan Tze v Minister of Home Affairs*,<sup>82</sup> in which the courts attempted to exercise greater judicial scrutiny of detention without trial under the Internal Security Act, was swiftly overruled by constitutional and legislative amendment. The Court of Appeal, in a departure from a line of authorities in Singapore, Brunei, and Malaysia, rejected in *obiter dicta* the *subjective* test in national security cases (according to which it need only be shown that the President was in fact satisfied that the detention was necessary on national security grounds<sup>83</sup>) in favour of an *objective* test (requiring that the President's satisfaction was based on national security considerations). By subsequent constitutional amendment, the government brought the scope of judicial review in national security cases under the terms of the security legislation itself.<sup>84</sup> It also amended the Internal Security Act<sup>85</sup> to freeze the scope of judicial review at 13 July 1971 (the date of a decision<sup>86</sup> of the Court of Appeal which had affirmed the subjective test) and to restrict judicial review to matters of procedural compliance.

As far as constitutionalism is concerned, the problem in Malaysia and Singapore is not the absence of a legal infrastructure nor is it a matter of an unstable constitutional order, as in Thailand. The legal infrastructure is solid and, as the national security cases demonstrate, both governments are committed to the formal demands of the constitution; when faced with a constitutional setback, they enact a formal constitutional amendment to remove the difficulty.<sup>87</sup> If the law is to play a role in constraining state power generally, or in times of crisis, a

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<sup>79</sup> Article 150(2) of the Malaysian Constitution (since amended).

<sup>80</sup> *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458, [1979] 2 WLR 623 (PC).

<sup>81</sup> Constitution (Amendment) Act 1981 (Act A 544), s. 15.

<sup>82</sup> [1989] 1 MLJ 69 (Singapore CA).

<sup>83</sup> See *Liversidge v. Anderson*, [1942] AC 206 (HL).

<sup>84</sup> See Constitution of the Republic of Singapore (Amendment) Act 1989, No 1 of 1989.

<sup>85</sup> Internal Security (Amendment) Act, No 2 of 1989.

<sup>86</sup> *Lee Mau Seng v. Minister of Home Affairs, Singapore* [1971] 2 MLJ 137 (Sing. HC).

<sup>87</sup> *Supra* note 77.

different kind of transformation must take place—a transformation in the culture of accountability. This requires a transformation not only in the judiciary, but also in the broader social and political culture. And this suggests, in turn, a limit to what judges can do in the absence of strong social and political support.

In their recent work on the ‘judicial politics’ of the courts in authoritarian regimes, Tom Ginsburg and Tamir Mustafa explain why authoritarian regimes might yet allow the courts more leeway in constitutional cases. Courts are important in such regimes because they allow authoritarian regimes to ‘establish social control and sideline political opponents, bolster a regime’s claim to ‘legal’ legitimacy, strengthen administrative compliance with the state’s own bureaucratic machinery and solve coordination problems among competing factions in the regime, facilitate trade and investment, and implement controversial policies so as to allow political distance from core elements of the regime.’<sup>88</sup> This approach suggests that the opening of a space for constitutionalism to take hold may be the result of political rather than legal developments. But Ginsburg and Mustafa also recognize the role that ‘judicial support networks’—‘institutions and associations, both domestic and international, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions if they come under attack’<sup>89</sup>—play in changing the legal landscape, and the threat that they pose to authoritarian regimes.

It is not clear how much of Ginsburg and Mustafa’s analysis can be extended to Singapore and Malaysia, which, despite their authoritarian elements, have some of the formal and practical elements of democratic accountability. But their general point—that in legal systems lacking a strong tradition of judicial review, a shift to a rights culture requires a political change—resonates with the experience in Singapore and Malaysia. Just as a key litmus test for democracy is the willingness of an incumbent government to cede power to a democratically elected opposition, the litmus test for constitutionalism is the willingness of the government to abide by an adverse ruling by the courts. There may eventually come a point, following such a momentous shift in political culture, when a culture of accountability permeates all branches of government and, in Ginsburg and Mustafa’s words, ‘the wheels of justice ... simply have too much momentum to stop.’<sup>90</sup> At this point, the courts may well be able to play a greater role in constraining state power, even in times of crisis. But until this constitutional tipping-point is reached, the struggle for legality is primarily a political one.

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<sup>88</sup> *Supra* note 46 at 4, following Tamir Mustafa, ‘The Struggle for Constitutional Power: Law, Politics, and Economic Reform in Egypt’ (Cambridge: CUP, 2007) (numbering of points in the original text omitted).

<sup>89</sup> *Supra* note 46 at 13.

<sup>90</sup> *Ibid* at 21.

### III. EMERGENCY POWERS AND LIBERAL DEMOCRACIES

The challenge posed by emergencies in some developing legal systems in Southeast Asia is a challenge to the very *establishment* of a constitutional order in the first place. We have seen how a nascent constitutional order may need to invoke emergency powers to establish the basic conditions of stability upon which a legal and political system can be built; we have also seen how, in the absence of a strong legal culture, other institutions might play a role in checking the abuse of power, and the challenges these arrangements pose for the creation of impersonal controls on political power; and we have seen how, even when a legal infrastructure is firmly in place and formal legality is generally respected, the shift from formal conception of legality in which law is understood primarily as an instrument of government to a substantive conception in which it is conceived as a means of controlling political power, requires a conscious and deliberate political choice. In other work, I examine the implications of these observations for emergency powers and constitutionalism in Southeast Asia.<sup>91</sup> My concern in this paper is to consider what lessons the experience of emergency powers in developing constitutional orders hold for constitutionalism and constitutional theory in established liberal democracies. In this part, I return to the theories of emergency powers identified in the first part of the paper, and I show how the experience of emergency powers and constitutionalism in Southeast Asia throw their basic assumptions about constitutionalism into question.

#### (a) *Conflict and Constitutionalism*

Constitutionalism, understood as a commitment to the rule of law, is contentious precisely because the rule of law is itself a contested concept, with formal and substantive or thinner and thicker versions.<sup>92</sup> For A.V. Dicey, the rule of law was, under the English constitution, the basis upon which power may be exercised, as opposed to 'the influence of arbitrary power', and it excluded 'the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government'.<sup>93</sup> Lon Fuller famously argued that to have a legal system at all, there must be clear, stable, public, consistent, comprehensible, and prospective rules, capable of obedience and faithfully implemented.<sup>94</sup> Others, notably Ronald Dworkin, have defended a substantive version of law (avoiding the term 'rule of

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<sup>91</sup> *Supra* note 51.

<sup>92</sup> See respectively, Paul Craig, 'Formal and Procedural Conceptions of the Rule of Law: An Analytic Framework' [1997] *Public Law* 467; Randall Peerenboom, 'Varieties of the Rule of Law: An Introduction and Provisional Conclusion' in Peerenboom, ed., *Asian Discourses of the Rule of Law* (London: Routledge, 2004), 1-55; Allan C. Hutchinson & Patrick Monohan, 'Democracy and the Rule of Law' in Hutchinson & Monohan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987), 97-123.

<sup>93</sup> Dicey, 'Rule of Law and Its General Applications' (Chapters IV), *supra*, note 1, at 198. The rule of law also required that everyone, including public officials, be subject to the ordinary laws as administered by the courts, and signified that, in English law, the source of constitutional principles was 'the ordinary law of the land' not their codification in a written constitution (at 198-99).

<sup>94</sup> *The Morality of Law* (New Haven: Yale University Press, 1969), at 39.

law'), which seeks to embed law in a larger conception of justice, consistent with the community's institutions and its 'conceptions of fairness.'<sup>95</sup> At the same time, however, the rule of law has been criticised for sustaining an 'elitist politics' with an 'impoverished sense of community'<sup>96</sup> and, because of the multiple meanings of the rule of law in World Bank policy, for being used to 'justify the goals of any given project' and to deflect criticisms 'by alternating between the purposes of the different conceptions at play.'<sup>97</sup>

Despite this seemingly interminable disagreement on the scope of the concept that even this brief survey reveals, a commitment to the rule of law in post-conflict situations, such as East Timor, may well point us back to a core function of the rule of law. On the one hand, the concept of the rule of law might yet be criticized on definitional grounds. Jane Stromseth, David Wippman, and Rosa Brooks have recently argued that although 'precise definitions may be impossible, this lack of clarity on the part of policymakers can be very damaging, especially in fragile post-intervention societies, for it allows policymakers and practitioners to pursue poorly thought-through and often internally contradictory programs.'<sup>98</sup> The problem, they argue, is that the 'conflation of the formal and substantive aspects of the rule of law has led to a simplistic emphasis on structures, institutions, and the "modernization" of legal codes, in a cookie-cutter way that has generally taken little account of the differences between societies.'<sup>99</sup> They are mindful of the danger that the rule of law risks becoming a wish-list for a wide array of projects including reforming key public institutions and legal codes, building capacity within the legal profession, and enhancing legal access,<sup>100</sup> often without sufficient regard for local customs and practices.

But in view of these concerns about the ambiguity or even vacuity of the concept, some international law scholars have suggested a purposive or functional understanding of the rule of law which forces us to ask why we might aspire to a system of legality in the first place. The post-conflict reconstruction context suggests an answer; we want, according to Simon Chesterman, to use the rule of law to 'establish non-violent mechanisms for resolving political disputes.'<sup>101</sup> As we have seen, it may at times be necessary to invoke and then gradually ease up on emergency powers to allow nascent legal and political institutions an opportunity to develop and to earn the confidence of the people.<sup>102</sup> But post-

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<sup>95</sup> *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), at 405.

<sup>96</sup> Hutchinson & Monohan, *supra* note 92 at 111.

<sup>97</sup> Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: CUP, 2006), 253-300 at 276.

<sup>98</sup> *Can Might Make Rights? Building the Rule of Law After Military Interventions* (New York: Cambridge University Press, 2007), at 73.

<sup>99</sup> *Ibid* at 74.

<sup>100</sup> *Ibid*.

<sup>101</sup> Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331.

<sup>102</sup> It is also important, for the same reasons, that governments in nascent constitutional orders wean themselves quickly from emergency powers to avoid undermining the rule of law project in

conflict situations serve as an important reminder of why, at least in a deeply divided society, legality is highly valued; it is seen as a way of managing political disagreement through processes and institutions whose legitimacy and authority are acceptable to most. In these situations, rule of law does not presuppose an individualistic ideology nor does it, by focussing on the courts, pose a threat to the development of a vibrant political democracy;<sup>103</sup> rather it secures the foundation on which a constitutional order—whose legal and political institutions are yet to be fully formed and whose precise shape may well remain contentious—can be built.<sup>104</sup>

In the context of liberal democracies, it would be a rare case when emergency powers would be needed to stabilize a volatile political situation so as to ensure that political conflict does not undermine organized government. For instance, Bruce Ackerman argues in the US context that even if a suitcase bomb were to destroy a major American city, the government of the day would survive.<sup>105</sup> This suggests, he argues, that the goal of government following such an attack is not to secure the existence of organized government, but to reassure ‘its terrorized citizens.’<sup>106</sup> Similarly, in the House of Lords’ first major post-9/11 decision, *A. v. Secretary of State for the Home Department*<sup>107</sup> (known informally as the *Belmarsh* case), Lord Hoffman held (albeit in dissent on this point) that the terrorist threat facing the United Kingdom was insufficient to constitute a threat to the life of the nation such as would permit derogation under Article 15<sup>108</sup> of the European Convention on Human Rights:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.<sup>109</sup>

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the first place. The permanent emergency in Malaysia shows us the danger of holding on to emergency powers for longer than is strictly necessary.

<sup>103</sup> For a critique of the rule of law on these grounds, see Hutchinson & Monohan, *supra* note 92.

<sup>104</sup> Despite their critique of the rule of law, Hutchinson and Monohan concede, in principle, a role for the rule of law in securing basic institutions: ‘A commitment to democracy does not mean that constraints on popular decision-making must everywhere be condemned. It is important that the basic institutions and practices of democracy—free elections, debate and assembly—be guaranteed and extended’ (*supra* note 92 at 122).

<sup>105</sup> *Supra* note 14 at 1036-37.

<sup>106</sup> *Ibid* at 1037.

<sup>107</sup> [2004] UKHL 56.

<sup>108</sup> Article 15 provides: ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’

<sup>109</sup> At para. 96.

None of the other judges argued positively that the threat was in fact an existential one. Most held either that the question of whether an emergency actually existed was a political question that was not for the courts to determine<sup>110</sup> or that based on the Strasbourg jurisprudence on emergencies, there was indeed a “public emergency threatening the life of the nation.”<sup>111</sup> In sharp contrast, in a post-conflict setting, securing the existence of the state remains an overriding objective.

*(b) Liberal Democracies and the Struggle for Legality*

A second important lesson to be gleaned from the experience of constitutionalism and emergency powers in Southeast Asia concerns the struggle for legality. Although legal liberalism, in its orthodox versions, insists that law is normatively prior to the state,<sup>112</sup> developing constitutional orders remind us that historically and empirically this is not the case. As Thailand’s experience with constitutionalism suggests, absent a social and political culture which sees constitutional law and judicial review as playing a critical role in constraining the arbitrary power of the state, the constitution is unlikely to be able to provide a serious check on emergency powers. What does this observation tell us about the aspiration of legality in liberal democracies?

Liberal legalism is sometimes attacked in liberal democracies for its hegemonic control over social and political life.<sup>113</sup> Some of these criticisms are certainly justified. Yet one of the great achievements of liberal democracy is its ability, by and large, to subordinate violent political conflict to law and to channel political disputes into public institutions designed, ideally, to resolve those conflicts in a manner that most accept as legitimate. The experience of constitutionalism in Malaysia and Singapore reminds us that a commitment to a substantive notion of legality is not easily given; however, once it is given, this commitment marks a transformation in the way that political conflicts are to be resolved. Emergencies test the commitment to legality, inviting Schmittian scepticism of liberalism’s ability to respond to a crisis. The experience of developing constitutional orders reminds us that we should not take for granted the liberal constitution’s capacity

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<sup>110</sup> See, for instance, Lord Bingham at para. 29 (deference should be made to the Home Secretary in what is ‘a pre-eminently political judgment’ and based on considerations of relative institutional competence); and Lord Hope at para. 116 (‘the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament’). Lord Scott expressed reservations as to whether the ‘public emergency’ was one that threatens the life of the nation, but was ‘prepared to allow the Secretary of State the benefit of the doubt on this point’ (para. 154).

<sup>111</sup> For Lord Rodger, the situation in December 2001 was ‘no less grave than other situations which the European Court of Human Rights has regarded as constituting a “public emergency threatening the life of the nation”’ (para. 165).

<sup>112</sup> See David Dyzenhaus, ‘The Compulsion of Legality’ in *Emergencies and the Limits of Legality*, *supra* note 17, 33-59 at 36, referring to Hans Kelsen’s ‘Identity Thesis’.

<sup>113</sup> See Mark Tushnet, ‘Critical Legal Theory’ in M.P. Golding & W.A. Edmundson, *Philosophy of Law and Legal Theory* (Malden and Oxford: Blackwell, 2006), 80-89.



to respond to political violence through law or the significance of the commitment to do so.

Reflecting on the rule of law before an audience in Kuala Lumpur, former British Prime Minister Tony Blair explained his reaction to an adverse ruling by the House of Lords in the *Belmarsh* case:

We had sought to say to suspected terrorists: You can leave this country freely; but if you stay in Britain, you stay locked up. We couldn't be sure that we could successfully prosecute these people. The British public is greatly attached to the rule of law. But overwhelmingly it supported our position as a government. But the House of Lords held that these anti-terrorism laws were contrary to the Human Rights Act. I remember being absolutely furious. I could see the terrorist threat. The intelligence about it was daily. The capacity of these people to do evil was manifest. The House of Lords, I felt, seriously misjudged the threat and misunderstood the only practical way of dealing with it. Indeed, a few months later, terror struck London and over 50 innocent people died in the worst terrorist attack London ever saw. I recall pacing up and down my study at 10 Downing Street, berating the court and expostulating at the ludicrous way they sought to substitute their judgment for mine. A member of staff concurred and added: 'They should be stopped from ruling in these cases.' Immediately I turned round to him and said: 'Oh no. That would be completely wrong. I profoundly disagree with them but I profoundly believe in their right to do it. I think they have made the wrong judgment. But I think it is right that they can; they are above me, not me above them.'<sup>114</sup>

The Blair government's decision to respect the House of Lords ruling in the *Belmarsh* case and amend its anti-terrorism legislation despite its profound disagreement with the result is a mark of a liberal constitutional democracy's commitment to legality – all the more so since, legally, all the House of Lords did was to issue a declaration that s. 23 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights.<sup>115</sup>

The three models of emergency powers described in the first part of the paper respond in different ways to the challenge posed by the state's invocation of emergency powers. They all recognize, at least implicitly, the importance of a commitment to legality, although they are incomplete in different ways. The legal-procedural model acknowledges the importance of *ex ante* constraints on the state's response to emergencies, but to the extent that it carves out a space for governments to act unconstrained by law, is inconsistent with a commitment to substantive legality. Ackerman's proposal falls short on this score to the extent that it relies on economic incentives (the potential need to compensate) rather than substantive values (a right against arbitrary detention) as its main check against abuse of power by the state.<sup>116</sup> Yet in so far as his proposal seeks to

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<sup>114</sup> The text of Tony Blair's 22<sup>nd</sup> Sultan Azlan Shah Law Lecture, was reprinted under the title, 'Upholding the Rule of Law: A Reflection' in *The Straits Times (Singapore)* (7 August 2008), p. 27.

<sup>115</sup> The courts do not have the power to strike down legislation as invalid under the Human Rights Act 1998.

<sup>116</sup> See Cole, *supra* note 6.

subject the invocation of emergency powers to procedural safeguards, his proposal is consistent with the broader aims of legality, though it may be incomplete.

Dyzenhaus's proposal is important in as much as it acknowledges that the rule of law project (as he calls it) requires the cooperation of all branches of government. Although his theory stresses the important role of the courts, he argues that the precise institutional arrangement in an emergency is not as important as the role that the institutions play in securing compliance with law: 'I have argued,' explains Dyzenhaus, 'that the question of how the institutions of a particular legal order attempt to bring to realization the ideal of the rule of law is less important than that they do'.<sup>117</sup> What is lacking in his argument, however, is an account of the social and political conditions under which a constitutional order of the kind he describes can flourish.

In recent work, however, Dyzenhaus confronts squarely the 'realist' view that seeks 'to understand law purely as a matter of political and social forces'.<sup>118</sup> He specifically rejects accounts which hold that law is not an 'autonomous constraint on actions but a constraint which those with political power will accept or not depending on their relative strength'.<sup>119</sup> Dyzenhaus argues:

In making these moves, realism denies the worth of legal theory altogether, seeing it as an attempt to hide the facts of power, in which legal considerations are but one of a number of, and far from the most important considerations, when one is seeking to understand the constraints on the state. However, in seeking to debunk legal theory and refocus our concerns on political and social forces, realism also gives up on the aspiration of the rule of law to replace the arbitrary rule of men with something qualitatively better. Realism is an account of the dynamics of power, not an account of authority. It does not simply mount an inquiry from a different theoretical perspective.<sup>120</sup>

This passage suggests that Dyzenhaus is hostile to any account of law that seeks to diminish the role of law in constraining the state. But elsewhere, he qualifies his stand: 'This kind of theory goes much further than a claim that legal theory cannot be divorced from a political [or] sociological understanding of the forces that shape the practice of law, a claim which I completely endorse'.<sup>121</sup>

The problem with this qualification is that this does not take the stage of constitutional development into account. We can consistently aspire to develop a legal order that subordinates politics to law, while recognizing that, at a particular stage of constitutional development, the founding of a constitutional order is itself a political struggle that take place outside law. The process of creating a constitutional order, as the experience in Southeast Asia demonstrates,

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<sup>117</sup> Dyzenhaus, *The Constitution of Law*, *supra* note 7 at 233.

<sup>118</sup> *Supra* note 112 at 37.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* at 38.

<sup>121</sup> *Ibid* at 37.

requires a political struggle and a cultural transformation. Once it is established, political and social forces will fade into the background and jurisprudence can take over; yet in these forces rest the viability of the constitutional order. In this respect, Learned Hand's wartime observation is illuminating:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.<sup>122</sup>

The real threat to a liberal constitutional order posed by an emergency, then, is not simply the creation of legal black holes,<sup>123</sup> but the gradual acceptance of executive power unconstrained by law and with it, the erosion of the social and political foundations of the constitution.

### *(c) Lessons for Constitutional Theory*

I turn finally to the general lessons this analysis holds for constitutional theory. In the years leading up to the enactment of the Human Rights Act 1998 in the United Kingdom and in the decade since its passage, modern constitutional theory in the UK has witnessed a renaissance. Unconstrained by debates about originalism and interpretivism that have plagued US constitutional theory,<sup>124</sup> UK constitutional theory has focused on the appropriate role of the courts relative to parliamentary practices and traditions, as the primary check on executive power. Those who defend the legal constitution see an important role for law and judicial review in subordinating politics to the rule of law.<sup>125</sup> Those who seek to revive the political constitution see legal liberalism as antagonistic to the mature and sophisticated kind of civil republicanism they seek.<sup>126</sup> This is, of course, something of a caricature; recently, both sides have tried to show how law and politics are complementary. But at the very least, they disagree on which ultimately takes precedence (a debate whose pedigree in public law extends back

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<sup>122</sup> Irving Dillard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York: Vintage Books, 1959) at 144.

<sup>123</sup> See Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

<sup>124</sup> For a recent engagement with these issues, see Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: OUP, 2007). For two recent examples of attempts to move away from an exclusive focus on the courts, see: Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Jeremy Waldron, *Law and Disagreement* (Oxford: OUP, 1999) (but note Waldron's comment, at 16, that he intends his arguments 'to be heard in the British debate, not to offend American constitutional pride or sensitivity').

<sup>125</sup> See, for example, Tom R. Hickman, 'In Defence of the Legal Constitution' (2005), 55 *University of Toronto Law Journal* 981; Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72.

<sup>126</sup> See, for instance, Adam Tomkins, *Public Law* (Oxford: OUP, 2003). See also Martin Loughlin, 'Rights, Democracy, and Law' in Tom Campbell et al., eds., *Sceptical Essays on Human Rights* (Oxford: OUP, 2001), 41-60; Martin Loughlin, *Swords and Scales* (Oxford and Portland: Hart, 2000). The idea of the 'political constitution' can be traced in recent scholarship to J.A.G. Griffith's article, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1.

for centuries) and in their assessment of whether the recent ‘judicialization of politics’ is a positive development.<sup>127</sup>

The emergency powers debate, in its preoccupation with the question of which institution—the courts or the legislature—is better positioned to check the exercise of emergency powers by the state largely tracks and draws on the larger debate in constitutional theory. And so, with a modicum of caution, the same criticisms of the former debate may be extended generally to the latter. Take, for example, Adam Tomkins’s defence of the political constitution in his treatise *Public Law*,<sup>128</sup> which has attracted much scholarly attention. Tomkins argues that in contrast with the American understanding of the separation of powers as a separation of powers among three branches of government (legislature, executive, and judiciary), the English constitution is premised on a separation of powers between the Crown and Parliament.<sup>129</sup> As such, he argues, the political constitution – ‘in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament)’<sup>130</sup> – plays a greater role and, he argues, should not so quickly be displaced by a more court-centred conception of public law. Tomkins argues, with reference to parliament-based mechanisms of executive accountability (such as collective and individual ministerial responsibility) that these mechanisms make ‘an outstanding contribution to the task of holding the Crown’s government to account’ and that the political constitution is therefore ‘alive and well.’<sup>131</sup> We should not, he concludes, assume that ‘no constitutional problem is solved unless it is judicially solved, and that there is no constitutional problem that cannot be solved by the judiciary.’<sup>132</sup>

Tomkins’s book is an important contribution to a growing body of scholarship in constitutional theory that is attempting to draw our attention away from a single-minded focus on the courts as the sole concern of constitutional theorists. His account of the political mechanisms of accountability is important in as much as it shows us (in similar fashion to the emergency powers theories of Ackerman, Ferejohn and Pasquino, and Scheuerman) how institutions other than the courts can play an important role in constraining executive power and emphasizes (echoing Gross) the importance of a democratic ethic of political responsibility. These are important issues in constitutional theory, no doubt; but Tomkins’s argument is ultimately one of *optimizing* mechanisms of accountability; and a survey of constitutional orders (even limited to liberal democracies) will show that there is a range of different institutional arrangements for checking executive power. Tomkins recognizes that the United Kingdom is engaged in a process of *renegotiating* the ‘relationship between political and legal institutions

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<sup>127</sup> See Loughlin, *Swords and Scales*, *ibid*, at 4-5.

<sup>128</sup> *Supra* note 126.

<sup>129</sup> *Ibid* at 39-54.

<sup>130</sup> *Ibid* at 18.

<sup>131</sup> *Ibid* at 169.

<sup>132</sup> *Ibid* at 210.

and methods of accountability'.<sup>133</sup> But here it is appropriate to recall Dyzenhaus's point 'that the question of how the institutions of a particular legal order attempt to bring to realization the ideal of the rule of law is less important than that they do.'<sup>134</sup>

A detailed study of mechanisms of accountability in any particular jurisdiction is an important part of constitutional analysis in that jurisdiction, particularly when reforms are on the table. But in undertaking such a study, it is important not to lose sight of the fundamental problem of arbitrary state power, including the arbitrary exercise of coercive state power, which is a real threat in developing constitutional orders—and which resurfaces in constitutional theory in liberal democracies in times of crisis. A study of the challenges faced by developing constitutional orders reminds us of what it takes to establish a culture of accountability or justification<sup>135</sup> within the institutions of the state, and what it takes to ground that institutional culture in the social and political realities of a particular society. And it might also remind those of us living in liberal democracies in the midst of an apparent emergency how much there is to lose by taking that institutional culture and its social and political foundations for granted.

#### IV. CONCLUSION: REFUTATIONS AND FINAL REFLECTIONS

I started this paper with the deliberately provocative claim that constitutional theory in Western liberal democracies is increasingly parochial. I argued that the experience of developing constitutional orders holds important lessons for constitutional theory, including the lesson that theorists in liberal-democracies should not take for granted the basic constitutional mechanisms for legal and political accountability, however much they might disagree about the optimal arrangement of those mechanisms. This argument invites two broad sorts of objections from different perspectives. The first objection is that my argument allows too much latitude on the part of developing constitutional orders to abuse human rights in the name of an emergency (the 'free pass' objection<sup>136</sup>). The second objection is that my argument, in drawing a distinction between a developed, liberal-democratic West and the developing constitutional orders of Southeast Asia, presumes and privileges a 'Western' understanding of constitutionalism and the state above other ways of structuring political authority

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<sup>133</sup> *Ibid* at 210-11.

<sup>134</sup> *Supra* note 117.

<sup>135</sup> According to Dyzenhaus (following Etienne Mureinik), such a culture of justification comes about when 'a political order accepts that all official acts, all exercises of state power, are legal only on condition that they are justified by law, where law is understood in an expansive sense, that is, as including fundamental commitments such as those entailed by the principle of legality and respect for human rights': see 'Deference, Security, and Human Rights' in Benjamin Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007), 125-56 at 137.

<sup>136</sup> I am grateful to Arun K. Thiruvengadam for articulating this objection to my argument.

(what we might call the ‘Orientalist’<sup>137</sup> objection). Let me conclude by explaining briefly why I don’t think these objections are successful.

The free pass objection is directed at my claim that there is an important normative distinction, in the emergency powers context, between states that are seeking to *establish* a constitutional order and those that are seeking to preserve one. Although I do not in this paper develop the implications of this distinction for developing constitutional orders,<sup>138</sup> it is an important objection that follows from my argument, so I want to sketch my response. It is important to acknowledge that my argument is premised on the assumption that there is some measure of commitment on the part of the governments in question to constitutionalism or the rule of law, even though the full implications of this commitment (including its implications for substantive legality) may be controversial. The argument seeks to show how the invocation of emergency powers, while sometimes necessary, has the potential to undermine this commitment, and shows what is necessary to follow through on it. Holding on to emergency powers for longer than necessary can undermine a government’s commitment to constitutionalism and its ability to establish and nurture the social and political foundations of a constitutional order.

What of the ‘Orientalist’ objection that my argument presumes and privileges a ‘Western’ notion of constitutionalism? There are two reasons why this argument is unconvincing. First, although the examples I use are drawn from Southeast Asia, there is nothing particularly ‘Asian’ about the development of a constitutional order. Southeast Asia provides fertile ground for thinking about emergency powers because of the diversity of legal and political structures and the relative frequency with which emergency powers have been invoked in recent times. But the same arguments I have made concerning, for example, the dangers of political instability in a nascent constitutional order and the need for a firm social and political basis for that order, were as relevant to the project of restoring confidence in public institutions in Northern Ireland after the ‘Troubles’<sup>139</sup> as they are to the rebuilding of public institutions in contemporary East Timor. So there is nothing particularly ‘Asian’ about my arguments; its implications are much broader.

My second response is that we need not assume that legal liberalism necessarily provides the only or the best way of constraining state power in an emergency or otherwise. There may be other non-legal ways of constraining state power that are consistent with the underlying social and political culture which are more

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<sup>137</sup> See Edward W. Said, *Orientalism* (New York: Vintage Books, 1978). I am grateful to M. Sornarajah for alerting me to this potential misreading of my argument, though he did not frame the concern in ‘orientalist’ terms.

<sup>138</sup> I develop this argument in other work: see ‘The Emergency Powers Paradox’ *supra* note 51.

<sup>139</sup> Restoring confidence in public institutions was one of the key aims of the *Agreement Reached in the Multi-Party Negotiations*, 10 April 1998, Cm 3883, known as the ‘Belfast Agreement’. See Colin J. Harvey, ‘The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland’ in Harvey, ed., *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 1999), 9-51.

effective and more appropriate. Thailand provides us with a fascinating example of a dysfunctional constitutional order that is experimenting with alternative means of constraining state power. Drawing on political anthropology and political sociology, we might speculate on other ways of structuring and limiting political authority beyond the confines of the modern state. But to the extent that societies are organized around Weberian states that command a 'monopoly on the legitimate use of physical force',<sup>140</sup> the challenge of limiting state power in an emergency remains a legal one, however grounded it must be in the social and political reality.

The invocation of emergency powers invites constitutional theorists to confront fundamental issues about the structure and foundation of the constitutional order. We might tackle these issues by asking the usual questions about how to interpret the constitution, who should do this, and which mechanisms of institutional accountability are most effective. Or we might venture beyond the familiar and ask why anyone would want a constitutional order in the first place. In so doing, we might be able to see our own reflection in a different light.

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<sup>140</sup> Max Weber, *Politics as a Vocation* in H.H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: OUP, 1946), at 78.