Civil Liberties or National Security? Rethinking the Question[*]

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Introduction

Counter-terrorism measures – from preventive detention to special investigative powers – stand in tension with civil liberties. For example, preventive detention, which some argue is necessary for national security purposes, is ostensibly inconsistent with human rights norms and constitutional guarantees of civil liberties, including due process rights. It is therefore tempting to frame the issue as one of balance – how much liberty should be sacrificed in the name of national security? The more we have of one, the less we have of the other. Too much emphasis on civil liberties means national security is compromised and too much emphasis on national security concerns means that civil liberties are compromised. In this paper, I want to challenge this way of framing the problem. If we think of the problem in these terms, we are lulled into an unwinnable debate about which is more important or which should take priority over the other. Instead, I suggest that there is a more important question at stake, a question about a state's commitment to constitutionalism and the rule of law—a question that must be confronted squarely.

Civil Liberties and National Security: A Zero-Sum Game?

But let us first return to the assumption that civil liberties and national security constitute a zero-sum game, and consider the two common ways of challenging it. The first is to prioritize national security. It is sometimes argued that the stability secured through national security is a precondition for civil liberties in the first place. There is a sense in which this is clearly right. In periods of great strife in which violence is rampant, public institutions have broken down, and the state has lost its ability to maintain order, talk of civil liberties is meaningless (although international humanitarian law continue, at least in theory, to be relevant). In these situations, the first order of business is to restore order and to begin the long and arduous process of reconstruction. Yet it is important to acknowledge that this is the extreme case. Most situations involving the exercise of emergency powers are not of this sort and the existence of the state and its key institutions remain intact. But if this is so, and there is no existential threat to the state, then the claim that national security is a precondition for civil liberties proves very little.

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What of the converse challenge to the zero-sum argument—that there can be no security without rights since, in the absence of rights-protection, abuses will take place, which will in turn lead to a cycle of political violence, what Colm Campbell cases 'the repression-mobilisation nexus.'[1] Again, there is a sense in which this is plainly true. Where the state makes it clear that it refuses to play by the rule, its political opponents will use the state's conduct as a rallying cry, and will use state abuses of power to win more recruits. Playing by the rules does, in some respects, seem to be part of an effective counter-terrorism strategy. Yet the inability of the state to limit or contain violence poses a direct challenge to its legitimacy; so at times it may be necessary to limit civil liberties—as most core human rights instruments acknowledge.

Emergency Powers and the Rule of Law

So neither the claim that national security trumps civil liberties nor the claim that adherence to civil liberties is necessary for national security is entirely inaccurate or entirely convincing. The problem with both of these approaches is that they fail to consider the broader implications of counter-terrorism measures and emergency powers for constitutionalism and the rule of law. The rule of law is, of course, a contested concept. Contemporary legal theorists distinguish between two conceptions of the rule of law – a formal and a substantive one—or alternatively, a thin and thick one. Formal conceptions conceive the law – and the rule of law – and consisting of clear, stable, and prospective rules, that are capable of obedience and are consistently applied by judges and other public officials.[2] On the other hand, substantive conceptions, while typically embracing the minimum requirements of the formal account, also include requirements of justice and human rights. Both of the approaches are problematic, for different reasons. A formal conception of the rule of law is, it is often argued, consistent with great injustice (as the Third Reich and apartheid South Africa seem to show); a substantive conception, on the other hand, requires the articulation of a comprehensive theory of rights or justice, making the rule of law conceptually inconsequential.

Many scholars have therefore suggested a return to a core conception of the rule of law aimed at preventing the exercise of arbitrary state power. On this view, the fundamental objective of a legal order is to subordinate political power to law, so that no power can be exercised without legal authority. This aspiration of constitutionalism reveals the core meaning of the rule of law. Emergency powers challenge the aspiration of constitutionalism to the extent that the decision to invoke those powers and the scope and limits on those powers fall to the

[1] Colm Campbell, 'Law, Terror and Social Movements: The Repression-Mobilisation Nexus' in Victor V. Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, forthcoming 2008).

[2] T.R.S. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: OUP, 2001), referring to Lon L. Fuller, *The Morality of Law* (1969).

executive branch of government alone to determine. This is precisely why Nazi philosopher Carl Schmitt's ideas about emergency powers have attracted the attention of legal scholars in recent years – not because anyone particularly agrees with his prescriptions, but rather because he very clearly capture the challenge that emergency powers pose for legal liberalism. In an emergency, Schmitt insisted, 'the state remains, whereas law recedes'.[3] At most, law could set out *who* was to exercise emergency powers, but it could not specify in advance what would be a necessary or permissible response.

To the extent that Schmitt is right, the exercise of emergency powers necessarily results in what Lord Steyn, referring in extra-judicial comments to Guantánamo Bay, has called a 'legal black hole' – a place seemingly beyond the reach of the law. Of course, the courts have not stood still in the face of this challenge. In 2004, in a case called *Rasul v. Bush*, the United States Supreme Court held that the control exercised over detainees by the U.S. government in Guantánamo Bay was sufficient to trigger *habeas corpus* rights and to invoke the jurisdiction of the courts. Although challenge to the military tribunals in Guantánamo Bay continue and critics continue to draw attention to the unfairness of the procedures used by those tribunals, the Supreme Court's affirmation of its jurisdiction over these detentions was at least a first step toward ensuring that law remains relevant even in the face on an emergency.

I don't mean to imply that it is sufficient that the courts assert that they have jurisdiction. It is equally important what the courts do once they have asserted their jurisdiction and whether they regard it as their role to prevent abuses of power. But we should not lose sight of the fact that there are situations in which the authority of the courts to pronounce on such matters in the first place remains in doubt – where detentions in the name of national security are a matter of executive prerogative uncontrolled and unreviewable by the courts.

Constitutionalism and Arbitrary Power

Although the 9/11 attacks on the United States and Guantánamo Bay detentions have focused attention on the use of emergency powers in the developed West, the existence and use of emergency powers is expansive – and the temptation to use them looms largely in states with developing legal and political systems, where political instability and violence threatens the legitimacy of governments and the ability of those governments to achieve other social and economic objectives. In these situations, the threat that emergency powers pose is particularly serious because the use of these powers has the potential to undermine the aspiration of establishing constitutionalism and the entrenching of a wider culture of accountability. Let me very briefly take three examples for the region: East Timor, Thailand, and, together, Malaysia and Singapore.

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

(a) East Timor

Emergency powers are problematic from a rule of law perspective in most circumstances, but especially so in the context of post-conflict reconstruction. Consider East Timor, where in the midst of a struggle to rebuild public institutions and restore some measure of public confidence in government, the government found itself, in February 2008, in the awkward position of having to declare a state of emergency under Article 25 of its constitution following an assassination attempt on its President and Prime Minister.

As constitutionally-entrenched emergency powers goes, East Timor's are relatively difficult to invoke. Under Article 25, fundamental rights, freedoms and guarantees can be suspended only if a state of emergency has been formally declared according to the constitution (by the President, with the authority of the National Assembly, and after consulting key government officials: Article 85), and the triggering conditions for a state of emergency are limited to instances involving effective or impending aggression by a foreign force, a serious disturbance or threat of serious disturbance to the democratic constitutional order, or a public disaster. The suspension of rights is limited to renewable thirty-day periods and the rights, freedoms, and guarantees to be suspended must be specified. Moreover, following international best practice, some rights are regarded as non-derogable, even in a state of emergency, namely: '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.' These rather restrictive constitutional provisions compare favourably, at least in theory, to the rather perfunctory treatment of states of emergency in neighbouring Indonesia, whose constitution merely specifies (in Article 12) that President declares the state of emergency and that the 'conditions for such a declaration and the measures to deal with the emergency shall be governed by law.'

And yet, as is often the case, the text of a constitution does not tell the whole story, for the culture of accountability, while nascent in both democracies, is more deeply entrenched in Indonesia ten years after the fall of Soeharto, than in East Timor, which remains politically volatile and is still, by most accounts, still struggling to nurture its fragile legal and political institutions, law enforcement agencies, and economy. In these circumstances, questions concerning the appropriate balance between civil liberties and national security seem quixotic. The real threat that emergency powers pose in a post-conflict context is a threat to constitutional government itself.

(b) Thailand

Thailand's invocation of emergency powers in its restive south ostensibly raises questions about the relationship between civil liberties and national security, but in Thailand too, these questions seem peculiar, even quaint. Thailand's constitutional history has seen 18 constitutions since 1932,[4] suggesting that the relationship between constitutionalism and emergency powers is a complex one. Thailand's bloodless military coup in September 2006, which was followed by another round of constitution redrafting and the eventual reinstatement of a new constitution in 2007, is yet another important reminder that in many parts of Southeast Asia, the invocation of emergency powers cannot be separated from the struggle for constitutionalism itself.

Before the 2006 coup, in response to the insurgency in the predominantly Malay-Muslim southern provinces, the Thai government had in July 2005 issued an Emergency Decree on Government Administration in States of Emergency, conferring on the authorities special powers to deal with the insurgency, including special powers of investigation, arrest, detention, and confiscation of weapons. The latest constitution follows its predecessors in both attempting to entrench constitutional norms and institutions to check the powers of the executive, while leaving intact the emergency power decree and retaining the emergency power provisions under which it was issued. What is remarkable about this story is that although Thailand's constitutional order is relatively fluid, its emergency powers regime is remarkable stable, suggesting once again that the issue in Thailand has little to do with the relationship between civil liberties and national security, and more to do with the challenge emergency powers pose to the constitutional order itself and the ability of the legal order to constrain political power.

(c) Malaysia and Singapore

I want to turn briefly to Malaysia and Singapore now, because they seem on their face to be different. Not only are both countries relatively stable politically, but both have constitutional orders that are measures in decades, not years, with Malaysia celebrating the fiftieth anniversary of its *Merdeka* constitution last year. And yet, despite their relative stability and constitutional longevity, Malaysia remains formally under a state of emergency which was declared in 1969 and has not be rescinded – while Singapore, according to my colleague Michael Hor, remains technically under a state of emergency which it inherited from Malaysia when Singapore separated from Malaysia in 1965 and which it too never formally rescinded.

Of course, both countries have established and widely respected judiciaries, whose rule of law credentials are among the strongest in the region. And yet, the

[4] Chaowana Traimas & Jochen Hoerth, 'Thailand: Another New Constitution as a Way Out of the Vicious Cycle?' in Clauspeter Hill & Jörg Menzel, eds., *Constitutionalism in Southeast Asia*, volume 2 (Singapore: Konrad Adenaur Stiftung, 2008), 287-310.

legal regimes established by the Internal Security Act in both jurisdictions bring us right back to the legal black hole of Guantánamo Bay – both countries' constitutions ostensibly limit the ability of the courts to review the grounds for executive detention and legal challenges to this regime have not borne fruit. So even in these jurisdictions, which can rightly be proud of their distinguished legal fraternities and a common and deeply rooted legal infrastructure, the problem of emergency powers is inseparable from questions about constitutionalism itself. Once again, this is not a question of the relative balance between civil liberties and national security, but rather about the degree of penetration of constitutionalism as an aspiration of government. It is in the exercise of emergency and emergency-like powers that the arbitrary power is most threatening, and it is in the faces of these powers that a government's commitment to constitutionalism is put to the test.

Conclusion

My argument should now be clear: However important the tension between civil liberties and national security might be, a prior, fundamental question should not be ignored – namely the implications of emergency powers for aspirations of constitutionalism. Until this question is confronted and a government's commitment to constitutionalism is put to the test, questions about the proper balance between civil liberties and national security are quixotic. Of course, once a choice is made to govern through law, then international human rights law provides a useful litmus test for determining where emergency measures are warranted; Article 4 of the International Covenant on Civil and Political Rights[5] (and its cousin in Article 15 of the European Convention of Human Rights) provide a useful starting point for answering this question. But until that choice is made, any talk of a tension between civil liberties and national security is, at best, premature.

[5] Article 4(1) provides: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' Article 4(2) prohibits derogation from articles 6 (right to life), 7 (prohibition of torture or to cruel, inhuman or degrading treatment or punishment), 8(1) and 8(2) (prohibition of slavery and servitude), 11 (no imprisonment for breach of contract), 15 (prohibition of retroactive criminal offences), 16 (right to legal personality) and 18 (freedom of thought, conscience, and religion) of the ICCPR.

Appendix A

Constitution of the Democratic Republic of East Timor

Section 25 (State of exception)

1. Suspension of the exercise of fundamental rights, freedoms and guarantees shall only take place if a state of siege or a state of emergency has been declared as provided for by the Constitution.

2. A state of siege or a state of emergency shall only be declared in case of effective or impending aggression by a foreign force, of serious disturbance or threat of serious disturbance to the democratic constitutional order, or of public disaster.

3. A declaration of a state of siege or a state of emergency shall be substantiated, specifying rights, freedoms and guarantees the exercise of which is to be suspended.

4. A suspension shall not last for more than thirty days, without prejudice of possible justified renewal, when strictly necessary, for equal periods of time.

5. In no case shall a declaration of a state of siege affect 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.

6. Authorities shall restore constitutional normality as soon as possible.

Section 85 (Competencies)

It is exclusively incumbent upon the President of the Republic ... (g) To declare the state of siege or the state of emergency following authorisation of the National Parliament, after consultation with the Council of State, the Government and the Supreme Council of Defence and Security...

Appendix B

The 1945 Constitution of the Republic of Indonesia
(as amended)

Article 12

The President declares the state of emergency. The conditions for such a declaration and the measures to deal with the emergency shall be governed by law.