Ordinary laws for emergencies and democratic derogations from rights

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I. Introduction

The post-9/11 scholarly debate on emergency powers as represented by the debate between David Dyzenhaus and Oren Gross over legality and extra-legal powers has defined the concept of emergency narrowly in relation to the detention or disruption of suspected terrorists or enemies. This understanding of emergencies is dramatically under-inclusive. It ignores genuine emergencies such as Hurricane Katrina, the Asian tsunami and pandemics, as well as the need for recovery after particularly disruptive acts of terrorism. Although cloaked in the rhetorical urgency of emergencies, the post-9/11 debate about emergencies has been about the treatment of the rights of suspected terrorists, not about how a state will respond to the full range of emergencies that modern society will face.

Although I am sceptical about whether the post-9/11 debate is really about emergencies, I am not sceptical about the fact that modern society will confront genuine emergencies. Such emergencies will require the state to engage in extraordinary measures that may have adverse effects on rights. Modern states have recognised the reality of emergencies and have enacted framework statutes to enable the state to deal with emergencies. To this end, we should be concerned about the ordinary law that governs all emergencies. In contrast to the mountains of work that have been devoted to anti-terrorism measures, emergency laws in Canada, the United Kingdom and the United States have attracted comparatively scant scholarly attention. I will suggest that this is unfortunate because emergency laws should provide a principled and creative starting point when societies face a broad range of emergencies.

I thank Victor V. Ramraj, the National University of Singapore’s Faculty of Law and the participants at a symposium held in Singapore. I also thank Maxwell Cameron, Yale’s University Canadian Studies Program and the participants at a symposium held at Yale in October 2006 where a preliminary version of this chapter was presented.
Emergency laws can be structured either to affirm executive dominance and secrecy or they can be carefully crafted to allow the legislature, the judiciary and the executive to supervise and review the conduct of the state during emergencies. I will suggest that emergency statutes can themselves be seen as a nascent attempt to subject sovereign power in emergencies to the rule of law in a manner similar to that used to subject the administrative state to the rule of law.¹ This difficult task will, as Dyzenhaus suggests, require institutional imagination that will engage courts, the executive, the legislature and creative new hybrid institutions to cooperate in maintenance of the rule-of-law project.²

To the extent that either emergency or anti-terrorism measures over-ride rights, we should continue to look to the ordinary law as a starting point. Most modern rights protection instruments allow the state to justify reasonable and proportionate limitations on rights. Some limitations on rights may be justified in the context of anti-terrorism, especially with regard to difficult issues such as preventive detention and secret information.³ If, however, governments conclude that it is necessary to go beyond reasonable limits on rights and dispense with rights altogether, the ordinary law also provides a vehicle for doing so. The established vehicle for doing away with rights is to invoke provisions that allow for temporary derogations of rights. Although extensive and repeated use of derogations could lead to tyranny, this has not been the post-9/11 experience. Rather, most democratic governments⁴ have not been eager to enact temporary democratic derogations from rights, and have instead tried to sell possible derogations from rights as reasonable and permanent limits on rights.

Like Oren Gross’s extra-legal model, a derogation model has the virtue of recognising rights even as they are not respected and of not constituting a permanent change to the law. At the same time, however, derogations respect legality and democracy more than the extra-legal model because they are triggered by an ex ante legislative act as opposed to the discretionary decisions of officials who decide whether it is necessary to take the risk of violating the law and the rights of suspected terrorists. Derogations are also subject to ex post legislative and judicial review which can also

⁴ In this respect, my chapter only speaks to the approach to emergencies in stable liberal democracies with an active civil society.
occur under the extra-legal measures model, but will not occur if prosecutors decline to prosecute illegal actions or the executive pardons officials who have acted illegally. Derogations will also be subject to sunsets and international supervision.

Professor Gross will argue with some force based on the experience of Northern Ireland, Israel and other states that the derogation model could lead to a permanent emergency. I will suggest, however, that the post-9/11 experience has been quite different and legislatures have been quite reluctant to assume democratic responsibility for derogating from rights. In addition, judges have been able to supervise the few derogations that have been made and to use the possibility of derogation in order to protect the rights of suspected terrorists.

One of the powerful concerns raised by Oren Gross is the problem of the seepage of emergency powers into the regular law. The seepage problem is real for the reasons articulated by Professor Gross. Seepage can, however, be resisted by two strategies that I advocate in this chapter. The first is the use of emergency legislation that has been drafted in advance of particular emergencies and requires legislative reaffirmation of emergencies. A second strategy is to empower courts to require explicit democratic authorisation of derogations from rights. In other words, courts should be especially vigilant about allowing emergency powers to become permanent in those cases in which the exercise of emergency powers result in derogation from rights. I will suggest that the optimal model for democratic derogation from rights, like the optimal model of emergency legislation, will provide a role for judges, bureaucrats and legislators. In addition, derogation measures should also engage civil society and international institutions in reviewing how the state acts during an emergency.

II. Is the debate about emergencies or rights?

Much of the post-9/11 debate about emergency powers focuses on a narrow subset of emergencies that may confront modern society. Oren Gross, for example, noted that emergencies are not limited to war and terrorism and include natural disasters and economic crises, but declared that he will restrict himself to emergencies caused by violence in part because they

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require ‘immediate action’ and in part because they ‘pose the greatest and most sustained danger to constitutional freedoms and principles.’

Bruce Ackerman limits his proposal for an emergency constitution to one that will follow another terrorist attack that is the equivalent of the 9/11 attack. It focuses on the detention of terrorist suspects even though similar detentions after 9/11 did not lead to prosecutions. It does not deal with other measures such as quarantines and evacuations that may have to be taken to limit harms after acts of chemical, biological or nuclear terrorism, let alone the broad range of other emergencies. Hurricane Katrina does not even merit a mention in Professor Ackerman’s 2006 book.

Claims of emergency powers can be a cloak for the unwarranted detention or harsher treatment of those suspected, perhaps wrongly, of terrorism. Although he rejects the Bush administration’s claim that the United States is at war with terrorism, Professor Ackerman has concluded that the crime paradigm is inadequate because of the threats that al Qaeda terrorism presents to the ‘effective sovereignty’ of the state. He argues that ‘it was al Qaeda’s success in shaking the public’s confidence in the American government’s effective sovereignty that gave the attack its overwhelming political resonance. For a while at least, it was perfectly reasonable for ordinary Americans to wonder whether the government was in control of affairs within the nation’s borders’. The challenge to the state’s effective sovereignty that Professor Ackerman asserts, however, is by no means limited to mass terrorism attacks. Indeed, the broader dimensions of both emergencies and their challenge to the state’s effective sovereignty can be seen in the failure of the American state to respond effectively to Hurricane Katrina.

Hurricane Katrina was responsible for 1,836 deaths and revealed serious problems in America’s response to emergencies, as well as the organisation and execution of emergency services by the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security. The 2003 SARS outbreak that killed about 800 people around the world also underlines the dangers of pandemics. Although the evil exercise of human agency in acts of terrorism distinguishes terrorism from natural disasters,
this distinction is relevant only with respect to the punishment of terrorists and not the preventive or recovery efforts that the state takes to limit harm.

Restricting rights during natural disasters raises the question of equal and collective self-sacrifice as opposed to the sacrifice of the rights of the ‘usual suspects’. The random nature of natural disasters serves as a kind of Rawlsian veil of ignorance. We do not know whether we will be the person quarantined because of exposure to SARS or some other disease. In contrast, we do know the likely suspects who will be imprisoned under Professor Ackerman's emergency constitution or dealt with illegally under Professor Gross's extra-legal measures model.

In no small part because it was affected by the 2003 SARS crisis that led to 42 deaths in Toronto, Canada enacted an all-risk national security policy in 2004 that focuses on emergency preparedness and public health as well as the dangers of terrorism. This all-risk approach has the potential to moderate anti-terrorism policy and prevent irrational over-investment in anti-terrorism measures. The failure of the American state to mitigate the harms of Katrina at the same time as it has spent billions of dollars on homeland security, not to mention the war in Iraq, reveals the folly of focusing on terrorism as the prime threat to human security.

The post-9/11 debate about emergency powers has an artificial but telling character in its focus on various harsh measures that some claim may be necessary to prevent acts of terrorism. The debate is not really about emergencies but rights. Even if the emergencies we face are somehow limited to terrorism, it is odd that the emergency powers debate has not extended to what extraordinary measures may be necessary to mitigate the damage of another catastrophic terrorism attack such as requirements that all institutions engage in emergency planning or that cities be evacuated in the wake of a dirty bomb attack. Indeed, the partial focus of the emergency powers debate on harsh measures that attempt to prevent terrorism suggests that the debate may be more about the rights of terrorist suspects than the responsibilities of states in emergencies to protect the

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13 For a similar conclusion see T. Campbell, ‘Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory’ (Chapter 9) in this volume.

14 The 9/11 Commission found that it took four hours to evacuate the WTC after the 1993 bombings whereas all but 2,152 of the 16,400 to 18,800 people in the twin towers were evacuated in under an hour on 9/11. *The 9/11 Report* (New York: Norton, 2004), ch. 9.4.
lives of their citizens and to re-establish order. One consequence of the skewed and narrow nature of the emergency powers debate is that most commentators have ignored the ordinary laws that govern the broad range of emergencies that may threaten the lives of citizens.\textsuperscript{15}

### III. The ordinary law of emergencies

Most modern democracies have established laws to deal with emergencies, but these laws have received relatively little attention in the post-9/11 debate about emergency powers. Drawing on Dicey, however, Oren Gross has recognised that emergency legislation provides a means to authorise exceptional powers ‘\textit{ex ante}, i.e. prior to the exercise of the relevant powers by the executive\textsuperscript{16} and can be contrasted with the \textit{ex post} use of what Dicey described as acts of indemnity and what Gross describes as his extra-legal measures model. Along with Dyzenhaus, I favour the \textit{ex ante} approach because it accords better with legality by authorising and limiting the actions that will be taken in an emergency. It also accords better with democracy by requiring legislatures to act and deliberate before extraordinary powers are exercised.\textsuperscript{17} It does not allow unelected members of the executive to act as sovereigns in deciding when an emergency exists and what actions are required to respond to the emergency.\textsuperscript{18} The secret and illegal actions of the executive can constitute what Kim Lane Scheppele has criticised as ‘stealth emergencies powers’\textsuperscript{19} whereas the ordinary law of emergencies can be the subject of democratic and legal deliberation. The \textit{ex ante} approach, however, is not necessarily inconsistent with robust review of what has been done in an emergency. As will be seen, some emergency statutes require both \textit{ex ante} authorisation of state power and \textit{ex post} review of its exercise.

\textsuperscript{15} For a notable exception see K.L. Scheppele, ‘Small Emergencies’ (2006) 40 Georgia Law Review 835 at 846 who argues that ‘emergencies have been brought into the constitutional order by being normalized’ by various emergencies statutes.


\textsuperscript{17} The argument from democracy may explain why Professor Tom Campbell, despite his disagreements with Professor Dyzenhaus over positivism, seems more favourably disposed to Dyzenhaus’s legality model than Gross’s extra-legal measures model.

\textsuperscript{18} Gross acknowledges that as compared to Dicey his ‘Extra-Legal Measures model is more open to the possibility of \textit{ex post} ratification taking place outside of the legislature’. \textit{Ibid.}, p. 99.

\textsuperscript{19} Scheppele, ‘Little Emergencies’, 858.
A. American legislation and reform proposals

The National Emergencies Act has not been reformed despite the lessons of 9/11 and Hurricane Katrina. It allows the President to declare emergencies that are then transmitted to Congress and published in the Federal Register.\(^{20}\) It does not contemplate on its face that the President will attempt to justify the declaration of an emergency or acts taken pursuant to an emergency to Congress.\(^{21}\) Moreover, it makes no attempt to outline the principles that should govern the President's decision to declare an emergency or to govern the executive response to the emergency or on the rights that may be affected during an emergency. In its single-minded focus on the power of the President to declare an emergency or an exception as opposed to the principles that might govern the declaration and conduct of the emergency, the Act is Schmittian.\(^{22}\)

The National Emergencies Act allows Congress by a Joint Resolution to end emergencies and requires Congress to consider such a vote every six months.\(^{23}\) Congress has, however, never ended an emergency and rarely discharges its statutory obligation to consider voting to end an emergency.\(^{24}\) The routine use of emergency powers in the United States demonstrates that Gross's warnings about permanent emergencies have some relevance in the United States. At the same time, it is ironic that apparent Congressional disobedience to its obligations under the National Emergencies Act and the refusal of courts to order a legal remedy has allowed emergency powers to persist in the United States. Although Gross intends his extra-legal powers model as an antidote to the real problem of permanent emergencies, there is no guarantee that persistent disobedience by officials will not also create a de facto state of permanent and undeclared emergency. Indeed, Gross's model of extra-legal measures may have its greatest power as a description of America's ambiguous attitudes towards legality both generally and in particular with relation to national security.\(^{25}\)

\(^{20}\) 50 USC 1621.

\(^{21}\) On the dangers of Presidential powers during emergencies, see W.E. Scheuerman, 'Presidentialism and Emergency Government' (Chapter 11) in this volume.


\(^{23}\) 50 USC 1622.

\(^{24}\) Ackerman, Before the Next Attack, p. 125.

\(^{25}\) For an account of extra-legal actions such as renditions, torture, secret prisons and unauthorised electronic surveillance, see S. Chesterman, 'Deny Everything: Intelligence Activities and the Rule of Law' (Chapter 13) in this volume. As Gross recognises, this ambivalence may in part be a reaction to the high degree of legalism in the United States. O. Gross, 'Extra-Legality and the Ethic of Political Responsibility' (Chapter 3), this volume. This
A factor in the failure of American emergency legislation to be obeyed or to provide real restraints on the executive may be the fact that the legislation does not engage with rights. As will be seen, comparable British and Canadian legislation attempts to set out some principles and rights to guide conduct during an emergency.

The National Emergencies Act provides that executive orders, rules and regulations ‘shall be transmitted to the Congress promptly under means to assure confidentiality where appropriate’ but does not provide for means to publish, nullify or amend secret orders or regulations. To his credit, Professor Ackerman has proposed an enhanced accountability system under his emergency constitution that would give members of opposition parties the majority of seats on an oversight committee and the ability to decide whether to make secret information public or to discuss this information in secret sessions of Congress. There is a need for creative responses to the dilemmas proposed by secret information and Ackerman’s proposal in this respect is interesting and bold.

The American emergency legislation has been justly criticised from a number of quarters. After concluding that the American system of emergency regulation gives the President powers that are not checked by either the legislature or the judiciary, Jules Lobel suggested increased engagement with international institutions and more local democracy as possible counterweights. Although there has been citizen engagement with the Patriot Act, as well as reactions to media discovery of various abuses of powers by the executive, one shortcoming of relying on local democracy is the secrecy that may surround much emergency action taken for national security reasons. We cannot be assured that everything will come out, especially outside the United States which is exceptional in its approach to media freedom. An urgent priority in the emergency powers debate should

26 Eric Posner and Adrian Vermeule correctly note that American emergency legislation has not been effective, but conclude from this experience that no ex ante emergency legislation including the Ackerman proposals can be effective because of the need for executive flexibility to respond to emergencies. Their argument, however, does not consider the consequences of disobeying laws that either prohibit or require certain justifications for the violation of rights. Moreover, it takes a welfarist approach that trades off rights and security as comparable goods. E. Posner and A. Vermeule, Terror in the Balance: Security, Liberty, and the Courts (New York: Oxford University Press, 2007), pp. 163–8 and 28.

27 50 USC 1641.

28 Ackerman, Before the Next Attack, p. 85.


be to devise creative means to ensure the maximum exposure of information about what the state is doing during the emergency. Secrecy can act as the handmaiden for unrestrained executive power during emergencies.

Lobel’s second proposal for increased international engagement with the exercise of emergency powers is very interesting. As will be suggested in the fourth part of this chapter, one of the significant benefits of formal derogation of rights is that they may engage increased international scrutiny of actions taken at the domestic level. At the same time, however, international scrutiny of how a government exercises emergency powers may be handicapped by the lack of access to information that the government has an interest in classifying as secret, as well as a deferential application of margins of appreciation by international bodies towards domestic action.\(^{31}\)

Professor Ackerman has rightly concluded that the National Emergencies Act is seriously deficient and he has proposed more robust and meaningful legislative supervision of emergencies through a supermajoritarian escalator that would require legislative ratification of emergencies by increasing majorities of the legislature.\(^{32}\) He argues that ‘the escalator expresses a principled presumption in favour of liberty and permits extensions only when there is growing consensus that they are required most obviously, when a massive second-strike attack occurs and the need to prevent another is imperative’.\(^{33}\) The supermajoritarian escalator is a good idea because it should empower more meaningful debate and deliberation about the exercise of emergency powers. It could also potentially give minorities who are most likely to be harmed by emergency powers more political power.

Although Professors Gross and Ni Aoláin provide an extremely compelling and sensitive account of how discriminatory attitudes can infect anti-terrorism efforts,\(^{34}\) they fail to propose a means to ensure respect for non-discrimination in the extra-legal measures model and the reality that

\(^{31}\) Gross and Ni Aoláin, *Law in Times of Crisis*, ch. 5.

\(^{32}\) Ackerman, *Before the Next Attack*, p. 80.  

\(^{33}\) Ibid.

\(^{34}\) They argue that ‘targeting outsiders may . . . be seen as bearing relatively little political cost. In fact, it may be considered politically beneficial’. Gross and Ni Aoláin, *Law in Times of Crisis*, p. 221. They use this accurate insight as a reason against models of accommodation, but it applies more strongly against extra-legal measures that are not disciplined by the generalisability of the formal law. For arguments that racial and religious profiling would not be authorised by explicit legislation but that it can thrive when officials have discretionary power see S. Choudhry and K. Roach, ‘Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability’ (2003) 41 *Osgoode Hall Law Journal* 1.
religious, racial and political minorities associated with terrorists will suffer disproportionately from illegal action under the extra-legal measures model. In contrast, Ackerman’s supermajoritarian escalator has a minority bias that will not be present when officials or legislatures decide whether to ratify extra-legal measures.\(^{35}\)

Ackerman proposes that compensation be provided for those detained but not charged. Although it is difficult to argue against compensation, there is a danger that compensation will routinise the detention of suspected terrorists on unjustified grounds. To his credit, Professor Ackerman recognises that those detained as suspected terrorists will require exoneration as well as compensation. This certainly has been the experience in Canada. The Arar Commission’s conclusion that after an exhaustive examination it saw no evidence that Maher Arar had violated any laws or was a threat to national security\(^{36}\) was practically much more important that the $10.5 million in compensation he later received. Exoneration is essential, but may often be impossible because of the secrecy of information and lingering suspicions.\(^{37}\) There is a danger that compensation could trivialise the rights that are violated by unjustified detention of terrorist suspects. Damages could become a tax on the suspension of habeas corpus and the detention of Muslims who have come to the attention of the authorities.

**B. United Kingdom legislation**

The United Kingdom enacted the Civil Contingencies Act 2004, to replace previous emergency legislation that allowed the executive almost unfettered power. Emergencies are defined broadly in the new law to include not only wars, terrorism and other security threats, but any event or situation that threatens serious damage to human welfare or the environment including contamination of land, water or air with biological, chemical

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\(^{35}\) Ironically, Ackerman’s super-majoritarian escalator could have little bite if there was bipartisan consensus on security issues though it could be much more effective in Canada or Europe where there are multiple parties and Muslim minorities are more active in politics than in the United States.

\(^{36}\) Maher Arar, a Canadian citizen born in Syria, was detained in the United States when in transit back to Canada and was removed to Syria where he was held and tortured as a terrorist suspect before eventually being released after almost a year’s imprisonment. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006) at 9.

\(^{37}\) Although exonerated in Canada, Mr Arar has not been exonerated in the United States and remains on their watch list.
or radioactive matter. This approach establishes an all-risk approach to emergencies which is based on a realistic assessment of the multiple risks faced in modern society. By imposing obligations on both the private and public sectors, the Act recognises that responsibilities for emergencies are not restricted to governments. This whole society approach to emergencies seems realistic and necessary and it also has the virtue of dispersing power throughout society and not focusing power in the executive.

The Cabinet still has the ability to make a broad range of emergency regulations, but some effort has been made in the law to restrain powers by principles of proportionality. The government defended the law on the basis that it respected a ‘Triple Lock’ that requires a serious emergency, that existing legislation is inadequate to prevent, control or mitigate the emergency and that the emergency regulation be proportionate to the emergency. Section 20 requires that the person making the regulations certify that they both satisfy legislative restrictions and are compatible with rights in the European Convention. To be sure, these principles could have been improved by clearer statements and explicit reference to the objective requirements of the situation, but they represent an admirable attempt to provide legal principles and limits on the exercise of power. They can be contrasted with the American emergency legislation which leaves the declaration of emergency totally to the discretion of the President without any reference to legal principles that might guide and restrain the exercise of emergency powers.

The new United Kingdom legislation contemplates that emergency regulations enacted by the executive be placed into a richer constitutional environment that includes the legislature and the judiciary. One section of the new Act provides: ‘A person making emergency regulations must have regard to the importance of ensuring that Parliament, the High Court and the Court of Session are able to conduct proceedings in connection with the regulations or action taken under the regulations’. The act also requires that regulations be placed before Parliament and lapse if both houses do not pass a resolution approving them within seven days of receiving the regulations. In any event, the regulations lapse after thirty days, but may be renewed. It is assumed that the regulations will be made public and there is no provision for maintaining confidentiality.

38 The Civil Contingencies Act 2004, c.36, s.1. 39 Ibid., s.20–1.
41 The Civil Contingencies Act 2004, s.22(5). 42 Ibid., s.27. 43 Ibid., s.26.
The British legislation may be based on an admirable assumption that all law should be public, but both American and Canadian emergency legislation contemplate some secret law. As will be seen, only the Canadian legislation addresses means to ensure scrutiny and repeal of secret laws.

Undoubtedly, the United Kingdom's legislation could be strengthened and made more creative. At the same time, however, it demonstrates an admirable attempt to outline some broad legal principles to govern emergency governance rather than simply consigning these questions to the discretion of the sovereign.

C. Canadian legislation

Canada's Emergencies Act was carefully drafted in light of Canada's unhappy experience with the use of unfettered executive powers under the War Measures Act which was used to intern Japanese-Canadians during World War II and to detain about 500 people associated with Quebec separatism during the October Crisis of 1970 in which two terrorist cells murdered a Cabinet Minister and kidnapped a British diplomat. The War Measures Act provided little in the way of objective restraints on the exercise of executive power and the courts generally deferred to the exercise of executive power. The Supreme Court upheld the denial of habeas corpus under the Act concluding: 'The exercise of legislative functions such as those here in question by the Governor-in-Council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extraordinary measures'.

One of the most important and unique features of the Emergencies Act is its pre-commitment to respecting non-discrimination norms during an emergency. Section 4(b) specifically addresses the sad history of discriminatory internment in Canada by providing that 'nothing in this Act shall be construed or applied so as to confer on the Governor in Council the power to make orders or regulations ... providing for the detention, imprisonment or internment of Canadian citizens or permanent residents ... on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. This echoes Article 4 of

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44 SC 1988, c.29. 45 Re Gray (1918) 57 SCR 150 at 181–2.
46 Questions can be raised about the adequacy of this provision especially as it relates to so-called partial profiling in which the state detains a person in part on the basis of race or ethnic and social origin and in part on some other basis. It also does not prevent
the International Covenant on Civil and Political Rights (ICCPR)\(^{47}\) which provides that emergency measures cannot be inconsistent with international law obligations or `involve discrimination solely on the ground of race, colour, sex, language, religion or social order'.

Although the Act is designed to apply to all emergencies, it provides for different types and levels of emergency. The most extreme emergency, a war emergency, does not have to be ratified by Parliament for 120 days, a public welfare emergency caused by natural disasters and pandemics has to be ratified within 90 days, an international emergency that affects more than one state by imminent or actual use of force, intimidation or coercion has to be ratified within 60 days, and a public order emergency caused by temporary threats to the security of Canada that cannot be effectively dealt with under other laws within 30 days. Although governments could attempt to manipulate these categories, they would have to justify such attempts to the courts in part because the executive cannot vary the Act by executive decree.\(^{48}\)

Like section 4(b) with its pre-commitment to non-discrimination, other parts of the Act recognise from past experience that the government may limit rights during an emergency. Section 8 provides that public welfare emergency powers should not be used to end strikes. Section 19 provides that public assemblies may only be restricted during public order emergencies `when they may reasonably be expected to lead to a breach of the peace'. This provision both enables and restrains the state by incorporating an imminence requirement that has been neglected in modern anti-terrorism legislation. Canada's ordinary law of emergencies attempts to place some prior restraints on executive power. As Kim Lane Scheppele has argued, the modern Canadian approach attempts to restrain executive excesses in emergencies while the relevant American law still follows a pre-World War II tradition of martial law and executive domination.\(^{49}\)

Executive action in declaring an emergency must under the Act be justified to Parliament at the earliest opportunity. It is not a Schmittian discrimination against non-citizens. It is also not clear that protections from discriminatory law enforcement should be limited to protection against detention, imprisonment and internment.

\(^{47}\) This is reenforced by the fact that the ICCPR is specifically referenced in the preamble of the Emergencies Act `particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency'.

\(^{48}\) Emergencies Act, SC 1988, s.4(a).

exercise of unrestrained power. The executive’s explanation to Parliament must also include an account of any consultations that it has held with the provinces about the emergency, thus using federalism as a possible restraint on federal executive domination. At the same time, no attempt is made, as in the United Kingdom’s legislation, to codify legal principles of proportionality to govern when and how far the executive should invoke emergency powers.

The Emergencies Act provides that motions to discontinue the emergency can be initiated by 20 Members of the House of Commons or ten Members of the Senate. These low numbers represent an attempt to empower minorities in Parliament. In the last decade they would have meant that both leftist and rightist parties and a party dedicated to the separation of Quebec from Canada all could have initiated debate.

One of the largest problems in reviewing state actions during an emergency will be a lack of full information. The speed and confusion of emergencies and emergency responses is one factor, but so is the need or purported need for secrecy as the state responds to various emergencies. This problem is addressed by providing that a special Parliamentary Committee, subject to a secrecy oath that is even included in the legislation, can amend and repeal secret orders and regulations. This Committee is required to have representation from all parties with 12 members in the House of Commons and all parties represented in the Senate. Practically, this would mean that both socialist and separatist parties would be represented on the Committee. This would provide a much more diverse form of review than under Professor Ackerman’s proposals for a bipartisan oversight committee controlled by the minority in Congress.

The Parliamentary Committee is required to report on ‘the exercise of powers and the performance of duties and functions pursuant to a declaration of emergency’ both during and after the emergency. In addition, the government is required to ‘cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency’ within 60 days after the revocation or expiry of the emergency. This requirement should be viewed in the backdrop of the Canadian custom of appointing public inquiries, such as the Arar Commission, headed by a sitting or retired judge. The appointment of a similar judicial inquiry to examine the state’s conduct during the emergency should ensure a thorough and impartial examination of

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50 Emergencies Act, SC 1988, s.58(3).
51 Ibid., s.62(5).
52 Ibid., s.62(1).
53 Ibid., s.63.
the government’s conduct. Although such an inquiry would technically be part of the executive, it would enjoy significant de facto independence. The judge heading the inquiry would retain the implicit right to resign and return to his or her regular duties on the bench if the government did not provide full information or attempted to interfere with the Commission’s independence. A judicial inquiry into the government’s actions during the inquiry could consider governmental actions that would otherwise be secret. As with the Arar Commission, it could challenge and even litigate against the government over the appropriate balance between publicity and secrecy. Legislation that requires review of what happened in an emergency might provide a more reliable means of ensuring review and deliberation about emergency actions than the passage of an act of indemnity or the exercise of prosecutorial discretion or jury nullification that would be used to review illegal action committed during emergencies under Professor Gross’s extra-legal measures model.55

Canada’s Emergencies Act also addresses issues of compensation based on the general principle that individuals are entitled to ‘reasonable compensation’ from the Crown for ‘loss, injury or damage as a result of any thing done, or purported to be done, under the Act’. The Act requires judges of the Federal Court to be used as assessors to determine disputes about compensation. This represents an interesting attempt to bring judges into the process. At the same time, the right to seek judicial review from an assessment is also maintained. Compensation, however, will not address the need to exonerate those who may have been wrongfully identified and detained by the state as security risks.

D. Summary

The best emergencies statutes will, consistent with Dyzenhaus’s theory, make creative use of all branches of governments in maintaining the rule of law. The Canadian law demonstrates the potential for legislative review

54 See Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [2007] FC 766 deciding that the majority of material that the Arar Commission concluded should be made public could be released over the government’s objection that it would excessively harm national security, national defence or international relations.
55 Gross argues that acts of indemnity ‘presents the legislature with a unique opportunity to review the actions of the executive branch and assess them ex post, relieved from the pressures of the crisis, before deciding whether to ratify them’. Gross, ‘Stability and Flexibility’, in Global Anti-Terrorism Law and Policy, p. 105.
56 Emergencies Act, SC 1988, s.48(1).
57 Ibid., s.52(3).
both during and after the emergency.\textsuperscript{58} It has procedures somewhat similar to Ackerman’s proposed supermajoritarian escalator that are designed to empower legislative minorities during an emergency. It also demonstrates how there can be a creative blurring of all three branches of government that may be particularly helpful to supervise the state during emergencies. Committees that are staffed by a combination of retired judges, retired politicians and retired executive officials may have the combination of the necessary expertise, credibility and public confidence to review the often-secret actions of the state during an emergency.\textsuperscript{59} The Canadian Act provides carefully considered \textit{ex ante} restrictions prohibiting internment on the basis of race, national or ethnic origin or religion. The new United Kingdom legislation also sets out legal principles of justification for emergency powers while the comparable American legislation simply recognises the power of the President to declare an emergency while providing Congress a power that has not been used to end emergencies. The American legislation contains no \textit{ex ante} restrictions or legal principles of justification on what can be done in an emergency and no requirements for review of what has been done in an emergency.

\section*{IV. The derogation model of emergencies}

So far in this chapter I have argued that the post-9/11 debate about emergencies has been more concerned about the rights of terrorist suspects than with the full range of emergencies that may require swift and strong responses from the state. I have also examined some framework statutes that provide for the governance of emergencies and have suggested that they should enable the legislature, the executive, the judiciary and creative hybrid institutions to play a role in applying the rule of law to state conduct during emergencies. In this section, I return to the questions of rights and

\textsuperscript{58} As my colleague Lorraine Weinrib has written: ‘Bicameral, multi-party examination of government policy, including systemic review of its application in individual cases with access to confidential information and a reporting mechanism can prevent and remedy abuses long before they would come to the attention of the judiciary’. L. Weinrib, ‘Terrorism’s Challenge to the Constitutional Order’, in R.J. Daniels, P. Macklem and K. Roach (eds.), \textit{The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill} (Toronto: University of Toronto Press, 2001), p. 105.

examine what should be done when an emergency may require the state to take actions that derogate from rights.

Pointing to the experiences of Northern Ireland and Israel, Oren Gross warns of the danger of a perpetual state of emergency in which powers introduced to deal with the terrorist threat seep into many other parts of the legal system. Gross's warnings are important and historically accurate, but post-9/11 the greatest threat to rights has come not from use of emergency powers, but rather from undeclared emergencies that have attempted to give permanent legislation what my colleague David Dyzenhaus has criticised as a thin veneer of legality. In Dyzenhaus's terms, the problem has been more grey holes than black holes.

To be sure, there have been attempts to create black holes that are states of exception devoid of law such as the attempts to resist all judicial review of the Guantánamo detentions and the warrantless spying by the National Security Agency. Slowly but surely, however, these practices were challenged in court and are now being subject to legislation. Although there has been one officially declared black hole, namely Britain's derogation from the right to liberty to authorise indeterminate detention, it has been repealed after the House of Lords declared it to be disproportionate and discriminatory.

In what follows, I will argue that it is better for courts to push states towards formal black holes that require explicit derogations from rights than to legitimate diluted versions of rights and grey holes. Derogation contemplates official, prospective and legislative declarations of an emergency and a clear desire to reject rights. Derogation is designed to be a temporary measure that comes with considerable political and legal costs, both domestically and internationally. Derogation is a conservative strategy because, like emergency powers, it recognises the baseline set by existing rights, even as it departs from them. Unlike emergency powers, however, the very act of derogation recognises, and in a nation that accepts human rights, stigmatises extraordinary measures as inconsistent with rights. Finally, a derogation from rights is not a blank cheque as the exact extent of the derogation may be subject to domestic judicial review. Some constitutions have standards to justify derogations from rights and some exempt some rights from derogation. Even under more permissive

approaches, any derogation will be subject to continuing legislative review and international supervision.

**A. Derogation under the American suspension clause**

The American suspension clause is restrictive in only allowing one right to be suspended and only for the dire emergencies presented by rebellions and invasions. These restrictions make it possible for judges to take a strong stand in resisting both implicit and explicit suspensions of habeas corpus. In *Hamdi v. Rumsfeld*, Justice Scalia with the concurrence of Justice Stevens, affirmed the importance of explicit legislative derogations from rights. Like Justice Souter, Justice Scalia refused to find authorisation for detentions of citizens in Congress’s authorisation to the President to use all necessary force concluding that ‘contrary to the plurality’s view, I do not think this statute even authorizes the detention of a citizen with the clarity necessary’ to displace various presumptions related to detention. The suspension clause could have considerable value in ensuring that the legislature makes a clear statement of its desire to derogate from rights and in doing so pays the political price for such an act.

Justice Scalia’s opinion, however, must be read in light of his subsequent dissent in *Hamdan v. Rumsfeld* which held that it was not necessary for Congress to suspend habeas corpus to deprive non-citizens detained at Guantánamo of habeas corpus. There are hints of judicial abdication even in *Hamdi*. In particular, the idea the court should defer to Congress’s determination of ‘whether the attacks of September 11, 2001 constitute an “invasion” and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court’. This statement is unobjectionable if it simply means that the court will not consider the question because Congress had yet to make a clear statement, but it is more problematic if it means that the court will cede its interpretative authority over the Constitution to Congress on whether there has been a constitutionally sufficient invasion to justify suspension. Although there are eloquent defenders of coordinate construction in which elected legislatures act on their own interpretation of the Constitution even when it

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64 Justice Scalia concluded that ‘Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with the English practice and the Clause’s placement in Article I’. *Hamdi v. Rumsfeld* 542 US 507 (2004) at 563.

differs from that of the independent courts, such an approach is problematic when the legislature acts on behalf of the interests of a permanent majority and takes away the rights of a perpetual minority such as non-citizens or Muslims suspected of terrorism.

Another objectionable feature of Justice Scalia’s opinion is the statement that ‘when the writ is suspended, the Government is entirely free from judicial oversight’. Although a clear and justified suspension of habeas corpus would deprive courts of that vital device to determine the legality of detention, there should be other mechanisms to challenge detentions for violating other norms. Justice Scalia’s approach in allowing a suspension of habeas corpus to create a constitutional void can be contrasted to that taken by Justice Davis in *Ex Parte Milligan* who reasoned that a suspension of habeas corpus only suspends the ability of the courts to require the production of detainees. ‘The Constitution goes no further. It does not say, after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law... [the framers] limited the suspension to one great right, and left the rest to remain forever inviolable’. Justice Scalia was too quick to defer to the legislature on whether derogation has been justified and to view derogation as a completely lawless zone as opposed to a temporary and limited black hole in which habeas corpus and only habeas corpus has been suspended.

One of the values of clear statements that require derogation is that they are democracy forcing. They can force the executive to obtain explicit legislative authorisation and they can play a role in producing what Mark Tushnet in his contribution to this volume calls ‘moralised politics’.

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67 *Hamdi v. Rumsfeld* at 565.


69 This may explain Dyzenhaus’s criticism of Scalia on the basis that ‘once there is such a clear statement he is prepared to give the stamp of legality to the legal black hole. Blank cheques are fine as long as they are properly certified’. Dyzenhaus, *The Constitution of Law*, pp. 49–50.

70 M. Tushnet, ‘The Political Constitution of Emergency Politics’ (Chapter 6), this volume. Professor Tushnet’s argument, however, would reject the idea that judicial enforcement or framing the issue as a legal issue of derogation is necessary to achieve a ‘moralised politics’. For a related argument that derogation provisions unfairly force legislatures to admit that they are violating human rights when they are only engaging in reasonable disagreements
Justice Scalia effectively criticised the plurality’s invention of a diluted version of due process in *Hamdi* when he stated that such an approach ‘by repeatedly doing what it thinks the political branches ought to do it encourages the lassitude and saps the vitality of government by the people’.71 Judicial decisions that force democracy are just one act in a multi-act play. In a society that respects rights, legislatures will be tempted to respond to judicial decisions with new legislation. This legislation will often purport to comply with rights and attempt to create what Dyzenhaus would call grey holes. Courts then have a choice whether to force the issue the second time around by declaring that grey holes cannot be justified, effectively forcing the legislature to confront the more difficult issue of creating explicit black holes that derogate from rights.

Justice Scalia’s true colours became apparent in *Hamdan v. Rumsfeld* when in dissent he held that the argument that the habeas stripping provisions of the Detainee Treatment Act required legislative suspension of habeas corpus could ‘be easily dispatched’.72 His approach is similar to Professor Ackerman’s argument about how his emergency statute would satisfy the requirements of the suspension clause. Ackerman would allow Congress to suspend habeas corpus without paying the political or judicial price for invoking the suspension clause. He admits that his proposed emergency law allowing up to 45 days’ detention without full judicial review ‘amounts to a partial suspension of the Great Writ’73 and that ‘any restriction of habeas corpus in response to terrorism requires Congress to explore the twilight zone of its constitutional authority’ because it is ‘a stretch to say that one or two attacks – even very serious ones – amount to an “invasion” or “rebellion”’.74 Nevertheless, he argues that the court should accept this partial suspension of habeas corpus because the supermajoritarian escalator he proposes ‘provides institutional recognition that suspension is a very serious matter’.75 At the same time, he makes a contradictory argument that ‘the easy and extended suspension of the Great Writ by a simple majority in Congress threatens the very foundation of freedom’76 and should not be accepted. Professor Ackerman’s

with the courts over the meaning of rights see J. Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 23 *Supreme Court Law Review* 7. My concern, however, is that without a legal framing of these issues around the question of derogation that the due process rights and equality claims of unpopular groups like suspected terrorists will be trivialised or entirely neglected.

71 *Hamdi v. Rumsfeld* at 578.
73 Ackerman, *Before the Next Attack*, p. 127. 74 Ibid., p. 135.
75 Ibid. 76 Ibid., p. 136.
arguments can only be reconciled on the basis that courts should decide cases by making strategic judgments about the relative dangers of suspension of habeas corpus. The courts can ignore a soft and undeclared suspension of habeas, if there is a supermajoritarian escalator, but should enforce the restriction on suspension ‘at all cost’ should it not be present. Ackerman’s approach fudges the suspension of habeas corpus and in doing so attempts to legalise a process of mass detention without judicial review that should only be legal if Congress is prepared to suspend habeas corpus.

B. The Canadian model of derogation

Section 33 of the Canadian Charter is much more permissive than the suspension clause of the American Constitution. It allows federal or provincial legislatures to enact laws notwithstanding fundamental freedoms, legal rights or equality rights for renewable five-year periods. The Charter rights that are not subject to this override, democratic, mobility and minority language rights, are difficult to justify as non-derogable rights on universal standards. The Canadian override would allow Parliament to suspend habeas corpus (one of the legal rights) and even to authorise torture or internment based on race or religion for renewable five-year periods. There is no requirement that there be an emergency or that the measures be strictly necessary in the circumstances.

The Canadian courts have only reviewed the use of the override on one occasion. The Supreme Court upheld Quebec’s use of an omnibus override as a protest against the 1982 inclusion of the Charter in the Canadian Constitution over Quebec’s dissent. The Court deferred, noting that the legislature might not be able to know what particular Charter right might be relevant in a particular case. A unanimous Court declared ‘section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in the particular case’.

The Court did not, however, give the legislature an entirely free hand and held that the override could not be used retroactively. The Court’s discussion of this matter was quite brief and it justified its decision on the basis that section 33 was ambiguous on this point and the rule of construction against retroactive operation of legislation should be given effect. This decision, however, is perhaps pregnant with meaning. The

78 Ibid. at para. 36.
Court's appeal to common law norms governing statutory interpretation suggest that the values of common law constitutionalism may come into play with respect to judicial supervision of the override. Nevertheless, such a reading is in tension with the Court's unequivocal statement that it would not review the substantive merits of the override.

The Canadian requirement that the override can only be used prospectively may support Dyzenhaus's argument that torture is unlegalisable and can only be excused as a violation of law after it has occurred. The Canadian rule against the retroactive use of the override also puts in doubt overrides that function as bills of attainder or criminalise the actions of specific individuals or groups. Once Canadian courts start applying some of the values of the rule of law to the legislature's use of the override, they may end up applying all of its values. This could provide some judicial protections for the rule of law but perhaps at the expense of devaluing an explicit and considered legislative derogation from rights.

Taken by itself and without any rule-of-law restraints, the Canadian override could be an invitation to legislative tyranny. The override has been infrequently employed in Canada. Its major use has been by Quebec in response to a Supreme Court decision that struck down a law that prohibited the use of languages other than French in outdoor commercial signs. The use of the override was controversial and led to Anglophone Ministers resigning from the Cabinet. It also led to Anglophone merchants bringing successful complaints to the then Human Rights Committee of the United Nations under an Optional Protocol to the ICCPR that Canada has signed. As I have suggested elsewhere, this protocol adds an international dimension to dialogues about rights in Canada. Any Canadian exercise of the derogation power can be subject to international review and comment.

79 Dyzenhaus, The Constitution of Law, p. 214. See also Gross, 'Are Torture Warrants Warranted?' (2004) 88 Minnesota Law Review 1481 for a similar conclusion. For a contrary argument that torture could only be justified and not excused, see Andrew Simester, 'Necessity, Torture and the Rule of Law' (Chapter 12) in this volume.


81 K. Roach, 'Constitutional, Remedial and International Dialogues About Rights: The Canada Experience' (2005) 40 Texas International Law Journal 537. Gross makes a similar point with respect to ex post legislative ratifications of illegal acts when he notes that 'even if a particular extra-legal act is domestically ratified ex post, it may be subject to a different judgment on the international plane'. Gross, 'Stability and Flexibility', in Global Anti-Terrorism Law and Policy, p. 104.
The availability of the override has been used by the Court as justification for making controversial decisions. Derogation provisions may allow courts to be more aggressive on matters affecting national security, precisely because the government retains the option of derogating from rights as interpreted by the courts. The Court’s post-9/11 record, however, has been mixed and in one case it held open the very disturbing possibility that it might find deportation to torture to be constitutional in ‘exceptional circumstances’ without even requiring explicit legislative authorisation or the use of the override. Deportation to torture would always be unjust but the use of the override to authorise it would at least clearly signal to Canadian citizens and the international community what was at stake. I doubt that any Canadian government would use the override to authorise torture. As matters stand now, should courts in the future ever authorise torture, they may do so retroactively by finding it to be a constitutionally exceptional circumstance in a particular case and without full and robust legislative debate. Although the Canadian model of derogation is the most permissive for governments of the models outlined here, it at least requires prospective legislative action. This should ensure advance warnings and an opportunity for national and international debate and condemnation.

C. The European and international model of derogation

To my knowledge the only government that has employed an explicit derogation from rights in response to 9/11 was the United Kingdom, which in 2001 derogated from the right to a fair trial to authorise the indeterminate detention of non-citizens suspected of involvement with international terrorism who could not be deported because of concerns that they would be tortured. Although the decision to derogate received much criticism, it was made in part because of an acceptance of the absolute right against torture. In addition, the derogation was made temporary for 15 months and was subject to special review provisions. Writing in 2003, Conor Gearty warned of the legitimating potential of derogation provisions coupled with the judiciary’s traditional deference towards government on matters of national security. He wrote that:

the override clauses contained in typical human rights charters can, in most states, be actualized without proper democratic accountability. Having been offered a button marked ‘self-destruct’, it would be surprising if

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governments – even non-malicious ones – did not occasionally succumb to the temptation to press it. This is especially so in the atmosphere after 9/11 and has already produced a derogation in the United Kingdom.\footnote{C. Gearty, ‘Reflections on Civil Liberties in an Age of Counterterrorism’ (2003) 41 Osgoode Hall Law Journal 185 at 203.}

I must disagree with Professor Gearty on several accounts. Derogation in the United Kingdom, as well as in Canada and in the United States, all require legislation, which satisfies the ordinary meanings of ‘proper democratic accountability’. With the exception of the United Kingdom, countries have not hit the self-destruct button by making formal derogations. People care about their rights and democratic governments have proven not to be eager to make formal derogations. Finally, Professor Gearty, like many others, underestimated the ability of the judiciary in the United Kingdom to supervise derogations.\footnote{On the deference shown by the European Court of Human Rights to derogations, especially from democracies such as Ireland and the United Kingdom, see Gross and Ní Aoláin, Law in Time of Crisis, pp. 268–89. For valuable proposals to strengthen the European community’s supervision of derogations and to expand the range of non-derogable rights to include non-discrimination norms, see R. St.J. Macdonald, ‘Derogations under Article 15 of the European Convention’ (1998) 36 Columbia Journal of Transnational Law 225.} In the first Belmarsh decision, the House of Lords declared the derogation to be disproportionate and discriminatory because there was not a rational connection between preventing terrorism and detaining only non-citizens suspected of terrorism.\footnote{A v. Secretary of State [2004] UKHL 56.}

Parliament accepted the House of Lords’s decision by repealing the derogating provisions, but it also responded with new legislation providing for control orders that could be imposed on both non-citizens and citizens. Requiring the legislature to derogate from the rights of their citizens maximises the potential for full democratic debate and accountability for derogations.

The potential for democratic opposition is, however, only a potential. Parliament responded to the Belmarsh decision with legislation that provided a framework for both non-derogating and derogating control orders. To the extent that it provided for the possibility of derogation, Parliament followed the British pattern of making derogations with respect to anti-terrorism legislation in Northern Ireland. Extensive use of derogations raises Professor Gearty’s concerns about legitimising and routinising derogations.

But again, I think these concerns underestimate the reluctance of democratic governments to derogate from the rights of their constituents. The
British government has so far attempted to avoid derogation by using extremely restrictive control orders in the guise of non-derogating orders. Although the courts should call the government’s bluff on the issue of whether the restrictive control orders derogate from liberty, the government’s initial use of non-derogating control orders is a testament to its reluctance to pay the political costs of derogation. The fact that the derogation remains an option should also embolden judges. For example, a trial judge who declared that non-derogating control orders were incompatible with rights appealed to the option of derogation as a justification for not adopting a deferential approach to judicial review when he stated:

The importance of protecting members of the public from the risk of terrorism is not in doubt, but the importance of that objective is not a reason for the court to be less inclined to classify the obligations in these control orders as a deprivation of, rather than a restriction upon, liberty. The Convention makes express provision in Article 15 for there to be a derogation from (inter alia) Article 5 ‘In time of war or other public emergency threatening the life of the nation’... In the absence of a derogation under Article 15 of the Convention the respondents are entitled to the full protection of Article 5, and there is no justification for any attempt to water down that protection in response to the threat of terrorism.\(^{87}\)

A decision that the existing control orders derogate from Article 5 could promote sober second thoughts about whether the government can justify a derogation to the public and the courts. Derogations have both political and legal costs. The derogation option provides judges with a safety net as they negotiate the national security high wire. If the judges err on the side of liberty, they know that the legislature can respond by arguing that security requires derogation.

Derogation, especially after the first Belmarsh decision, is not an instant or final self-destruct button. The government will have to report the derogation to the Council of Europe and under the control order legislation, derogations are limited to 12 months.\(^{88}\) Even if the legislature decides to use derogating control orders, this will not be the end of the rule of law because the Belmarsh case suggests that the British courts are capable of taking a hard look at whether the government can justify the derogation.

\(^{87}\) [2006] EWHC 1623 (Admin) at para. 43.
\(^{88}\) Prevention of Terrorism Act 2005, c.2, s.6. Human Rights Act 1998, s.16. however, follows the more permissive Canadian model of allowing derogations for five-year periods.
D. Summary

The mechanism of derogation resembles common law requirements that the legislature make clear statements if it intends to derogate from rights. For this reason, Dyzenhaus has argued that the idea of a common law constitution ‘which controls Parliament does not depend on whether judges will in fact decide they have the authority to resist... an explicit override’. Fundamental to common law constitutionalism is the idea that ‘when a Parliament has explicitly declared that it does not want the executive to be bound by fundamental legal values, that declaration comes with a political cost’. This is supported by Dyzenhaus’s overall conclusion that ‘when push comes to shove, all that judges can do is take up the role of weath­ermen and make real to the people what kind of choice their government is making’. But in a national and international environment that cares about rights, such judicial signals and forcing of legislatures to confront the unhappy prospect of creating black holes will often be enough to make legislatures pull back from the abyss.

Although democratic derogation is part of his model of legality and common law constitutionalism, Professor Dyzenhaus is ambiguous about what judges should do when confronted by a clear derogation and his ambiguity reflects the different models of derogation discussed above. At some junctures, he favours the Canadian model of democratic derogation and suggests that so long as judges force the legislature to clearly state that it wishes to rule without rights and the rule of law, this is the best that the judge can do. The judge is only a weatherman who helps ensure that the public is informed by the legislature that a bad storm has arrived.

At other junctures, Dyzenhaus’s judge fights the storm and his vision of derogation is much closer to that found in the European and American models examined above. He criticises the House of Lords’s first Belmarsh decision for deferring to the government on the question of whether there was an emergency. This suggests that judges confronted with a derogation should take a hard look both at whether there is an emergency and whether the state’s response is justified. This is a robust form of judicial review in the face of a clear legislative invocation of emergency powers and a clear decision to use explicit powers of derogation.

At times, however, my colleague seems to shy away from derogation entirely. He criticises Justice Scalia’s dissent in Hamdi on the basis that

91 The judge respects the override not ‘merely because it is technically valid’ but also because ‘it is the product of a properly conducted democratic procedure’. Ibid., p. 211.
Scalia 'is prepared to countenance the government writing itself a blank cheque, as long as it can persuade Congress to certify it'.\textsuperscript{92} This seems to suggest little respect for clear legislative decisions to derogate from rights.

Professor Dyzenhaus's theory could be sharpened by greater clarity about his approach to derogation. In earlier work, he drew a distinction between liberal constitutionalism based on judicial supremacy in the American model and a more democratic and dialogic form of constitutionalism.\textsuperscript{93} He has built on this point in his work on emergencies by arguing that emergencies require the abandonment of a formal separation of powers and a willingness to allow the executive and the legislature to be a full partner in the rule-of-law project. This is well and good but avoids the critical question of what judges should do when faced with a democratic derogation. Are they simply weatherman? Or should they fight the storm? To my mind, a fuller acceptance of derogation would solidify the democratic credentials of Dyzenhaus's powerful and wide-ranging theory of the rule of law.

Professor Gross has expressed concerns that the executive may be more aggressive when it is supported by \textit{ex ante} legal authorisations.\textsuperscript{94} His concerns would be increased in those cases in which the legislature is prepared to make an explicit derogation from rights. Such an argument, however, discounts the ability of judges to interpret the exact ambit of a particular derogation and to apply some rule-of-law values to a derogation even under the permissive Canadian model. The American and European models of derogation provide the judge with additional grounds to review the necessity and proportionality of the derogation. The ability of judges to review the derogation, to fight the storm, could also influence executive conduct during the emergency in a manner not altogether different than that contemplated under the extra-legal measures model. Although Gross places much reliance on the possibility of prosecution as a factor that will


\textsuperscript{94} In relation to Governor Eyre's conduct during the Jamaica crisis, Professor Gross questions whether 'the Governor would have been a bit more circumspect and his actions a bit more cautious and less flagrant had the compulsion of legality not been satisfied \textit{ex ante}, for the imposition of martial law and the measures that followed?' He also cites the anxiety of some within the Bush administration over possible prosecutions as evidence of the restraining effects of the extra-legal approach. Gross, Chapter 3, pp. 78–80.
restrain extra-legal actions, this restraint can be nullified if the executive actor is confident of receiving a pardon or the benefit of prosecutorial discretion. One member of the executive can exempt another member of the executive from the consequence of extra-legal behaviour. Such secret self-dealing is a weakness of the extra-legal model. In contrast, the independent courts will play the dominant role in the derogation model because they will determine the precise ambit and in some cases the necessity and proportionality of the derogation.

V. Conclusion

Most recent commentators writing about emergency powers have focused on the dangers of a repeat of 9/11 or a ticking terrorist bomb while ignoring other real emergencies including Hurricane Katrina and the Asian tsunami. Even within the limited confines of emergencies presented by terrorism, most thinking has been about whether the rights of terrorist suspects should be violated in attempting to prevent terrorism, as opposed to limiting harms and speeding recovery after acts of terrorism.

The skewed nature of the post-9/11 emergency powers debate is unfortunate because little attention has been applied to the ordinary law of emergencies, the laws that govern a wide range of emergencies in many jurisdictions. Such laws provide insights into how the rule of law can be preserved in emergencies. The optimal emergency statute should take up Dyzenhaus's challenge of committing each branch of government, as well as creative hybrids of the different branches, to the maintenance of the rule of law with its emphasis on limited power, non-discrimination and effective review. It should provide legal principles to guide the executive's actions in declaring and acting during emergencies, but it should also provide for effective legislative, executive and judicial review of the state's conduct during the emergency.

To the extent that the post-9/11 emergency powers debate is more about overriding rights in an attempt to prevent terrorism than about how the state should respond to all emergencies, greater attention should be paid to formal and temporary derogations from rights. Derogation measures are already built into most domestic and international rights protection instruments. Since 9/11 we have been too quick to assign ordinary and existing laws to the dustbin of history and to propose novel models that may have unforeseen and harmful consequences.

The optimal derogation provision should be designed to maximise both political and legal deliberation about the justifications for derogation.
Derogations should be based on a deliberate legislative decision that it is necessary to override rights in an emergency. This can be contrasted with Gross's extra-legal measures model which gives each member of the executive a discretion to decide when it is necessary to dispense with rights and laws in order to deal with an emergency. Derogations can also, as the post-9/11 experience in the United Kingdom demonstrates, be subject to robust judicial review. The *ex ante* restraints on derogations will largely be political, but the courts can still play a valuable *ex post* role in interpreting the ambit of particular derogations and in ensuring that derogations are justified and as consistent with the rule of law as possible.

If there is a need for a third way to deal with terrorism not captured by the laws of crime or of war, the derogation model should be considered. Explicit legislative derogation from rights will have significant political costs, ones that most democratic governments have so far been unwilling to pay even in the post-9/11 environment. Moreover, the option of derogation provides judges with a resource to resist legal grey holes that are based on implicit states of permanent emergency and implicit derogations from rights. Derogations honour rights even as they admit that the government is prepared to govern without regard to rights and they force legislatures to be candid about the effects of their actions. Even when they are employed, derogations can offer justiciable questions about ambit of particular derogations, the proportionality of the state's response and the existence of an emergency.

Derogations are a legal and democratic version of Professor Gross's extra-legal measures. They provide an opportunity for both democratic debate about whether a derogation is justified and for reviews of the continued need for and effects of a derogation. Although routine derogations could lead to tyranny, the enactment of permanent grey hole legislation and secret illegalities committed and pardoned by the executive have so far represented a much greater threat to rights and the rule of law in the post-9/11 world than explicit and democratic derogations from rights.

Derogations, like the best emergencies statutes, should be based on explicit legal standards and subject to creative forms of judicial, legislative and administrative review and reconsideration. No model can provide a foolproof guarantee against the real dangers of permanent emergencies that Professor Gross astutely warns against. Nevertheless, wise design of ordinary laws to govern emergencies with the requirement that any derogation from rights be made democratically and subject to review and reconsideration provide the optimal conditions for subjecting all emergencies to the rule of law.

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