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Victor V. Ramraj

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EMERGENCY POWERS AND CONSTITUTIONAL  
THEORY



*Victor V. Ramraj*

# EMERGENCY POWERS AND CONSTITUTIONAL THEORY



Victor V. Ramraj\*

*Contemporary theories of emergency powers have been so distracted by local debates that the broader aspirations of constitutionalism – subordinating arbitrary political power to law and managing internal conflict through non-violent institutional means – have been taken for granted. Drawing on the experiences of aspiring constitutional orders in Southeast Asia (East Timor, Malaysia, Singapore and Thailand) with emergency powers, this paper seeks to shift the attention of constitutional theorists away from parochial debates, towards an understanding of constitutional theory and emergency powers that extends beyond the familiar domain of liberal democracies. It begins by showing how contemporary theories of emergency powers are premised on assumptions about institutional stability. Then, using various Southeast Asian experiences, it exposes the importance of the social and political foundations for the project of constitutional constraint of state power. Finally, it suggests some important lessons for constitutional theory in established liberal democracies in its attempt to come to terms with emergency powers.*

“Our very understanding of the external world is so moored in our experiences and thinking that the possibility of going entirely beyond them may be rather limited. All this does not, however, indicate that positionality cannot be overcome in ways that take us to a less confined view. ... Comparative broadening is part of the persistent interest in innovative epistemological, ethical and political work, and it has yielded a great many rewards in the intellectual history of the world.”<sup>1</sup>

\* Associate Professor, Faculty of Law, National University of Singapore; Faculty Co-Director, Center for Transnational Legal Studies, London (2010–2011). Earlier versions were presented at Osgoode Hall Law School, York University (in collaboration with the Nathanson Centre on Transnational Human Rights, Crime and Security (19 Sept 2008); at the Centre for European Constitutionalisation, Faculty of Law, University of Copenhagen (in collaboration with the Centre for Advanced Security Studies), 16 Dec 2009; and at the NUS Faculty of Law’s Research Forum (5 Feb 2010). I am grateful to the participants in these seminars for their thoughtful comments, and to Cheah Wuiling, Simon Chesterman, Johan Geertsema, Henning Koch, David Jennings, Klaus Kondrup, Jaclyn Neo, François Tanguay-Renaud, Wang Jiangyu and especially to Andrew Simester and Arun Thiruvengadam for helpful exchanges regarding its central arguments. I also owe an intellectual debt to David Dyzenhaus, whose works, including unpublished drafts he has sent me, have helped sharpen my understanding of the issues.

<sup>1</sup> Amartya Sen, *The Idea of Justice* (London: Allen Lane, 2009), 170.

## Introduction

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

For Schmitt, emergencies expose a fundamental weakness in liberalism; the most law could do is to spell out *who* may exercise emergency powers. It cannot, however, set out in advance what would be a necessary or permissible response.<sup>4</sup> And so, in an emergency, “the state remains, whereas law recedes”.<sup>5</sup> Responding directly or indirectly to Schmitt’s challenge to liberalism, the contemporary literature<sup>6</sup> on emergency

<sup>2</sup> I have in mind, here, the contemporary debate over the legal and political constitution in the United Kingdom and the ongoing controversy surrounding the interpretation of the constitution in the United States: see below n 131 to 133. There are, however, some notable exceptions: see, for instance, Ruti Teitel, *Transitional Justice* (Oxford: OUP, 2000), and François Borella, *Éléments de droit constitutionnel* (Paris: Presses de Sciences Po, 2008).

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

<sup>4</sup> According to Schmitt, the “precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case” (*ibid.* at 6–7). See also W. E. Scheuerman, “Emergency Powers and the Rule of Law After 9/11” (2006) 14 *Journal of Political Philosophy* 61, 65.

<sup>5</sup> Schmitt (n 3), 12.

<sup>6</sup> There is, within the common law tradition, an extensive and related debate on emergency powers largely arising during the colonial era, although generally framed as a debate about the meaning, scope and legality of *martial law*: see, for example W. S. Holdsworth, “Martial Law Historically Considered” (1902) 18 *Law Review Quarterly* 117; Frederick Pollack, “What is Martial Law?” (1902) 18 *Law Quarterly Review* 152; Charles Townshend, “Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire” (1982) 25(1) *Historical Journal* 167. For an attempt to connect that debate to the contemporary debate over emergency powers, see David Dyzenhaus, “The Puzzle of Martial Law” (2009) 59 *University of Toronto Law Journal* 1.

powers examines whether and how judicial or formal political institutions are able to constrain emergency powers invoked by the state. Yet framed in this way, the theoretical response to emergency powers oscillates between assuming its relevance beyond the liberal democracies of the developed West and, vaguely recognising its limits, restricting its application to those very liberal democracies. Both of these moves are problematic. The former ignores the unique character, in liberal democracies, of legal and political institutions and the culture that sustains them, and thus fails to take seriously the difficulties posed in transplanting them elsewhere. The latter tends toward parochialism, in as much as it declines to confront important challenges to constitutionalism posed by emergencies in aspiring<sup>7</sup> constitutional orders – challenges that cast a new light on the emergency powers debate in the West and illuminate, in important ways, the relationship between legal and political responses to emergency powers.

My goal in this article is to engage constitutional theory from the Southeast Asian shores of the Pacific Basin, using the experiences of aspiring constitutional orders with emergency powers in an attempt to shift the attention of constitutional theorists away from parochial debates, toward an understanding of constitutional theory and emergency powers that extends beyond its familiar domain of liberal democracies. In so doing, I seek to shed light on the relationship between the legal and the political, a relationship that is best understood when the struggle for legality in aspiring constitutional orders is brought into view and the relationship between legal and political is seen as dynamic and interdependent, rather than static and independent.

Drawing on the experience of emergency powers in Southeast Asia, I demonstrate the importance of the social and political foundations of a constitutional order in constraining state power in an emergency. I do this by showing how contemporary theories of emergency powers are premised on assumptions about institutional stability – assumptions that conceal the importance of the social and political foundations of the constitutional order. I then use the experience of

<sup>7</sup> I use this term advisedly. As we shall see in the case of Thailand, not all states and not all actors within a particular state necessarily “aspire” to the same kind of constitution, and for the purposes of this paper, I remain agnostic as to whether the formal, western-style constitution is the only or the optimal arrangement for every state, even when there is a shared commitment to, say, constraining or limiting state power. However, when I speak of aspiring constitutional orders in this paper, I have in mind the aspiration (however politically contested it might be internally) of having in place a constitution that limits state power through formal legal or institutional means.

emergency powers of four states in Southeast Asia to expose the critical importance of these social and political foundations to the project of constitutional constraint of state power, before extracting three important lessons for established liberal democracies. The first is that even in established constitutional orders, the commitment to constitutionalism – and thus to the resolution of political disagreements and the moderation of state powers through processes and institutions acceptable to most – remains a fundamental goal of constitutionalism and provides the crucial normative basis for limiting state power in an emergency. A second lesson is that not only the establishment of a constitutional order but the continued viability of that order, particularly in times of crisis, depends on the stability of its social and political foundations. Finally, reflecting on the broader implications of these claims, I argue that contemporary constitutional theory generally should not lose sight of the fundamental importance of the social and political foundations of the constitutional order as part of a more holistic understanding of constitutionalism, and so should approach constitutional theory in a genuinely interdisciplinary way. I begin with a critical overview of the competing models of emergency powers in contemporary Anglo-American constitutional theory.

### Emergency Powers, Law and Politics

The debate over emergency powers is, in many respects, a debate over the roles of law and politics in constraining the state, and thus tracks broader debates in legal, political and constitutional theory. Contemporary theories of emergency powers might usefully be divided into three models, according to the type of check on emergency powers they favour. At the risk of some degree of simplification,<sup>8</sup> these models might be described as the legality model, the neo-Roman model and the extra-legal measures model. The legality model emphasises the importance of the courts and of judicial review as a check on emergency powers in times of crisis. On this view, emergencies pose a serious threat to *legality* – the notion that sovereign power is subject to law – and, to counter this threat, the courts continue to play an important role in preserving the legal order. The neo-Roman model stresses the importance of *ex ante* procedural

<sup>8</sup> There are other models; these three, however, embrace many of the key theoretical and practical debates about how to constrain the state's invocation of emergency powers and, as I shall argue, illustrate the kind of assumptions about institutional stability upon which many other theories are also grounded.

checks on emergency powers. Those who advocate this model often express some concern about the ability of the courts to check executive powers in times of crisis; they argue instead that a procedural check on executive power, typically involving the legislative branch, would be more effective. The extra-legal measures model is also sceptical of the ability of the courts to limit executive power. It advocates instead a political check on power, typically one that sees the final check on executive power as resting in the society or “the people”. In this part, I examine these models in turn, before exploring their common assumptions about institutional and normative stability.

### *The Legality Model*

The legality model relies on the judiciary as the main institution for checking the exercise of emergency powers by the executive. The courts, it is argued, are well-suited to constraining emergency powers for three reasons: they have the advantage of hindsight; they take up issues relating to emergency powers “not in the abstract ... but in the context of specific cases”; and they are required to give reasons for their decisions, thereby restricting what can be done in the next emergency.<sup>9</sup> But an unqualified reliance on the courts is problematic because, as the courts often argue, national security matters fall outside their institutional expertise and because the national security cases typically involve sensitive security intelligence information that governments are unwilling to furnish in open court.

The most sustained contemporary defence of the legality model is found in the work of David Dyzenhaus. The starting point of his approach is that judges have a duty to “uphold a substantive conception of the rule of law”<sup>10</sup> in an emergency. We should not, he insists, give up “on the idea that law provides moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress”.<sup>11</sup> Dyzenhaus is therefore critical of attempts to respond to emergencies through exceptional legal regimes that operate alongside the ordinary legal system, and which in effect give the executive a free hand to act in a manner unconstrained by law.<sup>12</sup> Thus, he seeks to show how the concerns

<sup>9</sup> David Cole, “The Priority of Morality: The Emergency Constitution’s Blind Spot” (2004) 113 *Yale Law Journal* 1753, 1762.

<sup>10</sup> Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: CUP, 2006), p 65. Dyzenhaus relies extensively on A. V. Dicey’s understanding of the rule of law in *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th edn, 1920).

<sup>11</sup> *Ibid.* 19.

<sup>12</sup> *Ibid.* 53.

of national security actors about the lack of judicial expertise and the confidentiality and sensitivity of intelligence sources can be addressed through “imaginative experiments in institutional design”,<sup>13</sup> drawing on modern administrative law principles to deal with emergencies in a manner consistent with the rule of law. A specialised administrative tribunal such as the Special Immigration Appeals Commission (SIAC), which was created by the United Kingdom to deal with national security cases involving foreign terrorist suspects, shows in principle how this could be done. Its three-person panel, consisting of a former judge, a former administrative adjudicator and a national security expert, would have the necessary expertise to review national security decisions and would be able, where necessary in the interests of confidentiality, to conduct closed sessions in the presence of a special advocate.<sup>14</sup> A tribunal of this sort could, in theory, uphold rule of law values while recognising the unique concerns that arise in national security cases. And although a measure of judicial deference would be afforded to such tribunals, the courts, through their review jurisdiction, would continue to play an important role in safeguarding the rule of law. According to Dyzenhaus, “judges always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project, and they have an important role when such cooperation wanes or ceases in calling attention to that fact”.<sup>15</sup>

### *The Neo-Roman Model*

This brings us to the second model, which, sceptical of the ability of the courts to serve as a check on emergency powers, emphasises the importance of procedural checks and, specifically, of a constitutional framework for such checks. Those who defend this model typically draw inspiration from the constitutional practice during the Roman Republic of appointing a dictator with virtually unlimited powers, for a fixed, six-month tenure, with the mandate of dealing swiftly with the emergency and restoring the normal constitutional order as quickly as possible. They also turn to the modern version of this model, defended by Clinton Rossiter in his influential work, *Constitutional Dictatorship*.<sup>16</sup> Prominent

<sup>13</sup> Dyzenhaus, “The State of Emergency in Legal Theory” in Victor V. Ramraj, Michael Hor, and Kent Roach (eds), *Global Anti-Terrorism and Policy* (Cambridge: CUP, 2005), 67; see generally, Dyzenhaus (n 7), 121–73.

<sup>14</sup> Dyzenhaus (n 10), 163.

<sup>15</sup> Dyzenhaus (n 10), 201.

<sup>16</sup> *Constitutional Dictatorship: Crisis Government in Modern Democracies* (New Brunswick: Transaction Publishers, 2002; originally published in 1948).

among these theorists is Bruce Ackerman, who argues for a constitutionally entrenched state of emergency provision that would allow, after a short period of unilateral executive action, that any emergency powers that accrue to the executive (say, to detain terrorist suspects) would be subject to the support of “an escalating cascade of supermajorities” in Congress: “60 per cent for the next two months; 70 for the next; 80 thereafter”.<sup>17</sup> Ackerman calls this the “supermajoritarian escalator” and explains its rationale as follows:

“The need for repeated renewal at short intervals serves as a first line of defence against a dangerous normalization of the state of emergency. The need for a new vote every two months publicly marks the regime as provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?”<sup>18</sup>

To the supermajoritarian escalator, Ackerman adds another key feature. The executive will be under a duty to compensate all innocent persons that have been detained in an anti-terrorism dragnet. The assumption here is that these procedural mechanisms – the supermajoritarian escalator, combined with the duty to give just compensation – will effectively contain the damage caused by the necessary, but regrettable, invocation of emergency powers, by providing a range of political and institutional incentives that would make emergency powers increasingly difficult to sustain. “The constitutional order places the extraordinary regime on the path to extinction”, Ackerman tells us, because “[m]odern pluralist societies are simply too fragmented to sustain this kind of politics – unless, of course, the terrorists succeed in striking repeatedly with devastating effect”.<sup>19</sup> One important virtue of this model, according to William E. Scheuerman, is that it “provides for demanding institutional tests by means of which the polity can at least minimise the executive’s tendency to monopolise such judgements [about what measures are necessary]: emergency rulers are made strictly dependent on other institutional actors and their potentially competing conceptions of necessity”.<sup>20</sup>

Ferejohn and Pasquino come to a similar conclusion concerning constitutionally entrenched emergency powers, albeit from a different starting point. Their aim is to show why, as between two sorts of emergency powers regimes – a legislative model (which uses “ordinary statutes

<sup>17</sup> Bruce Ackerman, “The Emergency Constitution” (2004) 113 *Yale Law Journal* 1029, 1047.

<sup>18</sup> *Ibid.* 1048.

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

<sup>20</sup> “Presidentialism and Emergency Government” in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge: CUP, 2008), 283.

that delegate special and temporary powers to the executive”<sup>21</sup>) and a constitutional or neo-Roman model (which, permits the “delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information and to suspend legal processes and right”<sup>22</sup> with a view to restoring the constitutional order to its pre-emergency state) – the latter is preferable. Ferejohn and Pasquino favour the neo-Roman model because, first, unlike ordinary emergency legislation, which tends towards permanence, the neo-Roman model conceives emergency powers in a fundamentally conservative way; its purpose is to restore the constitutional order to its original state and the powers that accrue during an emergency are fixed constitutionally in advance.<sup>23</sup> Ordinary legislation is more likely to lead to permanent changes to the law, they argue, as the extraordinary becomes the norm, and “if the justices on the Supreme Court are willing, this possibility of permanent transformation is even more likely”.<sup>24</sup>

These models of emergency powers are one step removed from the legality model because, although they rely on the formal legal frame of the constitution, they do not see the courts as the primary check on executive power. The solution, for these theorists, to the problem of emergency powers is to craft an array of *ex ante* constitutional procedures to reduce the likelihood that emergency powers would be abused. Those who defend this model tend to share with political constitutionalists a scepticism regarding court-centric theories; they prefer to rely on formal constitutional procedures as the first line of defence against executive abuse of emergency powers. But although these mechanisms are not judicial, “well conceived constitutional emergency powers help realise the rule of law by subjecting them to legal devices manifesting the classic legal virtues of clarity, publicity, generality, prospectiveness and stability”.<sup>25</sup>

### *The Extra-Legal Measures Model*

Another step removed from judicial checks on emergency powers is what might be called, collectively, socio-political models of emergency powers. These models may incorporate elements of the two other

<sup>21</sup> John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers” (2004) 2 *International Journal of Constitutional Law* 210, 217.

<sup>22</sup> *Ibid.* 210.

<sup>23</sup> *Ibid.* 234.

<sup>24</sup> *Ibid.* 236.

<sup>25</sup> Scheuerman (n 4), 76.

models – accepting that the courts and the legislature may at times have a role to play in constraining the emergency state – but they locate the ultimate constraint on executive power elsewhere, in the informal, social and political realities of the society that is subject to emergency rule. Oren Gross therefore begins an essay, defending his extra-legal measures model, with the following epigraph from Justice Jackson’s dissenting judgement in *Korematsu v United States*: “The chief restraint upon those who command the physical forces of the country ... must be their responsibility to the political judgements of their contemporaries and to the moral judgements of history”.<sup>26</sup> And while he is quick to distinguish his own view from Gross’s, Mark Tushnet also regards the ultimate check on emergency powers as emanating from a social and political, not a legal, source. Concepts such as the rule of law, he argues, “cannot succeed at all ... without sociology and politics at their back”.<sup>27</sup> I turn now to the details of their arguments.

Gross is sceptical of the ability of the courts to check executive power in times of crisis, noting the tendency of courts to defer to the executive in the heat of any emergency.<sup>28</sup> And while he does not (as Ferejohn and Pasquino do) consider constitutional emergency powers separately from ordinary emergency legislation, he regards them both as problematic since officials are able to “mould and shape the legal system, including the constitutional edifice, under the pretence of fighting off an emergency”.<sup>29</sup> It may be that Gross has underestimated the ability of constitutional mechanisms to hold the executive in place (and for the courts to interpret these provisions in like fashion), but what is significant about Gross’s model, and what I wish to focus on, is his reliance on deliberative democracy (“public deliberation and ... the taking of responsibility by each and every member of the community”<sup>30</sup>) as the ultimate check on executive power. Drawing on John Locke’s account of the prerogative,<sup>31</sup> Gross’s extra-legal measures model posits that in times of crisis, when public officials believe they must act contrary to law to prevent a catastrophe, they should do so, but then publicly acknowledge their extra-legal conduct and leave it to the people to decide their

<sup>26</sup> “Stability and Flexibility: A Dicey Business”, see n 13 above, 90–106.

<sup>27</sup> “The Political Constitution of Emergency Powers: Some Conceptual Issues” in *Emergencies and the Limits of Legality* (n 20), 145–155.

<sup>28</sup> Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?” (2003) 112 *Yale Law Journal* 1011, 1034.

<sup>29</sup> *Ibid.* 1068.

<sup>30</sup> *Ibid.* 1126.

<sup>31</sup> John Locke, *Second Treatise on Government* in P. Laslett (ed), *Two Treatises on Government* (Cambridge: CUP, 1988), esp. Ch XIV, “Of Prerogative”, 374–381.

fate – either by ratifying their conduct or condemning it. According to this model, the “society retains the role of making the final determination whether the public official who acted extra legally ought to be punished and rebuked or rewarded and commended for his actions”.<sup>32</sup> Gross recognises that extra-legal conduct may be ratified in a number of ways, “formal and informal, legal as well as political or social”.<sup>33</sup> He specifically mentions prosecutorial discretion not to prosecute, jury nullification, mitigation and pardon or clemency as legal forms of ratification; but he also specifically includes political and social ratification, such as the withholding of honorific awards and decorations. Behind all these modes of ratification, Gross sees an “ethic of responsibility, not only on the part of officials but also of the general public”.<sup>34</sup> It is here, at the level of public debate and political responsibility, that he locates the ultimate check on errant officials.

Tushnet takes this argument even further, criticising Gross for being committed to the proposition that “law occupies the entire institutional space of normative evaluation of emergency powers”.<sup>35</sup> Tushnet’s own position is clear: “Politics is the obvious alternative to law as a means of regulating the exercise of emergency powers – not politics as a mere preference or the exercise of power for its own sake, but a principled or moralised politics”.<sup>36</sup> Tushnet argues, using the combatant status review tribunals developed by the United States in Guantánamo Bay post 9-11 as an example, that the move toward more formal, due process requirements can be explained not by the prospect of judicial review, but rather by “bureaucratic pressures and professional interests” on the part of lawyers and military officers which point in the direction of greater procedural formality.<sup>37</sup> He argues:

“These bureaucratic and professional interests are the proximate reason for the adoption of procedures generally consistent with rule-of-law requirements for [Combatant Status Review Tribunals]. Behind them, though, lies what I have called a moralised politics. Bureaucrats and, even more, professionals, define their roles with reference to norms they have internalised. And, empirically, among those norms for the relevant bureaucrats and

<sup>32</sup> Oren Gross, “Extra-Legality and the Ethic of Political Responsibility” in *Emergencies and the Limits of Legality* (n 20), 60–94, 64.

<sup>33</sup> *Ibid.* 65.

<sup>34</sup> *Ibid.* 66.

<sup>35</sup> Tushnet (n 27), 146.

<sup>36</sup> *Ibid.* 147.

<sup>37</sup> *Ibid.* 154.

professionals is some degree of commitment to the rule of law. The legal black holes may be law-free zones, but they are not rule-of-law free zones, because they are created and sustained in part by a moralised politics.”<sup>38</sup>

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

### *Assumptions of Institutional Stability*

These theories show us the range of approaches within liberal democracies for constraining the state in an emergency. They also reveal a tension within liberal democratic constitutional theory between those who hold faith in the ability of the legal constitution (as interpreted and enforced by the courts) to check state power and those who prefer less court-centric means of constraint, relying instead on constitutionally entrenched procedural mechanisms or on informal social or political constraints on power. What is clear, however, is that these models all rest on assumptions about the stability of public institutions committed to the ideals of liberal-democracy and the presence of the right kind of social and political culture.

Consider, first, the assumption in the theories we have examined regarding the stability of the courts and formal political institutions. This assumption is evident in David Dyzenhaus’s account of constitutionalism in much of his work on emergency powers. In the introduction to his recent treatise on legality in times of crisis, Dyzenhaus makes it clear that his arguments are directed at societies that are committed to the rule of law, for which certain normative consequences follow: “[This] book is titled, ‘The Constitution of Law’ because my argument is that, in circumstances when a society chooses to rule through law, it also chooses to subject itself to the constitutional principles of the rule of law, whether or not it articulates those principles in a bill of rights”.<sup>39</sup> He then proceeds to substantiate his argument, drawing on examples primarily from

<sup>38</sup> *Ibid.* 155.

<sup>39</sup> Dyzenhaus (n 10), 4.

the United Kingdom, Canada and Australia.<sup>40</sup> But a commitment on the part of a society to “subject itself to the constitutional principles of the rule of law” is itself complex, not simply because a constitution might be written or not, but because the commitment is only meaningful if it is grounded on stable institutions and sustained by a particular kind of social and political culture.

Assumptions about the stability of legal and political institutions are equally evident in Bruce Ackerman’s account. Although his arguments are informed by the experience of other countries, including South Africa and Canada, and his work demonstrates a solid appreciation of constitutional principles in Europe and elsewhere, the core of his thesis rests on assumptions about how institutions, particularly legislative institutions, function in a liberal democracy and he illustrates his proposal, quite naturally, by reference to the United States. So whatever the merits of his proposal might be, it is grounded on the assumption that democratic politics will work in a particular way<sup>41</sup> and that minority interests will be adequately protected through the operation of stable institutions, whose dynamics are relatively predictable.<sup>42</sup> By the same token, Scheuerman, who supports Ackerman’s proposal in principle, makes similar assumptions, while acknowledging his own focus on the peculiar institutional dynamics of emergency powers within the US presidential system.<sup>43</sup> Similarly, Ferejohn and Pasquino concede that the countries spoken of in their analysis “are very stable and entrenched democracies that have little need to invoke extreme constitutional measures to protect their regimes”.<sup>44</sup>

Now consider Gross and Tushnet, whose arguments are, to different degrees, removed from the experience of formal legal institutions and practices. For his part, Gross insists that his is “not an ‘American’ study, nor is it a post-September 11th one” and should be “treated as generally applicable to constitutional democratic regimes faced with the need to respond to extreme violent crises”.<sup>45</sup> His argument, in short, is that in liberal democracies, political responsibility for abuse of emergency powers

<sup>40</sup> Elsewhere, Dyzenhaus suggests that his argument extends to “well-ordered societies” that do more than “pay mere lip service to the rule of law” (n 13, 88). As I argue in this article, the extension of Dyzenhaus’s legality model is problematic without a corresponding shift in the underlying social and political culture.

<sup>41</sup> “Modern pluralist societies are simply too fragmented to sustain this kind of politics” (so as to sustain emergency powers with 80 per cent support): see n 19 and accompanying text.

<sup>42</sup> See, eg Ackerman’s account of “minority control of information”, see n 17, 1050–53.

<sup>43</sup> Scheuerman (n 20), 258–59.

<sup>44</sup> Ferejohn and Pasquino (n 21), 216.

<sup>45</sup> Gross (n 28), 1027.

rests ultimately in the hand of the people.<sup>46</sup> But again, this assumption rests on a particular understanding of democratic politics and, implicitly, on civil society – a body politic that, at its core, would not (or perhaps should not), stand idly by while the government abuses its powers in an emergency. Tushnet's arguments likewise rest on assumptions about the institutional and social culture that supports rule-of-law values (although, as I shall argue later, Tushnet's theory recognises, in ways most other theories do not, the normative significance of the social and political foundations of the constitutional order).

All three of these models assume that the institutions are stable and the main issue is which institution, formal or informal, is in the best position to preserve the constitutional order in an emergency; the aim is, as Ferejohn and Pasquino argue, a conservative one.<sup>47</sup> This point is not lost on critics of judicial activism in times of crisis, such as Eric A. Posner and Adrian Vermeule, who argue that although the courts often adopt a deferential posture towards the executive, "the basic constitutional structure remains unaffected by the emergency" and in "the United States, like other countries, the constitutional structure has never collapsed during an emergency".<sup>48</sup> We could, of course, take issue with the last point; presumably, the authors have only contemporary liberal democracies in their sights and have not considered the experience of Weimer Germany. But their basic insight calls for some reflection. What is it about contemporary liberal democracies that make them resistant, more or less, to a slide towards authoritarianism in an emergency? And what is it that might yet make them potentially vulnerable?

All three models appeal, in different ways, to democracy or constitutional ideals, but all too rarely does the debate probe the sociological foundations of the liberal democratic constitutional order; they focus instead on how to better calibrate and optimise current institutional or political arrangements in the face of an emergency. Liberal democracies therefore suffer from an embarrassment of riches – those riches being the multiple layers of formal, institutional checks on political power, even in an emergency – which diverts scholarly attention from the social and political conditions needed to establish and sustain them. Considering the experience of aspiring constitutional orders with emergency

<sup>46</sup> Gross' extra-legal measures model is explicitly premised on assumptions about public political engagement: "In a democratic society, where such values as constitutionalism, accountability, and individual rights are entrenched and are traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if such actions have been taken, arguably, in the public's name" (*ibid.* 1123).

<sup>47</sup> Ferejohn and Pasquino (n 21).

<sup>48</sup> *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: OUP, 2007), p 4.

powers helps to bring the political-sociological underpinnings of the formal constitutional order back into focus and to shed new light on the emergency powers debate and constitutional theory in liberal democracies and beyond.<sup>49</sup>

### Emergency Powers in Aspiring Constitutional Orders

If, as I have argued, emergencies pose a challenge within liberal democracies of preserving the constitutional order, they often pose a distinct challenge in aspiring constitutional orders – a challenge to the establishment of a constitutional order in the first place.<sup>50</sup> The project of establishing a constitutional order will of course vary with the circumstances in which the constitution comes into being – whether it is a negotiated and gradual post-colonial transfer of power, a re-drafting of a document by a transitional military government, or a post-conflict constitution negotiated and drafted in haste in the interest of maintaining political stability. In each of these situations (and others involving aspiring constitutional orders), the project of establishing a constitutional order is a complex one – and it is one that becomes even more complicated when emergency powers are invoked. Here we see in sharp relief the interplay between law, politics and power, and, in particular, the role that political power must sometimes play in supporting a nascent constitutional order which, in turn, must subordinate sheer political power to law. In this part, I consider, with reference to examples in Southeast Asia, three challenges faced by aspiring constitutional orders – the challenge of establishing a post-conflict constitutional order while limiting resort to emergency powers to maintain political stability; the challenge of nurturing a social and political culture to sustain the constitutional order, one that channels political disputes and disputes about the exercise of the state's coercive power into legal and political mechanisms that have broad public support; and the challenge of making a transition from a regime of formal legality to one in which political power is moderated and genuinely constrained by constitutional norms.

<sup>49</sup> Tom Ginsburg and Tamir Mustafa make a similar case for studying the experience of courts in authoritarian regimes: "By looking at the extreme environment of a dictatorship, then, we may better understand the limited ability of courts to safeguard individual rights and the rule of the political game in democracies facing extraordinary circumstances" (see "Introduction: The Function of Courts in Authoritarian Politics" in Ginsburg and Mustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: CUP, 2008), pp 1–22.

<sup>50</sup> Bearing in mind the caveat noted earlier: see above, n 7.

### *Establishing Constitutional Order Post-Conflict: East Timor*

States emerging from conflict face a broad range of transitional justice problems, the most prominent of which is the fate of those accused of committing atrocities under the old regime. This has been the focus of much of the scholarly literature on transitional justice, hailing back to the Hart-Fuller debate following World War II.<sup>51</sup> More recent scholarly work has focussed on another set of transitional justice problems in post-conflict and post-revolutionary contexts, problems relating to transitional constitutionalism more broadly.<sup>52</sup> The general question is how to facilitate a social, political and legal transformation that will extend legitimacy to the new constitutional order. Seeking accountability for past wrongs is the important backward-looking part of this process; but there is a forward-looking dimension as well.<sup>53</sup> Especially in a post-conflict situation, legal and political institutions must aspire to become impartial public venues in which political disagreements can be resolved through the rule-of-law ideal of “adherence to known rules, as opposed to arbitrary government action”.<sup>54</sup> But this aspiration to legality is complicated because, in many transitional situations, nascent governments are tempted to invoke constitutional emergency powers to address political volatility, throwing into question their commitment to the rule of law, a phenomenon I have described in other work as the “emergency powers paradox”.<sup>55</sup>

The paradox is this: in nascent democracies, especially fragile, post-conflict ones, governments are often torn between the aim of establishing a constitutional order in which political disputes are resolved non-violently, according to rules accepted by most (the goal of legality) and the apparent need to invoke emergency powers at odds with the demands legality to bring about conditions of political stability upon which a culture of legality can be built.<sup>56</sup> In Southeast Asia, East Timor

<sup>51</sup> The original debate can be found in H. L. A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 *Harvard Law Review* 593–629 and Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 *Harvard Law Review* 630–72; both authors refined their positions in their subsequent work. See Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1961), esp. Ch IX, 181–207, and Fuller, “The Morality that Makes Law Possible” in *The Morality of Law*, rev edn (New Haven: Yale University Press, 1969), esp. 33–94.

<sup>52</sup> See, for example Bruce Ackerman, *The Future of Liberal Revolution* (New Haven and London: Yale University Press, 1992), and Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation” (1997) 106 *Yale Law Journal* 2009, later expanded into a treatise, see above n 2.

<sup>53</sup> As Teitel argues, “in periods of radical change ... constitutions are simultaneously backward- and forward-looking” (“Transitional Jurisprudence”, *ibid.* 2015).

<sup>54</sup> *Ibid.* 2016–17.

<sup>55</sup> See “The Emergency Powers Paradox” in Victor V. Ramraj and Arun K. Thiruvengadam, eds, *Emergency Powers in Asia* (Cambridge: CUP, 2010), pp 21–55.

<sup>56</sup> *Ibid.*

provides an illuminating example of the paradox. Emerging from 25 years of Indonesian occupation, and thrown into a period of intense political violence, East Timor, with the assistance of a UN-backed peace-enforcement mission and a UN transitional administration,<sup>57</sup> sought to stabilise the political situation and start the process of rebuilding state institutions, including its legal system.<sup>58</sup>

In the immediate aftermath of the 1999 independence vote, thousands were killed in violent clashes between pro-Indonesian groups backed by the Indonesian military and pro-independence groups. During this period, the international forces found it necessary to detain without trial many individuals, until an interim legal mechanism, the Detainee Management Unit, was set up to process their cases and the political situation was stabilised and civilian authorities could take over.<sup>59</sup> Even after this initial period of instability amid the reconstruction, the political situation remained volatile. On 30 May 2006, as violent protests by disgruntled rebel soldiers began to escalate and the death toll began to rise, East Timor declared its first formal state of emergency. The emergency ended within weeks, after international forces were deployed to help stabilise the situation. More recently, following an assassination attempt on its President and Prime Minister in February 2008, the East Timorese declared a state of emergency under Art 25 of its new constitution<sup>60</sup> and took steps to integrate its police and military forces under a central command to better address the threat of political violence. Once again, the formal emergency ended in a matter of weeks. In declaring a state of emergency, East Timor took a considerable risk; neighbouring Brunei, Indonesia, Malaysia and the Philippines have all spent a significant part of their post-colonial existence under emergency rule. To its credit

<sup>57</sup> Respectively, the Australian-led International Force for East Timor (INTERFET) and UN Transitional Authority in East Timor (UNTAET).

<sup>58</sup> See, generally, Damien Kingbury, "East Timor: The Difficult Birth of a New State" in *Southeast Asia: A Political Profile* (Melbourne: Oxford University Press, 2nd edn, 2005), pp 393–413; Hilary Charlesworth, "The Constitution of East Timor, May 20, 2002" (2003) 1 *International Journal of Constitutional Law* 325.

<sup>59</sup> See Simon Chesterman, "UNaccountable? The United Nations, Emergency Powers, and the Rule of Law in Asia" in *Emergency Powers in Asia* (n 55).

<sup>60</sup> Article 25 permits the President, in the event of "effective or impending aggression by a foreign force, of a serious disturbance or treat of serious disturbance to the democratic constitutional order, or of a public disaster", after consulting key government bodies and with the approval of the legislature, to declare of a state of siege or state of emergency. The emergency, although subject to renewal, is limited to 30 days and Art 25(5) provides that certain specified rights (the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defence in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination) cannot be suspended. Art 25(6) requires that the authorities "restore constitutional normality as soon as possible".

(and the credit of its foreign legal advisors), East Timor lifted its state of emergency two months later, in April 2008.

In the context of a nascent constitutional democracy struggling to emerge from decades of conflict, the invocation of emergency powers, although paradoxical, might yet be reconciled with a longer term aspiration of constitutionalism. Emergency powers, if used with moderation, can provide a sufficient degree of stability to enable political and legal institutions to take hold. East Timor and other nascent constitutional orders are confronted with what Bernard Williams calls “the first political question” – by which he means “the securing of order, protection, safety, trust and the conditions of cooperation”.<sup>61</sup> Until this basic “question” (or, perhaps, pre-condition of organised government) is addressed, nuanced debates about legal and political mechanisms for accountability and principles of constitutional interpretation are premature (although there are and ought to be other forms of constraint<sup>62</sup>); the challenge that emergency powers pose in these circumstances brings into focus the basic aspiration of constitutionalism – the challenge of subordinating political violence and the arbitrary exercise of coercive state power to law.

But even if a tolerable level of political stability was established for long enough to rebuild the basic institutional infrastructure to enable the state to function, two challenges would remain. One is the challenge to aspiring constitutional democracies of creating a legal and political culture of accountability, in the face of competing social and political structures premised on different understandings of political authority and accountability.<sup>63</sup> Another is the challenge of convincing strong executive governments to entrust some of their powers in other institutions and branches of government.

### ***Social Foundations of Constitutionalism: Thailand***

Assuming that some degree of political stability is present, the absence of a strong constitutional culture remains problematic, particularly when emergency powers are invoked in response to resurgent political violence.

<sup>61</sup> “Realism and Moralism in Political Theory” in Geoffrey Hawthorn, ed *In the Beginning was the Deed* (Princeton: Princeton University Press, 2005), 1–17, p 3; see above n 55, pp 43–44.

<sup>62</sup> Ramraj, *ibid.* 50–52 (discussing the political incentives that nascent governments might have in these situations for complying with international human rights norms governing emergency powers, including the proportionality principle).

<sup>63</sup> This is not to say that a liberal democratic constitution represents the only or even the optimal form of accountability, but to the extent that such a structure is sought, a new culture of responsibility would have to be nurtured.

In times of constitutional change or transition, other, traditional forms of political accountability may yet be able to supplement newer forms of legal accountability. But when legally authorised emergency powers are invoked in the midst of a constitutional transition, traditional forms of political accountability may not be strong enough to keep the constitutional transition on track.

Consider the experience of constitutionalism and emergency powers in Thailand. In the decade before the bloodless military coup in September 2006, Thailand's constitutional reforms showed much promise. The 1997 Constitution could readily be seen in a positive light, as part of "the new constitutionalism in Asia and the developing world more generally".<sup>64</sup> Not only did the constitution guarantee rights that would not be "out of place in a European or North American constitution"<sup>65</sup> but it also created institutions, including a constitutional court and a national human rights commission, to protect and implement those rights. In the midst of this constitutional transition, the Government of Thaksin Shinawatra unleashed the coercive power of the state in two ways that called into question the government's commitment to genuine constitutional reform. The first was a "war on drugs" launched in 2003, which resulted in the arbitrary killing of thousands of alleged drug traffickers.<sup>66</sup> The second was its role in and violent response to the escalation of political violence in the Southern Provinces since early 2004, including the "Krue Se" incident in which security forces killed 32 militants in a mosque and the "Tak Bai" incident in which some 86 protesters suffocated after being piled into army trucks.<sup>67</sup> In 2005, the government declared a formal state of emergency in the South;<sup>68</sup> the killings by both sides in this conflict number in the thousands.<sup>69</sup>

Although the wave of popular protests in 2006, which later culminated in the military coup, was inspired by a number of other grievances against the Thaksin Government, the war on drugs and the violence in the South form an important background to the coup.<sup>70</sup> While it may

<sup>64</sup> Andrew J. Harding, "Thailand's Reforms: Human Rights and the National Commission" (2006) 1 *Journal of Comparative Law* 88, 95.

<sup>65</sup> *Ibid.* 97.

<sup>66</sup> Human Rights Watch estimates the death toll from this campaign at 2800: see "Thailand's 'War on Drugs'" (available at: <http://hrw.org/english/docs/2008/03/12/thaila18278.htm>).

<sup>67</sup> See above n 64.

<sup>68</sup> *Ibid.* See also Andrew Harding, "Emergency Powers with a Moustache: Special Powers, Military Rule and Evolving Constitutionalism in Thailand" in *Emergency Powers in Asia* (n 55), 294–313.

<sup>69</sup> One grim narrative of the conflict is recounted by Human Rights Watch in its report, "No One is Safe: Insurgent Attacks on Civilians in Thailand's Southern Border Provinces" (Aug 2007), Vol 19, No 13(C).

<sup>70</sup> Thongchai Winichakul, "Toppling Democracy" (2008) 38 *Journal of Contemporary Asia* 11.

never be known with certainty what role King Bhumibol Adulyadej, who has reigned since 1946, had in relation to the coup,<sup>71</sup> those who supported the coup had called for the King's intervention; the coup has been described as a royalist coup, engineered by pro-monarchy elements in the military and the political elite, and supported by prominent Thai academics and others.<sup>72</sup> Although the King is seen by many as standing above ordinary Thai politics, few would dispute the critical role he has played at pivotal moments in contemporary Thai politics.<sup>73</sup> Ultimately, it was the intervention of the military (unopposed by the King), and not the judicial process, that brought down the Thaksin Government, and with it the various abuses of power for which it was deemed to be responsible. But even after the fall of the Thaksin Government, in the wake of mass street demonstrations by Thaksin's supporters and opponents (notably in May 2010, when protesters and police clashed on the streets of Bangkok, leaving over 90 dead<sup>74</sup>), emergency powers have become a familiar part of Thailand's political landscape, even in the capital.<sup>75</sup>

Contemporary Thailand, then, seems torn between two models of government: a Western-style constitutional democracy in which legal and political institutions play a critical role in moderating government power and a more traditional Buddhist conception of democracy, which

<sup>71</sup> Tom Ginsburg suggests that it is a matter of informal "constitutional" convention in Thailand that those seeking to carry out a coup must seek a private blessing from the King before they do so: Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7 *International Journal of Constitutional Law* 83.

<sup>72</sup> Thongchai Winichakul (n 70), 30.

<sup>73</sup> See generally: Kobkua Suwannathat-Pian, *Kings, Country and Constitutions: Thailand's Political Development 1932-2000* (London and New York: Routledge-Curzon, 2004).

<sup>74</sup> For a detailed account of the events, see Human Rights Watch, "Decent into Chaos: Thailand's 2010 Red Shirt Protests and the Government Crackdown" (Human Rights Watch, May 2011), available at: [www.hrw.org/node/98416](http://www.hrw.org/node/98416).

<sup>75</sup> On 2 Sept 2008, Prime Minister Samak declared a state of emergency after some 30,000 People's Alliance for Democracy (PAD) protesters seized Government House and several ministries. The state of emergency was lifted on 14 Sept after the Constitutional Court removed Samak as Prime Minister because of his "inappropriate involvement in commercial activities" (receiving a payment for appearing on a cooking show): Kevin Y. L. Tan, "From Myanmar to Manila: A Brief Study of Emergency Powers in Southeast Asia" in *Emergency Powers in Asia* (n 55), 149–86, 179–80. Later, after coming to power, the PAD declared and state of emergency after a mass protest forced the postponement of an ASEAN summit in Pattaya, Thailand, in April 2009; the meeting took place without incident in Oct 2009: "Thailand pulls off ASEAN summit at third attempt" (25 Oct 2009), *ChannelNewsAsia*: [www.channelnewsasia.com/stories/afp\\_asiapacific/view/1013630/1/.html](http://www.channelnewsasia.com/stories/afp_asiapacific/view/1013630/1/.html). The May 2010 protests in Bangkok and many of the northern provinces led to states of emergency being imposed, in many parts of the country, including the capital, only to be revoked (in most parts of the country) in Dec 2010: "Thai government ends state of emergency but will retain special powers", *The Guardian* (21 Dec 2010): [www.guardian.co.uk/world/2010/dec/21/thai-state-emergency-ends](http://www.guardian.co.uk/world/2010/dec/21/thai-state-emergency-ends). The Internal Security Act, introduced in 2007, which allows an internal Security Operations Command to impose restrictions on constitutional rights including the liberty of the person and freedom of assembly, remains at the government's disposal: see Harding, "Emergency Powers with a Moustache", n 68 above, 306–11.

“requires a ruler always to be mindful of the *dharma*, ie the teachings of the Buddha concerning the worldly responsibility of a leader in a society, as the principal guidance of his rule”,<sup>76</sup> and to provide for the welfare of his people. While the period of constitutional development ushered in by the 1997 Constitution witnessed the establishment of several key constitutional and human rights institutions, Western-style liberal democracy is by no means entrenched in Thailand,<sup>77</sup> as the 2006 coup and the continued political turmoil demonstrate. As one scholar of Thai constitutionalism observes, the “Thai mindset reveals a strong preference for more tangible but extra-constitutional sources of power – the military collective and individuals, manipulated and appointed Houses in Parliament, and the monarchy – all of which claimed, with some justification no doubt, to know what was best for the people [better] than the people themselves”.<sup>78</sup> The legal constitution in Thailand has so far been unable to constrain abuses of state power, whether in the context of a formal emergency or otherwise. According to the royalist view, it is a “cultural constitution”<sup>79</sup> premised on the legitimacy of the King that is of primary importance and reflects the reality of Thai political culture.<sup>80</sup> To the extent that the role of holding the government in check is currently played by the King and the military, however, the problem is that the power that the monarchy (in particular) wields is a deeply personal one; it is “overly dependent on the charisma of King Bhumibol”<sup>81</sup> and does not provide “a truly viable political system that could withstand the changes of time and personalities”.<sup>82</sup>

The inability of formal law to constrain the invocation of emergency powers by the state in Thailand must therefore be understood against the backdrop of an ambivalence in Thai legal and political culture between an aspiration for greater formal constitutional powers and institutions and a deeply rooted faith in the Thai “cultural constitution” which seeks to define and limit political power by reference to a stable set of informal norms relating to the role of the monarchy, the military, elected politicians, law and Buddhist principles in Thai politics.<sup>83</sup> These informal constitutional principles might suggest, as Tom Ginsburg has argued,

<sup>76</sup> *Ibid.* 20.

<sup>77</sup> *Ibid.* 29.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Nidhi Eoseewong, “The Thai Cultural Constitution” (Chris Baker, translator), *Kyoto Review of Southeast Asia* 3 (Mar 2003), available online at: [http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/article\\_243.html](http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/article_243.html) (this is a translated version of a 1991 article in Thai, which first appeared in *Sinlapa wathanatham* 11, No 1, Nov 1991).

<sup>80</sup> Thongchai Winichakul (n 70), 28.

<sup>81</sup> *Ibid.* 33.

<sup>82</sup> Kobkua Suwannathat-Pian (n 73), 29.

<sup>83</sup> Nidhi (n 79).

that “the monarch ... is highly respected and will limit his interventions in the political sphere”, that when he does exercise his power, “he will be respected”, that the military may “step in to resolve perceived crises, and coups are a perfectly acceptable method of leadership change” although “coup makers should always seek a private blessing from the throne before, and a public one immediately after, any coup”, and that “violence against the people is rarely, if ever, legitimate, and no political force is entitled to excessively restrict the freedoms of the people”.<sup>84</sup> As such, the question of whether the constitution can limit the exercise of state power in times of crisis is as much (if not more) a question about the nature of constitutionalism itself as it is about the formal constitutional text or principles.

### ***Constitutionalism and Political Commitment: Singapore and Malaysia***

The examples considered thus far involve jurisdictions where the political situation is volatile and public institutions remain under-developed, as in East Timor, or where legal constraints are not fully embraced and the formal constitutional order is chronically unstable, as in Thailand. In some parts of Southeast Asia, however, the legal order is highly developed, at least as measured by the standard of legal education<sup>85</sup> and professionalism, as well as anti-corruption-based governance indicators.<sup>86</sup> On these measures, Singapore and Malaysia rate very highly indeed. Moreover, as far as conformity by public authorities with the demands of *formal* legality is concerned, Singapore is exemplary; rare is the instance in Singapore where executive power is exercised without formal legal authority.

Even so, neither Singapore nor Malaysia can claim a strong tradition of judicial activism in public law matters. In Singapore, the only case in which legislation has been invalidated on constitutional grounds was quickly overturned by the Court of Appeal.<sup>87</sup> In Malaysia, the

<sup>84</sup> Ginsburg (n 71), 87–88.

<sup>85</sup> For an overview of legal education in Asia, see Tan Cheng Han *et al.*, “Legal Education in Asia” (2006), 1 *Asian Journal of Comparative Law* 184–207.

<sup>86</sup> According to Transparency International’s corruption perceptions index, Singapore is the fourth least corrupt in the world; Malaysia ranks 43rd out of 179 countries. See: *Annual Report 2007* (June 2008), available online at: [www.transparency.org/publications/publications](http://www.transparency.org/publications/publications).

<sup>87</sup> In *Public Prosecutor v Tan Cheng Kong* [1998] 2 SLR 410, [1998] 1 SLR 943, Justice Karthigesu held that a provision of the Prevention of Corruption Act extending the reach of the act extra-territorially, but only in respect of Singapore citizens, was inconsistent with the guarantee of equality in Art 12(1) of the Constitution. On a criminal reference, the Court of Appeal disagreed, arguing that the classification was reasonable for reason, among others, of Parliament’s intention to respect international comity: see *Tan Cheng Kong* [1998] 2 SLR 410, [1998] SGCA 37, para 71.

judicial crisis of 1988, in which several activist judges were removed from the bench for questionable reasons,<sup>88</sup> still looms large over the courts. Although the courts do intervene from time to time to reverse lower level administrative decisions, when it comes to national security cases involving the formal invocation of emergency powers or detention without trial under the Internal Security Act, the courts have been extremely slow to intervene.<sup>89</sup> There are a few recent signs of change in Malaysia,<sup>90</sup> but such change is neither imminent nor assured, and the historical pattern is clear – in the rare instances in which judges have shown some interest in scrutinising the basis for the detention, the government’s reaction has been swift and unequivocal.

For example, in post-independence Malaysia, the government resorted to emergency powers to deal first with the Indonesian Confrontation in 1964 and again in 1969, in response to ethnic riots and political violence in the wake of a general election on 13 May of that year.<sup>91</sup> The Proclamation of Emergency and the Emergency (Essential Powers) Ordinance of 15 May 1969 have not been rescinded and the government continued to issue emergency regulations under these instruments well after Parliament resumed on 20 February 1971. This was a problem because the constitution provided that in a formal state of emergency the Yang di-Pertuan Agong (the King) could “until both Houses of Parliament are sitting, promulgate ordinances having force of law, if satisfied that immediate action is required.”<sup>92</sup> In a death penalty case arising out of emergency regulations issued in 1975, the Judicial Committee of the Privy Council, in one of its last decisions on the Malaysian Constitution, held in December 1978 that the Yang di-Pertuan Agong’s emergency powers had lapsed once Parliament had sat in February 1971, thus invalidating all subsequent emergency regulations.<sup>93</sup> But the legal consequences of this ruling were minimal. Parliament quickly enacted the Emergency (Essential Powers) Act 1979, which retroactively validated every piece of subsidiary legislation made under the 1969 Emergency Proclamation

<sup>88</sup> For an overview, see Visu Sinnadurai, “The 1988 Judiciary Crisis and its Aftermath” in Andrew J. Harding and H. P. Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007* (Kuala Lumpur: LexisNexis, 2007), pp 173–95.

<sup>89</sup> For an overview of these cases, see Michael Hor, “Law and Terror: Singapore Stories and Malaysian Dilemmas” in *Global Anti-Terrorism* (n 13), 273–94.

<sup>90</sup> See Jaclyn Ling-Chien Neo, “Parsing Privative Clauses: Rights, Security and Judicial Review in Malaysia”, [2010] *Public Law* 25, reviewing the High Court decision in *Raja Petra bin Kamarudin v Menteri Hal Ehwal Dalam Negeri* (7 Nov 2008, unreported), which ordered the release of a blogger detained without trial on national security grounds under the Internal Security Act.

<sup>91</sup> For a detailed account of this incident and its legal consequences, see Cyrus V. Das, “The May 13th Riots and Emergency Rule” in Harding and Lee (eds), n 88, 103–113.

<sup>92</sup> Article 150(2) of the Malaysian Constitution (since amended).

<sup>93</sup> *Teh Cheng Poh v Public Prosecutor* [1980] AC 458, [1979] 2 WLR 623 (PC).

after Parliament sat in 1971, and it later amended the Constitution to make the proclamation of any emergency, its continued operation, and the validity and continuation in force of emergency ordinances all non-justiciable.<sup>94</sup>

Similarly, a bold 1989 case in Singapore, *Chng Suan Tze v Minister of Home Affairs*,<sup>95</sup> in which the courts attempted to exercise greater judicial scrutiny of detention without trial under the Internal Security Act, was swiftly overruled by constitutional and legislative amendment. The Court of Appeal, in a departure from a line of authorities in Singapore, Brunei and Malaysia, rejected in *obiter dicta* the *subjective* test in national security cases (according to which it need only be shown that the President was in fact satisfied that the detention was necessary on national security grounds<sup>96</sup>) in favour of an *objective* test (requiring that the President's satisfaction was based on national security considerations). By subsequent constitutional amendment, the government brought the scope of judicial review in national security cases under the terms of the security legislation itself.<sup>97</sup> It also amended the Internal Security Act<sup>98</sup> to freeze the scope of judicial review at 13 July 1971 (the date of a decision<sup>99</sup> of the Court of Appeal which had affirmed the subjective test) and to restrict judicial review to matters of procedural compliance.

As far as constitutionalism is concerned, the problem in Malaysia and Singapore is neither the absence of a legal infrastructure nor the instability of the constitutional order. The legal infrastructure is solid and, as the national security cases demonstrate, both governments are committed to the formal demands of the constitution; when faced with a constitutional setback, they enact a formal constitutional amendment to remove the difficulty.<sup>100</sup> If formal constitutional law is to play a role in constraining state power in times of crisis or more generally, a different kind of shift must take place – a transformation in the culture of accountability. This requires a transformation not only in the judiciary but also in the broader social and political culture. And it suggests, in turn, a limit to what judges can do in the absence of strong social and political support.<sup>101</sup>

<sup>94</sup> Constitution (Amendment) Act 1981 (Act A 544), s 15.

<sup>95</sup> [1989] 1 MLJ 69 (Singapore CA).

<sup>96</sup> See *Liversidge v Anderson*, [1942] AC 206 (HL).

<sup>97</sup> See Constitution of the Republic of Singapore (Amendment) Act 1989, No 1 of 1989.

<sup>98</sup> Internal Security (Amendment) Act, No 2 of 1989.

<sup>99</sup> *Lee Mau Seng v Minister of Home Affairs, Singapore* [1971] 2 MLJ 137 (Sing. HC).

<sup>100</sup> Hor (n 89).

<sup>101</sup> In his analysis of *Chng Suan Tze*, Michael Hor speculates as to the complex and strategic legal-political reasoning and “subtle manoeuvring” that the judges likely engaged in, faced with the real prospect of legislative reversal: n 89, 281–82.

In their recent work on the “judicial politics” of the courts in authoritarian regimes, Tom Ginsburg and Tamir Mustafa explain why authoritarian regimes might yet allow the courts more leeway in constitutional cases. Courts are important in such regimes because they allow authoritarian regimes to

“establish social control and sideline political opponents, bolster a regime’s claim to ‘legal’ legitimacy, strengthen administrative compliance with the state’s own bureaucratic machinery and solve coordination problems among competing factions in the regime, facilitate trade and investment, and implement controversial policies so as to allow political distance from core elements of the regime.”<sup>102</sup>

This approach suggests that the opening of a space for constitutionalism to take hold may be the result of political rather than legal developments. But Ginsburg and Mustafa also recognise the role that “judicial support networks” – “institutions and associations, both domestic and international, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions if they come under attack”<sup>103</sup> – play in changing the legal landscape, and the threat that they pose to authoritarian regimes.

It is not clear how much of Ginsburg and Mustafa’s analysis can be extended to Singapore and Malaysia, which, despite their authoritarian elements, have some of the formal and practical elements of democratic accountability.<sup>104</sup> But their general point – that in legal systems lacking a strong tradition of judicial review, a shift to a rights culture requires a political change – resonates with the experience in Singapore and Malaysia. Just as a key litmus test for democracy is the willingness of an incumbent government to cede power to a democratically elected opposition (or, perhaps, to make substantial policy changes in the face of democratic opposition), the litmus test for constitutionalism is the willingness of the government to abide by an adverse ruling by the courts. There may eventually come a point, following such a momentous shift in political culture, when a culture of accountability permeates all branches of government and, in Ginsburg and Mustafa’s words, “the wheels of

<sup>102</sup> Above n 49, p 4, following Tamir Mustafa, “The Struggle for Constitutional Power: Law, Politics, and Economic Reform in Egypt” (Cambridge: CUP, 2007) (numbering of points in the original text omitted).

<sup>103</sup> Ginsburg and Mustafa (n 49), 13.

<sup>104</sup> These elements of accountability are as pronounced as they have ever been in Singapore after its recent election, on 7 May 2011, which saw a record six opposition MP elected out of 87 contested parliamentary seats and a drop in the ruling PAP party’s popular vote to 60.1% (from 75.3% in 2001). The government, in response, has promised to do some “soul-searching”: “Banyan: Low Expectations” *The Economist* (14 May 2011), 68.

justice ... simply have too much momentum to stop".<sup>105</sup> At this point, the courts may well be able to play a greater role in constraining state power, even in times of crisis. But until this constitutional tipping point<sup>106</sup> is reached (*if it is*), the struggle for legality is primarily a political one.

## Emergency Powers and Liberal Democracies

The experiences of East Timor, Thailand, Malaysia and Singapore suggest that the assumptions of legal and institutional stability implicit in many Anglo-American theories of emergency powers are less appropriate in aspiring constitutional orders and that the invocation of emergency powers poses a distinct challenge in the latter context. We have seen, for instance, how a nascent constitutional order may well need to invoke emergency powers to establish the basic conditions of stability upon which a legal and political system can be built; how, in the absence of a strong legal culture, other institutions might play a role in checking the abuse of power, and the challenges these arrangements pose for the creation of impersonal controls on political power; and how, even when a legal infrastructure is firmly in place and formal legality is generally respected, the shift from formal conception of legality in which law is understood primarily as an instrument of government to a substantive conception in which it is conceived as a means of controlling political power, requires a paradigmatic shift in legal and political culture.<sup>107</sup> In other work, I examine the implications of these observations for emergency powers and constitutionalism in Southeast Asia.<sup>108</sup> My concern in this article is to consider what lessons the experience of emergency powers in aspiring constitutional orders holds for the way we think about emergency powers and constitutionalism in established liberal democracies.

## *Constitutional Commitments and Political Stability*

The experience of emergency powers in Southeast Asia serves as a reminder of the important role that constitutions and constitutionalism

<sup>105</sup> *Ibid.* 21.

<sup>106</sup> I explore the idea of a constitutional tipping point in more detail elsewhere. See: "Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice" (2010), 1 *Transnational Legal Theory* 191.

<sup>107</sup> On the importance of understanding the social significance of the rule of formal or "professional" law in different legal contexts, see: Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 *American Journal of Comparative Law* 5. See also Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2nd edn, 2006).

<sup>108</sup> See above, n 55 and 106.

can play in “brokering”<sup>109</sup> a transition from violent sectarian conflict to relative peace and stability, and thus draws our attention to an important foundational role that constitutionalism plays in many states, even when, over time, this primordial role becomes less visible. As we observed in the case of East Timor, it may at times be necessary to invoke and then gradually ease up on emergency powers to allow nascent legal and political institutions an opportunity to develop and to earn the confidence of the people.<sup>110</sup> But a judicious use of emergency powers, when used within the bounds of constitutional principles, can serve the important goal of ensuring political stability without necessarily sacrificing aspirations of legality and constitutional government. Post-conflict situations serve as an important reminder of why, at least in a deeply divided society, legality is highly valued; it is seen as a way of managing and, ideally, resolving political disagreement through processes and institutions whose legitimacy and authority are acceptable to most. In these situations, constitutionalism does not have to assume an individualistic ideology nor does it, by focussing on the courts, pose a threat to the development of a vibrant political democracy;<sup>111</sup> rather it helps to secure the foundation on which a constitutional order – whose legal and political institutions are yet to be fully formed and whose precise shape may well remain contentious – can be built.<sup>112</sup> By allowing nascent governments to respond to violent threats to political stability, while subjecting these responses to constitutional (and international law) norms, constitutional emergency powers can serve as important example of how a society emerging from conflict can empower its government to subject its coercive powers to constitutional norms; it shows how (in principle, if not always in practice) nascent states can, despite contested understandings of the rule of law among international

<sup>109</sup> Teitel (n 2).

<sup>110</sup> It is also important, for the same reasons, that governments in nascent constitutional orders wean themselves quickly from emergency powers to avoid undermining the rule-of-law project in the first place. The permanent emergency in Malaysia shows us the danger of holding on to emergency powers for longer than is strictly necessary.

<sup>111</sup> For a critique along these lines, see Allan C. Hutchinson and Patrick Monohan, “Democracy and the Rule of Law” in Hutchinson and Monohan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987).

<sup>112</sup> Despite their critique of the rule of law, Hutchinson and Monohan concede, in principle, a role for the rule of law in securing basic institutions: “A commitment to democracy does not mean that constraints on popular decision-making must everywhere be condemned. It is important that the basic institutions and practices of democracy – free elections, debate and assembly – be guaranteed and extended” (*ibid.* 122).

policymakers,<sup>113</sup> use law to “establish non-violent mechanisms for resolving political disputes”.<sup>114</sup>

In the context of liberal democracies, it would be a rare case when emergency powers would be needed to stabilise a volatile political situation so as to ensure that political conflict does not undermine organised government. For instance, Bruce Ackerman argues in the US context that even if a suitcase bomb were to destroy a major American city, the government of the day would survive.<sup>115</sup> This suggests, he argues, that the goal of government following such an attack is not to secure the existence of organised government, but to reassure “its terrorised citizens”.<sup>116</sup> Whatever we might think of Ackerman’s reassurance argument, there is an important sense in which constitutionalism continues to serve an important foundational role in as much as it serves as a political commitment to resolve fundamental disputes – among competing groups and

<sup>113</sup> The rule of law has been criticised for being used to “justify the goals of any given project” and to deflect criticisms “by alternating between the purposes of the different conceptions at play”: see Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: CUP, 2006), pp 253–300, 276. The lack of clarity in the use of the “rule of law” by international policymakers is seen as “very damaging, especially in fragile post-intervention societies, for it allows policymakers and practitioners to pursue poorly thought-through and often internally contradictory programs”: Jane Stromseth *et al.*, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (New York: CUP, 2007), 73. The problem, according to Stromseth *et al.*, is that the “conflation of the formal and substantive aspects of the rule of law has led to a simplistic emphasis on structures, institutions and the “modernisation” of legal codes, in a cookie-cutter way that has generally taken little account of the differences between societies.” For recent theoretical discussions of the tension between formal and substantive conceptions of the rule of law, see Paul Craig, “Formal and Procedural Conceptions of the Rule of Law: An Analytic Framework” [1997] *Public Law* 467 and Randall Peerenboom, “Varieties of the Rule of Law: An Introduction and Provisional Conclusion” in Peerenboom (ed), *Asian Discourses of the Rule of Law* (London: Routledge, 2004), pp 1–55.

<sup>114</sup> Simon Chesterman, “An International Rule of Law?” (2008) 56 *American Journal of Comparative Law* 331.

<sup>115</sup> Rossiter (n 17), 1036–37.

<sup>116</sup> *Ibid.* 1037. Similarly, in the House of Lords’ first major post-9/11 decision, *A. v Secretary of State for the Home Department* [2004] UKHL 56 (the “first *Belmarsh* case”), Lord Hoffman held (albeit in dissent on this point) that the terrorist threat facing the United Kingdom did not amount to a threat to the life of the nation such as would permit derogation under Art 15 of the European Convention on Human Rights: “This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. ... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community” (para 96). None of the other judges argued positively that the threat was in fact an existential one. Most held either that the question of whether an emergency actually existed was a political question that was not for the courts to determine (Lord Bingham, para 29, and Lord Hope, para 116) or that based on the Strasbourg jurisprudence on emergencies, there was indeed a “public emergency threatening the life of the nation” (Lord Rodger, para 165). Lord Scott expressed reservations as to whether the “public emergency” was one that threatens the life of the nation, but was “prepared to allow the Secretary of State the benefit of the doubt on this point” (para 154).

between the state and individuals or groups – through public institutions. So despite legitimate concerns that liberal “legalism” is sometimes attacked in liberal democracies for its hegemonic control over social and political life,<sup>117</sup> one of the great achievements of liberal democracy is its ability, by and large, to subordinate violent political conflict to law and to channel political disputes and disputes about state power into public institutions designed, ideally, to resolve those issues in a manner that most accept as legitimate.

Reflecting on the rule of law before an audience in Kuala Lumpur, former British Prime Minister Tony Blair explained his reaction to an adverse ruling by the House of Lords in the *Belmarsh* case, which declared inconsistent with the Human Rights Act anti-terrorism legislation purporting to authorise the indefinite detention of foreign terrorist suspects who could not be deported:

“We had sought to say to suspected terrorists: You can leave this country freely; but if you stay in Britain, you stay locked up. We couldn’t be sure that we could successfully prosecute these people. The British public is greatly attached to the rule of law. But overwhelmingly it supported our position as a government. But the House of Lords held that these anti-terrorism laws were contrary to the Human Rights Act. I remember being absolutely furious. I could see the terrorist threat. The intelligence about it was daily. The capacity of these people to do evil was manifest. The House of Lords, I felt, seriously misjudged the threat and misunderstood the only practical way of dealing with it. Indeed, a few months later, terror struck London and over 50 innocent people died in the worst terrorist attack London ever saw. I recall pacing up and down my study at 10 Downing Street, berating the court and expostulating at the ludicrous way they sought to substitute their judgment for mine. A member of staff concurred and added: ‘They should be stopped from ruling in these cases.’ Immediately I turned round to him and said: ‘Oh no. That would be completely wrong. I profoundly disagree with them but I profoundly believe in their right to do it. I think they have made the wrong judgment. But I think it is right that they can; they are above me, not me above them.’”<sup>118</sup>

The Blair government’s decision to respect the House of Lords ruling in *Belmarsh* and amend its anti-terrorism legislation despite its profound disagreement with the House of Lords is a mark of a liberal constitutional

<sup>117</sup> See Mark Tushnet, “Critical Legal Theory” in M. P. Golding and W. A. Edmundson, *Philosophy of Law and Legal Theory* (Malden and Oxford: Blackwell 2006), pp 80–89.

<sup>118</sup> The text of Tony Blair’s 22nd Sultan Azlan Shah Law Lecture, was reprinted under the title, “Upholding the Rule of Law: A Reflection” in *The Straits Times (Singapore)* (7 Aug 2008), 27.

democracy's commitment to constitutionalism – all the more so since, legally, all the House of Lords did was to issue a declaration that s 23 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights.

The experience of constitutionalism in Malaysia and Singapore reminds us that a commitment to a substantive notion of legality is not easily given; however, once it is given, this commitment marks a transformation in the process by which political conflicts are resolved and the state's coercive powers are deployed – as the former British Prime Minister's comments suggest. So in some instances, where legal and political institutions are particularly fragile, extraordinary legal measures may be required to establish the basic conditions of stability upon which a viable legal and political order can be established. In these situations, emergency powers, if employed in moderation, can help to bring about those conditions of stability in a manner consistent with a longer term political commitment to legality. Emergency powers may well play a transitional role in the creation of a new legal order, but constraints on the use of these powers are largely political; the legal system may not have the internal resources to constrain their use. In contrast, emergency powers in stable established constitutional orders form part of a legal system committed to holding the state to account through law. For this reason, executive power unconstrained by law is unacceptable, although the means by which law constrains executive power in times of crisis remains contentious. But a liberal democracy committed to constitutionalism should, in principle, have the legal resources (underwritten by a culture of accountability) needed to limit the use of emergency powers to what is strictly necessary to preserve the constitutional order.<sup>119</sup>

### *The Social and Political Foundations of Constitutionalism*

A second important lesson to be gleaned from the experience of emergency powers in Southeast Asia concerns the social and political foundations

<sup>119</sup> Does this distinction between establishing and preserving legality allow too much latitude on the part of developing constitutional orders to abuse human rights in the name of an emergency? (I am grateful to Arun Thiruvengadam for pressing me on this point). Although I do not in this paper explore fully the implications of the distinction for aspiring constitutional orders (for further discussion, see "The Emergency Powers Paradox", above n 55), the answer to this objection becomes clear when we consider the sorts of constraints that would operate in a nascent constitutional order; in the midst of a struggle for legality, the only meaningful constraints on emergency powers would be political, not legal ones. Holding on to emergency powers longer than necessary can undermine the credibility of a government's commitment to constitutionalism, with domestic and often international political consequences.

of constitutional government. Although legal constitutionalism, in its orthodox versions, insists that law is normatively prior to the state,<sup>120</sup> aspiring constitutional orders remind us that historically and empirically this is not the case. As Thailand's experience with constitutionalism suggests, absent a social and political culture which sees constitutional law and judicial review as playing a critical role in constraining the arbitrary power of the state, the constitution is unlikely to be able to provide a serious check on emergency powers. What does this observation tell us about the nature of constitutionalism in liberal democracies?

Consider Dyzenhaus's legality model, which despite its emphasis on the role of judges, acknowledges that the rule-of-law project (as he calls it) requires the cooperation of all branches of government. Specifically, he argues that the precise institutional arrangement in an emergency is not as important as the role that the institutions play in securing compliance with law: "I have argued", explains Dyzenhaus, "that the question of how the institutions of a particular legal order attempt to bring to realisation the ideal of the rule of law is less important than that they do".<sup>121</sup> What is lacking in this argument is an account of the social and political conditions under which a constitutional order of the kind he describes can flourish. In other work, however, Dyzenhaus confronts squarely the "realist" view that seeks "to understand law purely as a matter of political and social forces".<sup>122</sup> He specifically rejects accounts which hold that law is not an "autonomous constraint on actions but a constraint which those with political power will accept or not depending on their relative strength".<sup>123</sup> Dyzenhaus argues:

"In making these moves, realism denies the worth of legal theory altogether, seeing it as an attempt to hide the facts of power, in which legal considerations are but one of a number of, and far from the most important considerations, when one is seeking to understand the constraints on the state. However, in seeking to debunk legal theory and refocus our concerns on political and social forces, realism also gives up on the aspiration of the rule of law to replace the arbitrary rule of men with something qualitatively better. Realism is an account of the dynamics of power, not an account of authority. It does not simply mount an inquiry from a different theoretical perspective."<sup>124</sup>

<sup>120</sup> See Dyzenhaus, "The Compulsion of Legality" in *Emergencies and the Limits of Legality* (n 20), 36, referring to Hans Kelsen's "Identity Thesis".

<sup>121</sup> Dyzenhaus (n 10), 233.

<sup>122</sup> Dyzenhaus (n 120), 37.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* 38.

This passage suggests that Dyzenhaus is sceptical of any account of law that seeks to diminish the normative force of law in constraining the state. But elsewhere, he qualifies his stand: “This kind of theory goes much further than a claim that legal theory cannot be divorced from a political [or] sociological understanding of the forces that shape the practice of law, a claim which I completely endorse”.<sup>125</sup>

This is an important and laudable qualification, although it does not take into account the maturity of the institutions in a particular constitutional order. We can consistently aspire to a legal order that subordinates politics to law, while recognising that, at a particular stage of state-building, the founding of a liberal-democratic constitutional order is itself a political struggle that take place both within and outside the law.<sup>126</sup> The process of creating a constitutional order, as the experience in Southeast Asia demonstrates, requires a political struggle and a cultural transformation. To the extent that this transformation takes place (and it is an open question whether it *must* in any normative or historical sense), political and social forces will fade into the background and jurisprudence can take over; yet in these forces rest the viability of the constitutional order. In this respect, Learned Hand’s wartime observation is illuminating:

“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”<sup>127</sup>

The real threat to a liberal constitutional order posed by an emergency, then, is not simply the creation of legal black holes,<sup>128</sup> but the gradual acceptance of executive power unconstrained by law and with it, the erosion of the social and political foundation of the constitution – the culture of self-restraint reflected in former Prime Minister Blair’s reaction to the *Belmarsh* case.

<sup>125</sup> *Ibid.* 37.

<sup>126</sup> This is why judges might at times act strategically in light of the social and political climate. If the timing of judicial intervention is miscalculated, the consequences for judicial independence can be dire, as the Malaysia judiciary learned in 1988 (Hor, n 101). So judges confronted with a recalcitrant executive face a political choice: remain inside the system and biding their time and indirectly lending support to the political regime, or take a principled stand and possibly even resign, thus foregoing the opportunity to resist from inside. Either choice requires a political struggle that could prevent the realisation of constitutional government.

<sup>127</sup> Irving Dillard, ed, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York: Vintage, 1959), p 144.

<sup>128</sup> See Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 *International and Comparative Law Quarterly* 1.

Although not without exception, there is a tendency in contemporary Anglo-American theories of emergency powers to focus on legal texts and legal institutions, such as the key branches of government, particularly the courts. But legal and institutional constraints are meaningful and effective only if the legal principles and the public institutions through which they are realised are accepted socially as legitimate means for constraining political power and as the basis for public discourse. Only when constitutional norms and principles command broader social legitimacy and form the basis for debates over the role of and limits on the state can the formal constitution effectively play a role in constraining state power.<sup>129</sup> The experience of emergency powers in Southeast Asia reminds us that we must not, in our understanding of constitutionalism, neglect the importance of this social and political foundation – a lesson which lends support to Mark Tushnet’s claim that formal legal constraints on state power “cannot succeed at all ... without sociology and politics at their back”.<sup>130</sup>

### *Lessons for Constitutional Theory*

I turn finally to the lessons the preceding analysis holds for the methodology of constitutional theory. In the years leading up to the enactment of the Human Rights Act 1998 in the United Kingdom and in the decade following its passage, modern constitutional theory in the United Kingdom has witnessed a renaissance. Unconstrained by debates about originalism and interpretivism that have plagued US constitutional theory,<sup>131</sup> UK constitutional theory has focussed on the appropriate role of the courts relative to parliamentary practices and traditions, as the primary check on executive power. Those who defend the legal constitution see an important role for law and judicial review in subordinating politics to the rule of law.<sup>132</sup> Those who seek to revive the political constitution see legal constitutionalism as antagonistic to the mature,

<sup>129</sup> See Tushnet (n 131).

<sup>130</sup> Tushnet (n 27), 155. See also Colm Campbell, “Law, Terror and Social Movements: The Repression-Mobilisation Nexus” in *Emergencies and the Limits of Legality* (n 20), 172–98.

<sup>131</sup> For a recent engagement with these issues, see Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: OUP, 2007). For two recent examples of attempts to move away from an exclusive focus on the courts, see: Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Jeremy Waldron, *Law and Disagreement* (Oxford: OUP, 1999) (but note Waldron’s comment on page 16 that he intends his arguments “to be heard in the British debate, not to offend American constitutional pride or sensitivity”).

<sup>132</sup> See, eg Tom R. Hickman, “In Defence of the Legal Constitution” (2005), 55 *University of Toronto Law Journal* 981; Sir John Laws, “Law and Democracy” [1995] *Public Law* 72.

sophisticated kind of civil republicanism they seek.<sup>133</sup> This is, of course, something of a caricature; recently, both sides have tried to show how law and politics are complementary. But at the very least, they disagree on which ultimately takes precedence (a debate whose pedigree in public law extends back for centuries) and in their assessment of whether the recent “judicialisation of politics” is a positive development.<sup>134</sup>

The emergency powers debate, in its preoccupation with the question of which institution – the courts or the legislature – is better positioned to check the exercise of emergency powers by the state largely tracks and draws on the larger debate in constitutional theory. And so, with a modicum of caution, the same criticisms of the former debate may be extended generally to the latter. Take, for example Adam Tomkins’s defence of the political constitution in his treatise, *Public Law*.<sup>135</sup> Tomkins argues that unlike the American understanding of separation of powers as a separation of the legislative, executive and judicial branches, the English constitution is premised on a separation of powers between the Crown and Parliament.<sup>136</sup> As such, he argues, the political constitution – “in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example Parliament)”<sup>137</sup> – plays a greater role and, he argues, should not so quickly be displaced by a more court-centred conception of public law. Tomkins argues, with reference to parliament-based mechanisms of executive accountability (such as collective and individual ministerial responsibility) that these mechanisms make “an outstanding contribution to the task of holding the Crown’s government to account” and that the political constitution is therefore “alive and well.”<sup>138</sup> We should not, he concludes, assume that “no constitutional problem is solved unless it is judicially solved, and that there is no constitutional problem that cannot be solved by the judiciary”.<sup>139</sup>

Tomkins’s book is an important contribution to a growing body of scholarship that is trying to shift constitutional theory away from a single-minded focus on the courts. His account of the political

<sup>133</sup> See, eg Adam Tomkins, *Public Law* (Oxford: OUP, 2003). See also Martin Loughlin, “Rights, Democracy, and Law” in Tom Campbell *et al.*, eds, *Sceptical Essays on Human Rights* (Oxford: OUP, 2001), pp 41–60; Martin Loughlin, *Swords and Scales* (Oxford: Hart, 2000). The idea of the “political constitution” can be traced in recent scholarship to J. A. G. Griffith’s article, “The Political Constitution” (1979) 42 *The Modern Law Review* 1.

<sup>134</sup> See Loughlin, *ibid.* 4–5.

<sup>135</sup> Note 133.

<sup>136</sup> *Ibid.* 39–54.

<sup>137</sup> *Ibid.* 18.

<sup>138</sup> *Ibid.* 169.

<sup>139</sup> *Ibid.* 210.

mechanisms of accountability is important in as much as it shows us (in similar fashion to the emergency powers theories of Ackerman, Ferejohn and Pasquino, and Scheuerman) how institutions other than the courts can play an important role in constraining executive power and emphasises (echoing Gross) the importance of a democratic ethic of political responsibility. These are important issues in constitutional theory, no doubt; but Tomkins's argument is ultimately one of *optimising* mechanisms of accountability; and a survey of constitutional orders (even limited to liberal democracies) will show that there is a range of different institutional arrangements for checking executive power. Tomkins recognises that the United Kingdom is engaged in a process of *renegotiating* the "relationship between political and legal institutions and methods of accountability".<sup>140</sup> But here it is appropriate to recall Dyzenhaus's point "that the question of how the institutions of a particular legal order attempt to bring to realisation the ideal of the rule of law is less important than that they do".<sup>141</sup>

Since the ability of law to constrain state power depends on the existence not only of laws and courts but also of social and political conditions that enable law to have that constraining role, constitutional theorists ought to pay closer attention to these conditions in their work on emergency powers and more generally. Regrettably, the legal and social science literature on constitutionalism and the rule of law reveals a profound tension between theories that take seriously constitutionalism and constitutional doctrine as normative constraints on the state and theories that take an empirical and thus "realist" approach to law, viewing constitutional constraints as thoroughly dependent on the social and political conditions that obtain in a particular society. This article suggests, ultimately, that neither of these disciplinary perspectives is fully satisfactory. The process of establishing a formal constitutional order requires a political struggle and a transformation in social, political and institutional culture; once established, a constitutional order is capable of generating a set of norms which can, with the support of an entrenched culture of legality and justification,<sup>142</sup> generate effective normative constraints on state power.<sup>143</sup>

<sup>140</sup> *Ibid.* 210–11.

<sup>141</sup> Dyzenhaus (n 121).

<sup>142</sup> According to Dyzenhaus (following Etienne Mureinik), such a culture of justification comes about when "a political order accepts that all official acts, all exercises of state power, are legal only on condition that they are justified by law, where law is understood in an expansive sense, that is, as including fundamental commitments such as those entailed by the principle of legality and respect for human rights": see "Deference, Security, and Human Rights" in Benjamin Goold and Liora Lazarus, eds, *Security and Human Rights* (Oxford: Hart, 2007), pp 125–56, 137.

<sup>143</sup> See further, n 106.

## Conclusion

In the conclusion to his recent book, *The Idea of Justice*, from which the epigraph to the article is taken, Amartya Sen urges us to avoid the “trap of parochialism” by subjecting our theories of justice to wider scrutiny:

“If the discussion of the demands of justice is confined to a particular locality – a country or even a region – there is a possible danger of ignoring or neglecting many challenging counter-arguments that might not have come up in local political debates, or been accommodated in the discourses confined to the local culture, but which are eminently worth considering, in an impartial perspective.”<sup>144</sup>

In this spirit, this essay seeks to subject Anglo-American theories of emergency powers to broader scrutiny by examining their implications for the experience of emergency powers in developing constitutional orders in Southeast Asia. What we find when we do so is that these theories, by focussing on competing institutional approaches for constraining the state’s response to an emergency, often overlook the social and political foundations of constitutionalism that give normative principles practical force.

Whether a sufficiently fine-grained – yet comprehensive – theory of emergency powers and constitutionalism is possible or desirable remains an open question. But for such a theory to be at all viable, it would have to pay closer attention to the social and political foundations of the constitutional order and to the wide variations in the social significance of formal law in different societies.<sup>145</sup> In this respect, Tushnet’s sociological approach is illuminating. Critically, however, a sociological account does not preclude a normative theory; formal law requires a particular kind of social and political culture in order to thrive. A study of the experience of emergency powers in Southeast Asia allows us to see these connections more clearly and enables us to explore them in other contexts. The modest aim of this paper is thus to invite constitutional theorists to test their theories of emergency powers as widely as possible – in both a geographical and interdisciplinary sense – to avoid the “trap of parochialism” and to better understand and fully account for the complexities involved in constraining emergency powers through law.

<sup>144</sup> Sen (n 1), 403.

<sup>145</sup> Mattei (n 107).