

TERRORISM AND THE RULE OF LAW: LEGAL THEORY IN TIMES OF CRISIS

a symposium inspired by the Gross-Dyzenhaus debate

5-6 January 2007

*Faculty of Law, National University of Singapore
Bukit Timah Campus*

Should public officials ever be permitted to act outside the law in times of crisis? Would condoning such conduct preserve or undermine the rule of law? In a provocative article in the *Yale Law Journal* in 2003, Oren Gross argues that disobedience by public officials, when faced with the possibility of catastrophic violence, should be permitted, provided that such conduct is publicly disclosed and open to the possibility of public ratification after the fact. This approach would preserve the rule of the law by isolating such conduct and subjecting it to political rather than judicial controls. David Dyzenhaus (“The State of Emergency in Legal Theory” in Victor V. Ramraj, Michael Hor, and Kent Roach, *Global Anti-Terrorism Law and Policy*, CUP, 2005; *The Constitution of Legality*, CUP, 2006) challenges this “extra-legal measures model” arguing that it would permit egregious departures from norms of legality. Dyzenhaus argues, instead, that through “experiments in institutional design” we can deal with emergencies in a way that is consistent with the rule-of-law project and which transcends a formalistic separation of powers by developing solutions that involve both the legislature and the executive.

The Gross-Dyzenhaus debate sets out two competing approaches – one that attempts to subvert the state’s emergency response to the rule of law while attempting to ensure, through the careful and sophisticated redesigning of institutions, that the legal regime does not become contaminated by exceptional legal norms; another that seeks to preserve the purity of the law by subjecting extra-legal powers to political rather than judicial checks, so as to ensure that the inevitable exercise of such powers is not legally affirmed and normalized. It is this debate that inspired a closed-door, two-day symposium, *Terrorism and the Rule of Law: Legal Theory in Times of Crisis*, at the Faculty of Law, National University of Singapore, on 5-6 January 2007. In addition to Oren Gross (Minnesota) and David Dyzenhaus (Toronto), and Victor V. Ramraj (NUS), a distinguished group of experts on legal, political, and social theory will take part in the symposium, including R. Rueban Balasubramaniam (Toronto), Colm Campbell (Ulster), Tom Campbell (CAPPE), Simon Chesterman (NYU/NUS), Johan Geertsema (NUS), Kanishka Jayasuriya (Murdoch), Nomi C. Lazar (Chicago), C.L. Lim (NUS), Terry Nardin (NUS), Kent Roach (Toronto), William E. Scheuerman (Indiana), Andrew Simester (NUS), Mark Tushnet (Harvard). The papers presented at this symposium, will be edited by Ramraj, and published in 2008.

Symposium Programme (by invitation only)

Friday, 5 January 2007

0915-0930

Welcome from the Dean

Professor Tan Cheng Han, S.C., Dean, Faculty of Law, NUS

0930-1000

Introduction: Emergencies and the Limits of Legality

Victor V. Ramraj, Faculty of Law, NUS

Session 1: Legality and Extra-Legality in Times of Crisis

Chair: *Victor V. Ramraj, Faculty of Law, NUS*

1000-1045

The Compulsion of Legality

David Dyzenhaus, Faculty of Law, University of Toronto

1045-1130

The Physics of the Exception

Oren Gross, University of Minnesota Law School

1145-1315

Lunch

Session 2: The Legal Theory of Emergencies

Chair: *Ten Chin Liew, Department of Philosophy, NUS*

1315-1400

Emergency Logic: Prudence, Morality, and the Rule of Law

Terry Nardin, Department of Political Science, NUS

1400-1445

Necessity, the 'extra-legal', and the rule of law

Andrew Simester, Faculty of Law, NUS

1445-1530

Emergency Strategies for Prescriptive Legal Positivists

Tom Campbell, Centre for Applied Philosophy and Public Ethics

1530-1545

tea break

Session 3: Constitutionalism in Times of Crisis

Chair: *Arun Thiruvengadam, Faculty of Law, NUS*

1545-1630

The Constitutional Politics of Emergency Powers

Mark Tushnet, Harvard Law School

1630-1715

Presidentialism and Emergency Government

William E. Scheuerman, Indiana University, Bloomington

1715-1800

The Ordinary Law of Emergencies and Democratic Derogation from Rights

Kent Roach, Faculty of Law, University of Toronto

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Saturday, 6 January 2007

Session 4: Politics, Governance, and Emergency Powers

Chair: *Victor V. Ramraj, Faculty of Law, NUS*

0930-1015

The Jurisdictional Politics of Emergencies

Kanishka Jayasuriya, Asia Research Centre, Murdoch University

1015-1100

Does the Duty of Responsible Governance Outrun the Rule of Law when National Security is at Stake?

R. Rueban Balasubramaniam, Centre for Ethics, University of Toronto

1100-1145

A Topography of Emergency Power

N.C. Lazar, University of Chicago

1145-1315

Lunch

Session 5: Legality and Extra-Legality at the Frontiers of Law

Chair: *Alan Tan, Faculty of Law, NUS*

1315-1400

***Inter Arma Silent Leges?* Black Hole Theories of the Laws of War**

Lim Chin Leng, Faculty of Law, NUS

1400-1445

Deny Everything: Intelligence Activities and the Rule of Law in Times of Crisis

Simon Chesterman, School of Law, NYU and Faculty of Law, NUS

1445-1500

tea break

Session 6: Social-Critical Perspectives on Emergency Powers

Chair: *Michael Hor, Faculty of Law, NUS*

1500-1545

Exceptions, Bare Life, and Colonialism

Johan Geertsema, University Scholars Programme, NUS

1545-1630

Law, Terror and Social Movements: the Repression-Mobilisation Nexus

Colm Campbell, Transitional Justice Institute, University of Ulster

1630-1730

Discussion and Conclusion