EMERGENCIES IN PUBLIC LAW: THE LEGAL POLITICS OF CONTAINMENT (CAMBRIDGE UNIVERSITY (PRESS, FORTHCOMING, 2015

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Legal and political theory debates about the question of 'exception' dominated the first ten years following September 11 2001. Central to these debates was the argument for, or against suspending certain aspects of the law in order to deal with security threats. Today, as the shock of the attacks and the response to them declined, we are no longer faced with the binary distinction between normal times and exceptional times, but with the political and legal processes entailed by emergency powers over time. The shift in focus from exceptional moments to long-term processes of normalization requires a new descriptive theory of emergencies as a dynamic field of public law. The book is a step towards such theory. Taken as a general legal and political phenomenon, it argues, emergencies are better understood not as ad hoc moments of deviance, but as dynamic and long term processes, characterized by norm production and mobilization, implicated by various response agents, and carrying long-term effects on future response environments. In these processes, threats are defined and redefined, managed and re-managed while redrawing the horizons of political possibility. After mapping the field's background theoretical traditions, the book exposes the limits of its commonplace doctrinal assumptions and their political consequences using empirical case studies. It concludes with a methodological suggestion: rather than centralized ad hoc decision making powers and mechanisms, what emergencies urgently require are advances in our knowledge about the conditions under which enduring processes of threat containment take place.

Background

The narrative of emergencies as exceptions generates tensions that we recognize well in debates about the theory and operation of emergency law. How can we, once we allow necessary broad powers for handling unexpected threatening events also control and limit them? Can law constrain officials' response to such exceptional events? Should it? Can we improve constraint by institutional design? Can we trust political imperatives for constraint? How can we make sure, given the uncertainty of their subject matter, that exceptional powers are indeed exercised only in

exceptional circumstances, when they are really necessary? When does the exercise of exceptional powers end? Can we ensure that it ends at all? What if our regularly functioning norms and institutions are already changed because of the regular use of exceptional powers?

These questions have generated in recent years massive amount of literature. Not only literature that is motivated to improve the operation of this tension-filled practice area, but also literature that challenges the narrative that underlies it - the notion that emergencies are exceptional and that they require exceptional response. Many scholars are unsatisfied with the descriptive and explanatory power of the master narrative and challenge its discrepancies. Some attack the distinction between 'normal times' and special 'emergency times'. They claim like Jean Claude Paye and like Mark Neocleous that we are living already in 'a permanent state of emergency' in which no such distinction is meaningful.[1] Some, like Bruce Ackerman, lament this situation and announce it as a constitutional failure.[2] Others like Eric Posner and Adrian Vermule, simply acknowledge it suggesting that modern times are characterized by fast and dynamic threats and crises and therefore require permanent emergency government.[3] Others, criticize the distinction between 'special powers' and 'normal powers', Oren Gross, for example, critiques 'models of accommodation' that pretend to adjust power structures to flexible necessities but actually create seepage of extraordinary law into normal law.[4] In contrast but in a critic on the same distinction, Kent Roach contests the exceptional law paradigm and places emergency powers under a regulatory model.[5] Still others challenge the distinction between high, exceptional politics and low or quotidian politics. They either point to the impact of what are seen as 'small emergencies' on the constitution,[6] to the bearing of regular doctrines of exception such as 'necessity' on our understanding of national or existential emergencies[7] or they unravel the possibility of an alternative, more democratic politics of exception.[8]

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[1] Paye, J. C. 'A Permanent State of Emergency' (November 1 2006) *Monthly Review*; Neocleous, M., *Critique of Security* (Montreal and Kingston: McGill University Press, 2008) at 67.

[2] Ackerman, B. *The Decline and Fall of the American Republic* (Cambridge, Mass.: Harvard University Press, 2010).

[3] Posner E. and Vermule A. *The Executive Unbound*: *After the Madisonian Republic* (New York: Oxford University Press, 2010).

[4] Gross, O. and Ni Aolain F., *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge, UK: Cambridge University Press, 2006).

[5] Roach, K. 'Ordinary Laws for Emergencies and Democratic Derogations from Rights'.in Ramraj, V. ed *Emergencies and the Limits of Law* (NY: Cambridge University Press, 2008) 229.

[6] Scheppele, K.L. 'Small Emergencies' (2006) 40 *Ga. L. Rev* 835.

[7] Feldman, L., The Banality of Emergency: On the Time and Space of 'Political Necessity,' in Sarat A. *Sovereignty, Emergency, Legality* (New York: Cambridge University Press, 2010) 136.

[8] Honig B., *Emergency Politics* (Princeton, NJ: Princeton University Press, 2009).

But most of these theoretical endeavors are still very much tied to an underlying distinction between normal and exceptional. The worry is that normal law will be contaminated by special laws; that powers necessary to handle threats, cannot be effectively limited; that normal times have disappeared into a constant state of exception. The dichotomy is continuously replicated in the theory of a field which experiences have long ago transcended traditional separations. Emergency law, its practices and doctrines, the institutions that regularly deal with threats, are developing constantly in every jurisdiction as well as in international and transnational legal complexes – but the theory that critiques it and evaluate its consequences replicates a static dichotomy which it cannot and does not anymore sustain.

Shifting the Question

My work frames the field of emergency powers beyond the dichotomy. I assume methodologically, that to frame a field implies first and foremost - to define the space within which the practices that constitute the field occur.[9] The practices of legal emergency management do not respond to the dichotomy between normal and exceptional but to theoretical and practical problems, questions and tensions. And so – to define the field, my work traces its recurrent problems - theoretical and practical. Each of these problems, or "problem areas" (the book identifies the practical problems of: "definitions"; "authorization"; "jurisdiction" and of "temporality") typically has a certain formulation informed by the theory of exception, and with it a set of assumptions on how it is expected to be solved. Using case analysis that display experiences of engagement with each set of "problem areas", I outline a field that is characterized - rather than by law's limits and political decision - by dynamic engagement and norm productivity, and by contestations over the terms of response to threatening events.

Moving from the theories of emergency government (part I) to its practical questions (part II) and its consequences (part III), the research provides a missing link between the traditional and still dominant category of exception with its strict dichotomies, and a new and appealing way to talk about emergencies - as processes rather than momentary events; involving a plurality of response agents rather than one centralized executive; as opportunities for norm production, and legal and institutional mobilization rather than occasions for the suspension of law and legality.

[9] Tomlins, C. Framing the Field of Law's Disciplinary Encounters: A Historical Narrative, (2000) 34:4 Law & Society Review, 911

A number of my case studies have been (or are being) published separately. In the *Asian Journal of International Law* (2014) I have written about the problem of jurisdiction in emergencies beyond sovereignty using as a case study the involvement of the Association of South East Asian Nations (ASEAN) in the management of its member state's natural disaster (Myanmar, 2008). In Austin Sarat's *Studies in Law Politics and Society* (forthcoming 2015), I provide an introduction to structures of 'emergency time' that operate beyond 'exceptional time' using the Israeli High Court of Justice 1999 'ticking bomb' decision. Also in the process of publication are two separate case studies: one revisits the constitutional problem of authorization to respond to emergencies beyond the problem of power vs. constraint using a micro-institutional comparison between response capacities in the US Executive's Office of Legal Counsel (OLC) and in the UK Parliament's Joint Committee on Human Rights (JCHR). The other, analyses the House of Lords' Belmarsh derogation decision (2004) to expand the limited prism that 'exception' allows over problems of defining emergencies, commonly and mistakenly defined as too political for precise definitions.