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Legal constraint in emergencies: Reflections on Carl Schmitt, the Covid-19 Pandemic and Singapore | Symposium on Covid-19 & Public Law

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The controversial legal theorist Carl Schmitt's challenge to the possibility of meaningful legal constraint on executive power in emergencies could not be more relevant in a world struggling to deal with Covid-19. Scrambling against time, governments around the world have declared states of emergency and exercised a swathe of broad executive powers in an effort to manage this highly infectious disease. In times like these, if Schmitt is indeed right that emergencies cannot be governed by law, we are on the cusp of (or perhaps have already entered) a post-law world – where the business of government is characterised by discretion and power instead of law.

This post will suggest that such a bleak conclusion is avoidable. Indeed, if one accepts a broader conception of what "legal constraint" means, it is possible to answer Schmitt's challenge and hold to a view that even broad discretionary powers exercised during times of emergency can be (and should be) constrained by law in a meaningful way.

In a nutshell, Schmitt argued that emergencies posing an existential threat to a state can only be dealt with through unfettered discretionary power.[1] He argued that the usual process of law is incapable of responding to such situations adequately, due to a lack of knowledge about such emergencies as well as the proper response to them. Accordingly, when the state is faced with extreme emergencies, the sovereign is justified in exercising discretionary power, devoid of legal constraints, to bring all the resources of the state to bear on the problem. On this view, the sovereign is unconstrained in its ability to exercise the power to declare extreme emergencies and to respond to them – indeed, one can identify the true sovereign of a state by observing who possesses such power – and it is meaningless to seek to constrain government authority by way of law in such circumstances.

One might wonder how all this is relevant to the Singapore government's response to the Covid-19 pandemic. The government has not declared a formal state of emergency. Further, one might have thought that there was nothing constitutionally or legally suspect about the discretionary power granted to the executive under the Infectious Diseases Act and Covid-19 (Temporary Measures) Act to control the pandemic – wide-ranging as it is – nor with the exercise of such power. Indeed, restrictions on the freedom of movement and freedom of religion are expressly permitted under the Constitution of the Republic of Singapore for reasons of public health.[2] As such, we surely are governed by law even in such times, are we not?

One ought to be wary, however, of the consequences of accepting such a formalistic account of legal constraint. Accepting such an argument as a full instantiation of the requirements of the rule of law might pose the risk of unacceptably watering down the meaning of "legal constraint". Indeed, would an unfettered discretionary authority granted to the executive really be "constrained" by law in any meaningful sense, even if the grant was made pursuant to proper legal procedures and within the limits of the Constitution? Thinking that such constraint of law is sufficient and meaningful might be rather dangerous. David Dyzenhaus suggested that limiting oneself to conceptualising legal constraint in formalistic terms might facilitate the creation of legal black holes and grey holes.[3] Legal black

holes are zones of unfettered discretion granted to the executive by the legislature through the legal process. Legal grey holes appear to subject executive power to legal constraint, but do not do so in any meaningful manner – they are really legal black holes in substance. In Dyzenhaus' view, thinking about legal constraint in such formalistic terms encourages exercises of sophistry – the creation of "rule-of-law facades",[4] with the concept of the "rule of law" becoming devoid of content.

In the wake of this discussion, it seems like Schmitt might very well have been right – that it is difficult to speak of meaningful legal constraint on executive power in times of emergencies. Candour is surely preferable to sophistry. We are left with a rather bleak picture of the future of law in a world struggling to grapple with Covid-19.

This does not necessarily have to follow, however. The problems highlighted above stem from a particular view of what "legal constraint" means: a set of *ex ante* positive legal rules which can be enforced against the executive to robustly fetter the executive's exercise of discretionary power. It is a challenge to provide such legal constraint in times of extreme emergency – indeed, one might justifiably fear that doing so may undesirably hamper the executive's ability to react swiftly and decisively to existential threats. But this is not the only possible way of conceptualising "legal constraint". Should one take the view that law serves to "direct those people subject to it and to move them to follow its directives", then one observes that the law can do so not just through authority and force, but *also* through reason.[5] Indeed, law is precisely the rule of right reason.[6]

This provides a promising way forward for thinking about legal constraint in the context of emergencies. On such a view, broad discretionary powers exercised during emergencies are not exercised in a legal vacuum, but can remain constrained by law in a meaningful sense. It may be challenging to subject such powers to the same robust fetters we have grown accustomed to equating the rule of law with, but such powers can be exercised in a manner consonant with the rule of law if they are exercised in accordance with the requirements of practical reasonableness.[7] On this view, we should demand that the exercise of such powers be publicly *justified*. Press conferences to explain *why* one is not permitted to visit other households or gather in large groups become just as important as ensuring that the rules by which such restrictions are effected have been promulgated in accordance with legal procedures. By the same token, having ambassadors on the ground to explain the importance of such rules becomes just as important as dispatching officers to enforce the rules by way of fines – doing so would encourage the rule of right reason, and can go some way to contributing to the rule of law even in such circumstances.

Should one accept such an expanded understanding of legal constraint, then emergency powers are still capable of being governed by law in a meaningful sense. This is of course not to say that legal constraints in the usual sense are unimportant. The argument does not go as far as to say that the constraint of reason alone would amount to a *full* instantiation of the rule of law. Nevertheless, conceptualising "legal constraint" in this broader sense can help overcome the dichotomy between law and discretion. And this provides a useful way forward for thinking about how legal constraint can be achieved even in extreme emergencies. Instead of being *solely* fixated with thinking about how best to impose external restraints upon executive authorities, we can *also* begin to consider how best to encourage a stronger culture of public justification – furthering the rule of law as the rule of right reason.

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[1] For a full account of Schmitt's views, see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1985).

[2] Constitution of the Republic of Singapore, arts 13(2) and 15(4).

[3] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006), 50.

[4] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006), 3

[5] Thomas Pink, "Integralism, Political Philosophy, and the State" (Public Discourse, 9 May 2020) <https://www.thepublicdiscourse.com/2020/05/63226/> accessed 22 June 2020

[6] Cicero, *On the Commonwealth and On the Laws* (James Zetzel tr, Cambridge University Press 1999) III.33. See also John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 276-281

[7] John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 281-290.