International Journal of Law in Context, 3,4 pp. 313–318 (2008) Cambridge University Press
DOI: 10.1017/S1744552307004041 Printed in the United Kingdom

The political constitution of emergency powers: a comment

Keith Ewing
School of Law, King's College London

The United Kingdom had the experience of at least five different kinds of emergency throughout the twentieth century. The first and most serious is war, though not all wars (including the wars in Iraq and Afghanistan) create or created national emergencies. Nevertheless, the world wars of 1914–1918 and 1939–1945 almost certainly did, especially in the latter case with its risk – albeit short-lived – of invasion by a foreign power. The other causes of emergency were: second, the long-term internal conflict in Northern Ireland in what seemed like a separatist armed struggle, with one community pitted against another, and against the State (1969–2007); third, short-term but large-scale industrial action, which in at least one case (1926) was thought to border on the subversive; while the fourth has been an array of natural disasters, sometimes caused by adverse weather conditions, and sometimes caused by disease; finally, and most recently, there is the threat posed by international terrorism in the wake of 9/11 and our experiences in London in July 2005. Although emergency situations can thus arise for a host of reasons, it might be argued that the foregoing list is far from complete, with a sixth category of emergency being the various economic and fiscal crises that have engulfed the country from time to time, notably in 1931, when emergency powers were taken, and again after the end of World War II, when the country was financially exhausted by the demands of conflict.

Although it would be an exaggeration to say that the United Kingdom – or parts of it – has been in a perpetual state of emergency, it would be true to say, however, that for every generation, emergency of one kind or another has been 'normal'. The emergency in World War I lasted officially until 1921, after which war-time emergency powers were replaced by the Emergency Powers Act 1920, standing legislation (not repealed and replaced until 2004) that was used twice in the 1920s, with emergency powers being in force for the best part of seven months in 1926. The emergency powers introduced in 1939 remained in force until 1945, and some of the war-time conditions remained in place for some time thereafter. The Emergency Powers Act 1920 was invoked on no fewer than nine occasions between 1945 and 1974, by governments of both parties.[1] It is, however, a feature of the use of these powers in the era since the end of World War II that – in contrast to the use of the powers in 1926 – no serious restraints were imposed on civil liberties, the use of the powers being designed principally to ensure the free movement or supply of essential services. That would not be true of the emergency powers that were taken to deal with the situation in Northern Ireland as it unfolded from 1969, nor of the powers taken to deal with the situation in the United Kingdom as a whole since 9/11. The latter responses saw far-reaching controls on various forms of activity and major modifications to criminal procedure.

These different emergency situations have tended permanently to disfigure British law, leaving not a legacy of ad hoc powers quickly removed, but creating a source of continuing powers as the state authorities moved to make permanent that which had been introduced to deal with a crisis. Not so much a permanent revolution as a permanent emergency. But whatever their nature or the time of their introduction, both ad hoc and permanent powers give rise to a number of questions about the

1 For an account, see Morris, 1986, p. 50.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press

capacity of the constitution to protect civil liberties while also responding to the circumstances of an emergency. The first question is whether the political constitution has been effective to regulate the way in which these emergencies have been met. It is, of course, difficult to know what goes on behind the scenes, in terms of the institutional or other restraints on ministers. But it remains the case that extremely wide powers were taken during both world wars, and that extremely wide powers were taken in the Emergency Powers Act 1920 and subsequently in the Civil Contingencies Act 2004 to deal with other emergencies.[2] Emergency legislation in Northern Ireland was frequently found to be in breach of the European Convention on Human Rights (ECHR), from which it was rescued only by the expedient of derogation. It would be thus be true to say that governments have *generally* got what they wanted from Parliament in times of crisis, even if they have had to make minor concessions on major points of principle.

The alacrity with which Parliament enacted the Official Secrets Act 1911 on the eve of war is well known.[3] Less well known is the story of the first of three defence of the realm bills introduced in 1914 and 1915: 'the Home Secretary [Reginald McKenna] was given leave to introduce the Bill which was read the first time, and ordered to be printed. It was then immediately read a second time, whereupon the House resolved into committee and the Bill "reported without amendment, read the third time, and passed", the entire procedure consuming no more than two columns of Hansard'.[4] If this is hardly an example of the political constitution at its best, it is also the case that governments do not get *everything* they want. Important parliamentary initiatives by Lord Robert Cecil and Lord Parmoor respectively were decisive in protecting freedom of expression and restoring trial by jury during World War I, and Parliament was a source of withering criticism of the government during the miners' lockout of 1926. Professor Tushnet also points to the impact of Parliament in relation to the *Daily Worker* during World War II, and although there has not been an emergency on the scale of world war since then, the opportunity for Parliament to raise concerns and formally to consider issues in some detail has been greatly enhanced by a number of procedural reforms made since the end of the war.

The fruits of these reforms were on display during the enactment of the Anti-terrorism, Crime and Security Act 2001, passed in the wake of 9/11. The provisions relating to the indefinite detention of suspected international terrorists proved to be extremely controversial, as the new select committees provided many more opportunities for MPs to express their concerns. According to Zander, no fewer than five parliamentary committees criticised the Bill,[5] the core provisions of which nevertheless remained intact.[6] Important concessions were, however, won from the government, concessions which helped perhaps to hasten the demise of the especially offensive measures. Thus, the government was forced to yield an amendment that the relevant provisions of the Act would expire after fifteen months, unless revived by an order of the Home Secretary, which would require parliamentary approval. The Bill was also amended so that the offending measures would cease to have effect after the expiry of five years, and that fresh primary legislation would be required if the provisions were to continue beyond that date. As it is, the decision of the House of Lords in the *A* case (on which see below) brought forward that process by just over a year. The government was also forced to yield another unprecedented move whereby a committee of privy counsellors was to conduct a review

2 The 2004 Act is comprehensive and provides for emergency powers to be taken in time of war, as well as in a wide range of other circumstances. The 1920 Act which it replaced was concerned principally with industrial action by transport workers, coal miners and workers employed in the supply of electricity and gas.

3 See Williams, 1965, for the classic account.

4 Ewing and Gearty, 2000, p. 44.

5 Zander, 2001.

6 On the role of Parliament during this affair, see Hiebert, 2005.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press

within two years and to specify which provisions of the Act were to cease to have effect unless Parliament decided otherwise.[7]

This might be read as evidence of failure of political control, in the sense that the government got its business through, enabling people to be rounded up and interned. Others, however, may see it as a success to the extent that the government was forced to make concessions that would lead inevitably to unanswerable criticism. Overall, however, the lesson would appear to be that while the government can be expected to prevail on the substance in times of crisis, there will always be a group of usually backbench MPs able to mobilise enough resistance to require important changes to the detail in order to uphold important points of principle. The second question then concerns the success or otherwise of the judicial constitution by way of contrast. So far as the courts are concerned, the tendency until recently has been for the judges to pull in behind the government, with the occasional note of dissent – most famously from Lords Shaw of Dunfermline and Atkin[8] – acting as a reminder that there are wider issues at stake than the need to deal with a short-term emergency, however pressing it might be. Until recently, the history of the United Kingdom would thus generally support Professor Tushnet's views of the courts as 'weak reeds', generally unwilling to challenge the exercise of executive power. It is true that parliamentary sovereignty makes it difficult to challenge the conferring of power on executive bodies, but this does not excuse the failure to challenge the manner of exercise of such power.

Some will contend, however, that a Rubicon was crossed in the *A* case, where the House of Lords held that indefinite detention powers introduced since 9/11 were in breach of the ECHR.[9] But this seems an exaggerated reading of the decision, for, as has been forcefully pointed out, it was reached with due deference to the judgment of the government that there was a public emergency threatening the life of the nation,[10] the United Kingdom being the only country in Europe which has been forced to derogate from the provisions of the treaty on national emergency grounds. This is despite the fact that terrorist incidents have also occurred elsewhere in Europe (notably Spain), on an even more devastating scale than in London. Nevertheless, the view expressed in the Lords is that on matters relating to national security, the courts should defer to the government, on the ground that in such circumstances the latter is 'called on to exercise a pre-eminently political judgment', Lord Bingham explaining that 'the more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision'. Although enhanced well beyond the days of *Zadig* and *Liversidge*, the role of the courts remains a residual one, namely not concerned with whether the taking of emergency powers can be justified (a political question), but with whether the use of these powers is disproportionate and discriminatory (a legal question).

What the *A* case reveals above all, however, is the inefficiency and ineffectiveness of the judicial process even when the judges are at their boldest. Inefficient, in the sense that the Act was passed at the end of 2001, and the decision of the House of Lords was not reached until the end of 2004, with a number of people all the while detained in breach of their human rights. Ineffective, in the sense that the Lords' decision did not lead to the release of any of those who had been detained in breach of their Convention rights. Indeed, what the affair revealed is that the judges were playing a game they could not win. The detained individuals remained in custody until new legislation was introduced giving the Home Secretary the power to detain them at home by way of control orders,[11] a form of de facto

7 See Bradley and Ewing, 2003, p. 628.

8 *R v. Halliday, ex parte Zadig* [1917] AC 260, and *Liversidge v. Anderson* [1942] AC 206.

9 *A v. Secretary of State for the Home Department* [2005] 2AC 68.

10 Tomkins, 2005; see also Ewing, 2005.

11 Terrorism Act 2005, s1.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press

indefinite detention that was worse for some than the indefinite detention in Belmarsh and elsewhere. Although control orders appeared not to be as intrusive as internment and although control orders are also subject to challenge in the courts, the government had already moved some paces ahead of the judges by deciding that those subject to control orders could be returned to indefinite detention in prison. This was done under immigration powers, pending the deportation of the individuals concerned to states with whom memorandums of understanding were to be concluded, the memorandums being designed to prevent the torture of the detainees once they were returned.

The legal process is doomed to fail in emergencies, partly because of the judicial perception of their role (which is hard to fault) and partly because the process is inefficient, as an instrument for the protection of liberty. The third question then is whether political controls can be made to work better, especially in a parliamentary system, to protect human rights in times of emergency (or indeed at any other time). Professor Tushnet's conclusion is that the US-style separation of powers system will work 'well enough' when different parties control the Presidency and the Congress. The Westminster system does not, of course, enjoy this facility of split electoral authority, with two branches and two mandates. Indeed it is a feature of the Westminster system (and other parliamentary systems) that the executive recruits from, and usually in practice controls, the legislature. It is also a feature of such constitutions that constitutional government is designed to lubricate rather than restrain the implementation of a popular mandate, though it is also the case that no government in the twentieth century was elected to deal with an emergency. The Parliament at the beginning of the 1914–1918 war was elected in 1910, while the Parliament at the time of World War II was elected in 1935. In terms of institutional design as well as the nature of the relationship between the executive and the legislature, however, there are thus marked differences between the Westminster and US systems which are calculated to have a bearing on the conduct of Parliament and Congress respectively.

Indeed, it will usually be the case (at least in the British system) that elections will deliver a large majority to the executive, just as it will usually be the case that the US system will deliver a political outcome with no one party in overall control. The consequence of this in a Westminster system with strong executive government is that Parliament too may be an ineffective source of restraint in times of crisis and panic. Despite the successes of backbenchers described above, this may be particularly true in an emergency, with its pressure for coalition government, which was a feature of both world wars, though this has not been a feature of less pressing emergencies. This is not to deny that political controls are better than legal controls. One reason (and indeed the principal reason) in favour of political controls relates to arguments of democratic legitimacy. That, however, is an argument that is beginning to ring hollow in a political system such as the British when only two-thirds of the electors vote and in which just over one-third of these vote for candidates representing the party which secures a significant majority over all other parties in the House of Commons. But although a weak mandate from only 22 percent of the population is better than no mandate, it is also the case that the issues of democratic legitimacy and parliamentary effectiveness overlap to present urgent questions about the institutional design of the Westminster system, at least as it is practised in the United Kingdom. The authority of Parliament (and the government it supplies), as well as the authority of the power of Parliament, would be enhanced if Parliament were seen more accurately to reflect the electoral choices of the people.

Parliamentary control can only be as effective as Parliament is powerful, and the experience of other Westminster democracies as well as other parliamentary democracies is such to suggest that neither a legitimacy crisis nor an efficiency crisis is a necessary feature of such democracies. It is thus not clear why, 'one would want to reserve some significant role for legal controls in parliamentary systems, probably a larger role than in separation-of-powers systems'.[12] The explanation for this is

12 Tushnet, 2008, p. 278.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press

presumably (and paradoxically) that the latter has political controls and forms of institutional accountability that are lacking in the former. But the first of two points in response is that there is no single model of a parliamentary system, with it being possible to build brakes into a parliamentary system equivalent, though not identical, to the brakes that we find in the US system. Although it is true that in a parliamentary system the executive will always be recruited from the legislature, it does not follow that the executive will control the legislature, as has been the practice in the United Kingdom in recent years. Systems of proportional representation may mean that the largest party has to govern with the support of another party; a directly elected second chamber (as in Australia) may mean that the government does not have control of the second chamber.

The health of the political constitution has been under close observation in recent years, though pessimistic thoughts of its imminent demise and its replacement by a legal constitution seem misplaced. It is true that much of the complex web of political structures necessary to make the political constitution work have been eroded.[13] Political party membership is in decline and political parties now provide weak controls over party leaderships; the civil service has been sidelined and is now responsible for policy 'delivery' rather than policy development; and the press has to some extent relinquished any role as independent scrutineer of government, with newspaper owners being actively courted by governments who are dependent in turn on the continuing support of the proprietors. Indeed, the distorting influence of the commercial press (nourished by the legal constitution) is one of the greatest threats to the political constitution, and also one of the most neglected. On the other hand, there is evidence that Parliament is not unwilling to use the powers at its disposal, with Cowley's work revealing the extent to which backbenchers now vote against their government,[14] and with the House of Lords claiming greater authority because of its greater legitimacy to frustrate the government's programme. There is also the feature associated with the Blair years of political opposition from within the government, as the Chancellor of the Exchequer and the people around him appeared to operate on occasion as if they were Her Majesty's Unofficial Opposition.

The case for measures to strengthen the political constitution is not based on the need to protect liberty in times of crisis, though this may be a welcome consequence of such initiatives. These measures are required to strengthen the legitimacy of the political constitution and its democratic base at a time of growing popular disengagement, which sees governments returned with the support of little more than one in five electors. Although this is not to prejudge the form that electoral reform or House of Lords reform might take, the strengthening of political institutions could lead in turn to the strengthening of their powers. Rather than select committees having the power to report on the human rights or civil liberties implications of legislation (which might then be ignored), how much more effective it would be if one or more of these committees (failing which a more legitimately composed upper house) had the power (like the Constitution Committee of the Swedish Riksdag) to veto legislation on constitutional or human rights grounds, subject then to reversal by a special majority of the House of Commons.[15] It may well be of course that in times of emergency the legislature will inevitably close ranks as a nation unites to deal with an external enemy or an internal threat. But as noted above, there are varieties of emergency, so that while it might be expected that Parliament would close ranks in the most serious cases, this is not to be assumed in all cases. And even in the most serious cases, a legislature empowered by a more representative composition is likely to ask more searching questions about the nature of the emergency and the steps required to deal with it.

13 For a good account of these, see Miliband, 1982: better at saving us from the 'perils' of socialism than from the authoritarianism of the neo-liberals.

14 Cowley, 2002.

15 See Ewing, 1996, chapter 3.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press

References

BRADLEY, A. W. and EWING, K. D. (2003) *Constitutional and Administrative Law*. Harlow: Pearson Education Limited.

COWLEY, P. (2002) *Revolts and Rebellions: Parliamentary Voting Under Blair*, London: Politicós.

EWING, K. D. (1996) 'Human Rights, Social Democracy and Constitutional Reform' in C. A. Gearty and A. Tomkins (eds), *Understanding Human Rights*. London: Mansell.

EWING, K. D. (2005) 'The Futility of the Human Rights Act – A Long Footnote' *Bracton Law Journal* 37: 41.

EWING, K. D. and GEARTY, C. A. (2000) *The Struggle for Civil Liberties*. Oxford: Oxford University Press.

HIEBERT, J. L. (2005) 'Parliamentary Review of Terrorism Measures', *Modern Law Review* 68(4): 676–80.

MILIBAND, R. (1982) *Capitalist Democracy in Britain*. Oxford: Oxford University Press.

MORRIS, G. S. (1986) *Strikes in Essential Services*. London: Mansell.

TOMKINS, A. (2005) 'Readings of *A v. Secretary of State for the Home Department*', *Public Law* 259.

TUSHNET, M. (2007) 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation. *International Journal of Law in Context* 3(4): 255–88.

WILLIAMS, D. G. T. (1965) *Not In The Public Interest*, London: Hutchison.

ZANDER, M. (2001) 'The Anti-Terrorism Bill – What Happened?' *New Law Journal* 151: 1880.

https://doi.org/10.1017/S1744552307004041 Published online by Cambridge University Press