CHAPTER 2

Law and the Concept of Emergency

Law's Role in Emergencies

The most common way of dealing with the outbreak of an emergency is through the apparatus of law. This is particularly so in contemporary liberal democratic societies, where rule of law acts as a baseline for ensuring that there is institutional coherence among the different branches of government. This initial appeal to law and legal precedent eventually gives way to specific rights derogations, which in turn lead to authorizations for the use of greater and more restrictive force or at least this is the case in severe emergencies. While each state deals with emergencies differently, all more or less follow the pattern described above and move from precedent to derogation and finally to a use of lethal force. The response initiated by the government is usually proportionate to the severity of the perceived emergency. This chapter examines the two most prevalent methods for dealing with emergency under the constraints of liberal democratic law. The first approach is called the judicial “accommodations model,” while the second approach is called the “extra-legal measures model.” Which approach one finds most compelling has a lot to do with how one views jurisprudence, the role of the state in public affairs, and one’s conception of the nature of liberal democracy overall. I focus on two well-known proponents of these popular models: David Dyzenhaus and Oren Gross. Dyzenhaus defends a version of the “accommodations model,” while Gross defends the “extra-legal measures model.” This chapter will proceed as follows. First, I will explicate the two views. Then, I will examine the role that the concept of emergency plays in each. The chapter ends with a defense of my contention that emergencies (as typically construed) do not exist. This denial includes the class of emergencies that most occupy Dyzenhaus and Gross, namely “states of emergency.” As illustrated in the first chapter, the notion of an emergency is poorly understood at the conceptual level and this leads to problems at the practical level and in policy-making. Moreover, emergencies of a scale requiring state intervention prove on closer analysis to be largely chimerical, as they do not conform to the accepted criteria for being emergencies. That is, they are almost never events that appear suddenly, that require immediate action, that pose an imminent threat, or that were wholly unforeseen. Most so-called “emergencies” are not even definitional
“emergencies” in that they do not conform to the lexical criteria for so counting. Emergencies as argued in Chapter 1, are sudden and unforeseen events with severe material consequences. They therefore require criteria that most “state emergencies” fail to exhibit. Consequently, the argument over which model best captures the exigencies of emergency is somewhat misplaced as it is being rehearsed at the wrong analytical level.

Emergencies are not catastrophes or common misfortunes and should not be confused with them; they are their own manner of event and merit distinct examination. Most of the events that we popularly consider emergencies are foreseeable and therefore fail to exhibit the characteristics required of a genuine emergency. In contemplating emergency, discussion often turns to catastrophic events, but as noted catastrophes are not emergencies in the straightforward sense that I have presented, as a genuine catastrophe cannot be administered. Catastrophes are events in which people are killed and places are destroyed haphazardly and without viable recourse. While governments and lawmakers can make provisions for mitigating such events, these are strictly speaking half-measures. No amount of planning or deliberation can forestall or elide a large-scale catastrophic event like a tsunami, earthquake, or volcanic eruption. Moreover, there is no agency in a catastrophe in that no person is responsible for the devastation save in cases like flooding where there can be space for administrative negligence. Therefore, negligence aside little can be done to stop catastrophic outcomes. Emergencies however are different. We can mitigate emergencies by preparing for and managing them constructively in a way that reduces causalities and damages. Nevertheless, we will not be successful in this goal so long as diverse events are lumped together haphazardly and described collectively as “emergencies.” Emergencies differ from each other in their specifics, but they nonetheless share distinct qualities that render them similar in important respects and we should focus on these in thinking through emergency measures. To be effective in emergency planning we first need to understand what emergencies are yet few theorists dealing with emergency events have bothered to do so preferring instead to take the issue as settled. There is no rigorous analysis of emergency and that is what this chapter aims to rectify, if only in part. By examining Gross and Dyzenhaus on emergency, I aim to aid in acquiring a better understanding of the phenomenon than either author provides alone. I also hope to create a path toward a better form of emergency management and administration by provisionally removing conceptual obstacles to such an improved understanding. I now turn to their respective models.