THE AUSTRALIAN

Emergency powers must never stifle our rights

HENRY ERGAS
Follow @HenryErgas

By **HENRY ERGAS**, COLUMNIST
11:00PM NOVEMBER 4, 2021

"He who decides on the exception is sovereign", the German polymath Carl Schmitt famously wrote, in what remains the most frequently cited sentence from his vast body of work.

The emergency powers might seem an incidental, if indispensable, element in the toolkit of government; but nothing, Schmitt argued, could better serve as the grappling hook to dictatorship than the right to decide that the normal rules no longer applied.

Arguably the most detestable scholar to secure an enduring presence at the pinnacles of legal and political philosophy, Schmitt's interest in the power to declare an emergency was scarcely academic. On the contrary, acting as the Nazis' senior legal adviser, he helped Adolf Hitler use article 48 of the Weimar constitution – which gave the republic's president the right, in emergencies, to govern by decree – as the institutional path to total control.

The liberals who had drafted the constitution believed the emergency powers were hemmed in by layers of safeguards. However, as Schmitt well understood, the emergency powers themselves could be invoked to sweep those safeguards aside.

And that, of course, is precisely what the Nazis did when an arson attack gutted the Reichstag building, which housed the German parliament, on Monday February 27, 1933, four weeks to the day after Hitler's ascension to the chancellorship. Agitating their favoured rhetoric of the

"stab in the back", the Nazis immediately declared a state of emergency, consolidating the grip on power that led to genocide and total war.

Now, no one could seriously claim that Victoria will suffer the Weimar Republic's fate. But with Victoria's Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 set to clear its final hurdles, it would be foolish to underestimate the risks emergency powers can pose.

This is, after all, legislation that grants the state's premier an effectively unchecked ability to declare a health-related emergency and, having done so, to suspend virtually every civil liberty – including the protections against arbitrary detention – for what amounts to an indefinite duration. Embodying even fewer controls over those powers' exercise than similar legislation in NSW and New Zealand, the bill's draconian provisions, which have been condemned in an open letter signed by many of Victoria's most prominent QCs, largely sideline parliament and the judiciary.

That is not only inherently undesirable; it also runs directly contrary to the legal tradition that has, for many centuries, guaranteed our freedoms – and has done so precisely by rejecting the executive's ability to claim that necessity can justify granting it untrammelled control.

Two 17th century cases involving emergency powers – the Five Knights Case and the Case of Ship Money – proved pivotal in that respect; described by Sir John Baker, one of England's greatest legal historians, as "two of the most significant cases ever decided by English courts", they acted as the "flashpoints that led to civil war". Both cases upheld Charles I's use of those powers, but it was the finding in the 1637 Ship Money case that the monarch had the right to be the "'sole judge both of the danger, and (of) when and how the same is to be prevented and avoided" that triggered the blaze.

With the first session of the Long Parliament in 1640 unleashing a torrent of abuse against a - decision that allowed the monarch to override the common law simply by determining that the country faced a dire threat, drastically limiting the royal prerogative became a central goal of the Civil War that raged from 1642 to 1651 – and then of the Glorious Revolution in 1688-89.

It was widely understood by the revolutionaries that restricting the monarch's ability to respond to contingencies came at a cost. As John Locke put it in his Second Treatise of Civil Government (1690), "Many things there are, which the law can by no means provide for, (and) many accidents may happen, wherein a strict and rigid observation of the laws may do harm." From that it followed, he said, that if "all the members of the society are to be preserved" there "must necessarily be left to the discretion of him that has the executive power in his hands" the ability to deal with crises "as the public good shall require".

But having experienced the Stuarts' repeated abuses of the prerogative, the framers of the system of government that emerged from the Civil War echoed the judgment of Sir Matthew Hale, the towering scholar of the common law who became Chief Justice of the King's Bench in 1671. "It is better", Hale had declared, "to be governed by certain laws, tho' they bring some inconvenience at some time, than under arbitrary government which may bring many inconveniences that the other doth not".

Entrenched by the Triennial Act of 1694 and the Act of Settlement of 1701, the constraints the Civil War imposed on the executive's ability to unilaterally suspend the normal processes of lawful government secured an enduring place in the British constitution, which the Australian colonies inherited in 1788. As the role of the parliamentary opposition became increasingly well defined, and as oppositions more vigorously asserted their rights of surveillance, those constraints on the emergency powers steadily tightened, withstanding even the shock of the 20th century's devastating wars.

Now, however, we seem to be moving in reverse, supposedly in response to the lessons of the pandemic. And it is undeniably true that the past two years have highlighted deficiencies in our emergency statutes.

But the first step in identifying the reforms that are required should be a public, transparent and consultative process, preferably spearheaded by the Australian Law Reform Commission, to carefully examine that experience and recommend a way forward. Moreover, safeguarding civil liberties, and ensuring that emergencies cannot be used to stifle democratic accountability and undermine the rule of law, ought to be at the heart of the review's concerns.

Hastily prepared and even more hastily enacted, the Victorian legislation does the exact opposite. To say that is not to suggest that Dan Andrews would necessarily misuse the enormous powers it vests in the premier. However, it is not from the well-meaning that the laws need to protect us; it is from scheming knaves and grasping petty tyrants – and never more so than when basic liberties are concerned.

"Vast powers can reasonably be granted to none," wrote the brilliant English political theorist Algernon Sidney in the midst of the battle about the royal prerogative, "because no man knows what anyone will prove till he be tried". Far wiser, he said, to rely on freedom under law, for "the law errs not, while the king may be mad or drunk".

Nearly four centuries later, it is hard to put it better.