

HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY. By Joan Fitzpatrick. University of Pennsylvania Press, 1994. Pp. 260. (\$39.95).

Machiavelli wrote "a prince cannot possibly exercise all those virtues for which men are called 'good.' To preserve the state, he often has to do things against his word, against charity, against humanity, against religion".¹ This statement succinctly and accurately expresses the philosophy governments resort to when their authority is threatened.

Contemporary observers of the human rights movement are fully cognizant of the fact that despite all the advances in international rights protection, we are not even remotely close to achieving a tolerable standard of conduct by states during internal strife. Public emergencies present a formidable dilemma for governments: restoring order in the country while ensuring that minimum standards of human rights are upheld.

States use the derogation clauses in the various international human rights treaties to suspend rights during times of difficulty. Indeed, some in command even go as far as to treat legitimate opposition as perils to the state. The concern of human rights monitors is heightened when nations attempt to interfere with certain "fundamental" or "non-derogable" rights.

Scholars suggest that there is agreement on a number of non-derogable rights:² 1) right to life; 2) prohibition of torture or inhuman treatment; 3) ban on slavery; and 4) interdiction of retroactive penalties for crimes. To this list, the *International Covenant on Civil and Political Rights* adds the prohibition of imprisonment for breach of contract, right to recognition as a person before the law, and freedom of thought, conscience and religion. Except perhaps at the theoretical level, there appears to be no universal acceptance of any of these.

The acknowledgment of the exceptional character of public emergencies in international human rights law and the sanctioning of derogations from established standards demands that criteria be used in permitting such derogation. Writers have identified two criteria as being central to the derogation articles in international human rights treaties:³ 1) that there be a public emergency which threatens the life of the state; and 2) that emergency measures be necessary due to the exigencies of the situation. The underlying conflict is essentially between the goal of extra-territorial (universal) protection of human rights and a nation's control over its own domestic affairs, or the principle of national sovereignty.

This raises a number of questions. What international standards are in place? How effective are they? What are the shortcomings of existing standards, treaties and monitoring regimes? What improvements are required? *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* by Joan Fitzpatrick is the latest addition to the growing collection of scholarly publications addressing these and other germane issues in the context of human rights in states of emergency.

¹ Machiavelli, *Il principe*, (1532) XVIII (Adams tr. 1977, 50-51).

² See for example, International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983); J. Oraa, *Human Rights in States of Emergency in International Law* (1992); L.C. Green, "Derogation of Human Rights in Emergency Situations" (1978) 16 Can. Y.B. Int'l. L. 92.

³ Green, *supra* note 2.

The book, published as part of the Procedural Aspects of International Law Series, begins by defining and categorizing the various kinds of emergencies. A professor of law at the University of Washington, Fitzpatrick presents three attempts at developing typologies of emergencies: 1) the scheme advanced by the Committee on the Enforcement of Human Rights Law of the International Law Association (ILA); 2) the “reference model” put forth by Nicole Questiaux and the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities; and 3) Clinton Rossiter’s study.⁴ She highlights some of the strengths and weaknesses of each of these endeavours.

The discussion of the typologies allows the reader to appreciate the difficulties inherent in formulating and preserving standards. The ILA typology is complex and multidimensional, for instance, but it is “still ‘inefficient’ from a human rights perspective in including rather mild formal emergencies while excluding some situations involving massive restrictions on fundamental rights”.⁵

The book, which evolved from a decade of research and a thesis at Oxford University on the problem of protecting human rights during states of emergency, then explores the detrimental effects of emergencies on human rights. Typical occurrences during such internal strife are *inter alia* disappearances, summary executions, blatant violations of due process, torture, extracted confessions, etc. The horror can only be fully understood by those who have experienced the suspension of rights first hand. As a child of seven, I still recall dodging authorities out of my village to the airport, and eventually out of the country, with my father during the 1975 emergency in India, when individuals affiliated with suspected anti-government political and religious groups were targeted for detention.

The author examines and thoroughly analyses these effects under three subheadings: changes in the allocation of powers within the government; what she terms invasion of “absolute rights”; and restrictions of other “fundamental rights”. Breaking down the analysis enhances a reader’s understanding of the effects.

Professor Fitzpatrick then proceeds to address the treaty-based standards enunciated in Article 4 of the *International Covenant on Civil and Political Rights*, Article 15 of the *European Convention on Human Rights and Fundamental Freedoms*, and Article 27 of the *American Convention on Human Rights*. She evaluates the provisions of each treaty under the following categories: the extent of the public emergency required; notification and proclamation requirements; question of motivation; duty to comply with other international obligations; proportionality; non-discrimination requirements; and non-derogable rights. The treaties are similar in some respects but as Professor Fitzpatrick highlights, there also are significant variations. Because of the differences between the treaties, “inherent flaws in the treaty texts, and less than universal ratification of these instruments, various groups have attempted to articulate non-treaty-based standards”.⁶ Some of the non-treaty-based efforts advanced by inter-governmental bodies (IGOs), non-governmental organizations (NGOs), scholars, activists, and national officials are also explored.

The rest of the book focuses on the practical effectiveness of monitoring systems. This is the stage where the standards and “benchmarks are applied to concrete

⁴ P. 2.

⁵ P. 20.

⁶ P. 50.

situations".⁷ Chapters 4 and 5 provide a critical analysis of the activities of all applicable UN treaty and non-treaty-based bodies and agencies. The author notes that many of the mechanisms dealt with in these chapters do not address human rights and emergencies *per se*, but are nevertheless relevant because of their impact on government behaviour and their interaction and interrelationships with bodies within and outside the UN system. The discussion is presented in an organized fashion and is therefore easy to follow.

Similarly, Professor Fitzpatrick provides an assessment and critique of the regional mechanisms established by the Organization of American States and the Council of Europe.

Chapter 7, "The Role of Non-Governmental Organizations", is very informative and allows the reader to understand another dimension of this issue. Many of the books in this area do not address this topic or do so in a superficial manner. Theodor Meron, in his *Human Rights in Internal Strife: Their International Protection*,⁸ for example, only addresses the role of the International Committee of the Red Cross. The important role that NGOs can and must play cannot be underestimated. They create the public awareness of rights violations and supply "the basic data that fuel the inter-governmental mechanisms profiled in the previous chapters".⁹

As noted by commentators, the existing standards have achieved very little success for a number of reasons, the most prominent being the following: first, emergency situations are very sensitive from the perspective of national sovereignty and nations are hesitant to impose strict standards which they themselves may have to adhere to one day; second, the lack of any effective enforcement mechanism; and finally, the philosophical basis underlying the standards may not always be universally accepted nor understood.

The author advances a number of suggestions to improve the current situation, including: 1) clarification of the severity required for an emergency; 2) stricter and more objective application of proportionality to suspensions of derogable rights; 3) identification of functionally non-derogable rights; 4) development of criteria for determining when reservations to derogation clauses or to non-derogable clauses are impermissible; and 5) greater involvement of the UN Security Council in emergency situations.¹⁰

These recommendations are a first step and will contribute toward nurturing better respect of human rights during emergencies, but they do not even come close to addressing many of the reasons for the failure of existing standards. There will still be a lack of enforcement mechanism. Even if the Security Council was to become more involved, there will be an element of selectiveness in enforcement because of the composition of the Council and the veto power enjoyed by the five permanent members. The philosophical differences — essentially centering around the Western emphasis on individualism and the greater importance attached to community rights in Eastern and Islamic societies — also need to be addressed.

Without diminishing the excellence of the book, it could also have benefited from the inclusion of a more detailed discussion of the role domestic courts can play in

⁷ P. 81.

⁸ T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications Ltd., 1987).

⁹ P. 210.

¹⁰ P. 224.

protecting rights. Independent domestic courts can play a major role in ensuring that fundamental rights are preserved during times of internal strife. In practice, unfortunately, the courts have not done their job. In Canada and the U.S., for example, the courts approved the relocation of Japanese citizens at the end of World War II, even though the war was over. Similarly, the Supreme Court of India in 1976 sustained the suspension of *habeas corpus* during the 1975 emergency. The historical record has not been positive, but the potential exists for the courts to insist on the Rule of Law. Nations will not be as receptive to granting the same powers to international authorities.

A notable feature of the book is its extensive and meticulous referencing of sources. At times the footnotes distract the reader from the body of the text, but it is definitely a benefit for those interested in further research. The inclusion of the *Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency* authored by Professor Fitzpatrick, and which was adopted by the ILA at its Brisbane conference in 1990, is an added feature.

The book is a positive contribution to the existing literature and provides a good assessment of the problems and prospects of human rights protection in states of emergency.

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