

WHAT IS AN EMERGENCY? THE LEGAL POLITICS OF DEFINING THE “UN-DEFINABLE”

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I. INTRODUCTION

The famous House of Lords *Belmarsh*¹ decision—in which eight Lords quashed the United Kingdom government’s 2001 derogation order and declared incompatible with European Convention rights Section 23 of the Anti Terrorism, Crime and Security Act (2001) (“ATCSA”), authorizing the Home Secretary to detain without trial suspected international terrorists who cannot, for legal or practical reasons, be deported from the United Kingdom—is often described as a landmark decision and characterized as a rule of law victory.²

1. *A v. Sec’y of State for the Home Department (Belmarsh)*, [2004] UKHL 56, [2005] 2 AC (HL) 68 (appeal taken from Eng.) (Hereinafter: “the *Belmarsh case*.” The case is commonly known as the *Belmarsh case* in reference to the name of a prison in South East London in which its applicants were indefinitely detained).

2. The Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644 [hereinafter *Derogation Order*]; Mary Arden, *Human Rights in the Age of Terrorism*, 121 L.Q. REV. 604, 605 (2005); see David Feldman, *Proportionality and Discrimination in Anti-Terrorist Legislation*, 64 CAMBRIDGE L.J. 271, 273 (2005) (arguing that “perhaps the most powerful judicial defense of liberty” since the 1770s, ATCSA “will long remain a benchmark in public law.”); but see Keith Ewing, *The Futility of the Human*

Two elements in the decision could properly be characterized as tensions, gaps, puzzles or outright mistakes. The first is the unaccounted-for gap in the majority judgment between a robust, substantive and serious engagement with the question of whether the derogation measures in Section 23 of the ATCSA are “strictly required by the exigencies of the situation” and the deferential position on the question of whether an emergency in the sense required in Article 15 of the convention exists. The second is the gap between the majority opinion on the latter question, deferential and submissive to government decision as it was, and that of Lord Hoffmann’s dissent on this issue, which stood out starkly on that background, as its extreme opposite.³ Here, in contrast to his position in the *Rehman* case, Lord Hoffmann utterly dismissed the basis for the government’s claim that there is a state of emergency sufficient to derogate from human rights commitments.⁴ In the following, I seek to clarify these two instabilities, or gaps in the decision, and make sense of them by placing them in the context of a fundamental problem in the field of emergency powers in public law—the problem of definitions.

In traditional emergency powers theory the problem of defining the emergency is crucial, and often devastating. It is common knowledge that emergencies, are unexpected events, and therefore essentially un-definable. They resist, as it is often claimed, precise definitions. All that can and should be defined in advance is an authorized organ, most often the executive, or “the sovereign,” who is to declare the emergency and also an organ (possibly, but not necessarily, the same one), who is to define and declare what the measures to be taken in response to the declared emergency are.

Placing the definitional problem of the concept of emergency simply into the realm of the impossible, the un-definable, is clearly unsatisfactory. It is too dichotomized and too narrow to capture the range of definitional questions that emergencies regularly require answering. Anticipation of an emergency, its detection and its declaration necessarily require a set of assumptions with respect to what is being anticipated, detected, and declared. Yet more importantly, conceptualizing the emergency as the un-definable is unhelpful because it prevents us from asking crucial questions about the nature of the process—or multiple processes—in which actual emergencies are defined, detected, and declared. It is therefore crucial, that we begin to develop more subtle perspectives on the problem of definitions in

Rights Act, 37 B. L. J. 41 (2005); K.D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, PUB. L. 668 (2008) (contesting these assessments).

3. Arden, *supra* note 2, at 611.

4. Lord Hoffmann’s position here seems to contradict his majority opinion in *Home Secretary vs. Rehman*—that the question of what constitutes the interests of national security is a matter for the executive, not the courts. *Sec’y of State for the Home Dep’t v. Rehman*, [2001] UKHL 47, [54], [2003] 1 A.C. 153 at [53-55].

emergencies. Only by taking definition problems seriously can we start to criticize such processes and their effects on positive law.

To make this claim this article proceeds in three parts. The first part highlights the contrast between the vibrant discussions about definitional problems in other areas of emergency and disaster social sciences and the neglect of the question in traditional emergency powers theory. Legal and political theorists in this field, are either too focused on an excessively limited set of conditions or, more often, too invested in institutional design that will confront all possible exigencies. A field in which definitions are constantly used cannot be satisfied with a theory that is inherently uninterested with the problem of definitions.

The second and third parts make use of the *Belmarsh* case to illustrate this claim. First, I present the legal politics of definitions as reflected in the majority decision. To address the government's position that handling emergencies is inherently so risky that it calls for executive discretion unconstrained by judicial review, the majority used the framework of Article 15 ECHR (European Convention on Human Rights). By doing so, the majority maintained a distinction between two problems: first, of defining and identifying a public emergency threatening the life of the nation, and second, of defining the measures "strictly required" to respond to the emergency.⁵ It then continued this distinction in the differing levels of scrutiny applied—deference to the executive on the two first questions and strict scrutiny on the third.⁶

After discussing the gaps and instabilities of this solution and its legal and political implications—the enshrining in positive law of a definition of emergency as inherently impossible and a legal politics of executive exclusivity over defining the emergency—this paper concentrates on the alternative politics of definition that is reflected in the decision but avoided by the court's solution. The *Belmarsh* decision itself displays a rich terrain of alternative and competing definitions of what the nature of a public emergency is; an abundance of alternative descriptions of the existing threat as an emergency; a wide range of suggested methods for identifying the scope and intensity of threats; alternative claims regarding the proper process, procedures and standards for identifying threats; alternative suggestions regarding the persons, institutions and locations that are to be involved in such process, the conditions under which the process is to take place, and the time and space available for contestation. A whole world of

5. Article 15 (1) of the ECHR reads: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law," Council of Europe, European Convention of Human Rights art. 15, Nov. 4, 1950.

6. Arden, *supra* note 2, at 612.

resources available to confront the different problems of defining emergencies is hidden, unaccounted for, in the court's solution to the problem of emergencies as the "un-definable."

II. EMERGENCIES AND THE PROBLEM OF THE UN-DEFINABLE

A. Theorizing Definitions

"What does your family think about these methane plumes under the town?"⁷

My dad thinks it's a disaster. He goes on and on about his business losing money and the government doing not much to help . . . Mom? She thinks it's a disaster but not like dad does. She thinks we could all end up dead or something of one of those plumes exploding . . . [and you?] I don't know. It seems to me like a flood or earthquake like in San Francisco is a disaster . . . I did say yesterday or sometime that if my fiancé moved because of the gases, it would be a big disaster. I don't have a car right now.⁸

The quote above of a nineteen-year-old from a small town contaminated by methane plumes, was included by Steve Kroll-Smith and Valerie J. Gunter in a collection of essays titled "*What Is a Disaster?*," published in 1998.⁹ The essays in the book—by leading disaster scientists in different fields (sociology, geography, risk studies, environmental studies, anthropology, system studies, and public administration)—all deal with the problem of defining disasters, catastrophes, and emergencies.¹⁰ Some of the

7. Steve Kroll-Smith & Valerie J. Gunter, *Legislators, Interpreters and Disasters: The Importance of How as Well as What is a Disaster*, in *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION* 160, 165 (Enrico L. Quarantelli ed., 1998).

8. *Id.* This answer was given by a young man living in a Wyoming town contaminated by methane plumes expanding under commercial and residential properties.

9. *Id.*

10. Note that the focus of the book is not mainly on the term "emergency" but on the term "disaster." In disaster studies the question of what constitutes an "emergency" is somewhat secondary because an emergency is seen as one stage of the onset of disasters. See, e.g., *CTRS. FOR DISEASE CONTROL & PREVENTION, CRISIS AND EMERGENCY RISK COMMUNICATION* (2002), http://www.orau.gov/cdcynergy/erc/CERC%20Course%20Materials/CERC_Book.pdf ("What do emergencies, disasters, and crises have in common? Simply, that something bad has happened or is happening. When something bad and/or unexpected happens, it may be called an emergency, a disaster, or a crisis depending on the magnitude of the event and the current phase of the event."). The question of definitions in this field regards a set of concepts (and the relation between them), which appear to allow multiple definitions. See generally B. WAYNE BLANCHARD, *GUIDE TO EMERGENCY MGMT. AND RELATED TERMS, DEFINITIONS, CONCEPTS, ACRONYMS, ORG., PROGRAMS, GUIDANCE, EXECUTIVE ORDERS & LEGIS.: A TUTORIAL ON EMERGENCY MGMT., BROADLY DEFINED, PAST & PRESENT* 275-99, 300-89 (2007), <https://training.fema.gov/hiedu/docs/terms%20and%20definitions/terms%20and%20>

contributions presented sophisticated attempts to define the concepts.¹¹ Others are more interested in defining the problem of defining the concepts.¹² The discussion itself was motivated by a sense that the field of disaster studies is in need of an infrastructure and scholarly apparatus by way of explicit models, theories, and hypotheses, all of which require conceptual engagement.¹³

One major pressing discrepancy was between those who assume that disasters are physical happening out there and others who see disaster as fundamentally a social construction. Another was the question of the breadth

definitions.pdf. This is an extraordinary resource for definitions and an annotated history of emergency management terms where instead of narrowing the term "disaster" to one definition, the guide contains definitions for "disaster," and "emergency" spanning over 1366 pages and including 120 pages of references to sources from which the definitions were collected.

11. Some of these definitions are working definitions with criteria such as types of hazards sources; time of preparation; duration of emergency; magnitude of impact (including in terms of territory, population, ecosystem damage, losses, political, technological, economic aftermath); time and resources needed to recovery. See, e.g., Gary A. Kreps, *Disasters as Systemic Events and Social Catalysts*, in *What Is a Disaster?*, 31–55. Others are more theoretical. Wolf R. Dombrowsky, *Again and Again: Is a Disaster What We Call a "Disaster"?*, in *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION 19* (E.L. Quarantelli ed., 1998) ("an empirical falsification of human action, as a proof of the correctness of human insights into both nature and culture"); Russell R. Dynes, *Coming To Terms with Community Disaster*, in *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION 109, 113* (E.L. Quarantelli ed., 1998) ("a normatively defined occasion in a community in which extraordinary efforts are taken to protect and benefit some social resource whose existence is perceived as threatened"); Claude Gilbert, *Studying Disaster: Changes in the Main Conceptual Tools*, in *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION 11, 17* (E.L. Quarantelli ed., 1998) ("the loss of key standpoints in common sense, and difficulty of understanding reality through ordinary mental frameworks"); Boris Porfieriev, *Issues in the Definition and Delineation of Disasters and Disaster Areas*, in *What Is a Disaster?*, ("a state/condition destabilizing the social system that manifests itself in a malfunctioning or disruption of connections and communications between its elements or social units . . . ; partial or total destruction/demolition . . . making it necessary to take extraordinary or emergency countermeasures to establish stability"); Uriel Rosenthal, *Future Disasters, Future Definitions*, in *What Is a Disaster?*, *supra* note 6, at 146–59 ("an occasion with potentially elaborate network of "causes" rooted in the past, with a similarly complex and far reaching constellation of "consequences" that are contemporary, and with "ripple effects" that proceed forward in time"); Anthony Oliver Smith, *Global Changes and the Definition of Disaster*, in *What Is a Disaster?*, *supra* note 6, at 177–94

a process/event involving the combination of a potentially destructive agent from the natural, modified or constructed environment and a population in a social and economically produced condition of vulnerability resulting in a perceived disruption of the customary relative satisfactions of individual and social needs for physical survival, social order and meaning, acknowledging the interaction and mutual construction of society and environment and situating disaster in a context of socially produced vulnerabilities.

12. Most are interested in what Enrico Quarantelli termed "the question behind the question," with the preoccupations and paradigms that shape how disasters are approached. See Enrico L. Quarantelli, *What is a Disaster? An Agent Specific or an All Disaster Spectrum Approach to Socio-behavioral Aspects of Earthquakes*, in *SOCIAL AND ECONOMIC ASPECTS OF EARTHQUAKES 456* (Barclay Jones & Miha Tomazviev eds., 1982) [hereinafter EARTHQUAKES].

13. E.L. Quarantelli, *Introduction: The Basic Question, Its Importance, and How It Is Addressed in this Volume*, in *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION 1, 2–3* (E.L. Quarantelli ed., 1998).

of the referent—should it include conflict situations such as “war, imprisonment in concentration camps, terrorist attacks, riots, civil disturbances hostage taking, etc.?”¹⁴ Enrico Quarantelli, one of the pioneers of the field of disaster sociology explained, “unless we clarify and obtain minimum consensus on the defining features per se, we will continue to talk past one another on the characteristics, conditions and consequences of disasters.”¹⁵ In more concrete historical terms, he poses the following questions: Would all of us agree that the conflict in Somalia and in Bosnia is a disaster? Is the AIDS epidemic a disaster? Computer and network failures? Large scale food and drink poisoning and contamination?¹⁶

An important thread in the discussions was the sense of a dynamic and historical development in the attempts to define disaster—from a war approach focused on an outside agent’s action launched against the community to a focus on vulnerability hazards and social risks, centering on human relations within communities.¹⁷ Another was the danger of “missing agendas”—voices and issues that are hidden masked, obfuscated, and

14. *Id.* at 3.

15. *Id.* at 4.

16. *Id.* at 3.

17. In his 2005 Report to the General Assembly on International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, the United Nations Secretary-General criticized the emphasis on “natural” in the term “. . . as it conveys the mistaken assumption that disasters occurring as a result of natural hazards are wholly ‘natural’ and therefore inevitable and outside human control. Instead, it is widely recognized that such disasters are the result of the way individuals and societies relate to threats originating from natural hazards.” United Nations Secretary-General, *International Cooperation on Humanitarian Assistance in the Field of Natural Disaster, From Relief to Development*, ¶ 1, U.N. Doc. A/60/227 (Aug. 12, 2005); see Gilbert, *supra* note 11 (discussing a historical account of this move). This change is also reflected in the field of International Disaster Law and Policy. This shift is today at the center of an emerging international understanding of the term “disaster” as expressed by the World Conference on Disaster Reduction (Hyogo Framework)—a shift from a focus on the *event*, narrowly or broadly defined, to focus on the *risk*, which is even broader since it includes all possible vulnerabilities to disaster events. ReliefWeb Project, GLOSSARY OF HUMANITARIAN TERMS 19 (2008), http://reliefweb.int/sites/reliefweb.int/files/resources/4F99A3C28EC37D0EC12574A4002E89B4-reliefweb_aug2008.pdf (“The magnitude of potential disaster losses, in lives, livelihoods and assets, which could occur to a particular community or group, arising from their exposure to possible future hazard events and their vulnerability to these hazards.”).

The onset of “disasters” are, accordingly, best viewed as a function of exposure to risk. The difference between an earthquake in the middle of the ocean and one in the proximity of human populations is thus one of difference in risk. Viewed in such terms disaster relief assistance is also a function of risk reduction and management.

Arnold Pronto, *Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission*, 15 ILSA J. INT’L & COMP. L. 449, 453 (2009). By implication, the commission asserts that the turn to “risk” necessitates “imaginative thinking as regards to the role of law in this process.” *Id.* In other words, there is a need to articulate not only conservative disaster management models but more innovative risk management models. *Id.*

silenced.¹⁸ Many of the essays point to large and pervasive features of economy, labor, gender, and status that are hidden and placed in the shadows by mainstream ideas of political economy.¹⁹

These concerns lead to a call not to lose sight, in defining disaster, of the faces and voices in communities of risk:

Letting those in hazard speak for and of themselves, is one of the few possibilities for keeping the faces and pain in the foreground of interpretation and response . . . to listen to, value, and try to understand the plight and experience of ordinary people in everyday settings, and the victims of disaster, presupposes a concern with who they are and where their experience takes place. To focus on their words is to recognize that these are the only way to recover experience in other places and times. To pay close attention to what they say, their story and concerns, gives them direct entry into the concepts and discussions of social and disaster research.²⁰

Hewitt warns that the agendas of the professional settings - increasingly global, increasingly set by states and international organizations, and increasingly machine-mediated - cause disaster scientists to forget that²¹

[E]ven the most downtrodden and impoverished persons . . . have huge untapped abilities, as well as a capacity to survive where many of those who govern or study them would not. That applies to individuals, families and, outside the most atomized of Western Social settings, in communities and cultures. If people stop being active, or are prevented from developing and acting according to the capabilities and values appropriate to their contexts, then things indeed fall apart.²²

He is concerned that the “question behind the question” of definitions is overwhelmingly biased in favor of market agendas.²³ The issue is how we should “characterize disaster as a social problem to centralized organizations and professional management . . . as though we have been asked to imagine

18. Kenneth Hewitt, *Excluded Perspectives in the Social Construction of Disaster, in WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION* 75, 85, 88–89 (E.L. Quarantelli ed., 1998).

19. *See id.*; *see generally* INTERPRETATIONS OF CALAMITY: FROM THE VIEWPOINT OF HUMAN ECOLOGY (Kenneth Hewitt ed., 1983); *see generally* Betsy Hartmann & James K. Boyce, A QUIET VIOLENCE: VIEW FROM A BANGLADESH VILLAGE, (Zed Books Ltd 1998) (1983); *see generally* MICHAEL J. WATT, SILENT VIOLENCE: FOOD, FAMINE, AND PEASANTRY IN NORTH NIGERIA (1983).

20. Hewitt, *supra* note 18, at 87.

21. *Id.* at 88.

22. *Id.*

23. *Id.*

we sit at the control panel or the board where impersonal systems are administered, and conditions require a strategic vision and interventionist mission."²⁴ This directs all the discussion to a rather limited sense of the social content and the problematic of a disaster.

This concern is similar to the one behind Kroll-Smith and Gunter's essay from which the opening quotation of this part was taken.²⁵ They are concerned with sociologists' attempts to "legislate definitions," formulating ideas about society independent of the meanings, hopes, wishes, or beliefs of ordinary people: "in classical sociology," they complain, "legislators, their ideas, and an occasional third-party client, are all that is required to know something important about the world."²⁶ They stress the necessity of dissensus and the limitation of the legislative voice: "imagine for a moment that disaster is a large pitch black wall in a room with no light."²⁷ Legislative definitions are flashlights pointed at the wall, illuminating a small but important circle of what there is to see, and thus know, about disaster.²⁸ Defining the problem of defining disaster using the authority of a legislative voice, they warn, assures each definition is constructed in the absence of local, personal, subjective experiences of disaster, "as if sociology and society are two separate enterprises."²⁹ That is how the quote above fits in the argument. For the young man who lives with his family "atop methane plumes,"³⁰ disaster is a complex concept, "expressing generational and gender cleavages and also serving as a metaphor to communicate his strong feelings about his fiancé's possible relocation at a time when he does not have a car."³¹ The gap between legislated definitions of disaster and the situated, local definitions of a young man and his family living under threat illustrates, for Kroll-Smith and Gunter, the limitations of the top down, legislative approach: "Truth stops at the border of legislated definitions."³² They argue for a need to complement the voice of a legislator with the voice of an interpreter and to open the question of "what is a disaster" to the concerns of the "how" type—how people define and respond to disasters.³³ Shared, collective definitions are developed through an interpretative and

24. *Id.*

25. See Kroll-Smith & Gunter, *supra* note 7, at 165.

26. *Id.* at 162.

27. *Id.* at 164.

28. *Id.*

29. *Id.*

30. Kroll-Smith & Gunter, *supra* note 7, at 165.

31. *Id.*

32. *Id.* at 166.

33. *Id.* at 167.

negotiated process.³⁴ It is these processes that one might scrutinize in order to ask meaningful questions about effective response.

B. *Legal and Political Theory—At the “Dark Age” of Definitions*

Strikingly, while disaster scientists are so deeply worried about the question of what a disaster is—what makes it a unique phenomenon to be studied and generalized upon, and, as seen, what makes the question itself important—legal theorists seem almost completely uninterested with this question. They seem content in assuming that emergencies in public law are defined by their exceptionality, by the fact that they raise occasion for the use of special and exceptional powers. They are clearly much more interested in maintaining the flexibility of legal institutions—laws, political branches, administrative agencies, and officials—to deal with the unexpected. It is remarkable that in this field, the emergency comes already defined as the chaotic agent, which these agencies must be able to, or fail to handle.

1. Example No. 1: Carl Schmitt

An extreme but paradigmatic example of this theorizing is to be found in Carl Schmitt’s account of the problem of liberal emergencies.³⁵ Right after defining the sovereign as “he who decides on the exception,”³⁶ Schmitt starts *Political Theology* with a terminological account of borderline concepts³⁷: “a borderline concept is not a vague concept but one pertaining to the outermost sphere.”³⁸ The exception, he tells us, is a general concept in the theory of the state—it does not apply to any emergency decree or state of siege.³⁹ So, we learn from Schmitt, at the center of observation is not just any emergency, but a very specific one. It is that special kind, “which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like.”⁴⁰ It is not just an emergency situation, but also one that “cannot be circumscribed

34. *Id.*

35. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Mass. Inst. Tech. 1985) (1922), <https://idepolitik.files.wordpress.com/2010/10/schmitt-political-theology.pdf>.

36. *Id.*

37. *See id.*

38. *Id.*

39. *Id.*

40. SCHMITT, *supra* note 35, at 6.

factually and made to conform to a preformed law."⁴¹ It is the ultimate, radical other—"the exception."⁴²

This is a deliberately narrow and circular concept on which Schmitt focuses our attention. The exception is not just rare circumstance; it is exactly that which cannot be defined. If we read Schmitt's famous quote on the paradox of emergencies as a descriptive definition, it reveals what kind of condition he is interested in.⁴³ An extreme emergency is a condition in which "the details cannot be anticipated, nor can one spell out what may take place in such a case . . ."⁴⁴ It is a case, in which "the precondition as well as the content of jurisdictional competence . . . must necessarily be unlimited."⁴⁵ A case in which one can only constitutionally know who can act. Ultimately, an extreme emergency is that which the sovereign decides it is. An extreme emergency is a condition of such extremity that calls for a sovereign, extra-legal decision.⁴⁶ It is a condition that only a sovereign can solve because the sovereign can act against the law to declare the extreme threat and how it should be solved.⁴⁷ We can indeed know the features or the conditions under observation. An extreme emergency is an exception which is not simply surprising and unexpected, but un-expectable, un-definable, critical, and one for which treatment is impossible to spell out. For which, competence has not been anticipated,⁴⁸ for which the legal system fails to answer the question of competence.⁴⁹

Schmitt is interested with this narrow, liminal, borderline phenomenon because it is for him, essentially connected to the concept and the ideal of "the political" and, by extension, the concept of sovereignty.⁵⁰ The decision on the exception is for Schmitt—the decision on the distinction between friend and enemy and the conditions under which such decision is possible—also makes "the political" possible. He is drawn to the liminal and, exceptional, because that which is boring, repetitious, or general has no political meaning without the passionate attention that exception requires.⁵¹ So, the definition of emergency as an exceptional un-definable is used by Schmitt for the sake of defining and recognizing the importance of a third

41. *Id.*

42. *See id.* at 38.

43. *Id.* at 6.

44. *Id.*

45. SCHMITT, *supra* note 35, at 7.

46. *Id.* at 6.

47. *Id.* at 7.

48. *Id.* at 6-7.

49. *Id.* at 11.

50. SCHMITT, *supra* note 35, at 17-18.

51. *Id.* at 15.

concept—that of sovereignty. In defining sovereignty by way of the exception, what is solved, for Schmitt, is the problem of the political—the problem of connecting actual power with the legally highest power, like the power to decide on what is, by definition, unknowable.⁵² But the upshot is that Schmitt is interested only in a very narrowly defined phenomenon—that which is, in effect, un-definable. It is therefore interesting to ask why other theorists who are less skeptical of liberal law and liberal political institutions are also drawn to extremely narrow definitions of emergency.

2. Example No. 2: Oren Gross and Fionnuala Ní Aoláin

A more typical example is Oren Gross and Fionnuala Ní Aoláin, leading contemporary legal scholars of emergency powers whose book, *Law in Times of Crisis*, is probably the most comprehensive attempt to present contemporary emergency measures and the problems they raise. Gross and Ní Aoláin start their book by providing some definitional features for the phenomena they are studying. First, they limit the scope of their research to “violent crisis” and emergencies, by which they mean “such events as war and armed conflicts, rebellions and terrorist attacks, as distinguished from economic crisis and natural disasters.”⁵³ Maintaining such a distinction between different categories of crisis may not be so clear-cut because violent emergencies may lead to the use of emergency powers that are then extended in the context of emergencies of an economic nature.⁵⁴ They maintain the distinction, arguing that violent conflict “often requires the executive branch of government to act without the benefit of consultation with other institutions and other branches of government and economic crises may allow for longer response periods enabling a more sustained inter-branch action.”⁵⁵

According to Gross and Ní Aoláin, the fact that it is sometimes hard to tell between different types of emergencies, at least with regard to describing the measures taken to handle them, is part of the bigger problem of definitions in this field.⁵⁶ While there is a clear need to define the situations

52. *Id.* at 17–18.

53. OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 4 (2006), GROSS and NÍ AOLÁIN cite to such legal resources as *e.g.*, U.N., Econ. & Soc. Council, Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities on Its Thirty-Fifth Session, U.N. Doc. E/CN.4/Sub.2/15 (1982); S.R. CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY* 15 (London Pinter Publishers 1989); CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 6 (Princeton Univ. Press 1979).

54. GROSS & NÍ AOLÁIN, *supra* note 53, at 5.

55. *Id.*

56. *Id.*

in which emergency powers may be invoked, because of the vast scope of the powers that they call for, defining what constitutes a state of emergency is not an easy task.⁵⁷ The term emergency, "is by its nature an elastic concept which may defy precise definition."⁵⁸ They stress the reliability of this claim by quoting the International Law Association suggesting:

[I]t is neither desirable, nor possible to stipulate in *abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking into account the overriding concern for continuance of a democratic society.⁵⁹

They also refer to the definition of "public emergencies" under Article 15 of the European Convention to show that the terms used are "inherently open-ended and manipulable."⁶⁰ Finally, they refer to Alexander Hamilton's famous assertion that "it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."⁶¹ Since the circumstances that endanger the safety of nations are infinite, Hamilton concluded, "no constitutional shackles can wisely be imposed on the power to which the care of it is committed."⁶² From these, the authors do not learn that emergency measures must indeed be "unshackled," but that it is especially important to ask:

[W]ho determines that an emergency exists? Who may exercise emergency powers when such circumstances materialize and what might those powers be? What legal, political, and social controls are there on the exercise of such powers? Who determines when and how the emergency is over and what the legal effects of such determinations are?⁶³

In other words, for Gross and Ní Aoláin, the problem of definitions in emergency is clear. It is that we cannot precisely define them, that they defy definitions, that they are too elastic to be captured by a clear definition.⁶⁴

57. *Id.*

58. *Id.*

59. GROSS & NÍ AOLÁIN, *supra* note 53, at 5; see also JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY INT'L LAW 31 (1992) (quoting the ILA Paris Report of 1984).

60. GROSS & NÍ AOLÁIN, *supra* note 53, at 6.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 5.

Since what is at stake is the tendency of emergency measures to expand over legitimate rule and become permanent, it is particularly important to ask what, if any, are the available, realistic controls. Thus the fact of un-definability is assumed and becomes a reason to inquire how best to manage control over such uncontrollable phenomenon.

Without questioning the motivation of this vast scholarly work, this discussion features a typically simplistic account of "the problem of definitions in emergency powers."⁶⁵ Defining emergencies as un-definable already suggests a particular set of questions about response. If emergencies are inherently un-definable, we already in advance, before hearing the case, question the value of any discussion about their definitions. This inherent and assumed uncertainty at once defines an empirical and practical dilemma and excuses, and often plainly justifies, the failure to control. Moreover, describing the problem of defining the emergency in terms of the un-definable holds with it another tacit, unexamined assumption—that normal conditions are definable, supposedly predictable, managed, stable, and the basis for productive society and productive norm development.⁶⁶ Emergency, as a category inherently un-definable, is understood on the background of an unexamined, assumed normality with its correct, or at least ordered, definable categories.

3. Example No. 3: Bhagat Singh

A good example for this fallacy can be seen in Gross and Ní Aoláin's support for their claim that emergencies "defy precise definitions."⁶⁷ Although a few paragraphs above the authors promised that they would not focus in the book on authoritarian regimes because they "are not faced with the tragic choices that violent emergencies present to democracies,"⁶⁸ they specifically quote colonial and post-colonial judicial authorities for their claim that emergencies defy definitions.⁶⁹ The colonial example illustrates the emptiness and manipulability of this strong assumption.

To substantiate their prognosis that emergencies are hard to define, Gross and Ní Aoláin cite to the case of *Bhagat Singh v. The King Emperor*.⁷⁰ The Appellant in this case was an Indian nationalist who was convicted in

65. GROSS & NÍ AOLÁIN, *supra* note 53, at 5.

66. Gross and Ní Aoláin identify this fallacy as the "assumption of separation" (*Id.* at 12). Unfortunately, as seen, they too commit to it.

67. *Id.* at 5.

68. *Id.* at 3.

69. *Id.* at 5.

70. *Bhagat Singh v. King Emperor*, (1931) 58 IA 169, PC, <http://indiankanoon.org/doc/617286/?type=print>. The other case is from post-colonial Malaysia: *Ningkan v. Malaysia*, AC 379, 390 (1970) (appeal taken from Malay. decided in the Privy Council).

October 1930 by a special tribunal constituted by the Governor General's emergency powers according to Section 72 of the Government of India Act (1915) for killing a British police officer.⁷¹ After he was convicted and sentenced to death by hanging, Singh appealed to the Privy Council, where he argued against the authority of the tribunal on the basis of there being no emergency while the ordinance was promulgated.⁷²

The court dismissed the argument maintaining that it is rather impossible to define what "an emergency" is:

The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that that someone must be the Governor General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor General. It is he alone who can promulgate the ordinance.⁷³

By that argument, it is quite clear—it was the court—not the emergency measure itself, that stripped any rule-of-law significance from procedural controls in the legislation. According to Section 72 of the Government of India Act, 1915, the Governor General may, in:

[C]ases of emergency, make and promulgate ordinances for the peace and good governments of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature.⁷⁴

71. *Baghat Singh*, 58 IA at 169.

72. *Id.*

73. *Id.*

74. Gov't of India Act, 1915, No. 72, Acts of Parliament, 1915, https://archive.org/details/indianconstitu00muke_djvu.txt.

[B]ut the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and may be controlled or superseded by any such Act.

The court interpreted emergency in the Act as a vague, un-definable term.⁷⁵ If the emergency “does not permit of any exact definition,” it has to be judged by someone.⁷⁶ “[T]hat someone must be the Governor General and he alone.”⁷⁷ Therefore, the plaintiff’s contention that the conditions for the Governor to promulgate the ordinance according to section 72 did not exist “is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it.”⁷⁸

Can we not imagine a different set of assumptions rising from the legislation? Obviously, the plaintiffs did. They built their argument on the circumstances under which the ordinance was promulgated. The problem here was not that the emergency was impossible to define, but that the Privy Council defined it as imprecise purely in order to reject an argument about its features and apply the doctrine that it is the Governor General who alone must judge.⁷⁹ Un-definable emergencies in this case serve to hide the oppressive face of the regular political and legal context in which the emergency is invoked. It is thus puzzling that this case is used in reference to the un-definability of the concept of emergency by scholars such as Gross and Ní Aoláin, who are especially concerned about its manipulability.

4. Example No. 4: Hamilton’s Exigencies

Moving from this colonial background to which Gross and Ní Aoláin relate their assumption that emergencies essentially defy precise definition to the context of republican foundation, the authors refer us to Alexander Hamilton’s famous quote that “it is impossible to foresee or to define the extent and the variety of national exigency and the corresponding extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are indefinite.”⁸⁰ However, the context of Hamilton’s statement is important to understanding its significance. The context is constitutional design and, more specifically, “the

75. *Baghat Singh*, 58 IA at 169.

76. *Id.*

77. *Id.*

78. *Id.*

It was next said that the ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor General is also the judge of that. The power given by Section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.

79. *Id.*

80. GROSS & NÍ AOLÁIN, *supra* note 53, at 6; *see also* THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

necessity of a Constitution . . . to the preservation of the Union."⁸¹ How should the Union be designed to achieve its preservation?

Hamilton divides the inquiry to three branches: "the objects to be provided for by the federal government, the amount of power necessary to the accomplishment of these objects, and the persons upon whom that power ought to operate."⁸² First he gives the purposes, or objects, to be answered by the Union. They are:

1. [T]he common defense of the members;
2. [T]he preservation of the public peace as well against internal convulsions as external attacks;
3. [T]he regulation of commerce with other nations and between the States; [and]
4. [T]he superintendence of our intercourse, political and commercial, with foreign countries.⁸³

The powers essential to their achievement are then described. Hamilton tells us that for the common defense these are, "to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support," and these powers "ought to exist without limitation."⁸⁴ Why? Here comes the often-quoted maxim:

[I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.⁸⁵

And Hamilton refers to this fact as simply:

[O]ne of those truths which, to a correct and unprejudiced mind carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rest upon axioms as simple as they are universal; the means ought to be

81. THE FEDERALIST NO. 23, *supra* note 80, at 120.

82. *Id.* at 121.

83. *Id.*

84. *Id.*

85. *Id.*

proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.⁸⁶

At the moment that it is decided that the government is, “intrusted with the care of the common defense”⁸⁷ what follows is that it must have all the powers needed “to complete execution of its trust.”⁸⁸ Hence, since there is no limit to exigencies, there can be no limit to the authority which is “to provide for the defense and protection of the community, in any matter essential to the formation, direction, or support of the National Forces.”⁸⁹ This principle of unlimited authority is exposed as “fully recognized,”⁹⁰ says Hamilton, in the fact that “Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations.”⁹¹

So, we learn that Hamilton is referring to “exigencies” as unlimited in the context of Congress’ unlimited discretion to provide for what was defined already as the first objective of the Union—the common defense of its members.⁹² If there is an object, common defense, then the means to achieve it must be proportioned to it; if Congress is to be entrusted with such objective, it must have the powers to achieve it. Hamilton defines here not the emergency, (as un-definable) but the Union as such a body that must attend to all imagined exigencies.⁹³ Hamilton is clearly interested in the nature of such a new organ. Mainly, that it works according to the most essential truths of nature and that it must be flexible enough to handle all future threats.⁹⁴ He is clearly not interested in this context in defining the nature and the scope of such threats and it is consequently misleading to refer to his oft-quoted maxim as providing support for emergency’s un-definability.

5. Example No. 5: Clinton Rossiter

Unlike Hamilton, for whom exigencies are exactly this broad notion of circumstances with no temporal limit, Clinton Rossiter provides a definition that, just like Gross and Ní Aoláin’s, is temporally bounded. In a “time of

86. THE FEDERALIST NO. 23, *supra* note 80, at 121.

87. *Id.*

88. *Id.* at 122.

89. *Id.*

90. *Id.*

91. THE FEDERALIST NO. 23, *supra* note 80, at 122.

92. *Id.*

93. *Id.* at 122–23.

94. *Id.* at 124.

crisis" one should find "crisis government," which means, "a strong and arbitrary government."⁹⁵ Just like Gross and Ní Aoláin and Hamilton, Rossiter is not interested in what crisis is,⁹⁶ but in the institution that he thinks most fit to handle an un-definable threat—the institution of constitutional dictatorship.⁹⁷

Like Gross and Ní Aoláin, early on in his discussion, Rossiter provides a list of "types of crises" in the life of a democratic nation.⁹⁸ There are, he tells his readers, "three well defined threats to its existence as both a nation and a democracy, which can justify a government resort to dictatorial institutions and powers":⁹⁹ (1) war;¹⁰⁰ (2) rebellion;¹⁰¹ (3) economic depression.¹⁰² Rossiter admits, other types of crises have justified extraordinary governmental action in nations like the United States, such as "[f]ire, flood, drought, earthquake, riots and great strikes," all of which have "been dealt with by unusual and often dictatorial methods."¹⁰³ This is a definition that enumerates types of emergencies according to the fact that they have historically been declared as requiring "unusual and often dictatorial methods," events which in the past warranted an application of the "dictatorial principle."¹⁰⁴ The question, then, for Rossiter is what the nature and scope of such principle is. "The distinction," he says, "between Lincoln and Stalin, Churchill and Hitler should be obvious."¹⁰⁵

What is at stake for Rossiter is thus not the definition of emergency, but the definition of dictatorship. He wants constitutional dictatorship to shine as a different type of dictatorship than the fascist kind. He wants it to take on the features of antiquity and universality—"for it is coeval and

95. ROSSITER, *supra* note 53, at 6.

96. *Id.* ("[In] the eternal dispute between government and liberty, crisis means more government and less liberty."). Quoting Cecil T. Carr, *Crisis Legislation in Britain*, 40 COLUM. L. REV. 1309, 1324 (1940).

97. ROSSITER, *supra* note 53, at 6.

98. *Id.*

99. *Id.*

100. *Id.* ("Particularly to repel invasion for which, 'the necessity of some degree of readjustment in the governmental structure and of contraction of the normal political and social liberties cannot be denied, particularly by the people faced with grim horror of national enslavement.'").

101. *Id.* ("When the authority of a constitutional government is resisted openly by large numbers of its citizens who are engaged in violent insurrection against the enforcement of its laws or are bent on capturing it legally or even destroying it altogether.").

102. Rossiter, *supra* note 53, at 6. ("The economic troubles which plagued all the countries of the world in the early thirties invoked governmental methods of an unquestionably dictatorial character in many democracies. It was thereby acknowledged that an economic crisis could be as direct a threat to a nation's continued and constitutional existence as a war or a rebellion.").

103. *Id.*

104. *Id.* at 7.

105. *Id.* at 8.

coextensive with constitutional government itself.”¹⁰⁶ Rossiter notes, it should be clear, “like the Grand Canyon”¹⁰⁷ for anyone to see why a constitutional dictatorship is different from the non-constitutional, fascist type.¹⁰⁸

Later on in his introduction, and with the same purpose in mind, he recalls the types of crises according to the institutions that can deal with them.¹⁰⁹ Rebellion is dealt with primarily in an executive fashion and calls for the institution of some form of military dictatorship.¹¹⁰ Economic depression is dealt with primarily through emergency laws and calls for lawmaking by the executive branch of the government.¹¹¹ War, at least total war, is dealt with in both ways. However, “[i]f a situation can be dealt with judicially,” he tells his readers, “it is probably not a crisis.”¹¹² This reveals that what is important for Rossiter is not the exigency but the institution, the tool that is supposed to handle it, and how to make it useful in achieving the un-definable aim of handling exigency.¹¹³

106. *Id.*

107. *Id.*

108. ROSSITER, *supra* note 53, at 8.

109. *Id.*

110. *Id.* at 9.

111. *Id.*

112. *Id.* Rossiter identifies whether there is a crisis or not through the observation of who deals with it. *Id.* Every institution teaches us about a certain type of threat; martial rule, for example, is an emergency device for invasion or rebellion. *Id.* It means extension of military government to civilian population. *Id.* Rossiter explains:

[T]he institution of martial rule is a recognition that there are times in the lives of all communities when crisis has so completely disrupted the normal workings of government that the military is the only power remaining that can restore public order and secure the execution of the laws.

Id. Moving on to the “outstanding institution of constitutional dictatorship,” Rossiter explains that this is an institution of a legislative nature which amounts to

a voluntary transfer of law making authorities from the nation’s representative assembly to the nation’s executive, a frank recognition that in many kinds of crisis (particularly, economic depression) the legislature is unequal to the task of day to day, emergency lawmaking, and that it must therefore hand over its functions to someone better qualified to enact arbitrary crisis laws.

Id. at 9–10. And, finally, Rossiter “unfortunately” recognizes the “law of necessity.” *Id.* at 11. It is a doctrine that is a little better than “a rationalization of extra-constitutional, illegal emergency action.” *Id.* This necessity-knows-no-law doctrine isn’t a very pleasant theory because Hitler could shout necessity as easily as Lincoln. *Id.* Constitutional dictatorship is thus better than the doctrine of necessity because Lincoln could have used it and Hitler could not. *Id.*

113. ROSSITER, *supra* note 53, at 8.

As seen, from Schmitt's interest in the "outmost sphere" through Rossiter's focus on the "oustanding institution of constitutional dictatorship" to Gross and Ní Aoláin who are interested in control over the dangerously un-definable, legal theorists so invested in the ideal of management of exigency pay very little attention to the processes of portraying, delimiting and outlining exigencies' features.¹¹⁴ Either intentionally, because they are invested deeply in an ideal of contingency and therefore limit their inquiry to an extremely rare condition, or because they are invested deeply in institutional design which will be flexible and legitimate enough to handle any exigency, they continue to talk past each other and past the practitioners in the field who must constantly deal with definitions. This, is the state of the field. The next parts will use the *Belmarsh* case to illustrate why this is too narrow and misleading a state. For a field that is deeply and constantly invested in definitions, a theory which is invested in the un-definable is not only limited, but illusive.

III. ARTICLE 15 OF THE ECHR AND THE LEGAL POLITICS OF DEFINITIONS IN *BELMARSH*

The *Belmarsh* decision illustrates why and how definitional problems are important beyond the problem of the un-definable. The definition structures in the framework of Article 15 of the ECHR are used by the *Belmarsh* court to resist the government's claim that the question of handling emergencies is within exclusive executive discretion. However, the court's solution, maintains a distinction between deference on the question of the existence of an emergency and strict scrutiny on the question of the proportionality of the measures required to handle it. This serves to entrench the notion that emergencies are un-definable and to hide important questions about the processes through which emergencies are defined, identified, and declared.

In December 2004, the House of Lords issued its ruling in the case of *A v. Secretary of State for the Home Department*.¹¹⁵ The court declared that Section 23 of the ATCSA, introducing indefinite detention without charge to suspected international terrorists, was incompatible with the ECHR right to liberty under Article 5 because it was not "strictly required" within the meaning of Article 15 ECHR emergency derogation scheme.¹¹⁶ Many

114. See generally *id.*

115. See *Belmarsh*, *supra* note 1; see also *A v. Secretary of State for the Home Department*, 68 MOD. L. REV. 654, 654 (2005).

116. Adam Tomkins, *National Security, Counter-Terrorism and the Intensity of Review: A Changed Landscape?*, 126 L. Q. REV. 1, 1-2 (2010) [hereinafter Tomkins, *National Security*] (portraying an episode in the story of national security judicial review in the United Kingdom); see also *A v. Secretary of State for the Home Department*, *supra* note 115, at 654.

commentators, mostly but not only British, regarded the decision as "remarkable,"¹¹⁷ an outstanding landmark and "a beacon of light,"¹¹⁸ "the most important decision since *Entick v. Carrington* (1765),"¹¹⁹ "a victory to the rule of law."¹²⁰ Further, *Modern Law Review* pronounced it "one of the most constitutionally significant ever decided by the House of Lords" and commissioned four case notes to elaborate on its importance.¹²¹

But, while the majority in *Belmarsh* ruled that indefinite detention without charge was not "strictly required," they also ruled that the government was correct to conclude that there was "a public emergency threatening the life of the nation."¹²² On this matter the House showed deference to government and to Parliament. Lord Bingham accepted the Attorney General's argument on behalf of the government that the issue was "pre-eminently one within the discretionary area of judgment reserved to the Secretary of State."¹²³ Accordingly, he argued, the government's assessment must be given great weight because it was "a pre-eminently political judgment" involving a factual prediction about the future behavior of human beings and therefore, "necessarily problematic."¹²⁴ Lord Hope accepted that the judgment "that has to be formed on these issues lies outside the expertise of the courts, including SIAC."¹²⁵

As Adam Tomkins concluded, in this sense, *Belmarsh* did not overrule *Rehman*, but reconfirmed it.¹²⁶ Thomas Poole described it as having a "trace of schizophrenia" in its approach to deference and to the intensity of review.¹²⁷ David Dyzenhaus noted that although *Belmarsh* is a victory of the rule of law, the majority's failure to require the government to make proper justification on the question of the existence of the public emergency makes this victory not only "qualified" but also "unstable."¹²⁸

117. Tomkins, *National Security*, *supra* note 116, at 1.

118. Arden, *supra* note 2, at 167; *see also* Tomkins, *National Security*, *supra* note 116, at 2.

119. KEITH D. EWING, *BONFIRE OF THE LIBERTIES: NEW LABOUR, HUMAN RIGHTS, AND THE RULE OF LAW* 237 (2010).

120. David Dyzenhaus, *Deference, Security and Human Rights*, in *SECURITY AND HUMAN RIGHTS* 125, 128 (Benjamin J. Goold & Liora Lazarus eds., Oxford: Hart Publ'g 2007).

121. *A. v. Secretary of State for the Home Department*, *supra* note 115, at 654.

122. Tomkins, *National Security*, *supra* note 116, at 32.

123. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [25].

124. *Id.* at [29].

125. *Id.* at [116].

126. Tomkins, *National Security*, *supra* note 116, at 32; *see also* Adam Tomkins, *Readings of A v. Secretary of State for the Home Department*, 2005 PUB. L. 259, 259 (2005) [hereinafter Tomkins, *Readings*].

127. Thomas Poole, *Courts and Conditions of Uncertainty in "Times of Crisis,"* PUB. L. 234, 239 (2008).

128. Dyzenhaus, *supra* note 120, at 128.

This instability, can be explained and criticized by focusing on the court's attempt to handle the problem of emergency as the un-definable. Addressing the government's claim that threat is so inherently unexpected and therefore a matter for exclusive government discretion, the court made use of Article 15 framework to distinguish between the questions of determining the existence of emergency, on which the government has absolute knowledge and authority to which courts must defer, and of the proportionality of response measures, on which judges are particularly competent.¹²⁹ By strictly scrutinizing these measures it had succeeded in holding the government to account in this area of political discretion. However, by justifying exclusive government discretion on the question of the existence of an emergency according to Article 15, the court in fact provided particularly narrow answers to two questions it wished to avoid, what an emergency within the meaning of Article 15 is, and how it is to be identified.¹³⁰ If the decision on the emergency is beyond scrutiny, then an emergency is that which the executive declares as an emergency; and the executive holds an exclusive authority to identify the threat and to declare the emergency.¹³¹

The implication of narrowing the complicated problems of definitions to a single answer is that it obscures alternative views and contestations both on the problem of defining an emergency and on the process of identifying its existence. As so many such alternatives are reflected in the *Belmarsh* decision, Part IV will unearth an alternative world of definitions that is hidden beneath the attempt to clearly demarcate what is in and what is out of sovereign discretion.

A. The Challenge

At the center of this case is the government's claim about the nature and scope of its powers to decide what the emergency is and what is to be done to handle it. It is a claim that is made to connote and reaffirm the tradition of the un-definable.

The majority recounts this argument, summing up the attorney general's claims in the question of the existence of an emergency.¹³² "[T]he judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament."¹³³ And

129. See *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [115].

130. *Id.* at [25].

131. *Id.*

132. *Id.*

133. *Id.*

then again, summing up the Attorney General claim on the question of proportionality of the derogating measures:

As it was for the Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court allowed a generous margin of appreciation to member states, recognizing that they were better placed to understand and address local problems, so should national courts recognize, for the same reason, that matters of the kind in issue here fall within discretionary area of judgment properly belonging to the democratic organs of the nation.¹³⁴

The court contends, “This is an important submission properly made, and it calls for a careful consideration.”¹³⁵ Here, just like in *Rehman* and a long line of national security cases, the argument that is brought forward by the State is based on defining “an area of discretion,” an area which is so fundamentally “political” or so fundamentally “risky” that it must be governed by the executive and Parliament internally—no outside shackles are admitted to this area of special extreme concern.¹³⁶

Note that this image of a “discretionary area with no outside control” is somewhat contradictory to the way the government itself brings its arguments on its derogation measures.¹³⁷ Facing the threat of judicial intervention, the government claims that it can do almost anything it wishes in the context of emergency and threat because here it has to tackle an unexpected extreme danger.¹³⁸ In reality, it does not do whatever it wishes. It applies an interpretation of its limits on the basis of convention rights and their jurisprudence under which:

1. It cannot have universal administrative detention regimes for all terror suspects because of the Article 5 right to liberty.
2. It cannot deport foreign terror suspects to torture because of Article 3 and *Cachal*.
3. It cannot hold these “un-deportables” in detention because it can only detain for the purpose of deportation according to Article 5(1).

134. See *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [37].

135. *Id.*

136. *Id.* at [29].

137. *Id.*

138. *Id.*

4. In order to detain them it must then derogate from convention rights.
5. But then it must do so according to the conditions of Article 15 which are:
 - a. That there exists "a public emergency threatening the life of the nation."
 - b. That the derogation measures are "strictly required" to meet the exigencies of the situation.
 - c. That the derogation measures are not inconsistent with the United Kingdom's other obligations under international law.¹³⁹

The government is tied up, entangled, and willingly committed to a set of outside considerations and constraints within and around which it shapes the image and the scope of response measures.

But in spite of all these self-assertions, the government's claim that it is committed to law and judicial institutions, the court is strongly motivated, not so much by these commitments that the government sees itself tied to, but by the claim of demarcation, the claim that in certain areas, as oppose to others, the court and law is rather meek, non-constraining, and should be kept out, as much as possible:

I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behavior of human beings (as oppose to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown wrong or unreasonable because that which is thought likely to happen doesn't happen. It would have been irresponsible not to err, if at all, on the side of safety.¹⁴⁰

139. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [41-42], [79-80] ("[T]he court's role under the 1998 Act is the guardian of human rights. It cannot abdicate this responsibility." (quoting *Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't*, [2002] EWCA Civ 158, [27])); *id.* at [42] ("The courts are charged by Parliament with delineating boundaries of a rights based democracy." (quoting Jeffrey Jowell, *Judicial Deference: servility, civility and Institutional Capacity*, 2003 PUB. L. 592)).

140. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [29].

The court is careful not to accept the government's claim against its interference all the way through.¹⁴¹

I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by courts to political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence.'¹⁴²

This demarcation of functions is then suggested on a continuum from political to legal questions:

The more purely political (in 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. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present problem seems to me to be very much on the political end of the spectrum.¹⁴³

Thus the court's conclusion, largely influenced by the government's claim for control over all that is so uncertain, so much a matter of differing opinion and so much essentially a high risk prediction, that it must be political. The court is then especially enthusiastic to engage in efforts to delineate, demarcate, define spaces, areas, issues, roles, functions, divisions and distinctions, and to express the legitimacy of these divisions in view of the government's forceful claim for legitimate control over this vast sphere of unpredictable, unknowable, danger.

This delineation of spaces, roles, functions, is also the key to understanding the answer that the court provides to the government's claim of control over the realm of un-definable emergency. The structure of Article 15 of the ECHR allows the court to maintain a distinction, a line, a functional barrier aimed to overcome the government's invocation of its political realm. Even if it is true, that emergency is an essentially un-definable concept, that it defies definition, that it is exactly the type of concept that belongs to the political realm, characterized by uncertainty. Even if it is true that because

141. *Id.* at [41].

142. *Id.* at [29].

143. *Id.*

of this inherent vagueness and volatility it falls into that restricted realm of government exclusivity, demarcated space of discretion, where the unpredictable must be anticipated and defined, even if all that is true, the court assures itself and its audience, there is no reason to despair.

There is no reason to buy wholesale into the intimidation about "the limits of law" and the limits of judicial control because the court itself, although barred from that very narrow area of messiness and uncertainty, can certainly intervene and indeed must intervene in the other area—that of law and reason.¹⁴⁴ In fact, it is the particular responsibility of the courts to protect rights that demarcate and define that area as subject to judicial concern. Whenever there are questions of law and rights, here we can feel safe that we are operating within a recognized rule of law function. "[T]he function of independent judges charged to interpret and apply the law is universally recognized as cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."¹⁴⁵ The degree of respect that judges will give to the government's decisions is not based on the type and quality of justification that the government, being the master of its area, will provide, but on "the nature of the decision."¹⁴⁶ The court quotes the ECHR Court's decision in *Frette v. France*, "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background."¹⁴⁷

And so, in accordance with this self-demarcation, the court maintains a distinction in the framework of Article 15 between two contexts. One is purely or almost purely in the domain of the government and therefore closed to court's scrutiny¹⁴⁸; the other is utterly a question of rights, and not only of rights but of fundamental rights, and this is the realm which is open to court scrutiny.¹⁴⁹ It is this fact—the fact of the question being in one realm or the other—that determines the level of scrutiny each step of the analysis will be accorded.¹⁵⁰

144. *Id.* at [41].

145. *Id.* at [42].

146. *Fretté*, App. No. 36515/97, 2002 EUR. CT. H.R. at [21].

147. *Id.* at [22].

148. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [22].

149. *Id.* at [23].

150. *Id.* at [24] ("Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation." (quoting JOINT COMM'N ON HUMAN RIGHTS (JCHR), ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: STATUTORY REVIEW AND CONTINUANCE OF PART 4, 2003-4, HC 381, HL 38, ¶ 34 (UK)).

B. *The Distinction*

1. Defining and Identifying Public Emergency in Article 15

Because we are in the realm of government discretion on the question of whether an emergency exists, the court, having no responsibility to intervene, has no trouble expressing its sympathy and support for the Appellants' claims that an emergency according to Article 15 does not exist and even its own grave doubts regarding the government's assertion that it does exist.

All of the majority's speeches express doubts and reservations regarding this point. First, on the issue of the definition of emergency, the court provides a very general and conventional summary of European Court cases, and seems to agree with the Appellants about the requirements of imminence and temporality in the definition of "public emergency":

The requirement of imminence is not expressed in article 15 of the European Convention or article 4 of the ICCPR but it has, as already noted, been treated by the European Court as a necessary condition of a valid derogation. It is a view shared by the distinguished academic authors of the Siracusa Principles, who in 1985 formulated the rule (applying to the ICCPR): "Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of apprehension of potential danger."¹⁵¹

And as for the requirement of temporariness:

The requirement of temporariness is again not expressed in Article 15 or Article 4 But the United Nations Human Rights Committee of 24 July 2001, in General Comment No 29 on article 4 of the ICCPR, observed in para 2 that: "Measures derogating from the provisions of the covenant must be of an exceptional and temporary nature."¹⁵²

On the basis of such definition, the issue of identifying the threat, the court agrees, is also far from clear-cut.¹⁵³ On the question of imminence, the court recalls the ministerial statements in October 2001, and March 2002,

151. *Id.* at [21]. The same remark about reservations can be found in Lord Rodger's speech when he rejects the arguments of the appellants against the government decision about the existence of an emergency "not without some hesitation especially in the light of the speech of my noble and learned friend, Lord Hoffmann." *See id.* at [165].

152. *Id.* at [22].

153. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [154].

that “[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally and [i]t would be wrong to say that we have evidence of a particular threat.”¹⁵⁴ On temporariness, the court quotes the Joint Committee on Human Rights’ observation that, “[a]ccording to the Government and the Security Service, the United Kingdom now faces a near-permanent emergency,”¹⁵⁵ and adds its own observation that, “[i]t is indeed true that official spokesmen have declined to suggest when, if ever, the present situation might change.”¹⁵⁶

Further, the court seems to agree and give weight to the fact that no other State has derogated from Article 5 of the Convention in the context of the current terrorist threat¹⁵⁷ and to the fact that domestic organs such as the JCHR have consistently claimed that no evidence was shown by the Home Secretary regarding the existence of a public emergency threatening the life of the nation.¹⁵⁸ Indeed, the majority seems quite impressed by such doubts and reservations. Lord Bingham says he has misgivings that are fortified by the opinion of Lord Hoffmann.¹⁵⁹ Lord Scott expresses his doubts rather starkly:

I do have very great doubt whether the “public emergency” is one that justifies the description of “threatening the life of the nation.” Nonetheless, I would, for my part, be prepared to allow the secretary of state the *benefit of the doubt* on this point and accept that this threshold criterion of article 15 is satisfied.¹⁶⁰

Lord Hope maintained a positive assertion that the emergency is not imminent.¹⁶¹ “[T]he fact is that the stage when the nation has to face that kind of emergency, the emergency of imminent attack, has not been reached.”¹⁶²

However, all these doubts become meaningless in the face of that which is clear by the distinction of powers and responsibilities—that, in the words of Lord Bingham, the present question is “very much at the political end of the spectrum,”¹⁶³ or, in the words of Lord Hope, that “it is for the executive,

154. *Id.* at [119].

155. *Id.* at [22].

156. *Id.*

157. *Id.* at [23].

158. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [24].

159. *Id.* at [26].

160. *Id.* at [154] (emphasis added).

161. *Id.* at [119].

162. *Id.*

163. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [29].

with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind.”¹⁶⁴

2. Defining the Scope of the Derogation Measures

All doubts and all reservations disappear when the court moves from the first and second steps of Article 15 analysis to the third—that of defining the nature and the limits of the response measures. Here, suddenly and in spite of the fact that the rhetoric of the ECHR Court similarly refers to domestic “margin of appreciation,” the domestic court takes on itself “[f]inal responsibility for determining” whether measures are appropriately qualified.¹⁶⁵ What is the difference? It is that here “particular importance must be attached to the effectiveness of the process of scrutiny by the judiciary where the question raised is whether interference with the right to liberty is strictly required by the emergency. This is because the right to liberty is within its area of responsibility.”¹⁶⁶

Now that we have safely moved from the “political area” of the question of the existence of the emergency, to the separate question of the measures of response, the court feels comfortable, secure, at home in its area of responsibility. This is where reservations and doubts can be turned into knowledge and certainty, a wide range of resources and a sense of judicial enthusiasm and resilience, which gives this decision its historical fame. After the hesitancy, narrowness and dryness of the previous step, it now seems as if the court is putting on robes, its judicial attire, and getting to work.

Lord Bingham starts this part of the majority decision with the simple wording of Article 15 decision: “Article 15 requires that any measures taken by a member state in derogation of its obligations under the convention should not go beyond what is ‘strictly required by the exigencies of the situation.’”¹⁶⁷ With no hesitation this is interpreted as a “test of strict necessity, or in the Convention terminology, proportionality.”¹⁶⁸ The principle and its sub-tests are laid down by reference to the classic proportionality decisions, domestic, and comparative—the Privy Council in *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing*¹⁶⁹ and the Canadian cases of *R v. Oakes*¹⁷⁰ and in *Libman*

164. *Id.* at [115].

165. *Id.* at [113–114].

166. *Id.* at [113].

167. *Id.* at [30].

168. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [30].

169. *De Freitas v. Permanent Sec’y of Ministry of Agric.*, [1999] 1 AC 69 (PC) (appeal taken from Ant. & Barb.).

170. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

v. Attorney General of Quebec.¹⁷¹ The Appellants' arguments are then lined up according to these doctrines, especially directed to the second and third subtests: that there is no "rational connection" between the objective and the measures and that "the means used to impair the right or freedom are no more than is necessary to accomplish the objective."¹⁷² Without question or debate the proper image and content of derogation measures is assumed—they are, and they must be proportionate, rational, and non-discriminatory.¹⁷³ The way is automatically clear to a technical and rather unproblematic presentation and analysis.

As for the second sub-test, since, the threat to the United Kingdom is not confined to foreign nationals of the type addressed in the measures, those who cannot be deported, but extends also to British nationals and those foreign nationals who can be deported and effectively left to pursue their activities abroad, there cannot be said to be a rational connection between the objective of responding to the threat and the means chosen, detaining just those suspects who fall into the narrow category of foreigners who cannot be deported.¹⁷⁴ To be rationally connected, the measures must address the threat from United Kingdom nationals as well as from foreigners who are deported.¹⁷⁵ Also, while the threat is from Al-Qaeda related organizations the section allows detention of alleged members in a much broader span of organizations.¹⁷⁶

As for the third sub-test, assuming that British nationals suspected of terrorism are not just ignored by the government, and knowing that some foreigners are put on bail with restrictions, there are clearly means available that are less harmful to the liberty of suspects than the one chosen in Part 4 of the ATSCA.¹⁷⁷

When G, one of the appellants . . . was released from prison by SIAC [Special Immigration Appeals Commission] on bail . . . it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remains at his premises all the times, that he telephoned a named security company five times each day at specific times; that he permits the company to install monitoring equipment at his premises; that he limits entry to his premises to his family, his solicitor, his medical attendant and other approved persons; that he have on his premises no computer

171. *Libman v. Québec (Att'y Gen.)*, [1997] 3 S.C.R. 569 (Can. Que.).

172. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [30].

173. *Id.* at [209].

174. *See Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [210–211].

175. *Id.* at [228].

176. *See id.* at [201].

177. *Id.* at [35].

equipment, mobile telephone or other electronic communication devices; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellant's suggest that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.¹⁷⁸

Evidence to the sources of threat and the lack of rational connection are brought from sources as wide and varied as SIAC, intelligence agencies, the Newton Committee, European Commissioner of Human Rights and elsewhere.¹⁷⁹

Here, the Court suddenly is no more silently respectful, or giving the benefit of the doubt, to the government's attempts to restrict its powers on matters of "political character calling for an exercise of political, not judicial powers."¹⁸⁰ Indeed, it is actively and in full force engaged in reproaching government for stigmatizing judicial decision-making as undemocratic. It invokes the full breadth and depth of authorities—ECHR, the ICCPR, the European Court, the House of Lords itself, the United States Supreme Court, the European Commissioner on Human Rights, and down to the words of the 1998 Human Rights Act—to make plain that courts have a unique, irreplaceable, and especially democratic role in allowing for and assuring domestic protection of human rights.¹⁸¹ If upon the existence of emergency the Court sees itself just as a foreign court, foreign to the issues of identifying an emergency just as a Strasburg court is, here suddenly it signs up to its special domestic role.¹⁸² It is exactly the function of domestic courts within the regional human rights framework to ensure that rights are protected, in regular times and in emergency times, and to allow for the discretionary area, the margin of appreciation of the domestic government, to exist.¹⁸³ As it is the task of every state to secure rights enshrined in the Convention, and to control their application, the courts have a recognized, well-defined role in this enterprise.¹⁸⁴

With this extensive and powerful self-understanding, the court is now fully competent, fully attentive and consciously ready not only to accept the breadth of the Appellants' argument from proportionality but to extend it even further and criticize the government for irrationally choosing

178. *Id.*

179. *Id.* at [173–174].

180. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [37].

181. *Id.* at [40].

182. *Id.*

183. *Id.*

184. *Id.*

immigration as the policy area to confront threats, as well as SIAC for approving such choice:

[T]he choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected to having links with Al-Qaeda, may harbor no hostile intentions towards the United Kingdom.¹⁸⁵

The energized legitimacy of the court in this area allows it to extend its critique beyond the ambit of the question of whether the measure is strictly required to the rationality of the government's broader policy choices.¹⁸⁶ Immigration powers that allow for distinction between nationals and non-nationals are not the proper tool to handle threats that do not submit to such distinction.¹⁸⁷ At once, and in great contrast to its hesitant moves on the question of determining threats, we have a clear assurance by the court about both the nature of the threat, that it is a threat faced from all terrorist suspects without distinction by immigration status, and the right way to address it by rational, non-discriminatory security and not immigration measures.¹⁸⁸

Finally, the court also extends its critique beyond the scope of the rights that are the focus of the derogation order to other rights, namely the Article 14 prohibition of discrimination.¹⁸⁹ Again, making use of a broad and extensive list of authorities on the importance of the right, from Hersch Lauterpacht, to Justice Jackson, to Lord Hoffmann, to apply strict and quite technical scrutiny to the discriminatory implications of the measures.¹⁹⁰ Given that the right must be equally distributed to United Kingdom nationals and foreigners, and given that the threat from the two groups is the same, their unequal treatment is discriminatory.¹⁹¹ Justifying this on the basis of different immigration statuses might have been reasonable "in an immigration context, but cannot be so in a security context, since the threat presented by suspected international terrorists did not depend on their nationality and immigration status."¹⁹²

185. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [43].

186. *Id.* at [107].

187. *Id.* at [74], [102].

188. *Id.* at [101].

189. *Id.* at 77.

190. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [46].

191. *Id.* at [53-54].

192. *Id.*

The last stretch of this broad argument, which led from the words strictly required in Article 15 to a full revocation on reasonableness and proportionality grounds of the correctness of security policy choices taken by the government, is the challenge to the government's claim that deferential treatment of aliens is allowed in international law, and especially in the context of emergency.¹⁹³ Here again the whole world enters into the court's analysis to prove a commitment to non-discrimination in the fight against terrorism—from European sources, international sources, to domestic United Kingdom sources.¹⁹⁴ This provides a line-up of sources that are powerfully committed to strict scrutiny of governments' attempts to excuse themselves in the context of the uncontrollable emergencies from their commitments to what is seen to be strictly required by international human rights law.¹⁹⁵

The court thus is able to stand behind an image of thick protection of human rights while defining the features of derogation measures and while scrutinizing the government's policies as illegitimate, out of order, exceptions. The danger of the unknowable, political, chaotic, uncontrollable nature of emergencies is effectively contained in this image of strict scrutiny and by the legitimate voice of the court as responsible for its application.

C. *The Gap*

This committed refutation of the government's claim of unconfined powers to decide on the emergency is rather shaky. There are indications of a gap in the decision that cause readers to question the degree of its rule-of-law significance and call it "unstable" in Dyzenhaus' account or "schizophrenic" in Poole's words.¹⁹⁶

1. The Unexplained Leap from Deference to Strict Scrutiny

First, and most strikingly, the court never directly justifies or explains the leap that it allows itself to take quite silently between the two stages of analysis. Addressing the government claims that "as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public" and that both these matters are of "political character calling for an exercise of political and not judicial judgment,"¹⁹⁷ the court provides an answer, which cannot effectively be limited to the second stage

193. *Id.* at [55].

194. See generally *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [75], [76], [80], [82], [97], [99], [117], [119].

195. See *id.* at [57–62], [64–65].

196. Dyzenhaus, *supra* note 120, at 128; Poole, *supra* note 127, at 10.

197. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [37].

of inquiry without direct and further explanation. Recall, the court agreed that defining and identifying the existence of a “public emergency threatening the life of the nation” is a political matter—or more emphatically, “very much on the political end of the spectrum.”¹⁹⁸ It had also specifically maintained that on this issue, being a question of fact and not of law, SIAC have not misdirected itself in law.¹⁹⁹ On the legal point, the court stood behind what it described as a doctrine of broad margin of appreciation accorded by the European Court to national authorities derogating from obligations under Article 15.²⁰⁰ However, the court abandoned its previously held conclusions with no hesitation when the government relied on these conclusions, claiming that the question of response is also “political” in nature and that,

Just as the European Court allowed a generous margin of appreciation to member states recognizing that they were better placed to understand and address local problems, so should national courts recognize, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state.²⁰¹

When we are in the realm of rights, it seemed to be saying, though never explicitly so, the distinction between legal and political is suddenly erased; we are safely within the legal.

Furthermore, while on the existence of emergency the court tied its own nonintervention doctrine to the European doctrine of a wide margin of deference to national authorities, it suddenly interpreted this doctrine as relying on strict scrutiny by domestic courts. Quoting the European Commissioner, it maintained:

It is . . . precisely because the Convention presupposes domestic controls in the form of preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect to derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of the convention rights.²⁰²

198. *Id.* at [29].

199. *Id.* at [27].

200. *Id.* at [28]. This also explains why, as will be later shown, when analyzing the measures as discriminatory, the court does not seem to hesitate to positively assert what is the nature of the threat—that it is brought about by British and foreigners alike. See *infra* Part D. 2.vi.

201. *Id.* at [37].

202. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [40].

The court teaches us that this truth is especially important in “times of distress” when “the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.”²⁰³ Suddenly, a wide margin of appreciation is provided because of the promise of judicial scrutiny and not to justify its absence, and the national judiciary becomes a legitimate part of the ‘national authority’ and not only its rubber stamp.²⁰⁴

What explains the leap? It is striking that not one of the majority judges feels obliged to explain it. It seems to them obvious and transparent that defining and identifying the existence of an emergency in Article 15 is a political assertion having to do with prediction, irrationality and uncertainty but defining what is strictly required to handle it is so much a settled question of law that the government’s assertion of discretion is a stigmatizing insult, calling the courts to abandon their final responsibility.

The only Lord who actually justifies, or at least explains the difference in the majority’s scrutiny on the two issues is the dissenting Lord Walker, for whom it does not actually matter. Lord Walker thinks that on both issues great deference must be given to the government.²⁰⁵ Maybe this is why his interpretation of the majority’s motivation is the clearest unambiguous one:

A danger of terrorist action may be imminent even though there is uncertainty as to when, where and how the terrorists attack. Indeed (especially as the terrorists may try to use bacteriological, chemical, radiological or nuclear weapons) the uncertainty increases the gravity of the emergency, since it creates widespread anxiety and the need for comprehensive precautions. Given the requirement (under article 15) for a strict proportionate response to the emergency, there is no reason to set the threshold very high, and the jurisprudence of the European Court of Human Rights in the cases concerning Northern Ireland and the Irish Republic . . . shows that the Court has not set it very high.²⁰⁶

According to Lord Walker, the level of uncertainty about the threat correlates to the identification of a more extreme emergency. In this context the reason to allow discretion on the existence of an emergency is that the test regarding the proportionality of the measures is severe. This is the rationale for the disparity, which he doesn’t embrace, between the standards of inquiry on the two questions; as long as one is particularly strict on proportionality, one may be particularly relaxed on the threshold question.

203. *Id.* at [41] (quoting *Korematsu v. United States*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984)).

204. *Id.* at [175].

205. *Id.*

206. *Id.* at [208].

Lord Walker indeed captured if not the justification, the motivating reason behind the double standard of review. For the majority, the problem is in the government's claim that emergency is such an unexpected, unprepared for and existentially risky phenomenon that it is calling for unrestricted power to control it. This is hardly an accepted reality for the courts. There must be a way to hold back this discretionary chaos, or at least to control its effects. The framework of Article 15 provides a way to do so by maintaining a distinction between its two "limbs." If we have strict scrutiny on the second limb, then we can assure control of any discretion and disregard the messiness of reality.

The court cannot truly disregard this messiness. It pays the price for the artificiality of the distinction and its inability to truly confront the government's claim that the question of how to handle an emergency is probably as much a political matter as the question of whether it exists.

2. Lord Hoffmann's Competing Threat

The majority is also prevented from confronting another forceful position, expressed in Lord Hoffmann's dissent, that deeply challenges its deference on the question of the existence of emergency. Lord Hoffmann starts and ends his dissent with a warning tone:

This is one of the most important cases, which the house has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country have until now been very proud: freedom from arbitrary arrest and detention. The power, which the home secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.²⁰⁷

Finally, after defining an Article 15 emergency as the threat to the social, moral and legal life of the state as a social organism rather than "the lives of its people," he concludes that "[t]he real threat to the life of the nation in the sense of people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."²⁰⁸

There are two lines of argument here. The first is conceptual, terrorism and its threat to cause loss of life and possession is not an "emergency threatening the life of the nation,"²⁰⁹ because to threaten the life of a nation a danger must be shown to the continuation of the community's life in

207. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [86].

208. *Id.* at [91], [97].

209. *Id.*

accordance with its traditional values. The second is one of identifying a threat to the ancient common-law freedoms and the danger of England becoming a state in which a person can one day disappear into obscure imprisonment, indefinite and without criminal charge. Both lines deeply resonate in all of the majority speeches and strengthen the notion of instability in their decision; it is exactly this sense of crisis, a threat to the local political culture, to its institutions and to the rule of law, that the judges recognize in the government's claims of absolute discretion to decide how to handle the emergency. It is this notion of threat that motivates the distinction between the two questions in order to secure some measure of control over the arbitrariness of executive emergency response. The distinction they must maintain requires the majority to channel these worries elsewhere and let the executive enjoy the benefit of the doubt.

The majority's solution, however, with its strained control, must pay the price of heavy legal implications. It is a legal, not to say legislative, or better, adjudicative, answer to the conceptual problem of what an emergency is, which operates within the tradition of the un-definable. If one must be deferential on the question of whether Article 15 threshold conditions currently exist because it is a political question, then one knows what in Article 15 emergency means. It is exactly that which is so un-definable, so open, and so political that requires automatic deference to the unitary decision maker. So we are again blocked by the forceful image of the un-definable as it is once more ingrained into the legal practice of defining the emergency within the derogation scheme.

The problem here is not only that this is a paradoxical consequence that renders the practices of definition meaningless. Indeed, some might say, in the spirit of the political exception, that the paradox of emergency exposes a deep unsolvable tension in liberal law. What is much more striking here is that this consequence is remarkably detached from the rich and varied terrain of definitional practices, problems and solutions that are in fact reflected in the framework of Article 15 derogation and specifically in the *Belmarsh* case. This terrain is evaded and effectively eradicated by the conclusion that identifying emergencies is essentially so risky that it must safely rest in government discretion. When at the foreground of jurisprudence is the worry that emergencies are un-definable, other definitions and other worries are hidden, overridden or ignored.

The final part of the Article uses the *Belmarsh* decision, as a window to the world of emergency definitions that is reflected in the decision, but is ultimately hidden and obscured by the majority's solution. This analysis seeks to illustrate the claim that far from resisting precise definitions, emergencies call for definitions and raise a wide range of important definitional problems and an even wider range of solutions to such problems.

The *Belmarsh* case illustrates the legal politics of definitions rather than the premise that emergencies are indeed un-definable.

Kroll-Smith and Gunter plainly state in their essay, *Legislators and Interpreters in Disasters*, "A definition is a way of seeing, a strategy for looking. And every way of seeing, as common wisdom reminds us, is also a way of not seeing."²¹⁰ Unless we are able to see beyond the legislated definition of emergency as that which is un-definable, we are doomed to overlook the significance of the problems and most importantly the significance of the variety of perspectives they allow into the spaces in which emergencies are defined, identified, and contested.

IV. BELMARSH: A WINDOW TO AN ALTERNATIVE POLITICS OF DEFINITIONS

In a wild contrast to the image of the un-definable, the decision in *Belmarsh* opens up a world of definitions, requirements for definitions, and assumptions with regard to definitions. This abundance of problems, arguments and perspectives refutes the alleged impossibility of defining the emergency. Not only does the court itself from the very first paragraph define the emergency by its own description, it also helps to document a range of other processes and procedures through which the emergency was defined and is being defined, as well as a range of arguments contesting them. In this part this hidden complexity is demonstrated by mapping the different questions or problems of definitions in three large categories:

1. What is a public emergency? This consists of the questions of what type of emergency a terrorist threat is and how the feature "threatening the life of the nation" should be interpreted.
2. How should one identify the conditions of the emergency? This consists of the questions of what the proper methods for identifying the scope and intensity of threats and the proper process, procedures, and standards for identifying threats are.
3. Where should the process of identification take place? This consists of questions about the agents and institutions that should be involved in such a process.

Alternative answers to these questions are uncovered in the *Belmarsh* decision. This, I conclude, is the decision's alternative, though disregarded, legal politics of definitions.

210. Kroll-Smith & Gunter, *supra* note 7, at 164.

A. *What Is the Threat? Defining "A Public Emergency Threatening the Life of the Nation"*

1. *What Kind of Threat? What Type of Emergency?*

a. *The Majority's Background: A Post-9/11 Terrorist Emergency*

The decision starts with a description of the emergency. It portrays the attacks on the United States and ties them to the experiences of threat at home and elsewhere:

The mounting of such attacks against such targets in such a country inevitably caused acute concerns about their own security in other western countries, particularly those which, like the United Kingdom, were particularly prominent in their support for the United States and its military response to Al-Qaeda, the organization clearly identified as responsible for the attacks. Before and after 11 September Usama bin Laden, the moving spirit of Al-Qaeda, made threats specifically directed against the United Kingdom and its people.²¹¹

In one quick introductory paragraph, the court introduces a detailed story identifying the conditions that constitute the current emergency. An organization that has for many years announced its aggressive intentions towards the United Kingdom and its western allies has managed to carry out an unprecedented attack against the United States as the most prominent supporter of the United States military response, the United Kingdom has also come under direct threats. So, as the decision begins, the reader already confronts not only a knowable phenomenon, but also one, which fits the conventional portrait that is well known to him and quite simply identified.

b. *The Derogation Order's Background: An International Emergency with a Local Take*

This image of a terrorist threat factually recognized by the court's background description is complicated by the government's description of the threat in the derogation order. There it is depicted as a continuous international threat that is being domesticated by the local threats of foreign nationals. Recall that the order is structured to fit the requirements in Article 15 of the Convention. The first part is entitled, "Public emergency in the United Kingdom," and it describes what constitutes the current emergency.²¹²

211. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [6].

212. *Id.* at [11].

"The terrorist attacks in New York, Washington, D.C., and Pennsylvania on September 11, 2001, resulted in several thousand deaths, including many British victims and others from 70 divergent countries."²¹³ This brief description of the terrorist attacks is followed by an account of United Nations Security Council Resolutions that announced them as an international threat.²¹⁴ "In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognized the attacks as a threat to international peace and security."²¹⁵ Then the nature of the threat is briefly elaborated—again, with reference to United Nations Security Council authority:

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.²¹⁶

Then the description moves to identify the local aspect of the threat:

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are a threat to the national security of the United Kingdom.²¹⁷

The schedule concludes, "As a result a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom."²¹⁸ This is a declaration of the existence of an emergency in the United Kingdom, characterized as a "public emergency, within the meaning of Article 15(1) of the Convention" based on these facts:

1. The terrorist attacks of September 11 in the United States and their British and other victims.

213. Derogation Order, *supra* note 2.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Derogation Order, *supra* note 2.

2. United Nation Security Council recognition of the attacks as a threat to international peace and security.
3. A United Nations Security Council requirement for all States to take measures to prevent the commission of terrorist attacks, ("including by denying safe haven to those who finance, plan, support or commit terrorist attacks").
4. A terrorist threat to the United Kingdom from in particular foreign nationals who are present in the United Kingdom and are suspected of being involved in terrorism, of being members of terrorist organizations or groups or of having links with such, and who are themselves, we are told, a threat to the United Kingdom.²¹⁹

So we have a more specific terrorist emergency that can now be called a public emergency in the Article 15 sense, it is recognized in United States attacks, United Nations declarations, and local threats from persons who by nationality are foreigners in England and are suspected of planning attacks against the United Kingdom²²⁰

c. Lord Hoffmann: A Competing Crisis of Legality and Its Overtones in the Decision

As a mirror image of the first paragraph of Lord Bingham's speech, which described the emergency situation on the basis of the attacks on the United States, the threats from Al-Qaeda causing acute concerns, in his first paragraph Lord Hoffmann identifies a threat as deep and as worrying as that.²²¹ This case, he tells us "calls into question the very existence of an ancient liberty of which this country have until now been very proud."²²² Here the stage is already set to acknowledge an alternative crisis; the ancient history that is the national pride of the British is threatened, shaken, and disturbed by the exceptional measures taken by the government under the guise of an emergency.

Lord Hoffmann reminds us, "The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial."²²³ This is the threat, becoming a country in which the police can come and take away someone, forever. Lord Hoffmann identifies the danger through this image as the conditions that constitute it. This threat—that

219. *Id.*

220. *Id.*

221. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [86].

222. *Id.*

223. *Id.* at [87].

England is changing forever—is also what drives the burst of national localism in the next paragraph. This is not “some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers.”²²⁴ This picture of domestic normality is set up as the basis for what is now experienced, the fearful image of antiterrorist exceptional measures changing the very essence of British political liberty. The United Kingdom will now be like those other countries in which, once under suspicion, one can expect to be taken one day and never come back. If the alternative threat is only hinted at in the beginning of the speech, at the “finale,” after the conditions for an Article 15 emergency are laid down, it becomes explicit that:

The real threat to the life of the nation, in the sense of people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.²²⁵

It is the sovereign, according to Lord Hoffmann, who must decide how to respond to such threat.

Lord Hoffmann’s dissent is not the only place in the decision in which the derogation measures are themselves described as a threat, a terrible danger, and a crisis, which the judges must resist. In the majority speeches, too, images are brought from the ‘dark days’ in which democracy was losing grip because of perceived necessities. For example, Lord Scott, who is willing to allow the Secretary of State “the benefit of the doubt” despite his “great doubt”²²⁶ that the threshold criterion of Article 15 is satisfied, warns:

Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist Era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom.²²⁷

224. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [88].

225. *Id.* at [97].

226. *Id.* at [154] (Lord Scott).

227. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [155].

Lord Rodger, who expresses “some hesitation” about the existence of an Article 15 emergency²²⁸ but bears in mind that “courts do not have the expertise”²²⁹ similarly warns: “Sometimes . . . as with the Reichstag fire, national security can be used as a pretext for repressive measures . . .”²³⁰ This, he reminds us, can happen even in good faith—like the treatment of German and Italian enemy aliens in World War II.²³¹ Lord Walker, who in his dissent finds that indefinite detention is indeed proportionate, nevertheless recalls the dangers of oppression in the interest of national security and the threat of tyranny. “It is sufficient to refer . . . to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s.”²³²

The alternative crisis therefore looms large at the background of the majority’s position, as well as at the foreground of Hoffmann’s dissent. It is the court’s special expertise as human rights guarantor to detect and declare human rights and legality crises and to respond to them. As Lord Hope, quoting Baron Hume (in the Commentaries of the law of Scotland Respecting Crimes, 1844) asserted:

[I]t is obvious that . . . every court . . . must have the power of correcting the greatest and most dangerous of all abuses of the forms of law—that of the protracted imprisonment of the accused, untried . . .²³³

With the dangers of the nineteenth century in memory, Lord Hope goes on to warn, “the risks are as great now in our time of heightened tension as they were then.”²³⁴

2. What Is a “Public Emergency Threatening the Life of the Nation?”

a. ECHR Jurisprudence

Although the majority does not explicitly consider or decide this question for itself, it does refer to a variety of definitions in European instruments and sources. Especially, the need to follow the line of ECHR

228. See *id.* at [165] (Lord Rodger).

229. *Id.* at [166].

230. *Id.* at [177].

231. *Id.*

232. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [193].

233. *Id.* at [100] (Lord Hope).

234. *Id.*

cases opens up an interesting set of examples for definitions and demonstrations of definition analysis going back from the 1950s to the 1990s in ECHR jurisprudence.

i. *Lawless v. Ireland: Establishing the Court's Role on the Question of the Existence of an Emergency*

The first case is the landmark *Lawless v. Ireland*, in which the court's role in scrutinizing the existence of an emergency was initially asserted.²³⁵ There the emergency was IRA terrorist activity between 1954 and 1957.²³⁶ The Irish government derogated from Article 5 in order to permit detention without charges or trial and the applicant was detained between July and December 1957.²³⁷ In paragraphs 28 and 29, the ECHR Court established the conceptual definition of public emergency that goes a long way in later jurisprudence:

[T]he natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear. . . they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.²³⁸

After defining the concept, the court in *Lawless* explained that it "must determine whether the facts and circumstances which led the Irish government to make their proclamation of 5 July 1957 come within this conception."²³⁹ It does so on the basis of evaluation of facts to find that the Irish government "reasonably" deduced the existence at the time of a "public emergency threatening the life of the nation":

235. *Lawless v. Ireland* (No. 3), 1 Eur. Ct. H.R. 15 (1961) at para. 28.

236. *Id.* at para. 14.

237. *Id.* at para. 7-10.

238. *Lawless*, 1 Eur. Ct. H.R. at para. 28; The court in *Belmarsh* does not take on this definition neither does it remind the reader that there were competing definitions of emergency in the dissenting opinions in the Commission's report. *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 at [154]. In this case a nine-member majority in the European Commission of Human Rights defined a 'public emergency' for the purposes of Article 15 of the European Convention as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question." . . . One alternative reading suggested that the linkage between war and public emergency in Article 15 indicates that "public emergency" must be construed as "tantamount to war" or as analogous to circumstances of war. Another dissenting opinion suggested that a public emergency existed only when the constitutional order of the state had completely broken down when the different branches of government could no longer function. OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 4 (2006) at 249.

239. *Lawless*, 1 Eur. Ct. H.R. para. 28.

1. [T]he existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes;
2. [T]he fact that this army was also operating outside the territory of the State, thus seriously jeopardizing the relations of the Republic of Ireland with its neighbour;
3. [T]he steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.²⁴⁰

These facts would not be enough to constitute the existence of an Article 15 emergency without the existence of one more factor:

4. A specific attack on the night of July 3 to 4 which had brought to light the imminent danger to the nation caused by continuing military activities of the IRA on Irish territory.²⁴¹

On July 5, the Irish government proclaimed an emergency and later that month addressed the Secretary General stating the purpose of the detentions.²⁴² The Irish government, the ECHR Court then proclaims, was justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation.²⁴³

What the *Belmarsh* majority recalling *Lawless* does not emphasize is that the ECHR Court in this case deliberately assesses the questions: 1. what is a public emergency; and 2. whether one exists or doesn't exist. The next stage for the *Lawless* court was to determine whether the measures taken were strictly required by the exigency.

For the European Human Rights Court in its very first judgment, the definition of emergency was "natural and customary," clear and quite straightforward in application: an exceptional situation of crisis or emergency; affecting the whole population; constituting a threat to the organized life of the community; and including a requirement of imminent danger in the process of identification.

ii. The Greek Case: High Standard of Review over the Existence of an Emergency

From this first case taken to establish ECHR scrutiny over the question of the existence of an emergency the court moves to *The Greek Case*, in which the government of Greece failed to persuade the European

240. *Id.*

241. *Id.* para. 29.

242. *Id.* para. 24, 28.

243. *Lawless*, 1 Eur. Ct. H.R. para. 30.

Commission that there was a public emergency threatening the life of the nation such that derogation would be justified.²⁴⁴

The only thing that the court in *Belmarsh* takes from *The Greek Case* is the development by the Commission of the test for what constitutes a public emergency, adding the requirement of actuality or imminence:

Such a public emergency may then be seen to have, in particular, the following characteristics:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organized life of the community must be threatened.
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.²⁴⁵

The Greek Case on the question of defining the emergency stands for much more than this—it is an example of a serious and probing scrutiny of the threshold question. The context is important here. On April 21, 1967, a group of military officers carried out a successful coup d'état in Greece.²⁴⁶ In the name of “The National Revolution,” constitutional guarantees protecting human rights were suspended.²⁴⁷ Mass arrests, purges of the intellectual and political community, censorship, and martial law followed.²⁴⁸ The revolutionary government created a military dictatorship and in May 1967 informed the Secretary General of the Council of Europe that Article 15 of the Convention was being invoked.²⁴⁹ The governments of Denmark, Sweden, Norway and the Netherlands made applications against Greece which were heard, discussed at length and published in the European Convention Yearbook of 1969.

Under the heading, “Issues Arising under Article 15 of the Convention,” the Commission laid down an impressive project, objective and un-deferential, of factual and legal analysis regarding the existence of an emergency in the case and the applicable standards of review.²⁵⁰ One of the

244. *Id.* para. 150.

245. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [18] (quoting *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 21, para. 153).

246. *The Greek Case*, 31 Eur. Comm'n H.R. 1, 70, para. 22.

247. *See id.*

248. *Id.* at 6.

249. *Id.* at 2.

250. The first question that the applicants raised was whether a revolutionary government can derogate from provisions of the convention under Article 15. The applicants argued that a revolutionary

major questions was whether there was on April 21, 1967 in Greece a public emergency threatening the life of the nation.²⁵¹ Here the court distinguished between three “heads of the threat” on the basis of Greece’s claims that there was an emergency—the communist danger, the crisis of constitutional government, and the crisis of public order.²⁵² On each of these types of emergencies, or sources of threat, the Commission heard evidence by witnesses - at least thirty witnesses are named and described in the presentation of evidence on the question of a communist danger alone - and received documents, among them reports of political gatherings, speeches by political leaders, newspaper articles, secret dispatches, plans of action and more.²⁵³ Evidence was brought and discussed regarding the authenticity and relevance of these documents.²⁵⁴

In its discussion of each of the different types of crisis claimed by Greece, the Commission provided interesting criteria and distinctions. For example, on the issue of “communist threat” it distinguished between communist plans and their ability to execute the plans and argued that communist takeover was not imminent.²⁵⁵ On the “political crisis” the commission distinguished between “widespread anxiety about the future of political institutions” and such that require suspension of the constitution.²⁵⁶ Witnesses were brought to pledge their allegiance to the constitution.²⁵⁷ On the presence of “crisis of political order” the Commission distinguished between “a state of tension in Athens and Salonica” and the “state of emergency” to which the Article refers.²⁵⁸ It fully elaborated on the question what is “a public emergency threatening the life of the nation,” “the criteria governing the control of declaration of public emergency” and applied them

government cannot invoke an “emergency situation which they themselves created as a justification for derogating from Articles of the Convention in order to remain in power. The commission considered this and decided that the revolution itself did not deprive of Greece of its rights, or absolve it from obligations under the convention.” *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 21, para. 58, 60. The second was whether the procedural requirements of Article 15(3) had been fully met by Greece. The applicants argued that Greece failed in its submission to the Secretary General to indicate the Articles of the Convention from which it had derogated; to furnish the complete text of the administrative measures; to provide full information with regard to the administrative measures taken. *Id.* para. 74. The Commission maintained that they were correct and upheld a strict procedural requirement. *See id.* para. 225.

251. *The Greek Case*, 31 Eur. Comm’n H.R. 1, 70, para. 51–125.

252. *Id.* para. 51.

253. *Id.* para. 55–58. Among them were members of government from the periods before and after the coup, other officials from the previous regime and the current one, officers of the armed forces, economic officials and heads of unions, legal professionals, publishers and journalists from the press, one NGO delegate and even a Professor of Byzantine Literature from the university of Athens. *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 21, para. 96.

254. *See generally The Greek Case*, 31 Eur. Comm’n H.R. 1, 70, para. 59–75.

255. *Id.* para. 61.

256. *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 21, para. 126.

257. *Id.* para. 183.

258. *Id.* para. 149.

iii. That the Post-9/11 Global-Terror Emergency is Not an Article 15 Emergency

It is not only, the Appellants claim here, that European States who are similarly threatened by terrorism have not derogated, but that they consciously and collectively decided not to derogate in these new circumstances of global danger.²⁷² From these statements the appellants claim that post 9/11-terror threats should not be regarded as “threatening the life of the nation.”²⁷³ “In their fight against terrorism,” so resolved the Parliamentary Assembly of the Council of Europe in its Resolution 1271, January 24, 2002, “Council of Europe members should not provide for any derogations to the European Convention on Human Rights.”²⁷⁴ It also called on all member states to “refrain from using Article 15 of the European Convention on Human Rights . . . to limit the rights and liberties guaranteed under its article 5.”²⁷⁵ The United Nations Human Rights Committee in its General Comment No. 29 on Article 4 expressed “concern that states appear to have derogated from rights Protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by Article 4.”²⁷⁶ Finally, the European Commissioner for Human Rights expressed his opinion that “general appeals to an increased risk of terrorist activity post September 11th 2001 cannot on their own, be sufficient to justify derogating from the Convention . . .”²⁷⁷ The experiences of the 9/11 era, we learn from the Appellants, have a lot to add to the definition of emergency in Article 15, both on what a public emergency is and on what it is not.

c. *Lord Hoffmann’s Competing Definition: A Threat to the State as a Social Organism*

Lord Hoffmann also resists the definition of emergency that includes threats such as the 9/11 terrorist attacks.²⁷⁸ He goes further and presents his own analysis of Article 15 according to which a threat to the life of the nation is a threat to the continuation of the institution and values of the state as a social organism—not to its people. In paragraph 91 he asks, “what is meant by ‘threatening the life of the nation?’”²⁷⁹ He explains the essential terms:

272. *Id.* at [23].

273. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [24].

274. *Id.* at [23].

275. *Id.*

276. *Id.*

277. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [23] (citing Opinion 1/2002 of the Council of Europe Commissioner for Human Rights. Comm DH (2002) 7, 28 August 2002 [33].).

278. *Id.* at [97].

279. *Id.*

The "nation" is a social organism, living in its territory (in this case the United Kingdom) under its own form of government and subject to a system of laws, which expresses its own political and moral values. When one speaks of a threat to the life of the nation, the word "life" is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The armada threatened to destroy the life of the nation not by the loss of life in battle, but by subjecting English institutions to the rule of Spain and the inquisition. The same was true of the threat posed by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values that show a recognizable continuity.²⁸⁰

With this definition of "threat," "life," and "nation," Lord Hoffmann then considers the European Court's analysis of the concepts as unhelpful, a "desiccated description."²⁸¹ It only means, he explains, that the European Court gives the states a wide margin of appreciation in deciding "both on the presence of such an emergency and on the nature and scope of derogations necessary."²⁸² "What this means is that we, as a United Kingdom court, have to decide the matter for ourselves."²⁸³

As seen, the *Belmarsh* decision unfolds a range of alternative arguments, positions and claims on the first question: "what the emergency in Article 15 ECHR is." What are the conditions that satisfy the term "public emergency threatening the life of the nation?" Does it require imminence and temporariness? Is it a threat to "the population" or to "the nation," its institutions and its values? Does the terrorist threat satisfy such condition? What exactly is the threat experienced? Is it a condition of anxiety caused by the U.S. 9/11 trauma? Is it a condition announced by the United Nations Security Council? Is it global? Is it local? Is it actually the terrorist threat or is it an alternative threat caused by "such laws" as the one allowing for indefinite detention? These are all questions that are contested, but ultimately avoided, in the decision.

280. *Id.*

281. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [92].

282. *Id.* (quoting *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, para. 207 (1978)).

283. *Id.*

B. *How Should One Identify the Conditions as an Emergency?*

1. *Methods of Identifying the Scope and Intensity of Threats*

As seen in the derogation order, the government presented its methods of identification by (1) reference to actual conditions of threat; (2) reference to the United Nations resolution regarding an international threat; and (3) by announcing that an emergency exists.²⁸⁴ However, reflected in the decision are other suggestions regarding identification methods that arise from the interpretation of the specific requirements of Article 15.

a. *Learning About Imminence*

Recall that the appellants argued that if the emergency was not actual it must be shown to be imminent.²⁸⁵ In submitting that the test of imminence was not met, the appellants pointed to ministerial statements that there was no immediate intelligence or evidence pointing to a specific threat.²⁸⁶ The government, in turn argued that an Article 15 emergency could properly be regarded as imminent if "atrocities were credibly threatened" by a body such as Al-Qaeda, which demonstrated its capacity, and could be committed without warning at any time.²⁸⁷ This claim is echoed in Lord Walker's dissent when he claims that a terrorist threat, for the mere fact of the event being unknown and unpredictable as to when, where and how it will take place, is indeed imminent.²⁸⁸

b. *Learning About Temporariness*

The Appellants argued that an Article 15 emergency must be temporary and cannot require long-term adjustments because these cannot be justified as derogation measures.²⁸⁹ It relied again on statements by official spokespersons that the threat that the United Kingdom faces is "near-permanent."²⁹⁰ The government argued contrarily that an emergency couldn't be artificially defined as temporary.²⁹¹ Such a method for identifying an emergency that requires the person who detects an extreme

284. See Derogation Order, *supra* note 2, at 2.

285. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [21].

286. *Id.* at [166].

287. *Id.* at [25].

288. *Id.* at [208].

289. See *id.* at [21].

290. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [22].

291. *Id.* at [25].

threat to know in advance that it is not going to endure, was implausible according to the government's argument.²⁹²

c. *Learning from the Practice of Other States*

The Appellants argued that the practice of other states, none of which had derogated from the European Convention, strongly suggests that there was no public emergency calling for derogation.²⁹³ It relied on sources in European countries and within the United Kingdom that both urge the United Kingdom to refrain from derogation and alert the government to this anomaly.²⁹⁴ "The United Kingdom is the only country to have found it necessary to derogate from the European Convention on Human Rights. We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders."²⁹⁵ So commented the statutory Newton Committee.²⁹⁶

In response, the government argued that the method of looking to the decisions of other states is improper.²⁹⁷ The practice of other states cannot mean much because each government is "the guardian of its own people's safety and must make its own judgment on the basis of facts known to it."²⁹⁸ This British exceptionalism is to be understood on the basis of the fact that the United Kingdom is not only an enemy of Al-Qaeda but also a special ally to the United States²⁹⁹

d. *Comparing Emergencies: Learning by Applying the European Court Standards*

In the government's argument with regard to the inadequacy of the requirement that emergencies in Article 15 must be only short-term crises, it specifically relied on the Northern Ireland emergency derogation case of *Marshal v. U.K.* in which a long-term emergency derogation, lasting more than nine years from the previous decision, was accepted. Similar comparisons can be found in the majority decision where Lord Bingham presents his legal argument from the European case law.³⁰⁰ He stipulates, "If it was open to the Irish government in *Lawless* to conclude that there was a

292. *See id.*

293. *Id.* at [24].

294. *Id.* at [23].

295. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [23].

296. ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT, HC 100, at 189 (UK).

297. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [25].

298. *Id.*

299. *Id.*

300. *Id.*

public emergency threatening the life of the Irish nation, the British government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September."³⁰¹ The examples in European jurisprudence provide the court and the government indication about the level of threat that was applied then, and may be consistently applied to the current process of identification. If a *Lawless*-type emergency was acknowledged, and on the assumption that the current emergency is more severe, an emergency declaration in this case may coherently be acknowledged and deferred-to.

e. *Learning About the Nature of the Threat from the Nature of the Measures*

At the same time that they resist the urge to decide whether the current threat is an emergency and bear in mind that courts have no expertise in this matter, the judges in *Belmarsh* are prepared to learn about the threat from the rationale behind the government's derogating measures.³⁰² Lord Nichols, for example, opens his speech with a description of the exceptionality of the measures from which he adduces that we are in "an emergency."³⁰³ "Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified."³⁰⁴ Similarly, but from his very different perspective, Lord Hoffmann learns from the measures about the alternative threat that he detects. After describing the nature of the derogating measures, he warns that they raise the question whether the United Kingdom is becoming "a country in which the police can come to a person's house and take him away to be detained indefinitely without trial."³⁰⁵ Laws such as these, he warns, are the real threat to the life of the nation.³⁰⁶

301. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [28]; see also *id.* at [165] (Lord Rodger) (rejecting the appellant's claim that there was no emergency). Lord Rodger also relies on the decision in *Lawless*, which held that the Irish government reasonably deduced the existence of such emergency—there the government confronted terrorist threats and there they were continuous and not temporary. In comparison to this situation—these current emergency which were not contested by the European Court, were less acute. *Id.*

302. *Id.* at [116].

303. *Id.* at [74].

304. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [88].

305. *Id.* at [87] (Lord Hoffman).

306. *Id.* at [88].

f. *Learning from the Nature of the Threat About the Nature of the Measures*

i. The Analysis of What Is “Strictly Required” Relies on an Assumption About the Threat

Although the majority is decidedly deferential to the government’s claims about the threat, acknowledging that these types of questions that have to do with risk are preeminently political, it nonetheless freely interprets the government’s claim about the nature of the exigency in order to scrutinize the measures.³⁰⁷ In its proportionality analysis, the court relies on SIAC’s assertion contesting the Home Secretary consideration that “the serious threat to the nation emanates predominantly, and more immediately from the category of foreign nationals.”³⁰⁸ The threat, SIAC concluded on the basis of the evidence before it, “is not so confined. There are many British Nationals already identified . . . who fall within the definition of ‘suspected international terrorists’”³⁰⁹ Since the threat is not confined to foreign nationals who cannot be deported, but also emanates from British nationals and foreign nationals who are deported, the measures are not rationally connected to the objective and are certainly not the least harmful measures available.³¹⁰ Assumptions and arguments about the nature of the threat are used in the analysis of what type of response to that threat is strictly and rationally required.³¹¹

ii. Lord Rodger’s “Equality of Threats”

A version of this method of using assumptions regarding the threat in defining the measures is Lord Rodger’s depiction of the discrimination argument. According to Lord Rodger, the equality between the analog groups is not equality in rights, but an equality in the threat they pose.³¹² The threat is the same irrespective of the nationality of the individuals involved.³¹³ In the absence of any satisfactory evidence, that members of the two groups posed substantially different threats, the judgment of the government and Parliament, that the exigency of the situation did not require the detention of British suspects, undermines their simultaneous judgment that it was

307. *Id.* at [113].

308. *Id.* at [32].

309. *Id.* (quoting SIAC Judgment at para. 184).

310. *Id.* at [31].

311. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [122]. (Relying on such threat rationale arguments by the Newton Commission, JCHR, the European Commissioner and more).

312. *Id.* at [77].

313. *Id.* at [161] (Lord Rodger).

necessary to detain those foreign suspects who could not be deported.³¹⁴ This teaches that the detention was not strictly required. Discrimination is not on the issue of immigration, but on the issue of threat—they pose the same threat and therefore must be treated the same in respect to detention.³¹⁵ “In being thought to pose this kind of threat the foreign suspects are comparable with British suspects.”³¹⁶

iii. Lord Hope’s Combined Method

It is interesting that Lord Hope, who agrees that, the question whether there is an emergency and whether it threatens the life of the nation are preeminently for the executive and for parliament, provides a test that combines the scrutiny over the measures with the scrutiny over the existence and the nature of an emergency:

Where the rights of an individual are at issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights . . . One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes an emergency.³¹⁷

In applying the method, Lord Hope relies on the government’s statements to learn that the conditions are not of an imminent emergency:

It is an emergency, which is constituted by the threat that these attacks will be carried out. It threatens the life of the nation because of the appalling consequences that would affect us all if they were to occur here. But it cannot yet be said that these attacks are imminent.³¹⁸

Lord Hope distinguishes between two situations of emergency—the one in which threat is imminent, which will be the situation right after the threat would materialize, and the one in which threat is not imminent, which is the current condition.³¹⁹ Therefore, the question is: Do the exigencies of the situation that we face now, in which the threat is not imminent, require that appellants be deprived of liberty?³²⁰ The question of whether the derogating

314. *Id.* at [168].

315. *Id.* at [132].

316. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [171].

317. *Id.* at [116] (Lord Hope).

318. *Id.* at [119].

319. *Id.* at [119].

320. *Id.* at [221], [121].

measures are strictly required is judged in respect to the exigencies and, in Lord Hope's words, according to the "nature of the emergency" and whether there are other ways, alternative and less harmful ways, to deal with it.³²¹ If this is the nature of the emergency, not imminent, long term, possibly indefinite, are the indefinite detention of foreigners strictly required to handle it? Lord Hope answers this question negatively.³²²

Thus, alternative methods for identifying threat are proposed in the decision. How can we know whether the conditions of Article 15 are in existence? From United Nations Security Council resolutions? By reference to the government's statements and declarations? From other States' practices and declarations? By comparing current experience to past precedents? By analyzing the response measures? By assessing the rationality and proportionality of the measures? By judicial intuition about the proper relation between the intensity of threat and the intensity of the measure? This leads to the next set of concerns about how should such intuition be informed concerns about the proper process, and procedure for identifying and declaring Article 15 emergencies.

2. Proper Process, Procedures and Standards of Identifying Threats

The process of identifying emergencies does not only require special methods but also proper procedures and standards for identification and review. What is a proper process of identification? Are there special procedural and evidentiary requirements? What standards of knowledge and of expertise would guarantee a proper process? And what standards would guarantee proper review for such process?

a. The Requirement of an Informed Process

Recall that the Appellants' argued that the emergency is not actual and that no evidence was shown that there was an imminent danger to public safety.³²³ In this argument they relied on reports by the Joint Committee on Human Rights in which this argument was stressed, "[h]aving considered the Home Secretary's evidence carefully," the JCHR stated while the ATSCA bill was still pending before the two Houses, "we recognize that there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee."³²⁴

The claim is more fundamental than the simple argument that

321. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [109], [121].

322. *Id.* at [124].

323. *Id.* at [24].

324. *Id.* (quoting JCHR, SECOND REPORT OF THE SESSION 2001-02, H.L. 37, H.C. 372, para. 30 (U.K.) (made when the 2001 Act was a Bill before Parliament); see also JCHR, FIFTH REPORT OF THE SESSION 2001-02, H.L. 51, H.C. 420 para. 4 (U.K.).

imminence was not shown. According to the JCHR, the government must make available to the Committee as well as to each house, and not merely to SIAC in closed doors, sufficient evidence to make it possible to accept that derogation is strictly required by the exigency of the situation "to deal with a public emergency threatening the life of the nation."³²⁵ This strong claim regarding the importance of an informed process is not just an Appellant's complaint against national security cases being decided on in and on the basis of secret material.³²⁶ Coming from a parliamentary committee, the claim is that in order for the parliamentary process of identifying an Article 15 emergency to be effective and legitimate, the government must provide for appropriate conditions under which the legislative branch can operate.³²⁷ That means not only is it necessary that enough time be provided for internal processes of reporting, but also that there be assurance that these processes are well informed. This claim was not discussed by the court in confronting the government's assertion that it should pay deference to the executive and Parliament's decisions regarding threats to the nation.

b. *The Problem of Evidence*

The court was also especially reluctant to expose itself to questions of evidence for the government's claim that there is an emergency. While the Attorney General "expressly declined" to ask the court to read the sensitive closed material that was considered by SIAC alone, Lord Bingham concluded, without seeing the material, that "the closed material no doubt substantiates and strengthens the evidence in the public domain, [but] it does not alter its essential character and effect."³²⁸ SIAC was not misdirected in law "and the view which it accepted was one it could reach on the open evidence in the case."³²⁹ This, however, is a puzzling conclusion coming from a court that while holding "great doubts" and "some hesitation" according to Lords Scott and Bingham, regarding the question of the existence of an emergency in an Article 15 sense, did not ask to see these closed materials and was perfectly content to defer on this question.³³⁰ When deference to the government's decision on the identification of an emergency is based on the argument of political competence, there is no real reason to inspect the full range of evidence.

325. JCHR, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: STATUTORY REVIEW AND CONTINUANCE OF PART 4, SIXTH REPORT OF THE SESSION 2003-04, H.L. 38, HC 381, para. 34 (U.K.), <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/38/38.pdf>.

326. *Id.*

327. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [30].

328. *Id.* at [27].

329. *Id.*

330. *Id.* at [165].

More troubling is that the court did not pay attention to the claim that the full evidence should be provided to Parliament, if not to the courts. While giving the executive the benefit of the doubt, it could have at least entertained the argument that for such process to be legitimate, the legislator at least should have access to the full picture. Instead, the court relied solely on open general statements, which were all it needed in order to defer on the question of the existence of an emergency while scrutinizing the measures as not strictly required. However, if the court is right and it is truly not competent to scrutinize such decisions, it is especially important to assure that the process of identifying an emergency will be based on the relevant and full evidence.

The problem of closed evidence is important not only for the judge who wishes to be informed on the nature of the exigency in order to scrutinize the proportionality of derogation measures, but because, as the Appellant's argue, there should be a space for contesting assertions about the existence of an emergency.³³¹ If those who are affected by the government's claim have only access to public material, this material must be as full as possible. In the case of SIAC, this was solved by the somewhat problematic mechanism of the "special advocate"—while the detainee and his lawyer cannot know much of the case against him, his special advocate can see it, cross-examine witnesses, make representations to SIAC about it, and he may even persuade SIAC that some of the material should be disclosed to the detainee.³³²

David Dyzenhaus argued that "constitutional furniture" must be put in place in order to ensure that governments and parliaments deserve "due deference."³³³ If they cannot allow into the public domain more detailed information about the precise nature and scale of the threat, the authorities should devise "some system within Parliament whereby that part of the government's case that cannot be publicly debated can be heard."³³⁴ The court's solution of deference on "political issues" relies on the assumption that the most important evidence, that which has to do with our very existence, must remain in secret.³³⁵

331. *Id.* at [42].

332. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [155].

333. Dyzenhaus, *supra* note 120, at 130.

334. *Id.*

335. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [42].

c. *Local Sensitivities as a Standard for Identifying Threats*

i. *Local Sensitivities in ECHR Jurisprudence*

Recall that the government relied on the European Court's deference to "national authorities" to base its claim that the British Court must also defer to government on these issues.³³⁶ The idea behind the doctrine is that in order to identify a threat, local capabilities must be in place. But the implications of this standard are contested and a variety of options are reflected in the decision.

Ireland v. United Kingdom, and the claim of national authorities' "better position" based on direct and continuous contact: The court in *Belmarsh* learns that it should pay deference to the government's assertion that there is an emergency from, among others, the case of *Ireland v. United Kingdom*, in which the question of whether an emergency existed was agreed upon by the parties, the Commission and the court.³³⁷ The decision's contribution to the standards of review is in stressing *local sensitivities* in deciding the existence of an emergency. With no argument by the Appellants against the existence of an emergency, the ECHR Court explains why its Article 15 doctrine allows "a wide margin of appreciation" to national authorities:

By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.³³⁸

Nevertheless, the States do not enjoy an unlimited power in this respect. The court which with the Commission is responsible for ensuring the observance of the States' engagements,³³⁹ is empowered to rule on whether the States have gone beyond the extent strictly required by the exigencies of the crisis.³⁴⁰ The domestic margin of appreciation is thus accompanied by a European supervision.³⁴¹

This move towards a statement that the State is in better position than the European Court is criticized by authors who see this as an abdication of scrutiny, "or at best the power to stamp a state decision with the legitimacy

336. *Id.* at [176].

337. *Id.* at [18].

338. *Id.*

339. Council of Europe, European Convention of Human Rights art. 19, Nov. 4, 1950.

340. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [18].

341. *Id.*

of the Convention's seal of approval."³⁴² In fact, with no argument regarding the existence of an emergency, the court could be seen as articulating a standard for identifying local emergencies that is specifically tuned to local contestation.³⁴³ The criticism may be more relevant to later cases in ECHR jurisprudence, which seem to signal a move to discretion as an excuse to refrain from scrutiny.

Later cases, a state-focused doctrine: From *Ireland v. United Kingdom*, the *Belmarsh* court moves to the later cases that seem to repeat the account of local capacities while standing for a wide, almost total, deference to a State's decision on the existence of emergency. In *Brannigan v. United Kingdom*, the ECHR repeats *Ireland v. United Kingdom* in general, asserting a wide local margin of appreciation to local authorities.³⁴⁴ It must be stressed that in most of these later cases, there is no real contestation over the question of whether there is an emergency and the limited role of the court is simply stated to signal that it does have some role in this question.³⁴⁵

ii. Local Sensitivities Within a Regional Human Rights Regime

On the issue of proportionate response, the *Belmarsh* court articulates a specific type of argument about local sensitivities, which emphasizes the important role of the domestic court in the regional framework of the human rights Convention.³⁴⁶ According to this argument, the Convention regime for the international protection of Human Rights requires national authorities, including national courts, to afford effective protection.³⁴⁷ "The machinery of protection" in the Convention is in that respect subsidiary to the national systems of protection.³⁴⁸ In fact, the standard of a "large margin of appreciation in respect to derogation" presupposes the effectiveness of domestic controls.³⁴⁹ "It is now recognized," the court quotes its own doctrine, as well as the European Court's and the Commissioner's position, "that domestic courts must themselves form a judgment whether a

342. Ní Aoláin, *supra* note 261, at 117–18 (arguing that "*Ireland v. United Kingdom* started the trend on the retreat" from the duty to scrutinize state derogation practices to "State Focused Doctrine").

343. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [37].

344. *Brannigan and McBride v. United Kingdom*, 17 Eur. Ct. H.R. 539 (1993).

345. The court and the applicants agree on the existence of emergency. *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260. In *Brannigan*, the court adds that "in exercising its supervision the court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation." *Id.* para. 43. *But see Marshall v. United Kingdom*, App. No. 41571/98 (Eur. Ct. H.R. 2001) (referring to the previous cases to reject the claim by the applicant that the U.K.'s 1988 derogation had no validity nine years later).

346. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [40].

347. *Id.*

348. *Id.* at [48].

349. *Id.*

Convention right has been breached . . ."³⁵⁰ The intensity of review by a domestic court therefore correlates to the margin of appreciation accorded to the national authorities on derogation.

iii. Lord Hoffmann: Local Threats and Local Resilience to Threats

Lord Hoffmann's dissent reflects a competing claim about local sensitivities. For him the reason to respect local sensitivities was the threat posed by such laws to the very essence of British-ness: "The ancient quintessentially British liberty incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the convention because it set out the rights which British subjects enjoyed under common law."³⁵¹ The principles of liberty are ingrained as the British heritage. They are not special, not exceptional, and not foreign. They are part of what is the essence of British political normality, exported as precious valuables to those European nations that were not lucky enough to enjoy such political culture.³⁵² These were "local" ways, and they are now dangerously threatened.

The local threat is supplemented by a special, local British "resilience" which is part of "the life of the nation, its institutions and values."³⁵³ In front of this history, which proves a firmly based commitment to its own liberty, the threat from terrorism is belittled:

There may be some nations too fragile and fissiparous to withstand a serious act of violence but that is not the case in the United Kingdom . . . This is a nation that have been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation.³⁵⁴

The value of local sensitivities is thus extended to indicate concerns not only about special local vulnerabilities but also about special local abilities to withstand threats.

350 *Id.*

351. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [88].

352. *Id.*

353. *Id.* at [88], [91].

354. *Id.* at [95-96].

d. Alternative Standards for Judicial Deference

The government, we recall, presented a particular picture of the standard of deference, which Lord Rodger termed “abasement” before government views: “The judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.”³⁵⁵ That means indeed that to be legitimate, the process of identifying the threat, being so political, must exclude judicial intervention. This process must be utterly in the government’s discretion.

But there were other standards of deference that are reflected in the decision beyond this particular one.

*i. Deference According to Lord Bingham:
Functionally Bounded Deference*

The most visible perspective on the meaning of deference in the decision is Lord Bingham’s distinction between deference in respect to political issues that have to do with predicting the unpredictable and in respect to issues that are essentially legal.³⁵⁶ Under this depiction, deference exists on a continuum:

The more purely political . . . a question is, the more appropriate it would be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller therefore will be the potential role of the Court. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.³⁵⁷

This “demarcation of functions” or, “relative institutional competence,”³⁵⁸ raises the question of how we know that a matter is political. So many decisions have to do with individuals’ unexpected future behavior. This goes back to the question of the un-definable. It is the uncertainty that is inherent to the definition of emergency that makes the decision on the existence of an emergency, certainly and formally a legal decision because it adheres to and is strictly required from legal obligations of the state under the Convention and specifically from Article 15(1), which legally defines what constitutes a derogable emergency situation, so essentially political and

355. *Id.* at [25], [176].

356. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [28].

357. *Id.* at [29].

358. *Id.*

not appropriately under the responsibility of judges.³⁵⁹ Ultimately, what seems to distinguish Bingham's notion of deference from the government's is the discretion that courts have in demarcating their deference-zones based on their interpretation of the roles and responsibilities of judges. The court's recognition that "the traditional *Wednesbury* approach to judicial review was held to afford inadequate protection"³⁶⁰ and that it is now recognized under Convention jurisprudence and Human Rights Act jurisprudence alike, that "courts cannot abdicate their role as guardians of human rights."³⁶¹ This recognition makes it possible for the court to hold both Lord Hoffmann's *Rehman* holding that national security reasons are under the province of the executive and its own strict scrutiny of such reasons in *Belmarsh*.³⁶²

It is interesting that in Lord Bingham's identification of the question of the existence of an emergency as a preeminently political question, he identifies the deference that the court accords to the government with the European Court's "margin of appreciation" doctrine.³⁶³ Although Bingham is a domestic judge with "domestic sensitivities" according to the European doctrine, he identifies his deference as that of an international judge, rather than a "national authority." When a question is political in the court's understanding, it is as foreign to it as a foreign judge would see himself to be.

ii. Deference According to Lord Hope: A Contextual Standard

An interesting perspective on deference can be learned from Lord Hope's proposal of a "contextual" standard of deference.³⁶⁴ The context here is not only the nature of the right to freedom, "its absolute nature, save only in the circumstances that are expressly provided for by Article 5(1),"³⁶⁵ but also the context of the nature of emergencies:

Few would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind. But imminent emergencies arouse fear and, as has often been said, fear is democracy's worst enemy. So it would be dangerous to ignore the context in which

359. *Id.* at [30].

360. *Id.* at [40].

361. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [41] (quoting *Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't*).

362. *Sec'y of State for the Home Dep't v. Rehman*, [2001] UKHL 47, [54], [2003] 1 A.C. 153.

363. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [112].

364. *Id.* at [107] (Lord Hope).

365. *Id.*

the judgment is to be exercised. Its exercise needs to be watched very carefully if it is a preliminary to the invoking of emergency powers, especially if they involve actions, which are incompatible with Convention rights.³⁶⁶

So, according to this complex Contextuality, Lord Hope combines scrutiny over both questions—the existence of an emergency and the nature of the measures strictly required to handle them.³⁶⁷

The use of the word “strictly” invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government’s reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency.³⁶⁸

He then goes on to determine, as we have already seen, that the exigency of terrorism is indeed an emergency, but not one that is raised to the level of imminence required by Article 15 in order to justify such measures as the discriminatory and disproportionate ones chosen by the government.³⁶⁹ The question for him is whether the exigencies of the situation, determining that they are neither imminent nor temporary, require that the appellants be deprived of their right to liberty.³⁷⁰ He claims that all the factual material that may provide an answer to this question is in the hands of Home Secretary but he asks, “has he asked himself the right question in his analysis of the material?”³⁷¹ Deference, according to Lord Hope, requires that the government ask the right question.³⁷² The right question is one, which calls for a contextual analysis that takes seriously both the context of the right and the context of emergency.

366. *Id.* at [115].

367. *Id.* at [116].

368. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [116].

369. *Id.* at [119].

370. *Id.* at [120].

371. *Id.*

372. *Id.* at [121].

iii. Deference According to Baroness Hale:
Acknowledging “Imperfection”

Another interesting perspective on deference is Baroness Hale’s notion of personal limitation:

It would be meaningless if we could only rubber-stamp what the home Secretary and Parliament have done. But any sensible court, like any sensible person, recognizes the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the government and its advisors. They may, as recent events have shown, not always get it right. But courts too do not always get it right. It would be very surprising if courts were better able to make that sort of judgment than the government . . . I for one would not feel qualified or even inclined to disagree.³⁷³

On the face of it, this is in line with the strict deference approach. The government is best placed to identify and declare an emergency. Courts hold no expertise and can only intervene when it is “patently” clear that there is no emergency.³⁷⁴ Notwithstanding, there is a personal and somewhat hesitant tone here, which makes the claim of Indefinability somewhat less adjudicative. Baroness Hale is conveying her own imperfection, and owns up the government and the court’s vulnerability to making mistakes. This does not, of course, solve the problem of the gap between what the court can say about the exigencies and what it can say about the way to handle them. But by expressing self-doubts and limited capability and describing the possibility that courts would be able to say more than the government about the nature and scope of the threat as a “surprise,” Baroness Hale provides a way to think her assertion wrong. The process of detecting an emergency, she reminds us, is a human process, a question of regular capabilities and regular failures.³⁷⁵ It therefore cannot be correctly in the province of an “all knowing” body that decides. The problem with the government’s strict deference, as well as the majority’s functional deference, is that identifying an emergency is a complex process that may involve many voices and perspectives, the relevance and importance of which are legally obscured by the majority’s finding that this process is inherently the government’s business.³⁷⁶

373. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [226] (Baroness Hale).

374. *Id.*

375. *Id.*

376. At least two more approaches to deference can be detected in the decision: Lord Nicholls’ traditional deference and Lord Rodgers’ conceptual split. According to Lord Nicholls’ perspective, not

e. *Standards in Determining Threats: Belief and Suspicion in Article 21*

Is it possible to learn the standard of determining an emergency from the standards of determining other threats? Under section 21 of the ATCSA, “the Home Secretary may issue a certificate if he reasonably (a) believes that a person’s presence in the U.K. is a risk to national security and (b) suspects that he is a terrorist.”³⁷⁷ Baroness Hale notes that suspicion is an even lower hurdle than belief. Belief involves thinking that something is true; suspicion involves thinking that something may be true.³⁷⁸

It is not surprising, [she tells the reader,] that of the 16 who have been detained under section 23 so far, only one has had his certificate cancelled by SIAC. Another has had his certificate discharged by the Home Secretary. Two others have left for other countries. For the rest there is no end in sight and no clear idea of what they might be able to do to secure their release. One has been transferred to Broadmoor (we have not been told the legal basis for this) and another has been granted bail by SIAC on very strict

only are courts functionally restricted and prevented from making decisions on security matters, but they are also only the “last resort” in their own functional area:

Courts’ only duty is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. Great latitude is to be given to parliament and ministers who are primary decision makers. Courts intervene only ‘when it is apparent that, in balancing the various considerations involved, the primary decision maker must have given insufficient weight to the human rights factor.

A v. Sec’y of State for the Home Dep’t, [2004] UKHL 56, [2005] 2 A.C. (HL) 68 (appeal taken from Eng.) at [80] (Lord Nicholls). Deference, according to Lord Nicholls is bounded only by what is, on its face, an apparent mistake. As for Lord Rodger’s notion of deference, it is characterized by a striking conceptual split. On the question of the existence of an emergency, he does not even mention the word. All that the argument seems to need is government say-so, on the government’s controlled evidence, and that “the courts must bear in mind that they do not have that expertise.” *Id.* at [166] (Lord Rodger). There is no way to tackle this (even by bringing in the governments contradictory statements). To argue against this decision, one must “invalidate” the government’s assessment that the country was facing a risk of devastating attacks at some unspecified time, against which the government might have to take measures, which would not have been considered necessary before the events of September 11. *Id.* However, with respect to rights, Lord Rodger extensively lays down in three long paragraphs a theory about why ‘deference’ must be limited: “Due deference does not mean abasement before those views, even in matters relating to national security . . .” *Id.* at [176]. Here the courts are just “discharging” their duty, “performing their traditional role of watching over liberty of everyone within their jurisdiction regardless of nationality.” *Id.* at [178]. Not even mentioning that deference is being accorded on the issue of the existence of an emergency leaves the dramatic assertions that deference must be limited particularly hollow.

377. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [223] (Baroness Hale).

378. *Id.*

conditions of house arrest because of his mental condition. If we have any imagination at all, this should come as little surprise.³⁷⁹

One may contrast this to Lord Walker's insight about the urgency of the unexpected. According to him, a very low level of suspicion is appropriate for the most extreme threat.³⁸⁰ Terrorist dangers are uncertain, he reminds us; one can never tell when and how the terrorist will attack.³⁸¹ It is this uncertainty, which increases the gravity of the emergency.³⁸²

And so, the process of identifying threat is seen to be a contested matter. How informed should that process be? What level of evidence is required and how should it be made available? What is the court's role in assuring an informed process? What kind of standard of knowledge and expertise should be applied to the process, and to its review? How should we understand threat identification as a "local" capability? And if deference is the standard of review over such process, how should we understand the term? As a functional division of labor? As a strict rule? As a recognition of complexity and plurality of voices in the process? And if so, how does this feed back to the procedural requirements that should be put in place to assure that contestation will be possible? This broad set of questions should be seen as a basis for an alternative politics of definitions, one that takes seriously the shape of and the conditions for a negotiated process for identifying threats.

C. Persons and Institutions: Competing Over the Space of Defining and Contesting the Emergency

Besides the government, other persons and institutions claimed some kind of competence to identify and contest the existence of an Article 15 emergency.³⁸³

379. *Id.*

380. *Id.* at [208] (Lord Walker).

381. *Id.*

382. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [208] (Lord Walker).

383. I relate in this section only to those persons and institutions that are seen to be potentially involved in contesting the *existence* of the emergency. Other persons and institutions are seen to be involved in contesting and framing the definition itself. The United Kingdom government, in fact, had very little to say about the meaning of a public emergency and relied here substantively on the European Court's definition, and on its interpretation of the applicability of its previous cases. The fact that the Northern Ireland troubles were identified as a "public emergency" in constant rulings of the European Court, was reassuring, as well as the fact that the European Court was not troubled by the continuance of the emergency. In that respect, it is noteworthy that the government was willing to accept a foreign authority as a practically sole source for learning about the nature of "an emergency." However when Europe as a political actor contested the assertion that the risk of terrorism can be regarded as a public emergency in the sense of Article 15, see *A v. Sec'y of State for the Home Department (Belmarsh)* [2004] UKHL 56, [2005] 2 AC (HL) 68 (appeal taken from Eng.) at [23]. The government was keen to resist

1. United Nations Security Council

Recall that the government in the derogation order relied on the *United Nations Security Council* resolutions, 1368(2001) and 1373(2001),³⁸⁴ and its recognition that the attacks on the United States on September 11 were “a threat to international peace and security.”³⁸⁵

2. Parliament

The government, in arguing that the courts must refrain from reviewing the finding that an emergency exists submitted that it was for the executive and “Parliament” to assess the threat to the nation.³⁸⁶ However, there is little indication that Parliament was being seriously involved in the decision, beyond rubber-stamping the derogation order.

Contrarily, there is an indication in the Appellants’ arguments for a strong call to Parliament involvement in the process of identifying and declaring an Article 15 emergency in the references to the extensive reporting practices of the JCHR.³⁸⁷ This parliamentary committee, which was constituted pursuant to the HRA (“Human Rights Act”) 1998 and is authorized to assist Parliament to inspect and scrutinize governments bills and policies for compliance with Convention rights, repeated constantly that the government did not provide evidence to Parliament that would suffice to assert the kind of public emergency articulated in Article 15.³⁸⁸ This repeated claim resonates strongly in the decision on the background of the government’s claim that Parliament is the executive’s partner in the critically democratic decision regarding the existence of a threat to the life of the nation.³⁸⁹ The claim by a parliamentary committee that evidence was not shared with parliament strongly stands to contest the credibility of the government’s argument that the democratically elected institutions have the exclusive responsibility to make such grave decisions.

3. Civil Society Organizations

Other civil society organizations and committees specializing in human rights and security matters had presented strong claims to contest the

this intervention stressing, “each government is the guardian of its own people’s safety and must make its own judgment on the basis of facts known to it.” *Id.* at [25].

384. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [11].

385. *Id.*

386. *Id.* at [25], [37].

387. JCHR, REVIEW OF COUNTER-TERRORISM POWERS, EIGHTEENTH REPORT OF SESSION 2003–04, H.L. 158, H.C. 713, para. 4 (U.K.).

388. *See Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [24].

389. *Id.*

government's assertion that there is an emergency.³⁹⁰ Civil rights associations like Liberty, who made written and oral submissions to the House, brought forth a strong claim that the government must make its case on the existence of a public emergency in public, accept public scrutiny and provide the conditions, and especially the information, necessary for such scrutiny.³⁹¹

4. Committee of Privy Counselors ("The Newton Committee")

Established pursuant to section 122 of the ATCSA to review its application, the *Committee of Privy Counselors*, the "Newton Committee," also made significant efforts to argue for the insufficiency of evidence available in the public sphere for finding a justified derogation.³⁹² The Committee found it puzzling, for example that the United Kingdom is the only country that found it necessary to derogate.³⁹³ It recorded the Home Office argument about the dominantly foreign nature of the threat and drew attention to threats from British nationals, and to the extension of the threat from deported foreigners.³⁹⁴ A statutory body charged with the responsibility to review the operation of the 2001 Act in view of the HRA 1998 compliance requirements was seen by the court as competent to contest the government's findings on the nation's threat.³⁹⁵

5. SIAC

SIAC, a post-*Chahal* statutory tribunal, was exclusively authorized in Article 30 of the ATCSA to hear derogation cases including designation orders under Section 14(1) of the HRA³⁹⁶ and was the court that first decided that the government's assertion about the existence of an emergency was correct. While in *Rehman* the government argued against SIAC's competence to challenge national security decisions, in this case, not surprisingly, the government asserts not only that SIAC is competent, but that no appellate court could intervene because it was legally correct in its conclusion.³⁹⁷ The court followed the government's somewhat contradictory arguments about SIAC's authority both in *Rehman* and in *Belmarsh*.³⁹⁸

390. *Id.* at [4].

391. *Id.*

392. *Id.* at [23].

393. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [23].

394. *Id.* at [32].

395. *Id.* at [31].

396. ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, c. 24, § 30(1)(b).

397. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [25].

398. *Id.* at [27].

Note that SIAC was assumed by the *Belmarsh* court to be “the responsible fact finding tribunal”³⁹⁹ and that this was the basis for allowing its argument about discrimination. SIAC relied on the evidence before it to conclude “beyond argument” that the threat is not confined to foreign nationals and that there are many British nationals already identified as threats.⁴⁰⁰ Recall that the court relies on SIAC’s authoritative findings of fact regarding the source and nature of the threat, that it comes equally from nationals and non-nationals, to scrutinize the proportionality of the derogation measures. It is therefore prepared to accept that SIAC is competent and reliable in assessing threat.⁴⁰¹

6. Special Advocates

Another post-*Chahal* statutory invention was *special advocates*, who, according to Section 23 of the ATCSA, are authorized to receive information in order to protect the interest of the suspected terrorist without compromising intelligence sources.⁴⁰² Special advocates were summoned by the treasury solicitor but eventually were not called upon to testify.⁴⁰³ The idea that a special solicitor could be entrusted to see all the evidence, including secret evidence, on which the government was basing its assertion that there exists an emergency in existence, and make claims to contest it in the name of the Appellants was thus only hinted at in the decision, never explicitly considered.⁴⁰⁴

7. The Appellants

Finally, little attention in the decision was given to what was seen as obvious: that the *Appellants* themselves, who are directly affected by the government’s assertion that the existence of an emergency threatening the life of the nation justifies the derogation from their right to liberty, may contest the decision on this issue. Effectively, it was through the Appellants’ arguments that so many other voices entered the discussion about the existence of an emergency; the Appellants echoed and extensively quoted the JCHR reports, as well as the human rights organizations’ reports and the Newton Committee statutory reports, to support their argument that the evidence was insufficient to conclude that an emergency exists.⁴⁰⁵

399. *Id.* at [32].

400. *Id.* (quoting SIAC Judgment at para. 95).

401. *Id.* at [32].

402. *Belmarsh*, [2004] UKHL 56, [2005] 2 AC (HL) 68 at [205].

403. *Id.* at [4].

404. *See id.* at [223] (Baroness Hale).

405. *Id.* at [195].

While rejecting their claims on these issues, neither the government nor the court suggested that, the appellants had no standing on this question. The decision thus implicitly reflects a broad recognition that those affected by the government's declaration of an emergency have the right to bring evidence in order to contest it.

V. CONCLUSION

Traditional theory of emergency powers, as argued in this Article, have a limited view of definitional questions in emergencies and on why they matter. Because scholars are interested in the extreme liminal case, or because they are invested in institutional design to handle all exigencies, classic emergency powers theory is comfortable with defining the emergency as that which defies precise definition. In doing so, it generally overlooks the importance of definitional problems and questions of definitions in the practice of emergency law. Far from resisting precise definitions, emergencies very often involve contestations over definitions of emergency as a concept, over identifications of specific emergencies and over the process and procedures for such identifications. This is what this Article called—the legal politics of definitions—the contestations that problems of definition in emergencies bring to the fore and the consequences of such contestations.

The *Belmarsh* case in the British House of Lords is an illustration of how such politics unfold in one court case. In front of the government's claim that emergencies are so inherently un-definable that their identification as well as any determination over the scope and nature of response to them must stay under the exclusive control and discretion of the political branches, the court relied on the framework of Article 15 ECHR to distinguish between the question of whether a public emergency threatening the life of the nation exists, on which it accords absolute deference to government say so and the question of whether the measures—indefinite detention of suspected foreigners—are strictly required by the exigency on which it applied strict scrutiny.

This distinction, while successfully accommodating the devastating problem of the un-definable and the arbitrariness that it allows, has some adverse consequences. First, it exposes instability in the court's decision, as it could not satisfactorily respond to two strong claims: the government's claim that if the existence of the threat is so naturally a matter for its discretion, so is the decision what must be done to handle it and Lord Hoffmann's claim that the terrorist threat is not a public emergency, because it does not threaten the life of the nation. Second, the distinction served to legislate narrow answers to the two questions it wished to avoid: what an Article 15 emergency is, that which the executive declares as an emergency, and how it is to be identified, exclusively by executive declaration.

Finally—and the most important consequence—is that the distinction served to hide and obscure or render trivial alternative questions, views and distinctions regarding the problem of defining emergency in Article 15 and the process of identifying its existence. These questions call for and bring about an alternative politics of definitions, an alternative picture of multiple perspectives and competing claims which rather than prove that emergencies are un-definable show why they call for problematization, contestation, and debate. These are debates about the nature of the term public emergency in Article 15; about the nature of the terrorist threat as an emergency; about proper processes for identifying it, proper methods and procedures of identification, the standards of review for such processes, the spaces and places for contestation, and the actors to be involved.

This latter image of the politics of defining emergencies, may also have consequences in institutional design and institutionalized norm development, but these consequences are not, and cannot be recognized by a theory that still assumes that emergency is a vague concept that cannot be defined.