EMERGENCY POWERS, CLASS AND STATE

M. TUBBS

Australia is no exception to the trend, throughout the capitalist world, of greater social conflict and upheaval leading to growing difficulties for those with power to be able to hold that power and rule in the 'normal' manner.

This is shown by the experience of mass opposition to conscription and Australia's involvement in the Indo-Chinese war in the late '60s and early '70s; the massive industrial stoppages in 1969 against the penal provisions of the Arbitration Acts, the sharp uplift of strike action from 1970 on; the gradually increasing industrial action on social/political issues; the national demonstrative actions against the South African Rugby tour.

Such events have made politics and social control a whole new ball game. No longer can political issues be channelled through the normal bipartisan political processes; the appeal of extra-parliamentary action has, to many, been proven a better substitute.

The double dissolutions in 1974 and 1975 makes it more difficult to identify what's 'normal' now and virtually impossible to predict what it will be in the future.

Because of the tendency towards instability and the potential for increasing difficulties in ruling in a 'normal' manner, the dominant social class and their administrators follow another world-wide trend, that of rule by decree, by emergency powers. So we need to look at, and
understand, what emergency powers are, what they are used for and attitudes to be taken towards them.

THE STATE

While there may be arguments that laws exist in all societies (1) I think it is indisputable that emergency powers are unique to societies administered by a state. One of the prerequisites of being able to introduce and apply emergency powers is that state power exists in a form capable of enforcing these powers. No one would seriously argue that emergency powers existed in an Australian Aboriginal society, among the Kung bushmen of Africa or the Kiukuru Indians of the Amazon. It is the crystallisation of executive power which determines the difference between these kinds of communal societies and our own. (2)

What is it about a society with a state that makes emergency powers unique to them? The state, as Engels (3) pointed out, expresses a special or particular stage of human development. He went on to say: “It is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonisms which it is powerless to dispel.” (4)

This irreconcilable antagonism is a conflict between classes. The state only emerges when classes have been formed; there has never been a state in a classless society. Because the state arose out of class conflict it has been referred to as “an organ of class rule, an organ for the oppression of one class by another.” (5)

But the state is not seen by the majority of people as an instrument of class rule or a mechanism for oppression of a particular class; if it were the difficulties for the ruling class would be multiplied still further, with the likelihood that their rule would come to an abrupt and probably bloody end. No, the class for whose interests the state acts seeks to project the state as “a power seemingly standing above society”, (6) so it can act as an alleviator of social conflicts.

In general, the ruling class (in Australia the capitalist class) wields the apparatus of the state in such a way that its activities have the consensus of the vast majority of the people. Nevertheless, the state is founded on force and violence. At the centre of any state machine is “its army and police, its courts and jails”. (7) The state grows around these instrumentalities of force; there has never been a state which first built an administrative machine and later added these forces of coercion. The state is the manifestation of class conflict and it would be ludicrous to conceive of the state as being based on anything other than a force capable of protecting the ruling class from their class foe, and enforcing compliance with its dictates.

Private ownership of land and other natural resources was the objective proof that classes existed and as Marvin Harris notes, this required the “payment of rent which was always a source of animosity and is unthinkable in the absence of an ultimate police or military backing.” (8) Private ownership of surplus products, the means to produce those products, land and natural resources acted as a compulsion to have the physical means of guarding them from the natural inclinations of the have-nots.

The state then grows out of class conflict, is a mechanism for rule and subjugation of a class, but is presented as a neutral mediator of society’s disputes, conflicts and irreconcilable antagonisms.

EMERGENCY POWERS

There is hardly a developed capitalist country where the people have not experienced, in the last 15 years, the use of some form of emergency power. Those who were aghast and vocal in their condemnation of leaders of developing countries who introduced emergency powers are today defending the need for, and formulating their own, emergency powers. Bjelke-Petersen is a good example. He has been one of the most vocal in attacking other countries for what he calls totalitarianism, but himself has been a member of a government (once as its premier) which has twice, in the last decade, declared a state of emergency. West Australian Premier, Charles Court, and ex-NSW premier Bob Askin could be regarded as being cast in a similar mould.

Emergency powers are usually though not always (Northern Ireland has been under emergency powers since 1922 and South...
Africa since the middle 1950s) (9) introduced as short-term methods of rule.

No government can rule solely by emergency means without alienating an ever-growing section of its people. "Deception" is a more effective means of ruling (10) A piece of power used is a piece of power lost, and when you run out of power your time as a ruler runs out. This seems to have some validity in both Northern Ireland and South Africa.

If there is such a thing as normal rule, it is generally conceived of as encompassing human rights - such as no arrest or detention without trial; the right to legal representation; the right to freedom of speech, association, movement; access to information, etc. In reality, even in 'normal' periods of rule, these rights are a scarce commodity, competing against the growing needs of people. But we can say that we have, and expect more, individual freedoms and rights than if a state of emergency is declared. In normal rule, the use of punitive force is not expected; neither is it apparent. In fact, when we do see 'official' violence by some force of the state, such as the police, we usually strongly object. Normal rule is a rule of consensus. The term 'rule of law' expresses the fact that the overwhelming majority of people identify with and accept as correct the laws governing their society.

Sometimes, with little warning, the normal rule of law is dispensed with and emergency powers invoked. Whatever the reason, it is certain that the proclamation of emergency powers is caused by class conflict. The central issue is that of control - class control. In cases of natural disaster it may seem that declaration of an emergency has a non-class character. But that is not so. Because of the bourgeois values that prevail, the first priority is to protect property, then there is the need to compel people to do what they generally would not do, such as placing others' interests ahead of their own. This is done by fixing prices on food, clothing and water; the compulsory acquisition of equipment and supplies; the power to compel one to give a hand if necessary.

Finally, there is an important symbolic necessity: the benevolent capitalist state coming to the rescue, showing workers that in times of greatest crisis they can't get by without someone organised and capable of organising others. This paternalistic aspect was played out to the full in the Darwin disaster. An ex-Brigadier-General was presented by the media as the real savior and hero of the tragedy. Few stopped to consider the implications of the sweeping emergency powers he was given. Apart from being used as justification for the existence of emergency powers, natural disasters act as an opportunity to test those powers in preparation for a disaster which could face the ruling class in the future.

If we want to find the particular reasons for the proclamation of emergency, we should first look to the economic and political situation. In Northern Ireland, we are told, the main factors are religious, but when looked at more closely it can be seen that British economic, political and military strategic interests are involved and that the so-called Catholic side provides most of the cheap productive labor. Could it be that they are rebelling more against these things than against Protestant religious domination?

In South Africa the emergency powers are supposed to be there to protect the country against outside subversion. But looking at the internal economic and political situation we can see that 16 to 17 million blacks provide enormous wealth and prosperity for 3 1/2 million whites; that granting human rights, dignity and equality to the blacks would herald the end of white privilege. In Tanzania, the state of emergency was declared to stop cattle thieving which was disrupting the economic and political development of this newly emergent nation.

In a state of emergency one can say the 'rule of law' gives way to the naked rule of class power and woe betide those who try to block the use of that power. Effective immediate power is exercised, not by the multitude of government instrumentalities but by those exceptional arms of the state; the police and the military. It can be more clearly seen in conditions of a state of emergency that "the shabbiest police servant .... has more 'authority' than all the organs of gentle society put together." (13)

While this naked class power is unleashed fairly frequently nowadays, it would be quite wrong to think its power is unlimited. It still
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has to take account of the ideological and economic conditions in which it operates. Ideology, economics, traditions and conventions are all influences that act as partial constraints. No single aspect is sufficient by itself to act as a constraint. The restraint has to be perceived in a totality of all those things acting and reacting together. So, on November 11 last year, one convention was broken when Whitlam was dismissed, but other traditions and conventions acted as a restraint, allowing, for example, on that occasion, bourgeois elections to take place.

The political leaders administering, and the police and military applying, emergency powers are just as much conditioned by the prevailing ideology (usually more so), and would be unable to act independently of that conditioning. Another factor that can also act as a form of restraint is the proclaimed purpose of an emergency to restore control. The more ruthless its methods, the more primitive its means; the more opposition it generates, the longer it will be restoring control. In Northern Ireland, for example, there is: "... fairly solid evidence that internment has not merely redoubled IRA determination to employ violence but also increased recruits and broadened their support." (13)

The name of the game is class survival and rule, and the best guarantee of both is by the consensus of their class opponents. The longer the period of emergency rule the more difficult the road to normality. The fear of opening Pandora’s box becomes overpowering - until the inevitable happens and a social explosion opens it for them.

Emergency powers have one thing in common everywhere; they are based on violence and impending violence. They dispense with legal norms and, in effect, create their own ‘legality’ - the only guaranteed rights belong to those wielding power. Mathews notes that: “On paper there is little to choose between the detention laws of Northern Ireland and South Africa,” and that these powers have: “become an instrument of rule which the authorities are resorting to with growing frequency.”

He refers to the situation as “judicially uncontrolled”. (14) The exigencies of emergency power usually ensure that the police (and where used, the Army) become more physical in their coercion. The mass of the population are not only given to understand that, if necessary, physical force on a wide scale will be used, but they know such force will be unleashed should the situation warrant it. Punitive power is used with impunity.

To summarise this section, emergency powers are but a sharper expression of the class conflict. They arise when there is a threat to control by the ruling class and occur when normal methods of rule are thought to be ineffective in ensuring class domination. It shows that “Force exists to compel acceptance of capitalism if deception ... should fail.” (15)

THE AUSTRALIAN EXPERIENCE

The character of the ruling class in Australia is no different in essentials from the capitalist class of America, Britain, France and so on.

In Australia emergency powers exist and have been used on numerous occasions. Five of the six States currently have on their statute books emergency powers legislation. They are the Emergency Powers Act of 1941 (SA); State Transport Act, 1938-43 (Qld.); Public Safety Preservation Act, 1958 (Vic.); Fuel, Energy and Power Resources Act Amendment Act 1974 (WA); the State Emergency Services and Civil Defence Act 1972 (NSW). (16). There is also the NSW Energy Authority Act, 1976.

There are a number of things which should be noted about these Acts. Firstly, the title of three of them obscure the fact that they are emergency powers under which a state of emergency can be invoked. All have been promulgated since the social turmoil and experiences of the Depression. The periods around the Second World War and the Vietnam war can be identified with four of the Acts and the NSW and WA Acts have been assented to during the current economic downturn in the capitalist world. In other words, all these Acts can be identified with periods of depression and upheaval. An intent of all the Acts is to be free of judicial restraints and controls: “... this Act shall be published in the Gazette, and thereupon ... shall be judicially noticed, and shall not be questioned in any proceedings whatsoever.”
(17) and: "no action shall lie and no proceedings of any kind shall be instituted or heard in any courts in respect of any act or decision of the Minister or any person or body authorised by him in the exercise or purported exercise of his powers under this part of the Act." (18)

What we really have here is a rather kind way of saying that all judicial, legal and political rights will be suspended forthwith.

These two examples also show the tenuous nature of bourgeois rights; that when bourgeois law is a hindrance, our virtuous ‘law-abiding’ leaders have no compunction about ‘breaking’ the laws which they appeal to others to abide by. History shows the call for ‘law and order’ is the catchphrase of a tyrant. The abovementioned clauses are so obviously unconstitutional (Australian) (19) that little more needs to be said except that they still exist on the statute books.

The class nature of these Acts is self-explanatory. The NSW Act states the provisions shall apply to plagues or epidemics, etc. and “to an attack directed against the State or any part of the State”. (20) In the Queensland Act, whether the cause be fire, flood or Acts of God, etc. “or by reason of any other cause or circumstance whatever whereby the peace, welfare, order, good government, .... of the State” (21) are threatened.

As the States have no defence powers under the Constitution, their reference to an “attack directed against the state” must be an internal one, and that is hardly likely to mean an attack by the ruling class on their own state mechanism for oppression. Likewise, “any other cause or circumstance” whereby the “peace” and “order” or “good government” are affected can only mean that the act is directed at the working class. Since when did the capitalist class admit to being responsible for war, disorder and bad government? They are things of which only labor and workers’ governments and trade unions are capable.

Whether it is believed the emergency act is directed at the working class and other opponents of capitalism, the fact remains that, in Queensland, the Act has been used only against them, and them alone. The emergency powers in 1965 were not used to force Mount Isa Mining Co. to open their gates for work or to negotiate with or grant the miners their demands, but against the miners who were on strike. And in 1971 the powers vested in the Queensland Act were not used against racists but against their opponents. Queensland must have the rather dubious distinction of being the only government in the world to proclaim a state of emergency “for the purpose of conducting thereupon a Rugby Union football match”. (22) While it may sound funny, it is really extremely serious because it is a sad testament to, and reflection of, the paucity of that government and the threat it poses to democratic and legal rights.

I don’t want to go into the specific class factors which acted as causes for the dismissal of the Labor government, but want to make one exception and state that the reason for the government’s dismissal had little or nothing to do with the state of the economy. The fact is that the state of the economy is no better now than 12 months ago and is probably worse. Suffice it to say the issues were of a much deeper nature than the current rate of inflation, the number of unemployed or the size of the budget deficit. The “reprehensible circumstances” had to include matters such as political, economic and military strategies that threatened the ruling class’s social control of the working class, otherwise the exercise was illogical and did not make sense.

However, what I do intend to do is show the class nature of the powers used to dismiss the Labor Government and to concentrate at some length on the performance of the Governor-General in the events of November 1975.

At a commonwealth level it is a little uncertain how much legislative emergency powers the Parliament has, though the courts acknowledge that in time of war, its defence powers are extensive enough to allow it to declare a state of emergency. (23) Two things seem to need to be said. If the situation warranted it then, whether the Constitution gave the Commonwealth powers for declaring an emergency would be irrelevant—an emergency would be declared. Even in normal times when it comes to the grey zones of Commonwealth sovereignty, the Commonwealth has always assumed that it has the power and waited for the States to challenge and prove otherwise.
Secondly, under the Constitution the powers vested in the Governor-General in a sense could be claimed to be Commonwealth power and used if necessary with the approval of Parliament. Therefore I intend to concentrate my attention on the Governor-General’s executive powers.

COMMONWEALTH POWERS

Australia is somewhat different from most other capitalist countries in that its Constitution makes provision for a representative of the British monarchy to wield certain powers. These powers are often referred to, misleadingly, as ‘reserve powers’. Misleading because they do not designate the true nature of these powers. The ‘reserve powers’ of the Governor-General are the accumulation of enormous emergency class power. “Less well known is the power of the Crown to establish a state of martial law in times of insurrection or rebellion.”(24)

Section 61 of the Constitution states: “Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.” And section 1, ch. 1 states that legislative power of the Commonwealth resides with Parliament consisting of the “Queen, a Senate and House of Representatives”. S 57 gives the power to the Governor-General to dissolve Parliament. S 5 and S 28 give him additional powers over the dissolution and sitting of Parliament, with S 52 giving power to the government to make laws “for the peace, order and good government”.

Put together, all of these sections suggest that the range of emergency powers is extremely extensive, even if somewhat imprecise or uncertain. In effect the Governor-General could “be the autonomous ruler of the country for some time, provided of course that he had others to carry out his orders.”(25)

Prior to 1975 such propositions would have been considered ridiculous, impossible and the figments of an overactive imagination. However, today, nothing in terms of the possible extent of the Governor-General’s powers can be overlooked and dispensed with as being impossible. That which was unthinkable is today’s reality. Professor Howard clearly shows that the dissolving of Parliament in November 1975 did not take place in accordance with the provisions of the Constitution. S 57 could not “apply ... because there is never time for the complex procedures of that section to be complied with before the money runs out.”(26) Which poses the question, under which section of the Constitution was Parliament dissolved?

As for needing people to back his actions up, S 68 of the Constitution makes the Governor-General “the Commander-in-Chief of the Naval and Military” ... forces and one could add the Commonwealth Police under S 61. With that array of force at his disposal it is doubtful that many, if any, would refuse to carry out his orders. The point which should be grasped is that after it happens it is too late. One then is going to have to bear with the pain of the consequences. If there is an ounce of truth in the Leader of the Opposition’s claim that the Governor-General has “notions of grandeur” can we afford to take the risk?

How the Governor-General came to be vested with such powers is very much a class question and mirrors the real intention of those “reserve” powers. The Australian Constitution has to be seen as a “compromise between the British Imperialists, the new central authority and the authority of the previous six separate colonies.”(27)

So on the one hand we had the British colonialists, who had extensive interests in Australia, and on the other the newly emerging national bourgeoisie who wanted greater freedom to rule. England as a precautionary measure to protect its investments, demanded and got written into the Constitution that the armed forces of the new nation would remain under her ultimate command. “Constitutional law is not pure logic, it is logic plus politics.”(28) The formulators of our Constitution were not guided by the principle of ‘common interest’ but by class interests. Those who question this proposition should ponder on these facts: the only governments to be dissolved by the reserve powers of the monarchy’s representatives, have been labor (worker-oriented) governments and troops have been used only against the working class.

And for those who doubt that the military
would carry out the Governor-General’s orders - how many times in history have military commanders refused to carry out their superiors’ orders, and how many times in history has the military, in times of social conflict and rebellion, sided with the rebellious masses? Anyway, we have the answer straight from the horse’s mouth. A Major General Vickery, a senior officer of the Citizens Military Forces, is quoted as saying in respect to disturbances in Papua-New Guinea:

“Internal disorder of major proportions is a strong possibility. It could possibly happen by 1975 ... we must have a strong moral obligation to preserve its stability and integrity, if only by peace-keeping action. This is the strongest and most likely short term role for the Army in or outside Australia.” (29)

(My emphasis, M.T.)

Some may still think that all of this is drawing a long bow, is over-reacting, or fantasy, that it would not happen. Then once again they should reflect upon the fact that a defence report, reported publicly in the media in September 1975, dealing with the reorganisation and re-equipping of the military, proposed the formation of two new battalions as the only increase in the numerical size of the army. These two new battalions were to be highly mobile “paramilitary” units. Paramilitary units have one purpose and one purpose only - civilian control, rule and administration. They are for rule and government by the military.

It was also reported by some of the media that after the dismissal of the Labor Government in November, all police and army leave was cancelled. “The plain fact is that at the point where political tactics and constitutional law interact, the rules of Australian national government have changed,”(30) and like it or not that means the Governor-General’s powers are now practically speaking (no longer theoretically) greater than they have ever been. “The precedent has been set and accepted by all parties involved in the action.”(31)(My emphasis, M.T.) Not only by the political parties but also by the Chief Justice and the newly appointed High Court Judge, Mr Justice Aitkin. As reported in a press statement issued by the acting Attorney-General, Senator Greenwood, on November 20, 1975, he had tendered a legal opinion to the Liberal National Country Parties on October 23 1975, that the Governor-General had the power to act as he did.(32)

The shabbiest aspect of the implementation of the reserve powers of the Governor-General in November and what seems to have amounted to a deliberate, calculated manoeuvre to give his actions the imprimatur of legality, was the summoning of the Chief Justice for advice. The Constitution explicitly establishes and separates the High Court from the Executive and the Legislature and if there was any body of people he could not seek advice from it was High Court judges. For the simple reason is that, as has already been held in the Cormack v. Cope case (33), those persons may have to adjudicate on the validity of the Governor-General’s actions.

Thus a judge giving prior advice to a party, the substance of which, at a future date could be involved in an action before him/her could compromise their position and possibly pervert the course of justice. Section 71 of the Constitution makes it doubtful whether the High Court can validly sit on constitutional questions without the Chief Justice. Prior to November 11, 1975 the Governor-General supported the principle of judicial independence and in fact made it a distinction between bourgeois law and socialist law when he stated:

“Western society is characterised by the Rule of Law as a most important distinguishing feature between it and the Communist world. The latter being founded upon dictatorship, authoritarianism and .... tyranny ....”

He then goes on to state:

“... the lesson to be learned from what has been said is that the Rule of Law means little unless in the first place all can enforce their rights and be protected in their life, liberty, property and reputation .... For these purposes .... the law depends substantially upon the existence of a strong and independent legal profession ....”

(My emphasis M.T.)

The Governor-General would, I suggest, also have been aware of what the framers of
the Constitution intended to be the powers of that office. Two of them stated that the power of the Governor-General “can only be exercised according to the will of the people”, (36) and that it is exercised “according to the advice of Ministers who have the confidence of Parliament”. (37)

But the real class allegiance and bias of the Governor-General comes straight from his own mouth when he states “the real line of progress is to provide the poor with what the rich have, not to take it away from the rich”. (38) Such a proposition is a rather glib and sophisticated way of saying, “leave things as they are”, because not even he tried to explain how that could happen, and neither could he. To expect a Governor-General with these views to act in the interest of the poorer class is too much. I further suggest that the Governor-General was well aware of the following from the Chief Justice:

“In the first place it is not given to the Governor-General to decide whether or not in fact the occasion for the exercise of the power of double dissolution has arisen. In my opinion only this Court may decide that fact. But of course, the Governor-General must make up his own mind .... but what he determines for himself is in no wise binding.”

(My emphasis - M.T.)

This quote also brings into question the Chief Justice’s own honesty when he claimed at a press conference on June 10, 1976, that he gave advice to the Governor-General because the kind of action he had decided on could not come before the court. That was untrue. Precisely the actions he said could not come before the High Court had previously been before the Court in the Cormack v. Cope case, and he was the Chief Justice who sat on that case.

I surmise that the class interests were such that, irrespective of previous rulings or conventions, they went ahead. The validity of this opinion is substantiated by the fact that almost all the capitalist daily papers in Australia supported the Governor-General because the kind of action he had decided on could not come before the court. That was untrue. Precisely the actions he said could not come before the High Court had previously been before the Court in the Cormack v. Cope case, and he was the Chief Justice who sat on that case.

I have concentrated at some length on the events of 1975 because of their current importance and to show they had a class bias. Law students are being trained to believe in the ‘rule of law’, its importance in terms of order, peace, stability, life, liberty and social justice. Could it be that we have witnessed the highest office bearers of the bourgeois legal system, in protection of their class, wealth and privilege, coldly, dishonestly and without qualms, trampling over the laws they expect us - future jurists - to defend and uphold? And if we have, should we not follow the example they set for us? The point that Geoffrey Caine, and Professors Howard and Manning Clark (40) continuously overlook or obscure is the class nature of the reserve powers of the Governor-General. Their approach to November 11 is essentially a legalistic one. It cannot wholly be explained, fully understood, appreciated or the debate won by using purely bourgeois legal points. Every first year law student learns after the first tutorial that, for every legal point for one side, there is an alternative one for the other. So, no matter how eminent their opinions are, skilful exponents and masters at the legal game like the Governor-General and the Chief Justice will have an alternative one. About the only certainty of bourgeois law is that it works in the overall interests of the bourgeois class.

Emergency powers and ‘reserve’ powers of the Crown can better be fully understood and explained by using a marxist critique which identifies the classes involved. It is in the course of such a critique that the validity or otherwise of legal points is useful.

 LIBERALISING EMERGENCY POWERS

Some try to argue for a more “civilised” set of emergency powers. Sean McBride considers that to meet the criterion of the Rule of Law measures employed during a state of emergency should not be excessive or extreme. (41) Liberal propositions like these fail to take account of the character of emergency powers, or the reasons necessitating their implementation. It is ludicrous to think that emergency powers legislation can be enacted which will guarantee judicial restrictions on their use. One of the purposes of emergency powers is to allow the authorities to act as the situation warrants from time to time without having to
be concerned or restrained by the cumbersome functioning of the judiciary or to abide by that institution's restrictive rules of legal conduct.

It is because the judiciary recognises this fact, and the class character of these powers, that it has consistently refused to intervene. For example, in South Africa the court held with the 180 day detention rule “that the decision to detail need not be based on objectively established reasons and that the Attorney-General's own opinion that valid reasons exist is decisive”. (42) In Northern Ireland the court held that “the internment power is clearly not subject to judicial control in the form of a habeas corpus application or otherwise”. (43)

Every conceivable rule is broken under emergency powers with the acquiescence of the judiciary. Reasonableness gives way to random arbitrariness when it comes to arrest and detention, with the judiciary blandly asserting “In this case there is no reference to the reasonableness, nor do I find anything in the words of the regulations which suggests that it should be imported into it”. (44)

An Australian example of the timorous nature of the judiciary when it comes to intervention against the arbitrary powers inherent in a state of emergency, is the following quote by Queensland's Stables, J: “It is not for the court to question the validity of any opinion formed by His Excellency in Council under S 22. The Court is concerned with the question of legality and not with fact.” (45) The fact that this act was a public statement dismissing the learned Judge's own court as irrelevant and a nuisance seems to have been completely lost on him, or was it?

There are good reasons, apart from those I have already mentioned, of why the courts have acted placidly in emergency situations. Not the least of these are that when the class conflict or potential conflict has reached the stage of open antagonism which necessitates the declaration of a state of emergency, it is too late for legalities. The learned judges of the bench understand that when the instruments of class force (the police or military) are unleashed, they stand naked and impotent. When emergency powers are unleashed it is the moment of truth for the judiciary. While the courts are based on force, it is a force not inherent in that situation, but external to it (though that is not to say that force is not inherent in the decisions of the courts). What the court has is an authority or privilege that grants it access to a certain amount of force. But when that force is withdrawn, the court stands exposed as a toothless, clawless tiger. In a state of emergency this is a fact the court must face no matter how distasteful.

Of crucial importance in the performance of the judiciary is the class composition of the bench itself. Lord Devlin states: “Judges are, inevitably, part of the establishment and the establishment's ways are those which are operating in our minds ... I think the law has to be part of the establishment.”

Fellow judge, Lord Hailsham, put the matter a little more succinctly when he said: “There is no such thing as a value-free or neutral interpretation of the law .... judges, like everybody else, are influenced by the economic and political climate of their time, if they were not, they would be considered either revolutionary or reactionary, and they would become political judges .... judges must move with society.”

It is obvious from this that there is no earthly possibility of either judicially controlled emergency powers, or of judicial restraints being used against the use of emergency powers. The remarkably frank statements of the abovementioned judges make that abundantly clear. What Twining is really concerned about is not human rights. In fact he ridicules those who oppose the existence of emergency powers. He states his concern thus: "Civil order obtained through intimidation rather than integration will ensure the continuing need for emergency powers. The objects of introducing emergency powers is rather to create a situation in which they are no longer required."

What Twining seems to be after is the same game with a different name: the making of emergency powers respectable so that they have the approval of the class they are directed at, and intended to be used against. He is fearful that reaction to the extensive use of emergency powers could lead to social revolt and revolution. Thus his main concern
is for the survival of capitalism, not the human rights of the masses.

“It is a strange thing what authority the opinion of mankind generally grants to the intervention of courts. It clings even to the mere appearance of justice long after the substance has evaporated: it lends bodily form to the shadow of the law.” (46)

However, once the courts lose this mystical hold over the masses, the ‘rule of law’ is seen for what it is: a class instrument for their subjugation, a mechanism which allows tyranny to reign. It is fear of exposure which motivates the likes of Twining to redraft emergency powers legislation.

Those who believe in human rights and the rights of people to determine the kind of government and social system they want should not attempt to formulate emergency powers. Instead, they would do better to direct their energies to explaining their class character, working for their abolition, and with it the disarming of the police and having them placed under some kind of community control. At least that would allow the adversaries in the social conflict to fight it out on more equal terms and would surely be less painful to all concerned. It should never be forgotten that for rebellion to take place a prerequisite is for the ruling class to have fouled up their own rule, so why should they be protected?

In conclusion, the state is a mechanism for class subjugation; it grows out of class conflict and antagonism. Emergency powers are precisely that. They are the powers the ruling class wield in a crisis when its power, control and hegemony are threatened; when nothing, not even its own law is sacred. Emergency powers thus mirror the class conflict which exists in any society which has a state. Legal constraints on the use of emergency powers are impossible and their liberalisation not feasible. The very fact of their implementation is an admission that the ‘normal’ rule of law has failed. Events over the last few decades show that this analysis is as much applicable in Australia as anywhere else. Classes, the state, and emergency powers are inter-related. By abolishing classes the way is open to abolition of the state and with it emergency powers. Until that happens, be prepared and be warned: it will happen again. Probably the next time Labor wins an election they will only win the House of Representatives and thus return to a pre-November 11, 1975 position - the very situation which facilitated the invoking of emergency powers.

One other lesson can be learned from an historical study of the use of emergency powers: do not rely on the judiciary for protection. They are not on the side of the citizens but on the side of those unleashing arbitrary terror.

The real problem flowing from the events of November 11 and the real threat is that it makes it more likely that Australians will find themselves in a situation where they are ruled by decree. The safety valve for capitalism - short periods of reform under social democratic government - has all but been replaced by perpetual domination by a conservative senate. The probable solution to this quandary is open class confrontation and conflict. That is why the nature and character of emergency powers need to be exposed.

FOOTNOTES
4. ibid.
Private Vices, Public Virtues. Miklos Jancso’s latest film, is such a feast for the senses—vibrant music, rich coloring, warm, frank sensuality—that it comes as something of a shock to realise how tame and even tedious the whole exercise is. You can manufacture a continuing low level of interest in it, of course, by spotting the Jancso trademarks—dialogue so sparse that it tempts you to dismiss the story line outright, visuals so lovingly dwelled upon that you break your brains trying to squeeze as much significance out of the scene as the director obviously does, ritual stripping, the humiliation motif, etc. But such high-art gamesmanship soon palls, and you are left with a somewhat dense, but basically centre-less film featuring small doses of inchoate politics and large doses of curiously sexless sex.

Many of Jancso’s earlier films, however elliptical in form, are recognisably “about” revolution or the forms of popular expression that make revolution an imaginable possibility. Round-Up, The Confrontation, The Red and the White, Red Psalm are concerned with the struggles of “the people” (peasants/students) against repressive forces, and with the collective activities which nourish revolutionary vision. It is