Ius Gentium: Comparative Perspectives on Law and Justice 82

Richard Albert
Yaniv Roznai *Editors*

Constitutionalism Under Extreme Conditions

Law, Emergency, Exception

Springer

Ius Gentium: Comparative Perspectives on Law and Justice

Volume 82

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ISSN 1534-6781 ISSN 2214-9902 (electronic)
Ius Gentium: Comparative Perspectives on Law and Justice
ISBN 978-3-030-48999-1 ISBN 978-3-030-49000-3 (eBook)
https://doi.org/10.1007/978-3-030-49000-3

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Acknowledgments

The seeds for this book were planted at the Minerva Center for the Rule of Law under Extreme Conditions.

The Minerva Center—a unique collaboration between the Faculty of Law and the Department of Geography and Environmental Studies at the University of Haifa and the Faculty of Law at the University of Hamburg—conducts and supports interdisciplinary research on the normative and institutional dimensions of the rule of law as well as the study of law-in-action. It also fosters multifaceted empirical and theoretical research on the rule of law as a social sphere during belligerencies, natural disasters, and acute socio-economic crises.

The Minerva Center was the ideal forum to hold a symposium on how public law manages change in the face of extraordinary pressure on constitutions. On July 18–19, 2016, an international group of scholars gathered under the auspices of the Israeli Association of Public Law to dive deeply into some of the enduring questions involving constitutional resilience and endurance: what is the role of constitutions during times of crisis?; do different kinds of crises call for different solutions?; and can constitutions steer the conduct of political actors during periods of extreme pressure? The program was an immense success, not only in the fruitful discussions all enjoyed but moreover in the product of those deliberations, which are now produced in the chapters appearing in this book.

We thank the symposium organizing committee—consisting of Gad Barzilai, Eli M. Salzberger, Amnon Reichman, and Suzie Navot—whose members offered guidance on organizing the event. We thank also the discussants who gave valuable comments on early drafts of the papers presented at the conference: Eli Salzberger, Yair Sagy, Gad Barzilai, Amnon Reichman, Anna Mrozek, Lukas Hrabovsky, Ilan

Saban, Daniel Benoliel, Suha Jubran Ballan, Guy Lurie, and Patrick Graham. Finally, we thank the anonymous external reviewers for their comments on the manuscript, and the editorial team at Springer—Kavitha Palanisamy, Kay Stoll, and Anja Trautmann—for their patience and assistance from the very beginning of our journey toward publication.

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Introduction: Modern Pressures on Constitutionalism

Yaniv Roznai and Richard Albert

Abstract Constitutionalism under extreme conditions raises a bundle of fundamental questions about constitutional design and operation. While we envision constitutions as stable institutions intended to endure for a long duration through moments both peaceful and not, modern history has shown that constitutions are not as resilient as we expect them to be. Sometimes they suffer manipulation by incumbents intent on remaking the constitution under the guise of amending it; sometimes they fail even to withstand anticipated problems of transition or reconciliation; and still other times they quite simply collapse under the weight of changing social and political realities. In this volume on "Constitutionalism Under Extreme Conditions," a distinguished group of contributors focuses on yet another challenge to modern constitutions: the challenge that various kinds of crises—whether war, terrorism, siege, disaster, financial meltdown and health epidemics, for instance—pose for constitutional stability and survival. This introductory chapter situates the significance of the subject, explains the structure of the volume, and outlines the chapters and their importance to the study of public law both individually and collectively.

Constitutions are often made, broken, or changed under extreme conditions, whether war, secession, emergency or some other extraordinary circumstance. Over the past 40 years alone, more than 200 constitutions have been introduced in this way – and the number rises dramatically when we consider constitutional amendments proposed under extreme conditions. As Peter Russell notes: "no liberal democratic state has accomplished comprehensive constitutional change outside the context of

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R. Albert and Y. Roznai (eds.), *Constitutionalism Under Extreme Conditions*,
Ius Gentium: Comparative Perspectives on Law and Justice 82,
https://doi.org/10.1007/978-3-030-49000-3_1

some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup."[1]

Constitutionalism under extreme conditions raises a bundle of fascinating and important issues. Constitutionalism is nowadays commonly identified by certain conditions such as the recognition of the people as the source of all governmental authority, the normative supremacy of the constitution, the ways the constitution regulates and limits governmental power, adherence to the rule of law, and respect for fundamental rights.[2] Constitutions are intended to be stable and to survive during times of crisis. They are therefore sometimes designed expressly to accommodate unforeseen circumstances and to authorize resort to emergency powers.[3] These unforeseen circumstances—for instance belligerency, war, terror and alike; natural and manmade disasters; political and economic meltdowns, and the emergency regimes created to manage these situations—pose a serious challenge to each of the components of constitutionalism.

In a constitutional regime, there is a normative supremacy of the constitution, the source of which is 'the people'. However, states of exception and emergency powers go to the very root of the constitutional order, to the question of sovereignty and its exercise. As Carl Schmitt famously stated in his book *Political Theology*, the sovereign is "he who decides on the state of exception."[4] According to the classical institution of the Roman dictatorship, in times of crisis an eminent citizen was called by the ordinary officials and temporarily granted absolute powers to protect the republic.[5] Drawing inspiration from this influential model for emergency powers, constitutions can be designed to authorize resort to emergency powers and in some cases to create a temporary "constitutional dictatorship" as the regime seeks to restore the *status quo ante* emergency. These regimes undermine limits to governmental powers as they give enhanced powers, usually to the executive, allowing it to overcome legal restrictions in order to efficiently face the crisis.

Emergency regimes have implications for the rule of law. The rule of law comprises two layers: formal and substantive.[6] Briefly put, the formal aspect of

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[1] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press, 2004), 106.

[2] See, for example, Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects', in Michel Rosenfeld (ed.), Co*nstitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994), 39, 40– 2; Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010), 3, 9; Dieter Grimm, *Constitutionalism— Past, Present, and Future* (Oxford University Press, 2016).

[3] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

[4] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans., 2005), 5.

[5] Clinton L. Rossiter, *Constitutional Dictatorship – Crisis Government in the Modern Democracies* (Princeton University Press, 1948), 15–28; Andrew Lintott, *The Constitution of the Roman Republic* (Clarendon Press, 1999), 109–115.

[6] Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467.

the rule of law requires prohibitions and delegations to be explicitly anchored in the law, which is promulgated, prospective, general, stable, clear, and enforced equally. Emergencies stretch our commitments to generality, publicity, and the stability of legal norms as they often require particularity and tremendously broad discretionary powers. This is precisely why nowadays prerogative powers may be limited by statute and their exercise is open to judicial review—developments that blur the distinction between law and prerogative.[7] The substantive aspect of the rule of law requires prohibitions and delegations to respect various content-based values, such as individual rights or the separation of powers. In times of crisis both values are at risk.

Of course, as Eli Salzberger notes, the encounter between the rule of law and extreme conditions is complicated:

> Exactly in which circumstances does a disaster or an economic crises or indeed an armed activity constitute extreme conditions that justify special arrangements or an exception regarding the rule of law? In each of these categories, we can draw a dichotomous line (rather than a clear-cut dichotomy) between a major crisis … and a minor disruption to normal life … . Philosophically, normality can be defined as an exact routine or identical occurrence of events – which does not exist in reality, for every situation in life and every point in time is to some degree different from previous ones. Thus, the borderline that defines an extreme condition is not an obvious or a natural one.[8]

Our understanding of emergencies in its many varieties is shifting from temporary and exceptional ad hoc events to long-term processes that challenge the legal order but also provide opportunities for legal and institutional productivity.[9]

It is not lost on anyone that fundamental freedoms are at great risk in moments of crisis. Emergency periods are times of "moral panic",[10] which might cause decision-makers to act irrationally. Eric Posner and Adrian Vermeule write that "during an emergency, people panic, and when they panic they support policies that are unwise and excessive."[11] One obvious fear is the excessive suspension or derogation of fundamental rights and freedoms. As Bruce Ackerman has cautioned, "no serious politician will hesitate before sacrificing rights to the war against terrorism." [12] And indeed, as Oren Gross argues, "experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of

[7]Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 International Journal of Constitutional Law 247, 252–58.

[8]Eli Salzberger, 'The Rule of Law Under Extreme Conditions and International Law: A Law and Economics Perspective', in Thomas Eger, Stefan Oeter, Stefan Voigt (eds.), *The International Law and the Rule of Law Under Extreme Conditions* (Mohr Siebeck, 2017), 3–56.

[9]See Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016).

[10]Stanley Cohen, *Folks Devils and Moral Panics* (Routledge, 2011).

[11]Eric A. Posner & Adrian Vermeule, 'Accommodating Emergencies' (2003) 56 Stanford Law Review 605, 609.

[12]Bruce Ackerman, 'Don't Panic', London Review of Books (07.02.2002), 15–16.

human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned."[13]

Consequently, the expansion of executive powers, suspension of protected rights or even the suspension of democracy as it is or has been practiced raise great concern for the entire enterprise of constitutionalism during times of crisis. John Finn, for example, has demonstrated how normal constitutional procedures may be suspended during emergencies occasioned by domestic political violence.[14] Accordingly, there is, perhaps, no more foundational question than this: what may a constitutional democracy legitimately do to defend itself when confronted with an emergency or a crisis that has the potential to undermine democracy or the constitutional order itself?[15]

The question becomes more complicated when considering the temporal element of crises or emergencies. Traditionally, since the Roman dictatorship, a clear separation was created between normal and emergency times.[16] The state of exception continues until it is decided that normalcy has once again returned. However, when this period ends is not always clear. In modern times, it appears as if society is constantly under threat.[17] Is there a real distinction between normal times and times of emergency? Is it not the reality we are witnessing, in many places, that of "a permanent state of emergency"?[18]

True, certain legal and constitutional mechanisms aim to prevent "the dictator" from extending his exceptional rule after returning to normalcy. But the separation of powers often fails to fulfill its purpose under emergency circumstances. Studies show that constitutional rights and institutions have been too easily suspended in times of crisis and that temporary measures have often been extended beyond their original authorization. This may have a pernicious effect on the protection of human rights and the principle of separation of powers.[19] Indeed, abuses of these powers

[13] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional' (2003) 112 Yale Law Journal 1011, 1019.

[14] John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1990).

[15] For how democracies attempt to limit the ability to amend the constitution during emergencies precisely in order to protect the democratic order see Yaniv Roznai and Richard Albert, 'Emergency Unamendability: Limitations on Constitutional Amendment in Extreme Conditions' (unpublished, copy with authors).

[16] See John Ferejohn and Pasquale Pasquino, 'The Law of the Exception; A Typology of Emergency Powers' (2004) 2(2) International Journal of Constitutional Law 210, 223.

[17] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

[18] See Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018).

[19] See Antonios E. Kouroutakis and Sofia Ranchordas, 'Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies' (2016) 25(1) Minnesota Journal of International Law 29.

are plentiful in history, and have often allowed authoritarians to take hold of and maintain power through formally constitutional means.[20]

In order to justify emergency powers in the eyes of the people, it is often essential to turn to a trusted institution to legitimate their exercise. Here, the judiciary can be key. Using their power of judicial review, courts can define the terms of emergency powers explictly – by constitutionalizing them – and they can defend the public interest in situations where the legislature cannot.[21] One of the problems, however, is that just like the people and legislatures, during emergencies even courts can be tempted to "rally around the flag" and in so doing they may fail to exercise their constitutional functions.[22]

Under or following extreme conditions, countries may compromise some of the essential features of the rule of law.[23] Consider, for example, the global responses to terror threats since 9/11. How should established liberal democracies respond to these sorts of attacks? Attacks like these can compel states to be too quick to enact measures that limit the rights of both citizens and enemy combatants.[24] As seen in the United States, measures such as the Patriot Act have brought to the forefront a discussion of the tension between individual rights and security.[25] While some scholars have argued that constitutions are – and should be – interpreted differently during these times of crises, others such as Giorgio Agamben have been critical of such curtailments of rights.[26] The question whether a constitution should have the same meaning during times of war and times of peace is all the more relevant in today's world.[27]

During times of crisis, many states often turn to constitution-making or constitutional change. In the interest of bringing about increased stability, states throughout history have sought to redefine themselves with a new constitutional beginning. These significant transitions raise a number of important questions about democratic

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[20] See Claudia Heiss & Patricio Navia, 'You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy' (2007) 49 Latin American Politics and Society 163, 163–185; David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189.

[21] See Dante Gatmaytan's chapter in this volume.

[22] See e.g. Amnon Reichman, 'Judicial Independence in Times of War: Prolong Armed Conflict and Judicial Review of Military Actions in Israel' (2011) 1 Utah Law Review 63. For an empirical analysis see generally Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, 'The Supreme Court During Crisis: How War Affects only Non-War Cases' (2005) 80(1) NYU Law Review 1.

[23] See Andrej Zwitter, 'The Rule of Law in Times of Crisis A Legal Theory on the State of Emergency in the Liberal Democracy' (2012) 98(1) Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 95–111.

[24] See e.g. Victor V. Ramraj & Arun K. Thiruvengadam (eds.), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010).

[25] On constitutional pressure in wartime see e.g. Mark Tushnet (ed.), *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press, 2005).

[26] Giorgio Agamben, *State of Exception* (Kevin Attell trns., The University of Chicago Press, 2005), 1–31.

[27] Ian Zuckerman, 'One Law for War and Peace? Judicial Review and Emergency Powers Between the Norm and the Exception' (2006) 13 Constellations 522.

legitimacy and the rule of law. As Andreas Braune asks in this volume, if it is allowable to suspend certain rights during times of crisis, is it not also allowable to create new ones?[28] To what extent should the public be involved in this process? These questions are central to the establishment of a more stable regime following a period of unrest, and they also highlight the importance for governments and the people, during and after chaotic and critical moments, to reflect on the normative values in their constitutional order.

Equally deserving of consideration is another kind of crisis that puts strain on a constitution: divided societies. In multinational states there are often intense pressures on the state to hold together multiple nations within the framework of a single constitution. Constitutional arrangements can offer a way to keep these multi-national states together. But in some cases, these arrangements are asymmetrical and benefit only certain groups.[29] A study of these tensions can highlight important lessons on how constitutions can bring about stability in otherwise fragile systems.

Although many constitutional crises are violent political struggles, not all of them are. Many of the pressures constitutions face come from issues of public health and economic downturn. During these moments, states can enact a number of new measures to resolve the ongoing emergency. While these responses have the potential to bring about stability during the chaos, they can also make drastic changes to the constitution. But how far is too far? Whose role is it to safeguard the constitutional principles that were in place before the crisis began? It may sometimes be necessary to infringe an important constitutional rule in order to resolve a temporary emergency but impact is not always restricted to the resolution of that particular moment; they often long lasting.[30] The expansion of institutional powers, then, may have both constructive and destructive impacts in times of stability.

A study of state responses in the face of emergency can reveal important insights on the role constitutions play during a crisis. Surviving these moments may call for constitutions to be flexible or even created anew. Without oversight, responses to crises have the potential to contradict preexisting values, calling the legitimacy of liberal democracies into question – and even possibly giving rise ultimately to authoritarianism. The stability of a constitution is rooted in its ability to respond to emergencies without abandoning its core principles.

We intend in this volume to go beyond existing studies of constitutionalism under some form of extreme conditions. Some studies are country-specific, others are written in relation to a particular kind of crisis, and others deal with one or more kinds of responses to emergencies. Our volume offers a comparative and comprehensive inquiry into constitutionalism under extreme conditions. It moreover examines how constitutions deal with extreme conditions before, during and after the period of stress in the jurisdiction. And our volume also probes many different types of crises. We believe this volume stands alone in its breadth of subjects covered and in its variety of jurisdictions explored.

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[28] See Andreas Braune's chapter in this volume.

[29] See Nasia Hadjigeorgiou and Nikolas Kyriakou's chapter in this volume.

[30] See Elisa Bertolini's chapter in this volume.

The book is divided into five Parts. Each Part begins with a critical "mini-introduction" that comments on the chapters in each of the respective Parts of the book. The authors of these mini-introductions are Anna Damasku, Myriam Feinberg, Patrick Graham, Guy Laurie and Tom Gerald Daly.

The first Part of the book is titled "Emergency, Exception, and Normalcy". This Part provides an exploration of the concept of emergency powers and states of exception. The chapters in this Part theorize practices and strategies that could be used to help legitimate the use of emergency powers while respecting the constitutional principles created during a period of normalcy.

The first chapter in this Part is *From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization* by Ming-Sung Kuo. In this chapter, Kuo argues that rediscovering the role of responsibility vis-à-vis political judgment in constitutional ordering is pivotal to the constitutionalization of emergency powers amidst the normalization of the state of exception. First, he identifies two features of the liberal answer to the question of emergency powers: conceptually, that it is premised on the normative duality of normalcy and exception; and institutionally, that it pivots on the identification of institutional sovereignty that judges the state of exception. He then explains why this paradigm falters with the blurring of normalcy and exception. Drawing on the role of "theatricality" in Hannah Arendt's political theory, Kuo suggests that making the public "see" the role of judgment in the current undeclared emergency regime underpin the re-constitutionalization of emergency powers. Recast in a constitutional mindset, he writes, the judiciary is expected to act as the institutional catalyst for forming the public judgment on the ongoing state of emergency.

Next is *Judicial Review and Emergencies in Post-Marcos Philippines* by Dante Gatmaytan. In this chapter, Gatmaytan argues that when the Philippine Supreme Court held that the factual bases for declaring an emergency are beyond the scope of judicial review, it gave Ferdinand Marcos free rein to administer his martial law regime. When Marcos was ousted by protests in 1986, the new government drafted a constitution that strengthened the role of the Judiciary by giving it the power to review the factual bases of emergency powers. However, in six different cases the Supreme Court refused to exercise its new power, continuing to defer to the executive branch in matters that implicate national security. In this chapter, Gatmaytan asserts that the Supreme Court's reluctance in assuming a more powerful role reflects institutional competence concerns. Further, the Philippine case shows that a constitutional directive that alters the balance of power among the three branches of government does not override the rationale for deference to the executive branch in times of political trauma.

The following chapter is entitled *Constitutions as Instruments for Normalising Abnormalcy: The Sri Lankan and Indian* Experience, in which Kumaradivel Guruparan explores whether the laws can legislate for states of exception. Using Sri Lanka and India as case studies, Guruparan argues that it may not always be true that the constitution (and the law) cannot legislate for the exception – particularly when exceptions are not merely exceptions but become the norm. The chapter critiques

Carl Schmitt's assumption of abnormalcy as an exception and argues that in plurinational states which have been riddled by conflict and war, abnormalcy may in fact become the new normalcy. Two examples of such abnormalizing of the normalcy, the author argues, is the centralization of powers and permanent national security laws. In such circumstances, which he calls "the normalization of the abnormalcy", a state's constitution and law can, and in fact do, legislate for states of exceptions. This argument develops on Giorgio Agamben's identification that there are indeed 'prolonged states of being in exception' during which there is a long-term curtailment of rights. The chapter however critiques and modifies Agamben's views for a pluri-national setting.

Finally, in *Political Emergencies as Challenges to the Impartiality of Public Law,* Ioannis Tassopoulos discusses Greece's rich constitutional experience with constitutional crises, focusing on the use, and the abuse, of entrenchment in relation to profound political conflicts. From the constitutional point of view, the most important cases of emergency are civil war and war. Response to an emergency requires, first, confronting efficiently the dangerous situation as such; and, secondly, channeling and constraining the political conflict generated by the emergency within the broader framework of constitutional politics, i.e. the "rules of the game." The question is whether (and how) entrenchment, i.e. the constitutionalization of emergency provisions, can be a suitable method and technique of harmonizing these potentially conflicting ends. Going beyond mere functionalism, the chapter highlights the normative and argumentative constraints of the discourse on emergency and entrenchment, associated with the idea of constitutional impartiality: public law, procedural fairness of democratic elections, inclusive politics, and respect of fundamental rights without exception. It argues that the successful constitutional treatment of emergency crises is undermined by the excessive voluntarism and the factual origin of the constituent power, underlying the influential Schmittian notions of decisionism and constitutional legitimacy.

Part II of the book shifts the focus to a specific type of extreme condition, and one of the more burning challenges of recent decades, "Terrorism and Warfare". This Part assesses how constitutions are interpreted during times of war, the tension between individual rights and safety during these times of crisis, and the possible role of courts to ease this tension.

Human Rights in Times of Terror – A Judicial Point of View, by Aharon Barak, former President of the Israeli Supreme Court, opens this second Part. In this chapter, Barak argues that the main role of any judge, national or international, is to maintain and protect democracy. Further, he states that judges should protect it both from terrorism and from the means the state wishes to use to fight terrorism. The protection of human rights of every individual is a duty much more formidable in situations of terrorism than in times of peace and security. If judges fail in this role in times of terrorism, they will be unable to fulfill their role in times of peace and tranquility. As Barak states, a wrong decision in a time of terrorism plots a point that will cause the judicial curve to deviate after the crisis passes.

Next is *Detaining Unlawful Enemy Combatants in Israel: A Matter of Misinterpretation?* by Joshua Segev, whose chapter contributes to a much larger debate

regarding the protection of human rights in times of emergency, and the need for new constitutional frameworks and concepts to deal with the new threats. The chapter argues against the territorial and over-individualized interpretation given to the Unlawful Enemy Combatant Act of 2002 by the Israeli Supreme Court. Namely, that the purpose of the Unlawful Enemy Combatant Act establishes an "ordinary" administrative detention mechanism to be used beyond Israel's borders (i.e. in Gaza and Lebanon but not in Israel or the West Bank), and which requires the showing of an "individual threat" emanating from the detainee to state national security. Segev then defends an associative theory of culpability for detaining enemy combatants: the detention should be based also on who they are (i.e., high ranking commander versus low ranking officers or "field" soldier); on collective national goals (i.e., in order to release Israeli MIA soldiers); and not only on what they might do. Additionally, constitutional frameworks (i.e., the proportionality requirement) should be reframed accordingly to satisfy the demands and principles of the associative theory of culpability.

In *The Law Governing the Right of Enemy Aliens' Access to Courts*, Roy Peled, Liav Orgad, and Yoram Rabin ask whether a democratic judiciary may limit access to court by alien enemies? As they explain, an old common law rule clearly allows denial of court access from enemy aliens. Courts to this day have been hesitant to overturn the rule, while carving more and more exceptions to it. This chapter argues that this old rule should be declared void. It should however, they argue, be replaced with a new rule that will allow to limit access to courts by enemy aliens who are considered enemy organs in cases aimed at using the legal process to benefit an enemy. The chapter reviews the historical development of the old rule and argues for the necessity of a new model and the justifications for the model proposed.

Part III turns to different set of extreme conditions: "Public Health, Financial and Economic Crises". The chapters in this Part consider how constitutions change and respond to crises that are not necessarily political or violent. Instead, these chapters look to how constitutional measures can address public health, financial, and economic crises, and what lasting impacts these reforms have.

In *Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective*, Antonia Baraggia examines the role played by the judiciary during the Eurozone crisis, comparing the attitudes of national supreme courts (Portugal, Italy, Greece, Latvia and Romania) and the Court of Justice of the European Union in judging austerity measures adopted under emergency circumstances. She argues that, while at national level supreme courts have played a key role in fundamental rights protection, trying to safeguard the constitutional order's core values in moments of extraordinary circumstances, the latter has avoided - until the recent *Ledra Advertising case* - judging the legitimacy of the bailout measures, which therefore represent a sort of black hole in the EU legal framework. The chapter highlights the paradigmatic nature of the euro crisis as a global crisis that involves national, supranational, and international settings and sheds lights on the different attitudes of the Courts within the broader context of the persistent flaws of the EU economic governance.

Next is *Financial Crisis as a New Genus of Constitutional Emergency?* by Elisa Bertolini. In this chapter, Bertolini focuses on the possibility of drawing a parallel between an economic emergency and a traditional emergency. However, she argues, that they cannot be considered alike, since they do not share the basic feature of the temporary character of the measure, implying the restoration of the status ante the emergency finished. Nevertheless, when the economic crisis is finally over, these provisions are still in force because either they have become entrenched constitutional provisions – following a constitutional amendment – or if the statute law providing for them continues to be implemented and deploys its effects. Bertolini considers three main concerns that arise in these situations: first, whether it should be allowed to amend the constitution in highly critical situations; second, who should be entitled to protect the main principles and basic rights founding the legal order against the infringements by the crisis-management measures and how; and third, the opportunity to constitutionalise the economic crisis as a particular case of emergency.

The third chapter in this Part is *Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International*. Authored by Pedro Villarreal, the chapter explores how emergencies can require either ordinary or extraordinary responses, specifically within the context of transborder infectious diseases. He argues that while there are archetypes both at the practical and at the theoretical level attempting to provide a response, it cannot be considered that one of them is the only correct model. Rather, they can even interact with each other during pressing and unpredictable events that stretch the limits of institutional powers. Villarreal contends in this chapter, that even if they may not require creating a completely new strand within constitutionalism, public health emergencies can nevertheless contribute to the broader discussions on how to legally frame the ensuing responses.

Part IV is titled "Constitutionalism for Divided Societies" and investigates the stress put on constitutions by diverse, multi-national populations, which can create and intensify extreme conditions for constitutionalism. The chapters consider how constitutional features can facilitate stability and balance in these states.

In the first chapter of this Part, *The Constitutionalism of Emergency: Multinationalism Behind Asymmetrical Constitutional Arrangements*, Maja Sahadžić shows that, unlike "model" federations, recent federal systems are "holding together" multinational states that often employ asymmetrical constitutional arrangements as a response to differences. As she observers, even though this subject has gained importance in the relevant literature during the last decade, little research has been devoted to the concept of constitutional asymmetries in multi-tiered multinational systems. More specifically, Sahadžić states that the basis for the occurrence of constitutional asymmetries is not comprehensively researched and therefore not well understood. This chapter elaborates the influence of multinationalism on the constitutional asymmetries appearance. Within the framework of the dynamic notion of federalism, Sahadžić draws on three distinctive features of this topic, asymmetry, a multi-tiered system, and multinationalism. With reference to comparative examples, the findings reveal a significant effect of multinationalism in producing emergencies associated with the occurrence of constitutional asymmetries.

The next chapter is *The Paradox of Territorial Autonomy: How Subnational Representation Leads to Secessionist Preferences* by Nikos Skoutaris and Elias Dinas. Although there are various institutional devices through which segmental autonomy can be implemented, in practice, one of its typical manifestations involves the devolution of legislative competences to the regional level. This process is in turn accompanied by the establishment of subnational representative institutions: governments, parliaments and elections. The authors argue, that although such decentralization of political authority aims at accommodating centrifugal tendencies within a plurinational state, it may backlash, creating conditions that help such tendencies grow even further. By focusing on Spain, the chapter examines how subnational elections can have long-term unintended consequences, strengthening subnational identity, disseminating views in favor of further decentralization and potentially cultivating secessionist preferences.

In *Entrenching Hegemony in Cyprus: The Doctrine of Necessity and the Principle of Bicommunality* by Nasia Hadjigeorgiou and Nikolas Kyriakou, the authors argue that, since Cyprus became an independent state, most political power has been concentrated in the hands of the Greek Cypriot majority, with the other groups remaining largely marginalized. They state that this hegemony of the Greek Cypriot political elite has been the result of a dual, and rather contradictory approach. On the one hand, the constitutional protections for the different groups have been eroded through the application of the doctrine of necessity, a mechanism intended to keep the Constitution up to date with the political developments in the country. Conversely, in cases where the doctrine could be used to safeguard the minorities' rights, the government has highlighted the unamendable nature of the Constitution and relied on the obsolete constitutional provisions that the doctrine of necessity was designed to avoid.

Part V is titled "Constitution-Making and Constitutional Change", and its chapters address how constitutions are transformed or created anew during moments of crisis.

Authoritative Constitution-Making in the Name of Democracy?, by Andreas Braune, begins this Part. Braune suggests that in cases of constitutional emergency there might be a right to create constitutions. If it is allowable to suspend basic freedoms and democratic procedures to save democracy and rule of law, he asks, why should this be disallowed at the point of constitutional creation? This rather provocative suggestion stands at the end of some reflections on what Braune calls the "dilemma of democratic constitution-making". He suggests, at its core we can identify the problem that constitution-making in the democratic mode of the *pouvoir constituant* easily leads to a collapse of the constitution-making-process. The chapter concludes not with normative assertions but by proposing an open empirical hypothesis on the claim that certain forms of authoritative constitution-making are more promising to secure the establishment of democracy and rule of law than democratic modes are.

In *Again: From 1867 to Today, Making a Constitution Under an Elite Umbrella in Turkey*, Fatih Öztürk explores the instability of Turkish democracy by looking at the details and issues that surround the making of constitutions and the elite,

with specific focus on elite-public participations relations in a historically chronological order, which is a necessity in comprehending the complexity of the topic at hand. Öztürk argues that elite involvement without public participation in making constitution has caused a weak and unstable democracy in Turkey. Extremist elite powers have, and still, prevent harmonization within the state system and contribute to inequality among all members of society. He contends that the country currently needs a new constitution, which was promised by the government that was re-elected on November 1st, 2015, ever since its rise to power on November 3rd, 2002. Öztürk recommends that the new constitution should lead to the participation of the public before and after political events which take place in the administration of the country. With this in mind, he suggests that the privileges of the elitist system should be outlined as a set rate that does not vary from term to term, or if possible, be eliminated from the political system all together and re-inserted into its own realm of affairs in order for a flourishing Turkish democracy.

The following chapter is *Constitution-Making, Political Transition and Reconciliation in Tunisia and Egypt: A Comparative Perspective* by Manar Mahmoud. This chapter examines how the constitution-making process can become a reconciliatory constitution-making process. Its emphasis is on examining the necessary conditions needed for constitution-making process to be a reconciliatory process and in particular, the transformation in the nature of the political regime and political culture. Mahmoud addresses this issue in two countries: Tunisia and Egypt. These two cases differ from one another in terms of the success of constitution-making process, leading to a solution to the disputes between the various communities in these societies. While in the case of Tunisia the constitution-making process contributed to a great extent to the reduction of disputes and conflicts and the achievement of reconciliation, in the Egyptian case constitution-making process did not succeed in this matter.

In *Security Reform in Timor-Leste After the Constitutional Exception*¸ Ricardo Sousa da Cunha explores the current legal regime on national security in Timor-Leste, which is based on the answer given to situations of constitutional exception. He states that after the restoration of the independence in 2002, the crises of 2006 and 2008 led to the creation of joint military and police taskforces, which, as much as the legal and political doctrine on national security, shaped the legal regimes for the organization, development and engagement of the military and security Forces. He contends that the legal reform of 2010 laid the way for its subsequent implementation by Operation "Hanita" in 2015 and the recent approval of the Strategic Concept on National Defence and Security in 2016. However, in this chapter Cunha problematizes how there are still many challenges in the implantation, and eventual revision, of these legal regimes, which, however, are the building block of a system of Defence and Police Forces under the rule of law.

The volume concludes with Oren Gross's chapter on *Emergency's Challenges.* Gross examines numerous predominant challenges that are raised by emergencies. It focuses on four types of general concerns, namely the normalization of the exception ('normalizing'), the difficulty in balancing between the opposing values of security

and liberty ('balancing'), the manipulability of the very use of the concept of "emergency" to frame a given situation or state of affairs ('framing'), the "Us vs. Them" character of emergency situations that, in turn, exacerbates some of the previously identified challenges ('othering'), and the capacity to exercise international monitoring and supervision when a government declares a state of emergency ('monitoring'). This concluding chapter thus provides a framework for understanding and studying the challenges of constitutionalism under extreme conditions.

We hope this volume will advance our understanding of how constitutional orders can withstand extreme conditions while importantly protecting fundamental constitutional rights and values. At a time when democracies everywhere may be under crisis,[31] this book is particularly timely.

[31] Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018).

Emergency, Exception, and Normalcy

Introduction: Emergency, Exception and Normalcy

Guy Lurie

Abstract The introduction to the first section of this volume explains that all four chapters of this section have a common thread: the difficulty of safeguarding against the normalization of emergencies and the blurring of the distinction between public powers in times of crisis and public powers in regular times. The modern conception of law and authority assumes that such a distinction is possible, and it indeed forms the basis of our understanding of how constitutionalism should operate under extreme conditions. State practice that blurs this distinction may pose a threat to constitutionalism, not only under extreme conditions, but also in regular times, since the utilization of emergency powers in normal times quashes the rights associated with it. As the four chapters in this section demonstrate, each in a different way, the threat of the normalization of emergencies has now become more acute than ever.

In the early fourteenth century, a French noble wrote a letter to the jurist Oldradus de Ponte of Padua. In his letter he asked about the legality of the French king's collection of that year's emergency tax (called for a "public and common utility and necessity"). He thought that he might be exempt since he was a noble and this supposedly emergency tax was in fact collected year after year. In his subsequent opinion, Oldradus de Ponte legitimized this emergency tax while noting the novelty of collecting it annually instead of for a one-time crisis; he explained the legality of turning the exceptional emergency use of "necessity" into an annual ordinary use, basing it on the king's "imperial privilege" (de Ponte 1571, 39).

This fourteenth century legal opinion exemplifies two important points with regard to emergency law and constitutionalism that the chapters in this section discuss and analyze. The first point is the distinction between "normal" law and "emergency" law. Our modern conception of law and authority accepts that such a distinction may be possible. This modern conception is a product of developments during the late Middle-Ages. Gradually departing from law's former conceptualization as universal

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R. Albert and Y. Roznai (eds.), *Constitutionalism Under Extreme Conditions*,
Ius Gentium: Comparative Perspectives on Law and Justice 82,
https://doi.org/10.1007/978-3-030-49000-3_2

and divine, development of central authorities saw the crystallization of new conceptions that allowed for the distinction between public legal powers in normal times and public legal powers in times of crisis (Lurie 2017). Along with this distinction comes the second point exemplified in Oldradus de Ponte's legal opinion. Namely, the practice of public authorities to blur the distinction between their powers in times of crisis and their powers in normal times, extending the former to the latter.

The distinction between normalcy and emergency, between public powers in regular times and public powers in times of crisis, is the basis of our modern conception of how constitutionalism operates under extreme conditions. At the same time, state practice which blurs this distinction may pose a threat to constitutionalism, not only under extreme conditions, but also in regular times. "Constitutionalism" as it developed from the late Middle-Ages until today (Foronda and Genet 2019), is generally based on the premise that the use of public power is restricted in a way that protects the rights of the people (Van Caenegem 1995, 79). As states utilize emergency powers in normal times and not only under extreme conditions, they quash this premise and the rights associated with it.

For the liberal democratic state, this practice of blurring between emergency and normalcy is a real threat. The field of Historical and Comparative Institutional Analysis, for instance, has argued for the importance of constitutionalism for the flourishing of liberal democratic states and their citizens. Several scholars argued that only constitutional orders that had managed to build a credible commitment to rights (particularly, property rights) had achieved economic growth and political prowess. The problem, as scholars such as Douglass North and Barry Weingast describe it, is that in times of crisis, regimes' short-term incentives make them ignore their long-term interest in maintaining the constitutional order (which encourages the public to pay taxes, to invest money, and to lend the regime). Thus, self-enforcing mechanisms are needed, according to this analysis, to prevent breaches of the constitutional order under these extreme conditions (North and Weingast 1989; Weingast 1997). Yet, even assuming that we have found some self-enforcing mechanisms that restrict state powers under extreme conditions, by blurring the normalcy-emergency distinction the regime may bypass these mechanisms and effectively breach the constitutional order.

While democracies have found various solutions, some more effective than others, to create self-regulating mechanisms constraining regimes both in normal times and in emergencies, less success has been forthcoming in safeguarding against the normalization of emergencies and the blurring of the distinction between public powers in times of crisis and public powers in regular times. This difficulty is perhaps best manifest in the ways that democracies face threats of terror, in which the line between normalcy and crisis is the thinnest, as explained in this volume, for instance, by Myriam Feinberg, Terrorism and Warfare—Extreme Conditions or the New Normal, and by Aharon Barak, Human Rights in Times of Terror—A Judicial Point of View. Indeed, state measures against the threat of terror have become particularly harsh in the past two decades, especially following the attacks of 9/11 (e.g., Katselli and Shah 2003), instigating an intense theoretical and practical legal discussion. Some scholars, such as Agamben (2005), offer little solace in maintaining

the normalcy/emergency distinction, focusing on diagnosis and arguing that Western regimes now use the fiction of emergencies as a regular means of government, thus destroying the rule of law. Other scholars, such as Ackerman (2004), attempt to offer various practical legal solutions to grant emergency powers while keeping the rule of law, relying on constitutional measures, statutes, judicial oversight, or international law.

As the four chapters below demonstrate, each in a different way, the threat of the normalization of emergencies has now become more acute than ever. Each of them has a different emphasis, from diagnosis of the problem, to its practical suggested treatments. In the chapter "From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization," Ming-Sung Kuo demonstrates how the normalization of emergency threatens constitutionalism and the liberal project. The chapter shows that the normalization of emergency has eliminated the ability to constitutionally control it. As noted in the chapter: "the blurring of normalcy and exception in fact and norm has cast doubt on the control paradigm." The chapter suggests a new political model of controlling or at least illuminating the recourse to emergency, through giving the court a new role. Arguing that the judiciary has so far failed to check the normalization of emergency, the chapter calls for giving the courts a new role of declaring the existence of an emergency: a "judicial construction of the de facto emergency regime." Thus, according to Ming-Sung Kuo, the court will no longer simply play a role as an arbitrator attempting to control the emergency regime, but rather will be "the catalyst for forming the collective public judgment on the de facto emergency regime."

In the chapter "Judicial Review and Emergencies in Post-Marcos Philippines," Dante Gatmaytan also demonstrates the current problematics of relying on the Judiciary as the guardian of the liberal constitutionalism project against the normalization of emergency, through showing that the court in the Philippines was unable to assume its role as enforcer of the constitution in the context of emergencies. Despite the fact that the constitution gave the court in the Philippines authority to review governmental attempts to falsely claim "emergency," the court has not actually done so. As shown by Gatmaytan, the court "is unwilling to assume its new role as a check on the exercise of emergency powers." Gatmaytan shows that the Supreme Court has assumed in the Philippines a conservative role: "Constitutionally empowered to check the Chief Executive, the Supreme Court may yet be wondering what it has to gain by defying Executive findings that the public is in danger." Yet counter to Ming-Sung Kuo's call for the judiciary to assume a new and different role in this field, Gatmaytan writes approvingly of this conservative judicial policy: "The Supreme Court has opted to act smartly, by inoculating itself from the politics inherent in the nature of public emergencies and allowing other layers of political vetoes to come into play."

In the chapter "Constitution and Law as Instruments for Normalising Abnormalcy: States of Exception in the Plurinational Context," Kumaravadivel Guruparan shows that in states composed of several ethnic groups ("plurinational states") in which the dominant ethnic group tries to suppress by force another ethnic group, the normalization of emergency is a means used by the government to mask the abandonment of the liberal constitutionalist project. Guruparan demonstrates this phenomenon through

the Sri Lankan and Indian cases, showing that in these states "the state of exception has been used to invoke National Security Laws […] to settle the friend-enemy distinction that Schmitt identified as the purpose of the state of exception." Guruparan explains that the "centralisation of power has been justified by political elites as an exception to the liberal constitutional paradigm and not as an abandoning of the same, that centralisation has become a normal and essential feature of constitutional praxis in plurinational states aimed at protecting the dominant community's status in the state."

Finally, in the chapter "Political Emergencies as Challenges to the Impartiality of Public Law," Ioannis A. Tassopoulos examines the interplay among uses and misuses of emergency powers and constitution making processes in the modern history of Greece. Tassopoulos does so in order to pinpoint how emergency destroys constitutionalism. He emphasizes the tendency to fail to realize that constitutionalism is based on "consensus over the rules of the game and their impartiality, and on prudential prevention of reciprocal destruction in civil war, in sharp contrast to Carl Schmitt's decisionism during emergencies." He also emphasizes "the self-referential nature of popular sovereignty, whose culminating point is the doctrine of constituent power as the self-legitimization of any political force which creates right out of might by attributing its arbitrariness and audacity to the will of the people or to the nation."

In short, the four chapters below tackle the issue of normalization of emergency as the bane of constitutionalism. As such, they all share an assumption that the distinction between "normal" law and "emergency" law is possible. Indeed, they may all be viewed as part of the long-standing effort of the constitutional state to find a way to keep this distinction intact, seeing it as essential in order to preserve constitutionalism itself.

References

Ackerman B (2004) Yale Law J 113:1029–1091

Agamben G (2005) State of exception. University of Chicago Press, Chicago

Van Caenegem R C (1995) An historical introduction to western constitutional law. Cambridge University Press, Cambridge

Foronda F, Genet J-P (eds) (2019) Des chartes aux constitutions: autour de l'idée constitutionnelle en Europe (XII^{e}–XVII^{e} siècle). Éditions de la Sorbonne, Paris

Katselli E, Shah S (2003) September 11 and the UK response. Int Comp Law Q 52:245–255

Lurie G (2017) What is modern in the state of exception? J Eur Hist Law 8:50–57

North DC, Weingast BR (1989) Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England. J Econ Hist 49:803–832

de Ponte O (1571) Consilia, sev Responsa, & Quaestiones Aureae. Apud Franciscum Zilettum, Venice

Weingast BR (1997) The political foundations of democracy and the rule of law. Am Polit Sci Rev 91:245–263

From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization

Ming-Sung Kuo

Abstract In this paper, I argue that rediscovering the role of responsibility vis-à-vis political judgment in constitutional ordering is pivotal to the constitutionalization of emergency powers amidst the normalization of the state of exception. I first identify two features of the liberal answer to the question of emergency powers: conceptually, it is premised on the normative duality of normalcy and exception; institutionally, it pivots on the identification of institutional sovereignty that judges the state of exception. I then explain why this paradigm falters with the blurring of normalcy and exception. Drawing on the role of 'theatricality' in Hannah Arendt's political theory, I suggest that making the public 'see' the role of judgment in the current undeclared emergency regime underpin the re-constitutionalization of emergency powers. Recast in constitutional mindset, the judiciary is expected to act as the institutional catalyst for forming the public judgment on the ongoing state of emergency.

1 Introduction

The question of emergency powers has been brought back to the centre of constitutional theory amid the new 'long war' on terrorism (Ackerman 2006; Gross and Ní Aoláin 2006; Dyzenhaus 2006; see also Griffin 2013, 5–6, 204–35). Noticeably, this new wave of emergency talk stands apart from the traditional discussion of emergency powers. Traditionally, the debate about the promise and limits of 'the rule of law under siege' (Scheuerman 1996) centres on the unexpected, ground-shaking events, which are considered temporary in nature (Rossiter 1948, 5–7, 16–23). In contrast, as the post-9/11 responses to global terrorism have suggested, emergency powers are now more akin to part of a perpetual national security regime than a temporary juridical mechanism. The 'state

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R. Albert and Y. Roznai (eds.), *Constitutionalism Under Extreme Conditions*,
Ius Gentium: Comparative Perspectives on Law and Justice 82,
https://doi.org/10.1007/978-3-030-49000-3_3

of exception'[1] appears to be turning into a permanent condition, paving the way for the normalization of emergency powers and the general securitization of the juridical order (Frankenberg 2014, 185–220).

Facing this new reality of the state of exception, constitutional scholars are unsure how to respond. Some suggest that the state of exception be brought under the reign of the law through more discriminating statutes but caution that the rule of law may instead be undermined with the legal provision for emergency powers (Ferejohn and Pasquino 2004, 234–35). Others point to the political nature of emergency powers and argue that they require political rather than legal responses (cf. Gross and Ní Aoláin 2006, 110–70; Poole 2015). In this paper, I aim to provide a prognosis of the uneasiness about the question of emergency powers in contemporary constitutional scholarship. I shall argue that constitutional scholarship on the state of exception and emergency powers has long centred on the idea of institutional sovereignty.[2] What distinguishes among scholars is their preferred institutional holder of sovereignty that exercises the ultimate control over emergency powers (Sect. 2). With the normalization of the state of exception, I contend, this control paradigm in conceiving the constitutionalization of emergency powers,[3] which is underpinned by institutional sovereignty, is untenable. This is the root cause of the uneasiness about the state of exception in contemporary constitutional scholarship (Sect. 3). I suggest that the question of emergency powers be reconsidered outside the control paradigm. Departing from the law vis-à-vis politics dichotomy, I argue that conceiving the domestication of the state of exception should focus on how judgements concerning the state of exception are contested. The domestication of the seemingly perpetual state of exception lies in the rediscovery of the importance of responsibility vis-a-vis political judgment in the constitutional order. Through this lens, the court functions as the catalyst for forming the collective public judgment on the state of emergency. It is constitutional mindset, not the power of settlement, that will make the new judicial role possible, holding the key to the question of emergency powers (Sect. 4).

[1] The 'state of exception', as opposed to the 'state of normalcy', refers to the *factual* situation in which the ordinary rule of law is considered dysfunctional. I refer to those extraordinary powers the government adopts in the state of exception as 'emergency powers' or alternatively the 'state of emergency'. Thus, in contrast to the ordinary rule of law that governs the state of normalcy, the state of emergency (or emergency regime) is the alternative juridical regime in response to the state of exception. I thank Eli Salzberger for helping me rethink and clarify these concepts.

[2] As shall become clear, the problem of institutional sovereignty in the control paradigm evokes what Hermann Heller called 'organ sovereignty' whose equation with state sovereignty lies at the centre of his critique of German public law theory in the early twentieth century (see Heller 2019, 101–04, 106–07).

[3] For the present purposes, the constitutionalization of emergency powers refers to the way that emergency powers are addressed in constitutional orders, which may take the constitutional or statutory form. Whether they are considered 'extra-legal' and subject to what Oren Gross and Fionnuala Ní Aoláin call '*ex post* ratification' or act as a supra-constitutional norm as the Schmittian conception of sovereignty suggests, both instances are taken as the modes of the constitutionalization of emergency powers (cf. Gross and Ní Aoláin 2006, 162–70).

2 Under the Wings of Sovereignty: Liberal Answers to the Challenges from the State of Exception

In this section, I first discuss what I call 'normative duality' at the core of liberal responses to the question of emergency powers, by which the law is set apart from the political state of exception and thus would be saved from being overwhelmed by the exercise of emergency powers. From this underlying normative feature, I then turn attention to how it has worked out in institutional terms and suggest that institutional sovereignty has constituted the pivot of the liberal strategies to constitutionalize the state of exception.

2.1 Managing Distinction: Law and Politics Under Normative Duality

Despite the disagreement on the juridical character of emergency powers among scholars, it is acknowledged that crisis-induced exceptional situations exert massive impact on the state of normalcy, which both constitutes the precondition for the rule of law and is governed by the law (Kahn 2011, 59). The debate over emergency powers concerns whether the law and its application extend beyond the normal situation to the fundamentally different factual situation, namely, the state of exception (Agamben 2005, 9–11). Is the exceptional situation a state of lawlessness free of both legal and supra-legal constraints? If not, does it suggest that the state of exception can be extra-legal but not lawless? Can the state of exception be considered norm-generative to the extent that it induces a set of extra-legal norms (ibid., 1–2)? Oren Gross and Fionnuala Ní Aoláin's tripartite typology of the legal regulation of emergency powers offers a good access to these fundamental questions.

Under Gross and Ní Aoláin's first model, 'accommodation', emergency powers are *ex ante* stipulated in the constitution or other statutes but apply only to the state of exception that displaces the normal situation. Viewed thus, emergency powers function as predetermined legal measures in response to a different factual situation than normalcy (see Gross and Ní Aoláin 2006, 17–85). In contrast, under what they call the 'business-as-usual model', there is no such thing as emergency powers at least in the eyes of the legal order. The measures taken in response to the state of exception are simply one of the various applications of ordinary legal norms to a factual situation and thus their legality is subject to the same legal scrutiny. The law is recalibrated but its normative character remains unchanged when the unusual facts arise from the state of exception (see ibid., 86–109).

Gross and Ní Aoláin's third model, 'extra-legality', appears to occupy the middle ground. To begin with, echoing the business-as-usual model's insistence on the unitary character of the legal order, the extra-legality model subjects the legality of emergency powers to the same scrutiny of ordinary legal rules. On this view, emergency powers are illegal when they are in use in that they are *ultra vires* acts

that exceed the authorization of the general (ordinary) legal rules (see ibid., 111–12). Yet, the business-as-usual and extra-legality models diverge on a more fundamental issue. Departing from the business-as-usual model, the extra-legality model accepts that the illegality of emergency powers can be cured through various *ex post* ratifications (see ibid., 130–62). This distinctive feature moves the extra-legality model closer to the accommodation than to the business-as-usual model in that emergency powers are retrospectively brought back to the rule of law. According to the extra-legality model, emergency powers are neither a recalibrated application of ordinary rules as the business-as-usual model suggests nor merely an invocation of predetermined legal measures under the accommodation model. Taken together, all the three models agree on the factual distinction between exception and normalcy but hold differing attitudes towards the normative character of emergency powers in response to the state of exception, suggesting a deep anxiety over the relationship between law and politics at the core of legal liberalism.

As the global practices of emergency powers have suggested, the legal framework that governs emergency powers, whether it is constitutional or statutory, has to be flexible enough to accommodate unforeseen incidents (see ibid., 79–85). Specifically, procedures concerning the activation of and the subsequent exercise of emergency powers are provided for in the governing legal framework.[4] In contrast, the substance of emergency powers is defined in a way to be sufficiently accommodating of the needs of actual situations. Even without the inclusion of the catch-all clause in the emergency legislation, the *ex ante* catalogue of emergency powers is more likely to be deemed illustrative rather than exhaustive as the state of exception may well induce extra special measures (cf. Ackerman 2006, 90–100). Yet, this shows the limits of the accommodation model as attempts to *ex ante* regulate emergency powers appear to be just wishful thinking.

The foregoing criticism is correct but only to an extent. It is correct to note the limitation of legal positivism that underpins the accommodation model (Scheuerman 2016, 197). Yet, it misses the point: the accommodation model assumes that even uncodified measures are not lawless pure forces. Specifically, from the perspective of the accommodation model, uncodified emergency measures are not considered complete anathema to the normative character of the law to the extent that they are framed and thus contained by the actual situation. Uncodified emergency measures are not lawless as they derive their juridical character from the political dynamics of decision-making corresponding to the state of exception (see Schmitt 2004, 67–84; cf. Honig 2009, 66–67). Seen in this light, the accommodation model considers both law and politics 'jurisgenerative'[5] and interrelated despite their distinct characters. In other words, the accommodation model conceives of two normative orders: the ordinary rule of law and the state of emergency. The normative duality of the ordinary rule of law and the regime of emergency powers appears to lie at the core of

[4]The post-apartheid South African constitution is a good example (see Ackerman 2006, 89–90).

[5]By jurisgenerative, I mean the conceivable generation of norms in the political process, which may be extralegal but some of them may develop into part of the legal order later (see Cover 1983).

the accommodation model only. In contrast, under the business-as-usual and extra-legality models politics appears to be threat to the legal order as all emergency powers are the instances of pure political forces situated outside the legal order. Yet, upon a closer inspection, the difference between the accommodation model and the other two models is not as fundamental as is suggested above.

Although both the business-as-usual and extra-legality models insist that emergency measures be subject to the scrutiny of ordinary legal norms, neither rules out the relevance of the exceptional situation to the question of legality. Instead, decisions on the legality of executive actions, including those taken in the state of exception, are always context-sensitive (see Vermeule 2009, 1119–21). Through context-sensitive interpretation, the ordinary rule of law is effectively recalibrated to address the emergency measure in question. Seen in this light, the business-as-usual model amounts to what Gross and Ní Aoláin identify as 'interpretive accommodation' under the accommodation model (Gross and Ní Aoláin 2006, 72–79). Emergency powers are not totally lawless but operate under the recalibrated legal order. Thus, the business-as-usual model comprises two rather than one normative orders.

The dualist character of the extra-legality model is even more obvious. As noted above, the legality of emergency measures is to be determined through *ex post* ratifications under the extra-legality model. Gross and Ní Aoláin further point out that what underlies the extra-legality model is an 'ethic of political responsibility' (see ibid., 113–34). To be specific, the *ex post* ratification is a collective political and normative judgement on the emergency measures taken in the exceptional situation.[6] Pertaining to my present discussion, decisions as to whether to take what kind of emergency responses in the exceptional situation would be made with the prospective *ex post* judgment in mind (ibid., 147–53). In this light, emergency powers are not lawless politics but guided by the ethic of political responsibility, which operates as a distinct normative order from the ordinary rule of law governing the normal situation (Ignatieff 2004, 25–53). Taken together, not only does the accommodation model rest on normative duality but the business-as-usual and extra-legality models are also organized around it. Then arises the question: Why is the regime of emergency powers as a distinct normative order deliberately obscured or even denied as the business-as-usual and extra-legality models indicate?

This question can be answered in light of how the relationship between law and politics is conceived of in liberal constitutional orders. Constitutional order is an institutional framing by which politics and law are in constant dialogue with the aim of structuring and taming political forces. Yet, the law is equated with a rule-based juridical order in the hands of legal liberalism (Shklar 1964, 1–28). As a result, politics, which operates more on prudential judgment than on legal rules, is deemed as corrosive of the normativity of law. Given that the state of exception tends to elicit responses beyond what the legal rules have provided for, it is considered the epitome of politics unmoored from normativity, or rather, the expression of sovereignty (Frankernberg 2014, 97–100; cf. Schmitt 1988, 1). Seen in this light,

[6]Gross and Ní Aoláin note that 'the [extra-legality] model…retains sovereignty…with the people' (Gross and Ní Aoláin 2006, 170).

the denial of normative duality in the business-as-usual and extra-legality models reflects the deep suspicion of politics and ambiguities about sovereignty in legal liberalism (see Dyzenhaus 2006, 39).[7] It transpires that whether termed normative duality or not, the separation of the ordinary legal order from emergency powers is instrumental in the management of the relationship between law and politics in liberal constitutional orders (see Gross and Ní Aoláin 2006, 171–72; see also Kahn 2008, 149–58).

Moreover, normative duality underlies the prevalence of the 'switch mode' in the constitutional/legal regulation of emergency powers (Ferejohn and Pasquino 2004, 239; but see Dyzenhaus (2006), 196–220). Under this universal model of emergency constitution, the mode of law rules in the state of normalcy. When crisis displaces the state of normalcy, the mode of law will be switched to that of emergency powers, which is aimed to address the crisis-generated state of exception and to restore the state of normalcy, a precondition for the functioning of the mode of law. In this light, the exercise of emergency powers is more of a function of politics than the application of law.[8] Yet, as noted above, the state of exception that is governed by emergency powers is not chaos or anarchy. Rather, the better view is that the state of exception indicates a differently ordered situation in which decisions and concrete measures are taken against actual, exceptional political circumstances even at the expense of the legal rules to create the horizon on which the normal situation rests (see Schmitt (1988), 12; but see Gross and Ní Aoláin (2006), 162–70). Normative duality provides the conceptual tool for managing the distinction between law and politics in the constitutionalization of emergency powers.

2.2 Sovereignty Reified: Institutional Dominance and the Constitutionalization of the State of Exception

If my characterization of the constitutionalization of emergency powers as the embodiment of normative duality is correct, who has the authority to order that the mode of law be switched to that of emergency powers is central to the constitutional question of emergency powers. As emergency powers are the response to the factual situation of exception, the question of who orders the switch thus translates into that of who has the final say over whether the situation has turned from normalcy to exception. Furthermore, considering the extraordinary character of the emergency regime, the one who has the final say on the existence of the state of exception effectively holds the ultimate authority of the juridical order and thus acts as if he were the holder of sovereignty. To no one's surprise, this formulation of

[7] Notably, Ernst Fraenkel pointedly distinguished such normative duality from what he called 'the dual state' of Nazi Germany in which 'the "political" sphere is …an omnipotent sphere independent of all legal regulation' (Fraenkel 2017, 68–69).

[8] John Locke's concept of prerogative is the classical example (see Poole 2015, 51–52).

how emergency powers are operationalized in the constitutional order echoes Carl Schmitt's polemical proposition '[s]overeign is he who decides on the exception' (Schmitt 1988, 1).

I hasten to add that Carl Schmitt does not have the last word on the question of emergency powers and many flaws have been found in his theory of dictatorship (see generally Scheuerman 1999). Nevertheless, Schmitt illuminates the importance in the identification of ultimate authority in conceiving of emergency powers in the constitutional order as epitomized in his association of emergency powers with the institutional reification of sovereignty. Specifically, according to Schmitt, the chief executive is the institutional holder of sovereignty and has the monopoly on the decision concerning the switch from the ordinary rule of law to emergency powers and vice versa. The control of this crucial switch is completely in the hands of the executive power (Schmitt 2014, 8–9, 154–55, 159–60). Schmitt's attribution of sovereignty to the chief executive has been taken as an indication of his authoritarian proclivity. He has been criticized for essentially leaving the emergency regime to the whims of the chief executive's individual will (Gross and Ní Aoláin 2006, 167). For this reason, his theory of emergency powers is nihilistic and anti-constitutional and has been accused of conspiring to topple the troubled Weimar Republic (see Scheuerman 1994, 17–24, 131–40). Nevertheless, Schmitt's overzealously following the chief executive's will also reflects the public's anxious call for rapid reassuring reactions from the government when constitutional normalcy is hit by unforeseen events and perceived as plunging into an existential crisis (Ackerman 2006, 44–47). If so, it seems that we may still draw lessons from Schmitt in making sense of emergency powers. But is that really so?

Concerns about reassuring the anxious public in times of crisis are legitimate in any constitutional order (ibid.; see also Tribe and Guridge 2004, 1811). Among the constitutional powers, the executive appears to be the most capable of acting rapidly to reassure the public (Schmitt 2014, 8–10). But all this is premised on the real existence of the exceptional situation that calls for rapid government responses. If the claimed state of exception is only a creation of government propaganda, the rapid responses from the executive power would become repressive, not reassuring (cf. Tribe and Guridge 2004, 1814). This is where the architecture of Schmitt's executive theory of emergency powers crumbles. In his theory, the state of exception is not an actual situation but rather the chief executive's personal view of various occurrences (see Ferejohn and Pasquino 2004, 226). As John Ferejohn and Pasquale Pasquino suggest, normative duality that frames the constitutionalization of emergency powers works only when both the ontological and epistemic dimensions of the state of exception are taken into account. Without the ontological assumption that a real state of exception, as opposed to a perceived one, is actually different from normalcy, the constitutionalization of emergency powers would degenerate into Schmittian authoritarianism (ibid.). Apart from the ontological dimension, however, to make emergency powers a friend rather an enemy of the constitutional order, it is necessary to consider the epistemic dimension of the state of exception. How to differentiate the real state of exception from the false one is central to the institutional design of emergency powers (ibid.).

A quick look at the constitutional provisions concerning emergency powers or other legislation concerned the world over suggests that the chief executive remains an active role in switching on emergency powers (see Martinez 2006, 2495–2503). Yet, departing from the Schmittian ideal type of dictatorial executive, the initiative taken by the administration is no longer conclusive. Even in those countries where the executive power is constitutionally authorized to initiate emergency measures to respond to extraordinary events, their duration is not unlimited. Instead, they are allowed to exist on their own only for a pre-determined short period of time, functioning as a stopgap mechanism. To extend beyond, they require the parliamentary approval (ibid.). Political cooperation between the executive and the legislative power has replaced executive monopoly as the prevailing model of emergency powers in the post-WWII constitutional practice (see Ackerman 2006, 68–69). The requirement of parliamentary approval is seen as indicative of the importance of political control in the post-war constitutionalization of emergency powers. The aggrandized executive power in times of crisis is to be tamed through checks and balances between the political departments (ibid., 77–100).

More important, apart from the function of control, the role the legislative power plays in the decision on the activation and extension of emergency powers is to address the epistemic issues arising from the state of exception as noted above. As civic republican theories note, the separation of powers is not only instrumental to the idea of limited government but also an institutional mechanism to improve the quality of policy decisions (cf. Waldron 2016, 46–54). Cognitive errors concerning the state of exception are expected to be filtered out through the institutional dialogue between the administration and the parliament (cf. Vermeule 2014, 143).[9] Despite the variations on the institutional design with respect to the separation of powers, epistemic uncertainty surrounding the factual state of exception is thus minimized in this process. Through this constitutional vetting, the real state of exception is more likely to be differentiated from the false one than under the Schmittian dictatorial executive model. Moreover, as Jeremy Waldron meticulously argues, the parliament as a multi-member body is epistemically superior to the administration in reaching the conclusion on the realization of the state of exception (see Waldron 1999, 49–146). In sum, the supreme legislature seems to displace the chief executive as the ultimate constitutional power in deciding whether to switch from the mode of law to that of emergency powers in the post-war constitutional design.

Nevertheless, the record of the legislative role in this regard is not particularly glorious. Even equipped with the supermajority requirement, the parliament has not been effective in resisting the public calls for switching on emergency powers or endorsing the executive's initiatives. As its theoretical epistemic superiority yields to popular emotion, the political control expected of the legislative power also falls short (see Tribe and Guridge 2004, 1816–19). Against this constitutional horizon the focus of how to constitutionalize emergency powers shifts from who will switch the mode to who will pass the final judgment on the validity of emergency responses (cf.

[9]One of the functions of the separation of powers is to filter out cognitive errors in general policymaking (see Sunstein 1993, 17–39).

Gross and Ní Aoláin 2006, 137–42). Here is where the judiciary comes into play in the discussion of emergency powers.

In line with the court's enhanced role in the post-WWII constitutional landscape, emergency powers are subject to judicial control in terms of legality (see Cole 2003). It is true that the judiciary is unlikely to overturn the political decision to switch on emergency powers (see Ackerman 2006, 101–02). Worse, its wartime record is not quite reassuring (ibid., 61–64; Cole 2003, 2568–71). Yet, it is not the end of the constitutional judgment. Instead, emergency measures taken in times of crisis remain subject to judicial scrutiny even post the state of exception (see Dyzenhaus 2006, 197–98). Speaking through its rulings, the judiciary passes the final judgement on the instances of emergency power. In this way, the judicial power emerges as the centre of control in regard to the constitutionalization of emergency powers (see ibid., 54–59, 129–49).

My discussion of how the constitutionalization of emergency powers has evolved in theory and practice does not suggest a linear movement from the executive to the legislative to the judicial power in the quest for reconciling the state of exception with constitutionalism. Rather, all the three powers are important players in the decisional dynamics of emergency powers (see Ackerman 2006, 66). There is no agreement among scholars on which constitutional power is best placed to answer the challenge from the state of exception (compare ibid., 77–100 with Cole 2003). Yet, the above discussion points to the common concern over emergency powers in commentary: Control is the key to constitutionalize emergency powers. Moreover, the department that controls the constitutional status of emergency powers, whether through initiation or approval or ruling, effectively holds the ultimate authority, a reified sovereignty, as its judgment is considered dominant. Echoing Hannah Arendt's definition of sovereignty as domination (see Arendt 1990, 24–31; Arendt 1998, 234–35; see also Arato and Cohen 2009), I suggest that liberal responses to the state of exception, as the post-war constitutional theory and practice have shown, can be characterized as what I call the control paradigm, the pivot of which is the institutional reification of sovereignty.

3 From Constitutional Control to Legal Management: Broken Liberal Promises in the Age of Normalization

Now I take stock of the control paradigm as identified above in light of present exceptional situations. Let us start with the current condition of the state of exception: the normalization of the state of exception. As has been widely discussed in literature, this new condition has resulted in the perpetuation of the regime of emergency powers, posing fundamental challenges to the switch mode prevalent in liberal constitutional orders (see generally Frankenberg 2014; see also Ackerman 2006, 47–49). At first glance, this appears to be another instance of how new fact induces legal change.

Yet, a closer look at the organism of normalization will tell us a much more complex story.

To begin with, the normalization of the state of exception is not simply the result of new actual situations. It is the product of both fact and norm. As I have noted in Sect. 1, the state of exception traditionally refers to unexpected, sudden incidents. They are presumed to be rare and transient. Yet, as The Troubles in Northern Ireland shows, the state of exception may last as long as three decades. In addition, some structural developments also increase the frequency of crisis. With economic globalization and the continuing securitization of financial assets, not only the stakeholders but also the fabric of the globalizing society is ever prone to the ramifications of any financial crisis. The state of exception is structurally inscribed into the global economy and the financial market if you will (see generally Reynolds 2012). The breakdown of the global financial market and the Euro crisis bear witness to this development (ibid.). Apart from these new facts, however, normative changes contribute to the normalization of the state of exception, too. The so-called global war on terrorism epitomizes this development. Instead of contesting the war-like character of this long struggle, my present focus is on the targeted object 'terrorism' itself. Unlike actual incidents, terrorism as a target is elusive. To eradicate terrorism means killing off the thoughts or ideologies that may motivate it (Gordon 2007). Yet, thought or idea is hard to kill. Taking on terrorism as an instance of emergency-triggering incident effectively paves the way for the normalization of the state of exception (Macken 2011, 94). The joint force of changed fact and legal construction results in the normalization of the state of exception.

Once the state of exception is normalized, the relationship between the ordinary rule of law and the regime of emergency powers also changes. In correspondence with the normalization of the state of exception, emergency powers are perpetuated in two ways. First, as Taiwan's four-decade long martial-law rule shows, the emergency power regime suspends the normal constitutional order. During the reign of martial law, all security agencies, including the police, were placed under the command of the military (Roy 2002, 91–92). The civilian control of the military enshrined in the constitution was dispensed with (see Croissant et al. 2013, 79–96). This example suggests that an extended emergency regime does not just 'derogate' from the normal rule of law but rather effectively 'abrogates' the entire constitutional order (see Ferejohn and Pasquino 2004, 220). The other way towards perpetuation and normalization is simpler: writing emergency powers into the ordinary rule of law through various statutes. Taken together, the normalization of emergency powers effectively converts the ordinary rule of law into an emergency-responsive legal mechanism, thereby changing the character of the entire legal order (see Frankenberg 2014, 145–46, 189–95).

Apparently, the parallel development of normalization and perpetuation bears greatly on the control paradigm and the liberal constitutional order in general. The first and foremost effect is the dismantling of the conceptual framework of normative duality as the distinction is blurred between the ordinary rule of law and the emergency regime (ibid., 190–91). The impact of normalization is not on the conceptual level only. The institutional design of the constitutionalization of emergency powers

is affected, too. As discussed in Sect. 2, that institutional sovereignty occupies centre stage in the control paradigm is premised on normative duality. Once emergency powers are perpetuated to the extent of merging themselves with other ordinary legal tools, however, the holder of institutional sovereignty becomes obscured. And this is the real problem.

Specifically, the parallel development of normalization and perpetuation obscures the identity of institutional sovereignty with the dispersal of the decisions to invoke emergency powers. In the age of normalization, the legislature makes decisions on emergency powers piecemeal through ordinary legislative procedures. When emergency measures are introduced into the statutory framework this way, they become one among the numerous legislative bills waiting to be debated and voted on. It would be a tall order for parliamentarians (as well as the public) to constantly keep a close eye on individual emergency measure bills. As a result, while the parliament's legislative role remains unchanged, the political control the public expect it to exert on the emergency regime wanes. The constitutional requirement of parliamentary approval in the invocation of emergency powers effectively degenerates into a constitutional desuetude (cf. Roach 2008, 245).

The dispersal of emergency powers also transforms the administration in a fundamental sense. The invocation of emergency powers is not a decision taken by the chief executive in times of crisis any more. It is just one of the many policy tools within the discretion of individual civil servants. Like other policy tools, whether to resort to emergency measures are among the myriad choices they make in everyday bureaucratic routines. Likewise, expertise and experience provide the legitimacy for the technocratic choice of emergency responses over other policy tools (see Poole 2015, 207–09). Moreover, as security and risk prevention are prioritized on the administrative agenda, civil servants are gradually acculturated to rapid and forceful responses (Frankenberg 2014, 200–03). From out of the administration impregnated with a security culture we see looming the 'national surveillance state' and the 'security society' (ibid., 145–46; Balkin and Levinson 2006).

As noted above, judicial control is considered remedial to the flawed political control under the control paradigm. While the judiciary may be forgiving of executive actions amid the crisis, its rulings are still of constitutional importance after the state of exception as they reframe and reassess emergency powers in normative terms. Yet, with the dispersal of emergency powers and their embedding in everyday bureaucratic routines, the focus of the judiciary also shifts. The cases before the court are no longer instances of trial on the validity of emergency measures and the constitutionality of the decision to switch on the emergency regime. Instead, they are just among other administrative decisions of the modern regulatory state under judicial scrutiny. On this view, what is required of the judges is not so much their fidelity to constitutional principles and normative values as their knowledge of the complexity of risk and crisis prevention and their appreciation of the way policy choices are made in the modern technocracy. As a result, the judicial scrutiny of the piecemeal, normalized emergency responses looks more like part of the modern-day management of crisis and emergency that requires the interdepartmental cooperation between the administration and the court (Frankenberg 2014, 93–96, 190–207).

Yet, like ordinary administrative law cases, the judiciary oscillates between deference and micromanagement. Deferring to the administration's policy choices, the judiciary will leave emergency powers to the hands of the administration, creating legal 'grey holes' (see Vermeule 2009, 1118–31). In contrast, the judiciary will be prone to criticisms of micromanagement by interfering with the administration's policy making if it attempts to conduct an exacting scrutiny of emergency responses (Yoo 2006, 238). Either way, the judicial control of emergency powers is lost in the managerial ambience of the administrative state (see generally Christensen, Goerdel, and Nicholson-Crotty 2011).

4 Beyond Control: Judgment, Constitutional Mindset, and the Domestication of the State of Exception

As has been widely noted, the normalization of the state of exception is a result of fundamental changes on the presupposition of normative duality (see e.g. Frankenberg 2014, 185–220). There is no returning to the control paradigm. Yet, a closer look at how the state of exception is to be managed under that paradigm may give us some clues as to the way out of the current permanent state of emergency. In contrast to the dispersal of emergency powers in the age of normalization, the time when the emergency regime is switched on is clear under the control paradigm. The moment of the executive initiation and the legislative approval is unmistakable. Moreover, the court is conscious of its constitutional role in the regulation of emergency powers when an emergency measure-caused case comes before it. Of course the judicial scrutiny may not always be exacting. Nevertheless, there will be no doubt as to whether emergency measures are on trial. All these features are essential to the functioning of the control model. Notably, the transparency of who takes decisions leading to the switch-on of the emergency regime and when such decisions are taken are more than a requirement of clearness under the rule of law (Fuller 1969, 39). It further suggests that what underlies the post-war constitutionalization of emergency powers is the clear identification of who takes part in the decision-making process rather than who holds the ultimate power of control.

As my discussion of the twin phenomenon of normalization and perpetuation indicates, the problem with the current permanent state of emergency is its elusiveness and obscurity due to the dispersal of the decisions on emergency measures. Neither the public nor the institutional players are able to 'see' the coming of the emergency regime and its exceptional character. Hannah Arendt can help us see why 'seeing' is important when we reconceive the constitutionalization of emergency powers. According to Dana Villa, components of 'theatricality' are crucial to understanding Arendt's theory of politics and political action (Villa 1999, 128–54). Arendt pivoted the realization of politics on the engagement of the members of the political community. What is required of citizens is not only the engagement in the public issues but also their engagement with one another. The second aspect of engagement

is of special pertinence to my present discussion. Engagement in this sense consists of interacting with fellow citizens and debating with them on public issues in the public realm (Arendt 1998, 50, 54). It is through such engagement that thought is turned into reality and a common world, namely, the community, materializes (ibid., 50–53). Yet, to engage with his compatriots, each citizen has to be 'seen'. Not being seen, a lone citizen virtually vanishes from the public scene on which his compatriots engage with each other. Correspondingly, 'seeing' fellow citizens is equally crucial to this deliberative community. Seeing, or rather 'meeting', enables a citizen to interact with rather than simply to react to his compatriots. This is what engagement means (ibid., 50, 57). Seeing, being seen, and the resulting interaction among citizens not only underlie the theatricality of politics but also enable citizens to partake of the collective subjecthood vis-à-vis the choices taken by the political community (see ibid., 175–88).

In this light, the importance of the transparency of who takes decisions leading to the switch-on of the emergency regime and when such decisions are taken becomes clear. It enables the institutional players to see and thus engage with each other. Moreover, it makes the emergency regime itself and the institutional players' respective positions on it visible to citizens. Seeing the vices and virtues of the emergency regime, the public will be able to decide what to do about it and to judge how the institutional players have performed. Institutional sovereigns, namely, the central players in staging the emergency regime, can thus be held responsible for their emergency judgments through the collective judgement of the public.

At the last analysis, what makes the control paradigm function is not the formal structure of normative duality or the attribution of emergency powers to an ultimate institutional sovereign. Rather, it is the Arendtian political interaction that underpins the control paradigm. Thus, the debate as to whether the judicial power or the political branch has better control over the emergency regime just misses the point. Both are the demonstration of the law-politics interaction in constitutional orders. To put it bluntly, the judicial power and the political branch are part of the broader political process to rein in emergency powers through constitutional framing (Ackerman 2006, 77–12). The control paradigm is essentially political in this fundamental sense and should be reconceived in this light.

If it is not just the law but the law-politics interaction that makes the constitutionalization of emergency powers work, it seems to suggest that a new political response should be considered in the age of normalization when institutional sovereigns have disappeared from the public eye. I have already noted that the dispersal of emergency powers is the underlying cause of the malfunction of the control paradigm. Disguised as part of the complex crisis response and risk prevention mechanism, emergency measures appear to be the automatic product of the colossal administrative machine (cf. Farazmand 2014, 41–42). Viewed thus, emergency measures are ostensibly rid of human judgment and become programmed responses. As the programming of crisis response and risk prevention is too complex for the outsiders to understand, managerial rationality demands deference of the judiciary (Honig 2009, 67–68). What is concealed under the assumed superiority of the expertise-based administrative rationality to the judicial scrutiny is the legacy of institutional sovereignty under

which a dominant power must be identified even though it may turn out to be just a placeholder. Only this time, what dominates is neither the chief executive nor other constitutional powers but the institutional ideology that governs the administrative state.[10] In the shadow of institutional sovereignty, the end result is the uncontrolled emergency regime with emergency measures ready to be deployed.

Against this backdrop rediscovering the role of judgment is the antidote to the perpetuation of emergency powers. But, how? Do we need to press the reset button, if any, to start the design of the emergency constitution from scratch? Is it even conceivable? Fortunately, the experiences of constitutional ordering in the post-war era can serve as the repertoire of knowledge in this regard. Learning from this repertoire of constitutional knowledge, Martti Koskenniemi makes a prognosis of the current condition of the international legal order (see Koskenniemi 2006, 2007), which can also shed some light on the question of emergency powers. To counter the developments of 'deformalization', 'fragmentation', and 'empire', he observes, managerialism seems to be international lawyers' answer (Koskenniemi 2006, 13). Yet, he argues that the three developments requiring resistance are the product of managerialism (ibid., 13–17). He contends that to stop deformalization, fragmentation, and empire requires the shift of mindset from managerialism to constitutionalism. With constitutional 'mindset' instead of constitutional 'architectonics' (ibid., 31), the managerialism-driven developments will be seen as the product of judgment. For this reason, Koskenniemi strikes an optimistic note on the future of the international order, suggesting that constitutional mindset can help redefine the debate in terms of politics instead of techniques (Koskenniemi 2007, 19). Through this lens, constitutionalism as mindset appears to hold the key to the rediscovery of the role of judgment in the age of normalization, too.

In an ideal political world, every citizen has constitutional mindset and will be able to deliver the collective judgment jointly with his compatriots on the perpetuated obscure emergency regime (Honig 2009, 69). Unfortunately, the real world is anything but ideal. So, whither the search for constitutional mindset? In view of the international legal order, Koskenniemi points to international lawyers (Koskenniemi 2006, 18), who have been central to the origin and evolution of international law (see Walker 2015, 47–54). Turning the focus to domestic legal orders, we may pin hopes on the national apex courts hearing constitutional cases when their role is recast in the terms to be fleshed out.

I hasten to add that this is neither a prescription for more legalism nor an advocacy for judicial supremacy. Instead, this is a critical rethinking of the operationalization of emergency powers that draws inspiration from the post-war constitutional experiences. As Bruce Ackerman observes, one of the greatest achievements in the post-war political order is that politics can be conducted in constitutional terms. National constitutional or supreme courts are the key players in this post-war new politics (see Ackerman 1996). Moreover, the success of this new politics to which the global spread of constitutional review bears witness relies more on the political character of judges than on their lawyerly techniques (see e.g. Ellmann 2009). The judicial

[10] This points to the relationship between sovereignty and governmentality (see Dean 2014, 19–44).

practice of proportionality analysis illustrates this point. While it appears to give the judge a fig leaf so that his micromanagement of policies can be concealed, the component of judgment in the stage of balancing opens the judge and his reasoning to the judgment of the public (cf. Perju 2012). With the ostensible exception of the United States, the worldwide adoption of proportionality analysis suggests the judicial function and its legitimacy being reconsidered through the lens of the interaction between the judiciary and the public in this post-war new politics (see Gardbaum 2014).

Thus, if the judiciary wakes up to the calls for constitutional mindset, it may pave the way for a new political model of (re)constitutionalizing the dispersed emergency powers by helping citizens see the face of the emergency regime and focusing the public mind on the role of judgement in the age of normalization. To see how it works, let us take a closer look at the new role expected of the judiciary in the face of the perpetual emergency regime. As noted above, the twin development of normalization and perpetuation has turned the constitutional provisions on emergency powers into constitutional desuetude. We live in a de facto undeclared state of emergency if you will. Being undeclared, the current emergency regime is invisible to the public. Thus, a declaration will be necessary to enable the public to see the emergency regime and to see it as resulting from judgments, not an automatic product. Then who can declare the existence of the state of emergency? My answer is the judiciary.

Specifically, declared or not, emergency-responsive measures will likely be tested in the court sooner or later. As the preceding section suggests, they are currently disguised as administrative policy choices and thus tend to be handled in managerial terms. Yet, it is not the only way to decide those cases. They can be treated as the result of an undeclared state of emergency instead. Thus, under the new model, when a case of this kind reaches the constitutional or supreme court, the court should declare the government act at issue to be an emergency measure. The moment when the administration took the disputed measure should be seen as the inception of the state of emergency. And the court should declare that the state of emergency had ended at the time when the case reached it. With this judicial construction of the de facto emergency regime, some beneficial changes should be expected. First, through the proposed retrospective double judicial declaration of the state of emergency, the judiciary can redefine its relationship with the executive power and thus free itself from the acculturation of judicial deference to administrative expertise and experience and other dictates of managerialism. Through this lens, the de facto emergency measure on trial will no longer be seen as the product of the rational management of the administration. Rather, it will be treated as the question of political judgment, the responsibility for which is to be assessed against constitutional framing of institutional powers.

Moreover, by its declaration, the judiciary can focus the public mind on the emergency regime under which they are living. Obviously, the judicial ruling under this model will not have the final say over the mini-state of emergency but can only tell the public that the disputed action is the result of judgment for which the actor must be held responsible. It is just part of the political process leading to the collective judgment of the mini-state of emergency. By turning each emergency-related case into a

mini-version of *ex post* ratification, the judiciary can open the seemingly perpetual undeclared state of emergency to the collective constitutional judgment. In sum, the new role expected of the court to play is the catalyst for forming the collective public judgment on the de facto emergency regime instead of the arbitrator under the control paradigm.

Before concluding my present discussion, some issues and questions deserve further examination. One fundamental question concerns the judicial role: Is it realistic at all to expect the judiciary to be immune from the public atmosphere that has precipitated decisions on the state of exception and rendered the control paradigm dysfunctional? My answer is that the recast role of the judiciary should give us some hope. Under the control model, the judiciary is expected to play the role of arbitrator that passes the final judgment on the emergency regime. The ultimate responsibility of control falls on the judge's shoulders. It is just too much for the judicial power in the face of exceptional situations (Ackerman 2006, 60–64). In contrast, the new role the judiciary is expected to play in the age of normalization is much more modest. It is limited to making the public aware of the existence of an undeclared state of emergency, leaving the final judgment to the public. Even if the court approves of the de facto mini-state of emergency, its declaration on the existence of such a situation will be catalytic in bringing the unnoticed question of emergency powers to the forefront in the public debate. Considering its track record in the post-war era, this new but limited role is not much to ask of the judicial power.

Notably, the above proposal on the judicially constructive mini-state of emergency may well be rejected as counterintuitive. My response is that counterintuitive as it is, it is not unimaginable. And constitutional mindset works when we start the process of reimagining the constitutional order (see Koskenniemi 2006, 32; see also Cover 1983, 10). All this can be achieved if the judge is willing to view the case with constitutional mindset in the face of the normalization of the state of exception.

5 Conclusion

In this paper, I have attempted to rethink the constitutionalization of emergency powers in view of the normalization of the state of exception. To this end, I first took a close look at how the state of emergency power is conceived of in liberal constitutional orders. I identified the control paradigm as the liberal answer to the state of exception. Conceptually, it is premised on the normative duality of normalcy and exception; institutionally, it pivots on the identification of institutional sovereignty that passes the judgement on the state of exception. Yet, the blurring of normalcy and exception in fact and norm has cast doubt on the control paradigm. With more and more emergency measures adopted in criminal law and other ordinary legislation, we have entered the age of normalization in which an undeclared permanent emergency regime has been formed.

My diagnosis of the current condition of the constitutionalization of emergency powers showed that the dispersal of emergency measures and the disappearance

of institutional sovereignty have contributed to its malfunction. Emergency powers have been deformalized and merged into ordinary administrative policy choices. Under the sway of managerialism, the judiciary has failed to rein in the obscure de facto emergency regime. To counter this trend calls for a new political model of emergency constitution that pivots on the rediscovery of the role of responsibility vis-a-vis political judgment in constitutional ordering.

Drawing on the role of theatricality in Arendt's political theory, I argued that making the public 'see' the role of judgment in the elusive, obscure state of exception should be central to the re-constitutionalization of emergency powers. On this view, the judiciary is expected to act as the institutional catalyst for forming the collective public judgment on the ongoing undeclared state of emergency. Instead of assuming institutional sovereignty, the judiciary may help domesticate the beast of emergency powers by focusing the public mind on our current situation with constitutional mindset. Recast in terms of judgment and political responsibility, the judiciary under the new model can make the elusive state of emergency visible to the public again and this will do great service to the constitutionalization of emergency powers.

References

Ackerman B (1996) The political case for constitutional courts. In: Yack B (ed) Liberalism without illusions: essays on liberal theory and the political vision of Judith N. Shklar. University of Chicago Press, Chicago, pp 205–219

Ackerman B (2006) Before the next attack: preserving civil liberties in an age of terrorism. Yale University Press, New Haven

Agamben, G (2005) State of exception (trans: Attell K). University of Chicago Press: Chicago

Arato A, Cohen J (2009) Banishing the sovereign? internal and external sovereignty in Arendt. Constellations 16(2):307–330

Arendt H (1990) [1963] On revolution. Penguin, London

Arendt H (1998) [1958] The human condition. University of Chicago Press, Chicago

Balkin JM, Levinson S (2006) The process of constitutional change: from partisan entrenchment to the national surveillance state. Fordham L Rev 75(2):489–535

Christensen RK, Goerdel HT, Nicholson-Crotty S (2011) Management, law, and the pursuit of the public good in public administration. J Pub Admin Res 21(suppl 1):i125–i140

Cole D (2003) Judging the next emergency: judicial review and individual rights in times of crisis. Mich L Rev 101(8):2565–2595

Cover RM (1983) The Supreme Court, 1982 term—foreword: *nomos* and narrative. Harv L Rev 97(1):4–68

Croissant A et al (2013) Democratization and civilian control in Asia. Palgrave McMillan, Basingstoke

Dean M (2014) The signature of power: sovereignty, governmentality and biopolitics. Sage, London

Dyzenhaus D (2006) The constitution of law: legality in a time of emergency. Cambridge University Press, Cambridge

Ellmann S (2009) Marking the path of the law. Const Ct Rev 2:97–143

Farazmand A (2014) Global crisis in public service and administration. In: Farazmand A (ed) Crisis and emergency management: theory and practice, 2nd edn. CRC Press, Boca Raton, pp 35–54

Ferejohn J, Pasquino P (2004) The law of the exception: a typology of emergency powers. ICON 2(2):210–239