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

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[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.

[Keywords] (undeclared) state of emergency, the normalization of state of exception, dispersed emergency powers, normative duality of normalcy and exception, institutional sovereignty, control paradigm, mini-state of emergency, constitutional mindset, political judgment, responsibility, theatricality of politics, Hannah Arendt, Carl Schmitt

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I. Introduction

The question of emergency powers has been brought back to the centre of constitutional theory amid the new ‘long war’ on terrorism.¹ 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’² centres on the unexpected, ground-shaking events, which are considered temporary in nature.³ 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.

¹ See eg Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006). See also Stephen M Griffin, *Long Wars and the Constitution* (Harvard University Press 2013) 5-6, 204-35.

² William E Scheuerman (ed), *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press 1996).

³ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press 1948) 5-7, 16-23.

The ‘state of exception’⁴ 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.⁵

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.⁶ Others point to the political nature of emergency powers and argue that they require political rather than legal responses.⁷ 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.⁸ What distinguishes among scholars is their preferred institutional holder of sovereignty that exercises the ultimate control over emergency powers (Section II). With the normalization of the state of exception, I contend, this control paradigm in conceiving the constitutionalization of emergency powers,⁹ which is underpinned by institutional sovereignty, is untenable. This is the root cause of the uneasiness about the

⁴ 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.

⁵ Günther Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar 2014) 185-220.

⁶ See eg John Ferejohn and Pasquale Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *ICON* 210, 234-35.

⁷ cf Gross and Ní Aoláin (n 1) 110-70; Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP 2015).

⁸ 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 Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (David Dyzenhaus ed and Belinda Cooper tr, OUP 2019) 101-04, 106-07.

⁹ 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 (n 1) 162-70.

state of exception in contemporary constitutional scholarship (Section III). 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 (Section IV).

II. 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.

A. 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.¹⁰ The debate over emergency powers concerns whether the law and its application extend beyond the normal situation to the fundamentally different factual

¹⁰ Paul W Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press 2011) 59.

situation, namely, the state of exception.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?¹² 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.¹³ 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.¹⁴

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.¹⁵ 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

¹¹ Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press 2005) 9-11.

¹² *ibid* 1-2.

¹³ See Gross and Ní Aoláin (n 1) 17-85.

¹⁴ See *ibid* 86-109.

¹⁵ See *ibid* 111-12.

various *ex post* ratifications.¹⁶ 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.¹⁷ Specifically, procedures concerning the activation of and the subsequent exercise of emergency powers are provided for in the governing legal framework.¹⁸ 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.¹⁹ 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.²⁰ Yet, it misses the point: the accommodation model assumes that even uncoded measures are not lawless pure forces. Specifically, from the perspective of the accommodation model, uncoded emergency measures are not considered complete anathema to the normative character of the

¹⁶ See *ibid* 130-62.

¹⁷ See *ibid* 79-85.

¹⁸ The post-apartheid South African constitution is a good example. Ackerman (n 1) 89-90.

¹⁹ cf *ibid* 90-100.

²⁰ William Scheuerman, 'Human Rights Lawyers v. Carl Schmitt' in Evan J Criddle (ed), *Human Rights in Emergencies* (CUP 2016) 175, 197.

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.²¹ Seen in this light, the accommodation model considers both law and politics ‘jurisgenerative’²² 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 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.²³ 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.²⁴ 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

²¹ See Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer tr, Duke University Press 2004) 67-84. cf Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press 2009) 66-67.

²² 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 Robert M Cover, ‘The Supreme Court, 1982 Term -- Foreword: *Nomos* and Narrative’ (1983) 97 *Harv L Rev* 4.

²³ See Adrian Vermeule, ‘Our Schmittian Administrative Law’ (2009) 122 *Harv L Rev* 1095, 1119-21.

²⁴ Gross and Ní Aoláin (n 1) 72-79.

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’.²⁵ To be specific, the *ex post* ratification is a collective political and normative judgement on the emergency measures taken in the exceptional situation.²⁶ 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.²⁷ 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.²⁸ Taken together, not only the accommodation model rests on normative duality but the business-as-usual and extra-legality models are also organized around it. The question then arises: 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.²⁹ 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.³⁰ Seen in this light, 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.³¹ It transpires that whether termed normative duality or not,

²⁵ See *ibid* 113-34.

²⁶ Gross and Ní Aoláin note that ‘the [extra-legality] model...retains sovereignty...with the people.’ *ibid* 170.

²⁷ *ibid* 147-53.

²⁸ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press 2004) 25-53.

²⁹ Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964) 1-28.

³⁰ Frankenberg (n 5) 97-100. cf Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1988) 1.

³¹ See Dyzenhaus (n 1) 39. Notably, Ernst Fraenkel pointedly distinguished such normative duality from

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.³²

Moreover, normative duality underlies the prevalence of the ‘switch mode’ in the constitutional/ legal regulation of emergency powers.³³ 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 a function of politics than the application of law.³⁴ 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.³⁵ Normative duality provides the conceptual tool for managing the distinction between law and politics in the constitutionalization of emergency powers.

B. 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 response to the factual situation of

what he called ‘the dual state’ of Nazi Germany in which ‘the “political” sphere is ...an omnipotent sphere independent of all legal regulation’. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (EA Shils tr, OUP 2017) 68-69.

³² See Gross and Ní Aoláin (n 1) 171-72. See also Paul W Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (University of Michigan Press 2008) 149-58.

³³ Ferejohn and Pasquino (n 6) 239. But see Dyzenhaus (n 1) 196-220.

³⁴ John Locke’s concept of prerogative is the classical example. See Poole (n 7) 51-52.

³⁵ See Schmitt (n 30) 12. But see Gross and Ní Aoláin (n 1) 162-70.

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 how emergency powers are operationalized in the constitutional order echoes Carl Schmitt's polemical proposition '[s]overeign is he who decides on the exception'.³⁶

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.³⁷ 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.³⁸ 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.³⁹ 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.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.⁴¹ If so, it seems that

³⁶ Schmitt (n 30) 1.

³⁷ See generally William E Scheuerman, *Carl Schmitt: The End of Law* (Rowman & Littlefield 1999).

³⁸ Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Michael Hoelzl and Graham Ward trs, Polity 2014) 8-9, 154-55, 159-60.

³⁹ Gross and Ní Aoláin (n 1) 167.

⁴⁰ See William E Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (MIT Press 1994) 17-24, 131-40.

⁴¹ Ackerman (n 1) 44-47.

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.⁴² Among the constitutional powers, the executive appears to be the most capable of acting rapidly to reassure the public.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.⁴⁸ Yet, departing from the Schmittian ideal type of

⁴² *ibid.* See also Laurence H Tribe and Patrick O Guridge, 'The Anti-Emergency Constitution' (2004) 113 *Yale LJ* 1801, 1811.

⁴³ Schmitt (n 38) 8-10.

⁴⁴ *cf* Tribe and Guridge (n 42) 1814.

⁴⁵ See Ferejohn and Pasquino (n 6) 226.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ See Jenny S Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115 *Yale LJ* 2480,

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.⁴⁹ 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.⁵⁰ 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.⁵¹

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.⁵² Cognitive errors concerning the state of exception are expected to be filtered out through the institutional dialogue between the administration and the parliament.⁵³ 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

2495-2503.

⁴⁹ *ibid.*

⁵⁰ See Ackerman (n 1) 68-69.

⁵¹ *ibid* 77-100.

⁵² cf Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 46-54.

⁵³ cf Adrian Vermeule, *The Constitution of Risk* (CUP 2014) 143. For the function of the separation of powers in filtering out cognitive errors in general policymaking, see Cass R Sunstein, *The Partial Constitution* (Harvard University Press 1993) 17-39.

is epistemically superior to the administration in reaching the conclusion on the realization of the state of exception.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷ It is true that the judiciary is unlikely to overturn the political decision to switch on emergency powers.⁵⁸ Worse, its wartime record is not quite reassuring.⁵⁹ 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.⁶⁰ 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.⁶¹

My discussion of how the constitutionalization of emergency powers has evolved in

⁵⁴ See Jeremy Waldron, *Law and Disagreement* (OUP 1999) 49-146.

⁵⁵ See Tribe and Guridge (n 42) 1816-19.

⁵⁶ cf Gross and Ní Aoláin (n 1) 137-42.

⁵⁷ See David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 *Mich L Rev* 2565.

⁵⁸ See Ackerman (n 1) 101-02.

⁵⁹ *ibid* 61-64; Cole (n 57) 2568-71.

⁶⁰ See Dyzenhaus (n 1) 197-98.

⁶¹ See *ibid* 54-59, 129-49.

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.⁶² There is no agreement among scholars on which constitutional power is best placed to answer the challenge from the state of exception.⁶³ 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,⁶⁴ 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.

III. 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.⁶⁵ 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 Introduction,

⁶² See Ackerman (n 1) 66.

⁶³ Compare *ibid* 77-100 with Cole (n 57).

⁶⁴ See Hannah Arendt, *On Revolution* [1963] (Penguin 1990) 24-31; Hannah Arendt, *The Human Condition* [1958] (University of Chicago Press 1998) 234-35. See also Andrew Arato and Jean Cohen, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16 *Contellations* 307.

⁶⁵ See generally Frankenberg (n 5). See also Ackerman (n 1) 47-49.

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.⁶⁶ The breakdown of the global financial market and the Euro crisis bear witness to this development.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ The

⁶⁶ See generally John Reynolds, ‘The Political Economy of States of Emergency’ (2012) 14 *Or Rev Int’l L* 85.

⁶⁷ *ibid.*

⁶⁸ Philip H Gordon, ‘Can the War on Terror Be Won? How to Fight the Right War’ (2007) 86 (6) *Foreign Affairs* 53.

⁶⁹ Claire Macken, *Counter-terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law* (Routledge 2011) 94.

⁷⁰ Denny Roy, *Taiwan: A Political History* (Cornell University Press 2002) 91-92.

civilian control of the military enshrined in the constitution was dispensed with.⁷¹ 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.⁷² 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.⁷³

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.⁷⁴ 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 Section II, that institutional sovereignty occupies centre stage in the control paradigm is premised on normative duality.⁷⁵ 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

⁷¹ See Aurel Croissant et al, *Democratization and Civilian Control in Asia* (Springer 2013) 79-96.

⁷² See Ferejohn and Pasquino (n 6) 220.

⁷³ See Frankenberg (n 5) 145-46, 189-95.

⁷⁴ *ibid* 190-91.

⁷⁵ 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 Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (David Dyzenhaus ed and Belinda Cooper tr, OUP 2019) 101-04, 106-07.

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.⁷⁶

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.⁷⁷ Moreover, as security and risk prevention are prioritized on the administrative agenda, civil servants are gradually acculturated to rapid and forceful responses.⁷⁸ From out of the administration impregnated with a security culture we see looming the 'national surveillance state' and the 'security society'.⁷⁹

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

⁷⁶ cf Kent Roach, 'Ordinary Laws for Emergencies and Democratic Derogations from Rights' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 229, 245.

⁷⁷ See Poole (n 7) 207-09.

⁷⁸ Frankenberg (n 5) 200-03.

⁷⁹ *ibid* 145-46; Jack M Balkin and Sanford Levinson, 'The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State' (2006) 75 *Fordham L Rev* 489.

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.⁸⁰ 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'.⁸¹ 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.⁸² Either way, the judicial control of emergency powers is lost in the managerial ambience of the administrative state.⁸³

IV. 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.⁸⁴ 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

⁸⁰ Frankenberg (n 5) 93-96, 190-207.

⁸¹ See Vermeule (n 23) 1118-31.

⁸² John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Perseus Oto 2006) 238.

⁸³ See generally Robert K Christensen, Holly T Goerdel, and Sean Nicholson-Crotty, 'Management, Law, and the Pursuit of the Public Good in Public Administration' (2011) 21 (suppl 1) *Journal of Public Administration and Research* i125-i140.

⁸⁴ See eg Frankenberg (n 5) 185-220.

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.⁸⁵ 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.⁸⁶ 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.⁸⁷ It is through such engagement that thought is turned into reality and a common world, namely, the community, materializes.⁸⁸ 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

⁸⁵ Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 39.

⁸⁶ Dana R Villa, *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton University Press 1999) 128-54.

⁸⁷ Arendt (1998) (n 64) 50, 54.

⁸⁸ *ibid* 50-53.

means.⁸⁹ 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.⁹⁰

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 position 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.⁹¹ 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

⁸⁹ *ibid* 50, 57.

⁹⁰ See *ibid* 175-88.

⁹¹ Ackerman (n 1) 77-12.

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.⁹² 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.⁹³ 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.⁹⁴ 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,⁹⁵ 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.⁹⁶ Yet, he argues that the three developments requiring resistance are the product of managerialism.⁹⁷ He

⁹² cf Ali Farazmand, ‘Global Crisis in Public Service and Administration’ in Ali Farazmand (ed), *Crisis and Emergency Management: Theory and Practice* (2nd edn CRC Press 2014) 35, 41-42.

⁹³ Honig (n 21) 67-68.

⁹⁴ This points to the relationship between sovereignty and governmentality. See Mitchell Dean, *The Signature of Power: Sovereignty, Governmentality and Biopolitics* (Sage 2014) 19-44.

⁹⁵ See Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’ (2006) 8 *Theoretical Inquiries in Law* 9; Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 *MLR* 1.

⁹⁶ Koskenniemi (2006) (n 94) 13.

⁹⁷ *ibid* 13-17.

contends that to stop deformalization, fragmentation, and empire requires the shift of mindset from managerialism to constitutionalism. With constitutional ‘mindset’ instead of constitutional ‘architectonics’,⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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,¹⁰¹ who have been central to the origin and evolution of international law.¹⁰² Turning the focus to domestic legal orders, we may pin hopes on the national highest 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.¹⁰³ Moreover, the success of this new politics to which the global spread of constitutional review bears witness relies more on

⁹⁸ *ibid* 31.

⁹⁹ Koskenniemi (2007) (n 94) 19.

¹⁰⁰ Honig (n 21) 69.

¹⁰¹ Koskenniemi (2006) (n 94) 18.

¹⁰² See Neil Walker, *Intimations of Global Law* (CUP 2015) 47-54.

¹⁰³ See Bruce Ackerman, ‘The Political Case for Constitutional Courts’ in Bernard Yack (ed), *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* (University of Chicago Press 1996) 205.

the political character of judges than on their lawyerly techniques.¹⁰⁴ The judicial 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.¹⁰⁵ 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.¹⁰⁶

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

¹⁰⁴ See eg Stephen Ellmann, 'Marking the Path of the Law' (2009) 2 *Constitutional Court Review* 97.

¹⁰⁵ cf Vlad Perju, 'Proportionality and Freedom: An Essay on Method in Constitutional law' (2012) 1 *Global Constitutionalism* 334.

¹⁰⁶ See Stephen Gardbaum, 'Proportionality and Democratic Constitutionalism' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 259.

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.¹⁰⁷ 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.¹⁰⁸ 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.

V. 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.

¹⁰⁷ Ackerman (n 1) 60-64.

¹⁰⁸ See Koskenniemi (2006) (n 94) 32. See also Cover (n 22) 10.

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 deformed 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.