

## ORIGINAL ARTICLE

# Democracy and emergency: finding the constitutional foundation of the knowledgeable state in social dynamics

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**Abstract**

This article aims to bring to light the law–society dynamic relationship in constitutional governance by engaging with the question of political constitutionalism from the perspective of institutional epistemology. It first reframes the debate surrounding legal and political constitutionalism as one concerning the state’s ‘epistemic competence’ in governance shaped by the constitution, and then traces how constitutional ordering has given rise to the ‘knowledgeable state’ by setting a unique social dynamic in motion: the ‘epistemico-political constitution’. Using the example of the World Health Organization’s initial response to the COVID-19 pandemic, the article presents a two-part argument. First, constitutional ordering institutes a process of knowledge production embedded in the interaction between the state and society – a unique law–society dynamic – that responds to governance needs. Second, given the current law–society dynamic in the suprastate political landscape, the legitimacy challenge facing expertise-steered global governance is further intensified as more crisis responses are expected from outside the state.

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## 1 | INTRODUCTION: BEYOND WEBER AND FOUCAULT

That the constitution is situated at the interface of law and politics now sounds like a cliché. We have also long been taught that law sits between fact and norm.<sup>1</sup> Even so, we have had little doubt as to where to locate constitutionalism: it belongs to the normative universe, regardless of whether such a universe finds its centre of gravity in law or politics.<sup>2</sup> Yet, as constitutional studies extend beyond individual constitutional jurisdictions and move closer to the discipline of comparative politics, constitutionalism is losing its innocence.<sup>3</sup> As the concept of constitution – which has more or less developed in tandem with the idea of fundamental law in the modern usage<sup>4</sup> – becomes more and more indistinct from raw politics with its *legal* half obscured,<sup>5</sup> constitutionalism is veering from the normative universe towards the factual world. In the latest – and distorted – version, political constitution (or political constitutionalism) is virtually reduced to politics.<sup>6</sup>

Against this intellectual backdrop, I revisit the debate between political and legal constitutionalism<sup>7</sup> and the idea of constitutional governance from a different perspective. I aim to shed light on the less frequently noted link between the normative character of constitutionalism and its epistemic merit without reverting to the endless debate between political and legal constitutionalists.<sup>8</sup> Pivoted to the question of whether the court or the parliament is institutionally better placed to decide on constitutional matters, the current debate between legal and political constitutionalism tends to boil down to the contestation for normative superiority between legal normativity (law/norm) and political conventions (politics/fact) in constitutional ordering.<sup>9</sup> As a result, not only does the epistemic foundation of constitutional decision making get obscured,

<sup>1</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) trans. W. Rehg.

<sup>2</sup> R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007). Compare G. Gee and G. C. N. Webber, 'What Is a Political Constitution?' (2010) 30 *Oxford J. of Legal Studies* 273. This observation is made from the standpoint of public law. For a discussion of sociological understandings of constitution and political constitutionalism, see C. Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (2011); J. Přibáň, 'Constitutional Imaginaries and Legitimation: On *Potentia*, *Potestas*, and *Autoritas* in Societal Constitutionalism' (2018) 45 *J. of Law and Society* S30.

<sup>3</sup> D. Landau, 'Abusive Constitutionalism' (2013) 47 *University of California, Davis Law Rev.* 189; R. Hirschl, 'Abusive Constitutional Borrowing as a Form of Politics by Other Means' (2021) 7 *Cdn J. of Comparative and Contemporary Law* 6.

<sup>4</sup> D. Grimm, *Constitutionalism: Past, Present, and Future* (2016) 90–96. See also M. Loughlin, *Foundations of Public Law* (2010) 288–297.

<sup>5</sup> R. Dixon and D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (2021) 152–166.

<sup>6</sup> Compare J. A. G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Rev.* 1, with B. Su, 'Political but Incontestable: A Review of "Political Constitutionalism" in China' (2021) 10 *Global Constitutionalism* 10.

<sup>7</sup> In the British context, a further distinction can be drawn between legal and common law constitutionalism: R. B. Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism' [2018] *Public Law* 500. Considering the focus of this article, I do not apply this further distinction here.

<sup>8</sup> Consideration of how the organizational structure, decision-making processes, and personnel composition of courts and legislature as well as administration impact decisions taken by various constitutional powers is not alien to constitutional scholarship: see for example J. A. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford J. of Legal Studies* 409. As will become clear, I instead look into the epistemic foundation of constitutional decision making through social dynamics. For a perceptive discussion of the relationship between legitimation and governance effectiveness in constitutional design, see B. Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Rev.* 633, at 693–694.

<sup>9</sup> Compare T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (2013), with A. Tomkins, *Our Republican Constitution* (2005). For a discussion of the British origin of the debate between political and legal

but the underlying social dynamics of constitutional ordering that is the oxygen of constitutionalism is left out.<sup>10</sup> Departing from the focus of the current debate, my interest is instead in the way in which effective decisions on matters of fundamental significance are informed and reasoned under the constitutional framework within which law and politics interact dynamically.

In this article, I examine the underlying social dynamics of constitutional decision making, which I call the ‘epistemic-political constitution’ for present purposes,<sup>11</sup> from the perspective of institutional epistemology.<sup>12</sup> Delving into the sociological foundation of constitutions,<sup>13</sup> I argue that constitutionalism engenders a modality of institutional learning through which the state is empowered to make informed and rational decisions by tapping into the dynamic process of knowledge production inherent in society.<sup>14</sup> When discussing the rationality of institutional decisions and the ‘knowledgeable state’, as I call it,<sup>15</sup> we tend to look to Max Weber’s ideal type of bureaucratic rationality<sup>16</sup> or Michel Foucault’s concept of ‘power-knowledge’.<sup>17</sup> Through such lenses, the bureaucracy appears to be holding the key to the state’s epistemic strength through its acquisition of knowledge and extraction of information and intelligence from daily administrative routines. Without disputing the crucial role of bureaucratic knowledge in informing decisions on constitutional matters,<sup>18</sup> my focus is on the way in which constitutionalism may facilitate institutional learning in the transformation of the state.

My contention is that constitutional governance not only marks the project of consolidating political authority when state power expands but also institutes a process of knowledge projection embedded in the interaction between the state and society that responds to governance

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constitutionalists and how it plays out in different constitutional orders, see ‘Special Issue: Political Constitutions’ (2013) 14 *German Law J.* 2103.

<sup>10</sup> The epistemic question of constitutional democracy has recently come to the attention of constitutional scholars amid the authoritarian and populist trends in the global political landscape: see A. Huq and T. Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Rev.* 78, at 130–135; V. C. Jackson, ‘Knowledge Institutions in Constitutional Democracies: Preliminary Reflections’ (2021) 7 *Cdn J. of Comparative and Contemporary Law* 156. For a discussion of the relationship between expertise and constitutional democracy outside the context of populist politics, see R. C. Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (2012).

<sup>11</sup> The term ‘epistemic-political constitution’ should not be taken to imply taking sides in the political versus legal constitutionalism debate. Rather, it reflects the weighty influence of the political, non-legal components of constitutional ordering on the social dynamics of constitutional decision making and the epistemic foundation of constitutional governance.

<sup>12</sup> E. Anderson, ‘The Epistemology of Democracy’ (2006) 3 *Episteme* 8. See also S. Holmes, ‘Constitutions and Constitutionalism’ in *The Oxford Handbook of Comparative Constitutional Law*, eds M. Rosenfeld and A. Sajó (2012) 189, at 202–204.

<sup>13</sup> I should make it clear that the sociological observation made in the present article nevertheless assumes a public law conception of constitution: see generally M. Loughlin, *Political Jurisprudence* (2017). For a perceptive discussion of the relationship between constitutionalism and knowledge from a sociological – or, rather, social – conception of constitution, see Příbáň, op. cit., n. 2.

<sup>14</sup> To be clear, I am not arguing that constitutionalism, together with the modality of institutional learning that it induces, will lead to an informed and rational decision-making process in the government. My focus is on the relationship between institutional learning and constitutionalism – namely, the epistemic-political constitution, as I call it.

<sup>15</sup> The term ‘knowledgeable state’ draws upon Cass Sunstein’s characterization of the administration as ‘the most knowledgeable branch’: C. R. Sunstein, ‘The Most Knowledgeable Branch’ (2016) 164 *University of Pennsylvania Law Rev.* 1607.

<sup>16</sup> M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds G. Roth and C. Wittich (1968) 217–226.

<sup>17</sup> M. Foucault, *Discipline and Punishment: The Birth of the Prison* (1991) trans. A. Sheridan; M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, ed. A. I. Davidson (2007) trans. G. Burchell.

<sup>18</sup> Ackerman, op. cit., n. 8, pp. 693–699.

needs. As will be further discussed, while democracy underpinning political constitutionalism is central to the functioning of the state as an institutionalized learning apparatus – that is, the knowledgeable state – the epistemic-political constitution of the knowledgeable state consists of emergency as well as democracy. Emergency is no less political than democracy. Parallel to democracy, emergency – understood in the sense of the ultimate form of executive power – suggests an alternative mode of knowledge production and institutional learning, though its epistemic function relies more on the state's ability to extract intelligence from society than on society-informed deliberation and reflection. Given that both democracy and emergency underpinning the knowledgeable state's epistemic-political constitution remain to be successfully projected onto the suprastate political landscape under the current condition of the world order, expertise-steered global governance is facing increasing challenges as it is involved in more and more crisis responses.

A clarification on key terms used in this article is due before I proceed. By 'institutional learning', I mean the ability of an institution to obtain knowledge and information that are required for the enhancement of the rationality and reasonableness of its policy decisions.<sup>19</sup> The 'epistemic-political constitution' refers to the way in which a constitution shapes the institutional learning of the government. It is also worth noting that 'knowledge' in this article does not refer to presumptions or discoveries that are widely accepted by relevant academic disciplines or professional bodies. Rather, 'knowledge' in the present usage – or, rather, what can be known – includes, among other things, experience, virtue, and moral attitude that may contribute to the 'epistemic competence' of decision makers.<sup>20</sup> Notably, knowledge may be indistinguishable from information under certain circumstances, but not always.<sup>21</sup> All in all, knowledge, institutional learning, and epistemic strength as referred to in this article sit between intelligence and wisdom in the literature on theories of knowledge and collective wisdom.<sup>22</sup>

This article has four further sections. Section 2 reframes the political versus legal constitutionalism debate as a refracted manifestation of law and society constitutionalism centring on the dynamic relationship between the state and society. Section 3 discusses the knowledgeable state's epistemic-political constitution, at the core of which lies how the state gains epistemic strength in social dynamics. Section 4 examines the response of the World Health Organization (WHO) to the COVID-19 pandemic, suggesting that the challenge facing the WHO is symptomatic of the difficulty in projecting law and society constitutionalism beyond the state. Section 5 summarizes the argument.

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<sup>19</sup> In this way, discussion of institutional learning is part of the debate concerning the emergence of 'collective wisdom': see H. Landemore, 'Collective Wisdom: Old and New' in *Collective Wisdom: Principles and Mechanisms*, eds H. Landemore and J. Elster (2012) 1. Note that a decision-making body with high institutional learning capabilities does not guarantee the reasonableness and rationality of its policy in the end. However, with poor institutional learning, it will have difficulty in working towards an informed and rational policy in the decision-making process because it lacks knowledge.

<sup>20</sup> In this sense, *knowing* the moral attitude of society may enhance the epistemic competence of a decision-making body; however, this has no direct bearing on the 'moral competence' of the same decision-making body: H. Landemore, 'Democratic Reason' in eds Landemore and Elster, id., p. 251, at p. 255.

<sup>21</sup> Hélène Landemore rightly notes that mere possession of information is not equal to epistemic competence: id., pp. 255–256. Acknowledging this distinction, I nevertheless include possession of information as part of the state's epistemic strength, as it is potentially beneficial to the rationality and reasonableness of decision making.

<sup>22</sup> With regards to the distinction between intelligence and wisdom, compare id., p. 254, with D. Andler, 'What Has Collective Wisdom to Do with Wisdom?' in eds Landemore and Elster, op. cit., n. 19, p. 72.

## 2 | 'SOCIALIZING' LAW AND POLITICS: POWER, AUTHORITY, AND KNOWLEDGE IN CONSTITUTIONAL GOVERNANCE

Despite its British origin, the political versus legal constitutionalism debate is not confined to the United Kingdom (UK) or its former colonies that adopt Westminster-style parliamentary democracy.<sup>23</sup> This is understandable since constitutions – as the normative underpinning of political processes that frame the relationship between the ruling and the ruled – are inevitably influenced by politics. Leaving aside the technicalities engendered by variations on the power of national apex courts (or the functional equivalents) to scrutinize parliamentary legislation,<sup>24</sup> the political versus legal constitutionalism debate has centred on the role of the court relative to the political branches – especially the legislature – in decisions on constitutional matters. Notably, political *constitutionalism* does not set itself apart from legal constitutionalism by taking the view that the constitution comprises whatever results from the balance of political forces, as pre-modern constitutional orders suggest.<sup>25</sup> Instead, political constitutionalists challenge the legalist claim that, as fundamental law, the constitution is to be given authoritative meaning by judicial interpretation in the way in which the court interprets non-constitutional laws.<sup>26</sup> From the political constitutionalist perspective, the meaning of a constitution as the normative framework governing political interaction only manifests itself in the democratic political process with the elected national legislature sitting at the centre.<sup>27</sup> Ultimately, the political versus legal constitutionalism debate comes down to the institutional question of whether the parliament or the court is in a better position to make sense of the constitution and therefore to decide on constitutional matters.<sup>28</sup>

At first glance, this question appears to be another instance of how a normative debate is entangled with institutional choice.<sup>29</sup> It concerns the allocation of power: which institution – the parliament or the court – should be entrusted with the power to render official interpretations of the constitution? Yet, a closer look reveals that what lies beneath the question concerns not only power but also authority: can the state, through its institutions, command loyalty and compliance with the legal precepts from citizens with authority?<sup>30</sup> For political constitutionalists, it is the parliament that legitimates the state's claim to authority thanks to its representative and elective

<sup>23</sup> While the issues surrounding the relationship between law and politics emerge in virtually all constitutional orders, such issues were first characterized as the political versus legal constitutionalism debate in the UK and other Westminster democracies. Compare A. Tomkins, 'What's Left of the Political Constitution?' (2013) 13 *German Law J.* 2275, with M. Tushnet, 'The Relation between Political Constitutionalism and Weak-Form Judicial Review' (2013) 13 *German Law J.* 2249.

<sup>24</sup> Tomkins, *id.*

<sup>25</sup> A. Somek, *The Cosmopolitan Constitution* (2014) 37–38. Steering clear of the normative idea of constitutionalism, John Griffith offers a descriptive conception of political constitution, which still presumes a normative account of politics – democracy: see Griffith, *op. cit.*, n. 6.

<sup>26</sup> This does not mean that the court should apply the same methods of interpretation to the constitution as to non-constitutional laws. As Chief Justice John Marshall of the United State Supreme Court reminded us over 200 years ago in his widely noted remarks, 'we must never forget, that it is a *constitution* we are expounding': *McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 407 (1819), emphasis in original. Constitutional interpretation requires taking into account the unique functions and features of the constitution vis-à-vis non-constitutional laws.

<sup>27</sup> Bellamy, *op. cit.*, n. 2, pp. 139, 200–201, 239–240; Tomkins, *op. cit.*, n. 9. See also Gee and Webber, *op. cit.*, n. 2, pp. 281–292.

<sup>28</sup> M.-S. Kuo, 'Politics and Constitutional Jurisgenesis: A Cautionary Note on Political Constitutionalism' (2018) 7 *Global Constitutionalism* 75, at 76.

<sup>29</sup> Gee and Webber, *op. cit.*, n. 2, p. 274.

<sup>30</sup> See generally R. Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (2016).

character;<sup>31</sup> for legal constitutionalists, the state's constitutional voice only sounds authoritative when it comes from the judicial bench.<sup>32</sup> In this light, living in a constitutional order means that one obeys the state when the latter decides through its designated constitutional organ that can speak authoritatively. Emerging from this political landscape is a relationship of domination – that is, sovereignty.<sup>33</sup> At its core, the political versus legal constitutionalism debate assumes an institutional conception of sovereignty according to which either the legislative or the judicial institution occupies the seat of sovereignty<sup>34</sup> – that is, the notion of 'organ sovereignty'.<sup>35</sup>

It is true that a political order framed in constitutional terms remains one of sovereignty.<sup>36</sup> So is it that a constitutional order cannot survive without enforcement.<sup>37</sup> Nevertheless, owing to their shared assumption of organ sovereignty, both political and legal constitutionalism fall short in accounting for the dynamics of constitutional ordering and thus render a limited explanation of how law and politics interact constitutionally. Put simply, the assumed organ sovereignty is only a function of a continual dynamic socio-political process that has resulted in constitutional governance. The history of constitutional government suggests that constitutionalism emerged as a unique way of political ordering just in response to the great transformation that led to the loosening of the grip of traditional sources of authority on society, while powers were concentrated around the state.<sup>38</sup> Constitutionalism has since functioned as a mode of political legitimation according to which the state not only augments power but also claims authority vis-à-vis society.<sup>39</sup> Thus, constitutionalism – whether it is normatively pivoted to law or to politics – is inherently embedded in the interaction between the state and society.<sup>40</sup> Once detached from society, the law and politics underpinning constitutionalism become hard to grasp. To see how society contributes to the reconfiguration of state power and authority when political ordering assumes the constitutional form, let us take a quick look at the zero hour of modern constitutionalism.

As the fragmented politics of medieval feudalism faded away, state power reached its peak and the question of legitimacy became pressing at the same time. To put the legitimacy challenge

<sup>31</sup> Bellamy, *op. cit.*, n. 2, pp. 139, 200–201, 239–240; Tomkins, *op. cit.*, n. 9. For a discussion of the centrality of representation vis-à-vis democracy to the emergence of parliaments as the focus of constitutional ordering, see D. Boucoyannis, *Kings as Judges: Power, Justice, and the Origins of Parliaments* (2021).

<sup>32</sup> Allan, *op. cit.*, n. 9; T. R. Hickman, 'In Defence of the Legal Constitution' (2005) 55 *University of Toronto Law J.* 981.

<sup>33</sup> H. Arendt, *On Revolution* (1990 [1963]) 24–31; H. Arendt, *The Human Condition* (1998 [1958]) 234–235. See also A. Arato and J. Cohen, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16 *Constellations* 307.

<sup>34</sup> Kuo, *op. cit.*, n. 28, pp. 90–91; M.-S. Kuo, 'From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization' in *Constitutionalism under Extreme Conditions: Law, Emergency, and Exception*, eds R. Albert and Y. Ronzai (2020) 21. See also D. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (2015) trans. B. Cooper, 33–51.

<sup>35</sup> H. Heller, *Sovereignty: A Contribution to the Theory of Public and International Law*, ed. and trans. D. Dyzenhaus (2019) 101–109, 184.

<sup>36</sup> M.-S. Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?' (2013) 26 *Cdn J. of Law and Jurisprudence* 341, 368–374. However, compare Arendt, *op. cit.* (1990 [1963]), n. 33, p. 153.

<sup>37</sup> R. M. Cover, 'Violence and the Word' (1986) 95 *Yale Law J.* 1601; F. Schauer, *The Force of Law* (2015).

<sup>38</sup> Grimm, *op. cit.*, n. 4, pp. 4–6. See also H. Brunkhorst, 'Democracy and World Law: On the Problem of Global Constitutionalism' in *Domination and Global Political Justice: Conceptual, Historical and Institutional Perspectives*, eds B. Buckinx et al. (2020) 313, at 314–317.

<sup>39</sup> Grimm, *id.*, p. 45. Compare Arendt, *op. cit.* (1990 [1963]), n. 33, pp. 150–154.

<sup>40</sup> See generally Thornhill, *op. cit.*, n. 2. See also Přibáň, *op. cit.*, n. 2.

facing the emerging modern state starkly, the absolutist state would be condemned as tyrannical and thus be prone to rebellious challenges if its power could not be seen to be wielded legitimately.<sup>41</sup> Notably, paralleling the concentration of power was the secularization of authority. As the question of legitimacy was rendered more political than theological in the increasingly secular age,<sup>42</sup> ripples stirred up by secularization also reached beyond the traditional political realm. With the middle class beginning to rise in the seventeenth century, the traditional control over personal conscience and conviction by the church, the religious constraints on the pursuit of knowledge, and the continuing moralistic disapproval of individual economic transaction all began to crumble in the face of new outlooks and practices incubated in the spirit of the Enlightenment and the Scientific Revolution.<sup>43</sup> As a result of secularization, not only did religion lose its ability to lend legitimacy to political authority, but how the world became known to the people was also fundamentally changed.<sup>44</sup> The relationship between the state and society altered when the state sought alternative sources of legitimacy to stabilize its power vis-à-vis the increasingly secular bourgeois society.<sup>45</sup>

Responding to this general crisis of authority, constitutionalism with the feature design of the separation of powers emerged as a normative frame within which state power augmented without becoming tyrannical.<sup>46</sup> Through constitutional ordering, state power was reconfigured and political legitimacy reconceived. Moreover, constitutionalism was instrumental in responding to the wider social transformation following the collapse of religious authority. In the secular and constitutional age, the church's monopoly on moral authority was broken to make room for individual choice; the spirit of science and reason displaced theological teachings in guiding the pursuit of knowledge; and self-interest was no longer condemned as a sin but rather considered the basis of rational behaviour. This social condition eventually received constitutional recognition with the constitutional enshrinement of freedom of religion and speech, freedom of science, and freedom of contract.<sup>47</sup> In this way, constitutionalism facilitated the release of the force of individual self-improvement through public moral debate, scientific learning, and economic activity. Suffice it to say for now that, thanks to constitutional freedoms, individual choices and government decisions could be informed by moral and scientific knowledge, while society benefitted from the market of *homo oeconomicus*.<sup>48</sup> As a whole, constitutionalism not only functioned as a new source of political legitimacy but also contributed to the transformed state's epistemic foundation of governance,

<sup>41</sup> Grimm, op. cit., n. 4, pp. 42–43.

<sup>42</sup> E.-W. Böckenförde, *Religion, Law, and Democracy: Selected Writings*, eds M. Künkler and T. Stein (2021) 152–167. Compare C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1986) trans. G. Schwab.

<sup>43</sup> U. K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (1995) trans. D. Lucas Schneider, 100–105; D. W. Bates, *States of War: Enlightenment Origins of the Political* (2012) 10–19. This echoes what Hauke Brunkhorst observes of the emergence of the 'national state' amid the 'motivational', 'legitimation', and 'rationality' crises: Brunkhorst, op. cit., n. 38, p. 316. For a discussion of the impact of the emergence of the 'positivity' of modern social sciences on the law's configuration of society and the reverse of the relationship between the state and society following secularization, see T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997) 109–153.

<sup>44</sup> C. Taylor, *A Secular Age* (2007) 3–20, 159–211.

<sup>45</sup> Id., pp. 159–211; Grimm, op. cit., n. 4, p. 47.

<sup>46</sup> Arendt, op. cit. (1990 [1963]), n. 33, pp. 150–154; U. K. Preuss, 'The Political Meaning of Constitutionalism' in *Citizens in Europe: Essays on Democracy, Constitutionalism and European Integration*, C. Offe and U. K. Preuss (2016) 147, at 151–153.

<sup>47</sup> Preuss, op. cit., n. 43, pp. 26–37. See also Brunkhorst, op. cit., n. 38, p. 316.

<sup>48</sup> I discuss the epistemic function of constitutional freedoms further in the next section.

which lay in the state's steering of the changing relationship between the state and society in the secular age.<sup>49</sup>

In sum, while the political versus legal constitutionalism debate throws into sharp relief the legal and normative character of constitutions and the relationship between law and politics, its assumed institutional conception of sovereignty eclipses the underlying dynamic of how political ordering is possible in a secular society where the middle class becomes the main social force. Recast in the interaction of law and politics resulting from constitutional steering of the relationship between the state and society, constitutionalism – both political and legal – is intrinsically entwined with politics and society in essence. The constitutional project suggests an innovative embedding of institutional learning and knowledge production in society that enables the state authorities to make informed decisions on matters central to governance.

### 3 | LEARNING FROM SOCIETY: THE EPISTEMICO-POLITICAL CONSTITUTION OF THE KNOWLEDGEABLE STATE

If constitutionalism is inevitably entangled with politics and essentially embedded in society, the state envisaged by the constitutional project is not only a polity based on the rule of law, or, rather, a law state (*Rechtsstaat*) that steers social relations with legal norms; it is also a knowledgeable state – an entity that is equipped with knowledge and information and thus is capable of institutional learning through interaction with society. Seen in this light, the judicial proceedings at the core of legal constitutionalism turn out to be a secondary channel of institutional learning in modern constitutional governance.<sup>50</sup> Considering the centrality of political processes to the building of epistemic strength in a constitutional order, the knowledgeable state's underlying epistemic constitution is more political than legal.<sup>51</sup> How constitutionalism helps to form the knowledgeable state with an epistemic-political constitution – that is, the underlying social dynamics of constitutional decision making – is the theme to which I now turn. Let us start with the essence of the political constitution: democracy.<sup>52</sup>

#### 3.1 | Democracy

As suggested above, political constitutionalism does not mean that constitutionalism is nothing but politics. Seeing constitutional ordering through the normative lens, political constitutionalism

<sup>49</sup> Seen in this light, the epistemic-political constitution parallels the material constitution concerning the political economic foundation of the state: see M. A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021) 11–13. For a discussion of the concept of the material constitution, see M. Goldoni and M. A. Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Rev.* 567; L. Vinx, 'Hans Kelsen and the Material Constitution of Democracy' (2021) 12 *Jurisprudence* 466.

<sup>50</sup> Notably, Tim Murphy suggests that, before the transition to 'bureaucratic government', decision making was closer to the judicial model of reasoning, which he calls 'adjudicative government': Murphy, *op. cit.*, n. 43, pp. 77–153. See also M. Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975–76* (2003) eds M. Bertani and A. Fontana, trans. D. Macey, 129–130.

<sup>51</sup> See n. 11.

<sup>52</sup> This is even assumed in Griffith's pronounced descriptive, non-normative understanding of political constitution, but left out when the idea of political constitution and other related notions migrate to different political systems such as China. Compare Griffith, *op. cit.*, n. 6, with Su, *op. cit.*, n. 6.



rests on democratic political processes.<sup>53</sup> The normative character of political constitutionalism is derived from the fact that democracy links the ruler and the ruled in a way that allows the latter to express and withdraw their consent to the former's rule. Yet, giving the government mandate and authority is only part of what democracy brings to constitutional governance. Democratic linkage between the ruler and the ruled also serves as an institutional conduit of communication between the state and society.<sup>54</sup> How this democratic linkage contributes to the emergence of the knowledgeable state needs to be understood in relation to its functioning in a constitutional order.

A critical development in the emergence of constitutional governance is the instituting of the separation of powers.<sup>55</sup> Considered a normative feature of the constitutional framing of state power, the separation of powers has often been addressed in the literature in terms of prevention of tyranny, efficiency of decision making, or even realization of self-determination.<sup>56</sup> As a result, the epistemic dividends engendered by the 'reflexivity' of the separation of powers in a constitutional order has received only limited attention.<sup>57</sup> So how does the separation of powers entail epistemic dividends for constitutional orders? By dividing government power and then allowing divided powers to check and balance each other, the separation of powers effectively institutes multi-stage decision making through which policies are reflexively and regularly scrutinized in the interaction of divided government powers.<sup>58</sup> In this way, decisions made through the multiple stages of deliberation among distinct powers are likely less prone to error than those resulting from a monolithic government structure. The separation of powers adds epistemic competence to the state in the latter's quest for constitutional legitimacy.<sup>59</sup>

Moreover, the multiple stages of decision making under the formal structure of separation of powers concerns not only institutional interaction within the government. The ruled – the people – are also involved in the functioning of this multi-stage decision making. How a policy proposal will go down with the people cannot be excluded from consideration when the government decides whether the proposed policy should be adopted.<sup>60</sup> To estimate how the people will react to the proposed policy, the government may simply infer such information from some indicators of the public's attitude or proactively seek comments thereon from the people. It may go even further by including representatives from the people in the formative stage of policy design. All in all, the reflexive learning engendered by the separation of powers is not confined to the process within the government. Rather, the reflexive, multi-stage process of policy making is just one facet of the dynamic interaction between the state and society underpinning the knowledgeable state.<sup>61</sup> To adequately appreciate how constitutionalism helps the state to become

<sup>53</sup> Bellamy, op. cit., n. 2; Tomkins, op. cit., n. 9.

<sup>54</sup> P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (2011) trans. A. Goldhammer, 212.

<sup>55</sup> Grimm, op. cit., n. 4, pp. 19–22.

<sup>56</sup> C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (2013) 51–109; J. Waldron, *Political Political Theory: Essays on Institutions* (2016) 45–71.

<sup>57</sup> Preuss, op. cit., n. 46, pp. 152–153.

<sup>58</sup> Id.; Waldron, op. cit., n. 56, pp. 62–65.

<sup>59</sup> Holmes, op. cit., n. 12, pp. 202–204.

<sup>60</sup> Waldron, op. cit., n. 56, pp. 63–64.

<sup>61</sup> M.-S. Kuo, 'Against Instantaneous Democracy' (2019) 17 *International J. of Constitutional Law* 554, at 562–566.

knowledgeable, we must take a closer look at the dynamic interaction between the state and society, which is constitutionally framed by fundamental rights and freedoms.<sup>62</sup>

Among the fundamental changes to the relationship between the state and society brought about by the instituting of constitutional freedoms is the gradual rise of society as the free public sphere vis-à-vis the government domain, or, rather, the state.<sup>63</sup> Thanks to constitutionally enshrined freedoms of religion and speech, science, and contract, moral particularism has gradually given way to value pluralism and coexistence of different opinions, faith-based truth has largely lost its validity in the face of scientific progress, and the sin of greed has long been converted into the driver of market efficiency in response to the scarcity of resources.<sup>64</sup> All of these developments indicate the emergence of a free society that is characterized by unconstrained pluralism and individualism.<sup>65</sup> Yet, constitutional freedoms not only release different opinions or conflicting individual interests but also suggest a reflexive way to accommodate such differences and conflicts: public opinion forms and manifests itself in the dynamic process whereby individual moral opinions are subject to one another's critical reflection; progress in science is achieved through trial and error under peer review; limited resources are expected to be allocated efficiently when the force of greed is released and channelled by free competition of the market.<sup>66</sup> Taken as a whole, constitutional freedoms engender and channel a process of reflexive learning that underlies the idea of constitutional progress, which has continued to unfold in the transformation of the state in the constitutional age followed by the current constitutional renaissance.<sup>67</sup> With these reflexive mechanisms embedded in the constitution, knowledge and information about the moral, scientific, and economic orders has since grown exponentially, setting social progress in motion.<sup>68</sup> A free society functions as the reservoir of knowledge and information required for governance.<sup>69</sup> Here lies the foundation of a knowledge society.<sup>70</sup>

It may be helpful to summarize what has been said so far about the learning function of constitutional governance. Introduced as a response to the legitimacy question in the secular age, the separation of powers and the protection of freedom have further enhanced the state's institutional competence in moral and cognitive learning. Yet the separation of powers and the constitutional

<sup>62</sup> I hasten to add that the interaction between the state and society is overdetermined. The constitution is only one of the factors that influence such interaction. Fundamental rights and freedoms only mark out the baseline of the relationship between the state and society.

<sup>63</sup> J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1991) trans. T. Burger. See also Taylor, op. cit., n. 44, pp. 185–196.

<sup>64</sup> Preuss, op. cit., n. 43, pp. 100–105.

<sup>65</sup> This pertains to what Charles Taylor calls the 'third sense of secularity': Taylor, op. cit., n. 44, pp. 3–4, 14–15.

<sup>66</sup> Preuss, op. cit., n. 43, pp. 110–113.

<sup>67</sup> M.-S. Kuo, 'Making Constitutionalism Progressive Again: A Primer on City Constitutionalism and State (Re)Formation in a New Constitutional Geography' (2022) 85 *Modern Law Rev.* 801.

<sup>68</sup> K. L. Grotke and M. J. Prutsch, 'Introduction' in *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, eds K. L. Grotke and M. J. Prutsch (2014) 3, at 5–6.

<sup>69</sup> Notably, this account of constitutional progress is more of a mirror image of experiences of the birthplace of constitutionalism – Europe – than a depiction of what constitutionalism has actually achieved around the globe. As stated at the beginning, my concern is with the normative character of constitutionalism – with a focus on its epistemic competence – which has been constructed around constitutional experiences in Europe and North America. See A. Sajó and R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017) 13–19.

<sup>70</sup> Preuss, op. cit., n. 43, pp. 113–125. For a discussion of the public nature of scientific knowledge, see H. Nowotny, 'The Changing Nature of Public Science' in *The Public Nature of Science under Assault: Politics, Markets, Science and the Law*, H. Nowotny et al. (2005) 1, at 4–7.

enshrinement of fundamental freedoms and rights are not the only tools that have been employed to bolster political legitimacy and strengthen the state's institutional learning capacity. Situated in the institutional setting of constitutional freedoms and the separation of powers, democracy – the essence of political constitutionalism – works to uncover the blind spots in the drive for social progress and therefore becomes the lynchpin of the epistemic-political constitution of the state in its pursuit of legitimacy.<sup>71</sup>

While it did not take long for the force of freedom released by the constitutional protection of individual rights and civil liberties to change society in a fundamental way, such accelerated social change was not as uncomplicatedly positive as what we now tend to associate with the word 'progress'. Accompanying the relentless pursuit of progress was labour exploitation, population displacement, rapid urbanization, and other social issues. The 'social question' thus soon came to the fore in the constitutional age when written constitutions spread throughout Europe and beyond in the nineteenth century.<sup>72</sup> It was at this time that suffrage started to expand.<sup>73</sup> Thanks to electoral democracy, both the progress and the issues that a free society entailed could find an institutionalized conduit to the state.<sup>74</sup> Through democratic processes, the state could be further connected to the masses and benefit from the moral and cognitive learning embedded in society.

Needless to say, a full account of the epistemic function of democracy and its institutional infrastructure requires much more space than this article.<sup>75</sup> The present discussion is limited to the epistemic contribution of democratic election to government decision making without tackling how the epistemic function of democracy as a decision-making mechanism helps the correct identification of popular will.<sup>76</sup> When we extend the scope from voting to campaign – or, rather, the lead-up to voting – in understanding democratic election, we can see that such democratic processes channel diverse views and inputs through discussion, facilitate government decisions on policy response to problems of public concern, and open democratic decisions to dynamic error correction underpinned by periodic elections.<sup>77</sup> Moreover, through post-decision error correction, electoral democracy enables political accountability and takes on an 'experimentalist' quality to the extent that unsuccessful or unpopular policies can be replaced by innovative alternatives following the election of a new government.<sup>78</sup> Through this Deweyan lens, democracy functions as

<sup>71</sup> According to Landemore, the epistemic function of democracy rests on the conditions of 'inclusive deliberation' and 'majority rule': Landemore, op. cit., n. 20, pp. 257–272. The separation of powers and constitutional freedoms are instrumental to inclusive deliberation.

<sup>72</sup> Preuss, op. cit., n. 43, pp. 59–70, 81–89; E. Hobsbawm, *The Age of Revolution, 1789–1848* (1996 [1962]). For a discussion of the beginning of the constitutional age, compare Grotke and Prutsch, op. cit., n. 68, p. 3, with L. Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (2021).

<sup>73</sup> A. Przeworski, 'Conquered or Granted? A History of Suffrage Extensions' (2009) 39 *Brit. J. of Political Science* 291; G. B. Pittaluga et al., 'Democracy, Extension of Suffrage, and Redistribution in Nineteenth-Century Europe' (2015) 19 *European Rev. of Economic History* 317.

<sup>74</sup> Grimm, op. cit., n. 4, pp. 27–31.

<sup>75</sup> Anderson, op. cit., n. 12; D. Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority' in *Deliberative Democracy*, eds J. Bohman and W. Rehg (1994) 173; H. Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (2012).

<sup>76</sup> To address the epistemic role of democracy in the identification of popular will requires a thorough discussion: see Landemore, op. cit., n. 20, pp. 262–265.

<sup>77</sup> For a discussion of the current strains that communication technologies put on reflexive learning in democratic processes, see Kuo, op. cit., n. 61.

<sup>78</sup> Anderson, op. cit., n. 12, pp. 11–15.

an institutionalized epistemic mechanism of error detection and correction, with the government placed under the constant watch of society.<sup>79</sup>

In sum, constitutionalism helps the state to become knowledgeable while basing political legitimacy on normative grounds, first through the separation of powers and constitutional freedom and later buttressed by democracy. On the whole, the separation of powers, constitutional freedom, and democracy indicate reflexive institutional learning built into the epistemic-political constitution, while democracy emerges as the driving force of the political dynamic underpinning interaction between the state and society. By virtue of democratic reflexivity, constitutional legitimacy not only indicates a normative concept of political ordering but also engenders the state's epistemic role in constitutional governance.<sup>80</sup>

### 3.2 | Emergency

Being the constitutional lynchpin of the knowledgeable state's institutional learning, democracy does not exhaust the political constitution. Nor does the state's epistemic strength only derive from democratic reflexivity.<sup>81</sup> To understand the epistemic-political constitution of the knowledgeable state properly, we need to take into account components of political constitutionalism other than democracy. This is where emergency comes in. That emergency has epistemic merit may come as an unwelcome surprise to constitutional theorists wary of the state of governance and power. Is emergency not the beast to be tamed by the constitution? Can the power released by emergency be considered anything other than a threat to the free production of knowledge and the open flow of information? How can it enter into the equation of political constitutionalism, let alone the epistemic-political constitution of the knowledgeable state? To answer these questions, let us retrace the steps that have so far been taken.

As noted above, political constitutionalism underpinned by democracy and the resultant democratic-reflexive institutional learning have taken shape in the state's quest for new grounds of legitimacy amid the crumbling of traditional sources of authority. Seen in this light, this pursuit of stable power relations and legitimacy under the constitutional project has not put paid to sovereignty.<sup>82</sup> Emerging at the juncture when state power was increasing while traditional authority no longer reigned, constitutions were not intended to incapacitate the state, even with the emergence of the idea of 'limited government'.<sup>83</sup> Regardless of differences in design among positive constitutions, the constitutional project has since tamed and thus preserved state power by (re)framing it.<sup>84</sup> Tethered to democracy, political constitutionalism nevertheless assumes the

<sup>79</sup> Preuss, op. cit., n. 43, pp. 70–72. Compare A. Honneth, and J. M. M. Farrell, 'Democracy as Reflexive Cooperation: John Dewey and the Theory of Democracy Today' (1998) 26 *Political Theory* 763, at 773–776.

<sup>80</sup> U. K. Preuss, 'The Significance of Cognitive and Moral Learning for Democratic Institutions' in *Rethinking Political Institutions: The Art of the State*, eds I. Shapiro et al. (2006) 303, at 304–316. See also Brunkhorst, op. cit., n. 38, pp. 314–316; Rosanvallon, op. cit., n. 54, pp. 128–132. For a discussion of legal institutionalization of reflexive learning, see H.-H. Trute, 'Democratizing Science: Expertise and Participation in Administrative Decision-Making' in Nowotny et al., op. cit., n. 70, p. 87, at pp. 93–95.

<sup>81</sup> Sunstein, op. cit., n. 15.

<sup>82</sup> Loughlin, op. cit., n. 4, p. 229; Grimm, op. cit., n. 34; E.-W. Böckenförde, *Constitutional and Political Theory: Selected Writings*, eds M. Künkler and T. Stein (2017) 146–147.

<sup>83</sup> Preuss, op. cit., n. 43, pp. 5–6.

<sup>84</sup> M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007).

continuing existence of state power. This remains unchanged even if the concept of sovereignty seems to be dethroned by the Foucauldian notion of governmentality when it comes to the business of governance, with coercive power displaced by expertise-constructed disciplinary power.<sup>85</sup> Specifically, governmentality gives expression to the multifaceted, capillary reach of governance in practice, while sovereignty continues to stand as the conceptual lynchpin of constitutional governance and the attendant public law. Seen in this light, governmentality and its related notions, such as disciplines and power-knowledge, are not impervious to the pivotal concept of sovereignty in public law,<sup>86</sup> though they may connote different relations between the state and society when approached from standpoints other than public law.<sup>87</sup>

Thus, along with democracy, the ultimate form of such power, emergency power – that is, the power to derogate from legal normalcy<sup>88</sup> – remains an integral part of contemporary constitutional governance and stands out as another distinctive component of the political constitution.<sup>89</sup> Taming this ultimate form of executive power by means of the constitutionalization of the state of exception as ‘constitutional dictatorship’ testifies to the indispensable power component of political constitutionalism.<sup>90</sup> Even so, the key question remains yet to be answered: how does emergency acquire epistemic merit in the epistemic-political constitution of the knowledgeable state?

As suggested above, knowledge accruing from democratic reflexivity is embedded in the dynamic social process, which involves complex interaction among individuals, civic groups, and interest clusters in society, communication between the state and society, and the multi-stage decision-making process within the government.<sup>91</sup> It takes time to complete such a dynamic and complex learning process that underpins the epistemic merit of democratic reflexivity.<sup>92</sup> When the state has to take action under urgency, the democratic-reflexive mode of learning is put to the test. Under such circumstances, the state is faced with tough choices. It may conduct business as usual by responding to what urgency calls for with all of the knowledge and information already at its disposal. Whether the policy response will meet the challenges posed by an unexpected emergency is left to *fortuna*.<sup>93</sup> However, if it goes down that route, the government – in the public eye – looks more like it is taking no action than choosing cautiously. Alternatively, the state may take a step further instead by acting in good faith and making a judgement call based on what it has already learnt in the hope of dispelling the impression of failure to act. In these two scenarios, the state either relies on something beyond its control – *fortuna* – or simply stakes

<sup>85</sup> For a discussion of the transfiguration of sovereignty with the emergence of disciplinary power, see Foucault, op. cit., n. 50, pp. 34–40. See also Foucault, op. cit. (1991), n. 17; Foucault, op. cit. (2007), n. 17.

<sup>86</sup> Loughlin, op. cit., n. 4, pp. 167–170.

<sup>87</sup> Příbáň, op. cit., n. 2.

<sup>88</sup> This evokes Carl Schmitt’s definition of ‘sovereign’: Schmitt, op. cit., n. 42, p. 5.

<sup>89</sup> Brunkhorst also notes the crucial role of the administrative power of the state in the constitutional project: Brunkhorst, op. cit., n. 38, p. 314.

<sup>90</sup> Notably, the power to derogate from legal normalcy is no longer exclusive to the executive as indicated in constitutions around the globe. Nevertheless, the executive still plays the role of initiator in decisions on the state of emergency or exception even though the legislature is involved in the decision-making process. Also, the executive is front and centre in carrying out the decisions induced by the state of emergency: Kuo, op. cit., n. 34, pp. 26–29. See also C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948).

<sup>91</sup> Kuo, op. cit., n. 61, pp. 562–566.

<sup>92</sup> Id., p. 570. See also Brunkhorst, op. cit., n. 38, p. 314.

<sup>93</sup> C. D. Tarlton, ‘*Fortuna* and the Landscape of Action in Machiavelli’s *Prince*’ (1999) 30 *New Literary History* 737.

emergency response on its own judgement. At this critical juncture, the epistemic strength of the state looks rather like the epistemic limits of constitutional ordering.

At first glance, the above scenario evokes decision making under uncertainty, which has become an integral part of modern administration,<sup>94</sup> especially when crisis has gradually moved from the exception to the norm.<sup>95</sup> Yet to act under uncertainty in the face of crisis does not mean that the state must act with ignorance. Nor is there any reason to believe that the condition of uncertainty is impervious to human intervention. While uncertainty cannot be eliminated, it can be alleviated.<sup>96</sup> With the acquisition of knowledge and information regarding the unexpected state of urgency that causes a crisis, the challenge posed to acting under uncertainty can be moderated. When the learning function of democratic reflexivity can no longer operate, the state may address its epistemic deficit by turning to emergency as the alternative mode of learning.

Learning creatively from Foucault, we can reframe both aspects of the knowledgeable state's epistemo-political constitution – democracy and emergency – through the lens of the power-knowledge nexus. As discussed above, the goal of democratic-reflexive learning is to tap into society as the reservoir of the knowledge required for the state's governance. Benefitting from society-embedded knowledge, state power can get smart. As the state learns how to make the most efficient use of power to tackle governance issues, that power practically increases. Democracy thus engenders the positive feedback of knowledge on power through reflexive processes; society-embedded knowledge adds impetus to sovereign power in the attainment of constitutional governance. Yet, in the power-knowledge nexus, the direction of flow in the feedback loop between knowledge and power can be reversed. In times of emergency when the learning function of democratic reflexivity is too slow to help, the state can instead improve its knowledge by means of sovereign power.<sup>97</sup> Failing that, the state would have to act with ignorance, or it would risk committing 'executive underreach'<sup>98</sup> by not acting at all when the 'reassurance function' of the

<sup>94</sup> A. Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (2016) 127–128. For an excellent discussion of how uncertainty impacts modern administration in risk regulation (vis-à-vis crisis response), see E. Fisher, *Risk: Regulation and Administrative Constitutionalism* (2007). Needless to say, both the scientific and the behavioural uncertainties that Elizabeth Fisher identifies in risk regulation further confront the administrative state in crisis response.

<sup>95</sup> E. A. Posner and A. Vermeule, 'Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008' (2009) 76 *University of Chicago Law Rev.* 1613, at 1679–1680.

<sup>96</sup> To act under uncertainty in response to emergency or crisis is different from regulating risks under the guidance of the precautionary principle. It is true that both speak to making decisions under uncertainty. Yet, in risk regulation, the condition of uncertainty is attributed to the insufficiency of scientific knowledge concerning new technologies or related products, whereas in crisis response, uncertainty is multifarious. Moreover, the precautionary principle is formulated to overcome inaction on the part of the governance body by allowing or even imploring it to take restrictive or other regulatory measures with limited scientific knowledge even though no harm is discernible when such measures are undertaken. By contrast, when a crisis hits, the governance body is always prompted into action. While both require the governance body to make a judgement call as to whether to take action under uncertainty, only in response to emergency does power help to reduce informational uncertainty. Insufficiency of scientific knowledge itself that confronts risk regulation cannot be addressed by power. For a discussion of risk regulation and the precautionary principle, see Fisher, *op. cit.*, n. 94, pp. 39–46; O. Godard, 'Social Decision-Making under Conditions of Scientific Controversy, Expertise and the Precautionary Principle' in *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations*, eds C. Joerges et al. (1997) 39, at 65–70. See also C. R. Sunstein, *Risk and Reason: Safety, Law and the Environment* (2002) 102–105.

<sup>97</sup> C. Smith, 'The Sovereign State v. Foucault: Law and Disciplinary Power' (2000) 48 *The Sociological Rev.* 283. However, compare Foucault, *op. cit.*, n. 50, p. 39.

<sup>98</sup> D. E. Pozen and K. L. Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 *Am. J. of International Law* 608.

state is most needed.<sup>99</sup> Here we meet another mode of institutional learning in the knowledgeable state's epistemic-political constitution: executive emergency.

Time is the enemy of democratic-reflexive institutional learning in times of emergency.<sup>100</sup> In such moments, there is no time for democracy to run its reflexive processes so that the required knowledge can be learnt. Under such circumstances, executive emergency with power can offer a solution to the problem of time, even though that solution tends to be partial.<sup>101</sup> Capitalizing on its sovereign status, the state may actively gather intelligence and extract information from society that is required for decision making amid the crisis. Switching its bureaucratic apparatus to the emergency mode, the executive power can acquire information needed to ease the strains that uncertainty puts on decision making in times of crisis.<sup>102</sup> The executive aggressively, rather than reflexively, seeks the knowledge and intelligence embedded in society.

It should be noted that the state's aggressive – but not unlimited – extraction of information and other raw data to reduce uncertainty in a crisis by means of emergency power does not mean that the knowledge society is displaced by the knowledgeable but sovereign state. Rather, for the knowledgeable state to function well, such an emergency-guided mode of institutional learning is only a provisional means to the end of crisis governance in the face of extreme uncertainty. As suggested above, the knowledgeable state finds its governance strength in the social dynamics whereby knowledge crystallizes and the state's epistemic competence grows. Aggressive extraction of information and gathering of intelligence alone falls far short of reflecting the epistemic function of emergency. Emergency functions well as a mode of institutional learning in the knowledgeable state only when the state undertakes policy measures based on its newly obtained information and intelligence that further allow society to respond to the government measures proactively.<sup>103</sup> Learning from the way in which society reacts to them, the state can fine-tune its response and enhance the rationality and reasonableness of policy in crisis governance. In other words, the state turns to emergency to improve its epistemic competence by changing the normal social dynamics. Emergency restarts the stalled social dynamic under uncertainty by enabling the state to reduce initial informational uncertainty and to elicit social feedback with its preliminary crisis response. Paralleling democratic reflexivity, executive emergency serves as an alternative mode of institutional learning underpinning the knowledgeable state's epistemic-political constitution.

Granted, the state as conceived in the constitutional project is not all-knowing and state power is constitutionally framed. Furthermore, the foregoing analysis does not suggest that the challenges of decision making posed by uncertainty in times of unexpected crisis can be fully resolved by power – in the sense of the ability to acquire information and gather intelligence.<sup>104</sup> Whether information acquired by means of executive emergency counts as 'good' intelligence remains a question yet to be satisfactorily answered.<sup>105</sup> More importantly, information does not guarantee

<sup>99</sup> B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law J.* 1029, at 1037.

<sup>100</sup> Kuo, *op. cit.*, n. 61, p. 570.

<sup>101</sup> W. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (2004) 117–127.

<sup>102</sup> R. J. Aldrich, 'Beyond the Vigilant State: Globalisation and Intelligence' (2009) 35 *Rev. of International Studies* 889. Compare A. Vermeule, 'Our Schmittian Administrative Law' (2009) 122 *Harvard Law Rev.* 1095.

<sup>103</sup> Godard, *op. cit.*, n. 96, pp. 70–73.

<sup>104</sup> It goes without saying that information is only a component of knowledge: see K. R. Foster and P. W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts* (1999) 164–165 (including excerpts of P. Kurtz, *The New Skepticism: Inquiry and Reliable Knowledge* (1992)).

<sup>105</sup> H. L. Wilensky, *Organizational Intelligence: Knowledge and Policy in Government and Industry* (2015 [1967]) 62–74.

the rationality or reasonableness of the state's response to urgency.<sup>106</sup> Giorgio Agamben rightly warns us of the self-perpetuating character of emergency.<sup>107</sup> Yet, appealing to 'think[ing] of death beforehand' only, the state would not avoid the accusation of failing in its reassurance duty or enable the people to 'think of their liberty'.<sup>108</sup> Rather, failure to act on the acquisition of the required information and knowledge only exacerbates the challenge posed by the condition of uncertainty in times of emergency. Thus, the conclusion to be drawn is to neither place an absolute ban on learning by executive emergency, nor pursue institutional learning at all costs. Rather, to the extent that power – which constitutional ordering assumes and legitimates – can help to *alleviate* the challenge of acting under uncertainty, executive emergency plays an integral role in the underlying law–society dynamics that give epistemic competence to constitutional decision making.<sup>109</sup>

#### 4 | TRANSNATIONALIZING THE KNOWLEDGEABLE STATE? WHEN THE WHO MET THE COVID-19 PANDEMIC

If the knowledgeable state as discussed above rests on the unique dynamic relationship between the state and society shaped by constitutionalism, discussion of constitutional governance should not focus only on institutional design or normative principles. How effective and rational governance takes shape in social dynamics through constitutional ordering needs to be taken into account in thinking about the future of constitutional governance. Seen in this light, the continuing transference of governance responsibilities from states to transnational or global governance institutions makes the question of the constitutional framing of governance even more pressing.<sup>110</sup> Scepticism remains about how the normative constitutional framework can be realistically projected beyond the state.<sup>111</sup> The limits of global constitutionalism further speak to both the dilution of social dynamics that underpin the knowledgeable state's epistemic-political constitution in the suprastate political landscape, and the attendant constraints on the effectiveness of global governance. The WHO's disappointing response to the COVID-19 pandemic illustrates the

<sup>106</sup> Landemore, op. cit., n. 20, p. 255–256.

<sup>107</sup> G. Agamben, *Where Are We Now? The Epidemic as Politics* (2021, 2<sup>nd</sup> edn) trans. V. Dani. Yet, Agamben does not attend to the distinction between 'longevity' and 'durability' under the surface of the self-perpetuation of emergency. For a discussion of distinct types of 'relative permanence of constitutional dictatorship', see J. Meierhenrich, 'Constitutional Dictatorships, from Colonialism to COVID-19' (2021) *17 Annual Rev. of Law and Social Science* 411, at 427.

<sup>108</sup> Agamben includes an epigraph from Michel de Montaigne, which reads: 'It is not certain where Death awaits us, so let us await it everywhere. To think of death beforehand is to think of our liberty. Whoever learns how to die has learned how not to be a slave. Knowing how to die frees us from all subjection and constraint.' Agamben, id., p. 31 (citing M. de Montaigne, 'Through Philosophy We Learn How to Die' in *Selected Essays* (2012) trans. J. B. Atkinson and D. Sices, at 17).

<sup>109</sup> Drawing on the 'Böckenförde Paradox' to which the late German academic and former judge of the German Federal Constitutional Court Ernst-Wolfgang Böckenförde alluded in 1967, I would suggest that executive emergency as discussed above is the 'great gamble' that the knowledgeable state has made for the sake of rational governance through constitutional ordering. The full Böckenförde Paradox reads: 'The liberal, secularized state is sustained by conditions it cannot itself guarantee. That is the great gamble it has made for the sake of liberty.' Böckenförde, op. cit., n. 42, pp. 167, 377–381.

<sup>110</sup> The United Nations stands out as a general umbrella body of global governance institutions among international organizations: J. L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (2012). See also R. Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (2019).

<sup>111</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010) 52–68.



complexities of the law–society dynamic in the suprastate political landscape and its constitutional implications for global governance.

As with many global governance institutions, the WHO is a treaty-based specialized body, with mandates in global health, including eradicating diseases, improving environmental hygiene, and providing information, counsel, and assistance relating to its objectives.<sup>112</sup> Regarded as the ‘intelligence coordinator and informational hub’ of global public health, it has gained ‘recognition ... as the rightful [global health] crisis manager’ because of ‘an advance in knowledge’.<sup>113</sup> The WHO is an example of the expertise model of legitimate and accountable policy making by the executive power.<sup>114</sup> To be more precise, thanks to its knowledge and experience, the WHO has effectively responded to a wide range of health issues and thus emerged as the authority in global health governance. Ultimately, the WHO’s constitutional legitimacy hinges on its epistemic competence and the legal basis of the powers that it asserts, reflecting the view that conceives of global governance and its putative constitutionalization in functional and legal terms.<sup>115</sup>

Yet, the WHO’s authority has suffered a blow due to its initial hesitant response to the COVID-19 pandemic. The WHO was seen as slow in responding to the spread of coronavirus, including belatedly declaring the pandemic a ‘public health emergency of international concern (PHEIC)’ pursuant to the International Health Regulation (IHR).<sup>116</sup> Unable to receive timely information from China where the disease began to spread, the WHO hesitated in making recommendations to national health authorities. It was thus accused of being too submissive to its superpower member state. The WHO’s disappointing performance was attributed to its leadership.<sup>117</sup> Beyond the leadership style and the choice between confrontation and accommodation in the WHO’s engagement with China, however, the COVID-19 pandemic revealed the WHO’s underdeveloped epistemico-political constitution.

Obviously, democracy – or, rather, democratic reflexivity – is excluded from the WHO’s epistemico-political constitution by design. After all, electoral democracy finds no place in the WHO Constitution. The expertise that underpins the WHO’s claim to authority and legitimacy does not result from democratic election. It relies on the information and knowledge that come from the interlocking global networks of experts, health workers, and other stakeholders centred on the WHO. It is true that such epistemic networks facilitate reflexive learning and deliberation among experts.<sup>118</sup> Nevertheless, it remains an expertise-based governance body in which experts and stakeholders involved in the field of health talk among themselves. This dynamic between the governance body (the WHO) and society (call it global civil society) is a world apart from the

<sup>112</sup> WHO Constitution Article 1 (objective) and Article 2 (function).

<sup>113</sup> C. Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (2019) 157.

<sup>114</sup> S. Rose-Ackerman, *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France* (2021) 15–21, 23–25.

<sup>115</sup> Kreuder-Sonnen, op. cit., n. 113, p. 185.

<sup>116</sup> M. Toole, ‘Too Late, Already Bolted: How a Faster WHO Response Could Have Slowed COVID-19’s Spread’ *The Conversation*, 13 May 2021, at <<https://theconversation.com/too-late-already-bolted-how-a-faster-who-response-could-have-slowed-covid-19s-spread-160860>>; A. Maxmen, ‘Why Did the World’s Pandemic Warning System Fail When COVID Hit?’ (2021) 589 *Nature* 499.

<sup>117</sup> Editorial, ‘World Health Coronavirus Disinformation’ *Wall Street Journal*, 5 April 2020, at <[www.wsj.com/articles/world-health-coronavirus-disinformation-11586122093](http://www.wsj.com/articles/world-health-coronavirus-disinformation-11586122093)>.

<sup>118</sup> C. A. Dunlop, ‘The Irony of Epistemic Learning: Epistemic Communities, Policy Learning and the Case of Europe’s Hormones Saga’ (2017) 36 *Policy and Society* 215, at 221–222.

interaction between the state and society that underpins democratic reflexivity in the knowledgeable state's epistemico-political constitution.

As noted above, democracy is essential to the political constitution. Rejecting democracy, the constitutionalization of the WHO and global health governance suggests something other than the constitutional project that has given rise to the knowledgeable state. Yet, discourse on global constitutionalism has continued, despite scepticism about the projection of democracy beyond the state.<sup>119</sup> Thus, to make a full diagnosis of global health governance's constitutional disease, it is advisable not to stop at the designed exclusion of democracy from the WHO – especially because the WHO's disappointing initial response to the pandemic is symptomatic of another epistemic weakness of constitutional governance in the suprastate political landscape: the lack of the executive mode of institutional learning through emergency.

Needless to say, lacking up-to-date information prevented the WHO from acting immediately in the initial stage of the COVID-19 pandemic. Despite the new power invested in the Director General to act on the advice of the expert committee by the IHR amendment following the SARS outbreak in 2005,<sup>120</sup> the WHO trod carefully in the face of COVID-19.<sup>121</sup> In such a state of emergency, the WHO did not act like the executive in the knowledgeable state, which Cass Sunstein calls the 'the most knowledgeable branch'.<sup>122</sup> As Sunstein notes, the executive branch ranks as the most knowledgeable among other constitutional powers for its unrivalled informational advantage and the expertise that its experienced technocrats bring in.<sup>123</sup> Less noticed is that, in times of crisis, the bureaucratic face of the executive can turn 'dictatorial'.<sup>124</sup> Expected to act decisively at the critical juncture, the executive is entrusted with the power to decide and act swiftly.<sup>125</sup> As suggested above, the executive may, for example, compel the supply of extraordinary information that is necessary for emergency decisions to alleviate the challenge posed by extreme uncertainty.<sup>126</sup> In this way, the executive may enrich its knowledge and secure information from society through the executive mode of institutional learning instituted in a state of emergency.

Given that the WHO's recommendations exert enormous influence on the response of national governments, especially in a global health emergency,<sup>127</sup> the criticism levelled at the WHO in the initial stage of the COVID-19 pandemic centred on the failure of the WHO and its expert

<sup>119</sup> M. Belov (ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (2020). See also G. Ooms and R. Hammonds, 'Global Constitutionalism, Applied to Global Health Governance: Uncovering Legitimacy Deficits and Suggesting Remedies' (2016) 12 *Globalization and Health* 84.

<sup>120</sup> Kreuder-Sonnen, op. cit., n. 113, pp. 154–169.

<sup>121</sup> Toole, op. cit., n. 116.

<sup>122</sup> Sunstein, op. cit., n. 15.

<sup>123</sup> Id., p. 1609.

<sup>124</sup> Kuo, op. cit., n. 34, p. 28; S. Levinson and J. M. Balkin, 'Constitutional Dictatorship: Its Dangers and Its Design' (2010) 94 *Minnesota Law Rev.* 1789, at 1795–1796.

<sup>125</sup> Levinson and Balkin, id., pp. 1840–1843.

<sup>126</sup> J. M. Balkin, 'The Constitution in the National Surveillance State' (2008) 93 *Minnesota Law Rev.* 1. See also C. van der Hoeven et al., 'Declaring a State of Emergency in the Netherlands: What Additional Powers for Government?' *De Brauw*, 29 March 2020, at <<https://www.debrauw.com/articles/declaring-a-state-of-emergency-in-the-netherlands-what-additional-powers-for-government>>.

<sup>127</sup> P. A. Villarreal, 'Public Health Emergencies and Constitutionalism before COVID-19: Between the National and the International' in *Constitutionalism under Extreme Conditions: Law, Emergency, and Exception*, eds R. Albert and Y. Ronzai (2020) 225.

clusters to make timely recommendations.<sup>128</sup> Granted, the WHO's initial uncertainty over the nature of the virus was not without reason and it was the lack of up-to-date information and first-hand knowledge of the initial outbreak in China that prevented the WHO from making evidence-based recommendations in the initial stage of the pandemic.<sup>129</sup> However, the WHO's slow response also revealed its underdeveloped epistemic-political constitution. Lacking the executive mode of institutional learning through emergency, the expertise-underpinned WHO is unable to gather intelligence and extract information from member states as is required to make the much-needed emergency recommendation at critical moments.<sup>130</sup> To put it bluntly, in contrast to the state that holds sovereign power vis-à-vis society, the WHO directly faces the international society of states that are the holders of sovereignty, despite its sundry interactions with global civil society. This is the law-society dynamic in global governance.<sup>131</sup> As it becomes involved in more and more crisis responses, expertise-steered global governance is thus prone to more legitimacy challenges as it is denied a fully fledged epistemic-political constitution due to the refracted law-society dynamic in the suprastate political landscape.

## 5 | CONCLUSION

As the state no longer monopolizes the authority of governance, and constitutionalism is increasingly identified with the production of master-text constitutions, the debate about the future of constitutionalism is significant for both theory and practice. New frontiers have been opened up for political constitutionalism.<sup>132</sup> Among them is the extension of the project of constitutional governance to the suprastate political landscape.<sup>133</sup> Engaging with the pressing question of political constitutionalism in constitutional governance from the perspective of institutional epistemology, I have tried to bring to light the law-society dynamic relationship in constitutional governance. I have first reframed the debate surrounding legal and political constitutionalism as one concerning the state's epistemic competence in governance shaped by the constitution and then traced how constitutional ordering has given rise to the state's epistemic-political constitution by setting a unique social dynamic in motion. Taking the WHO's initial response to the COVID-19 pandemic as an illustrative example, I have made a two-part argument. First, constitutional ordering not only marks the project of consolidating political authority but also institutes a process of knowledge projection embedded in the interaction between the state and society – a unique law-society dynamic – that responds to governance needs. The functioning of the state as an institutionalized learning apparatus relies on both democracy and emergency, which jointly constitute the knowledgeable state's epistemic-political constitution, while each engenders a distinctive mode of institutional learning. Second, given that both democracy and emergency remain to be

<sup>128</sup> Toole, op. cit., n. 116.

<sup>129</sup> G. Meyerowitz-Katz, 'Our Knowledge of COVID-19 Changes Every Day. Hindsight Is Misleading When It Comes to Science' *Guardian*, 19 June 2020, at <[www.theguardian.com/commentisfree/2020/jun/19/our-knowledge-of-covid-19-changes-every-day-hindsight-is-misleading-when-it-comes-to-science](http://www.theguardian.com/commentisfree/2020/jun/19/our-knowledge-of-covid-19-changes-every-day-hindsight-is-misleading-when-it-comes-to-science)>.

<sup>130</sup> J. B. Heath, 'Global Emergency Power in the Age of Ebola' (2016) 57 *Harvard International Law J.* 1, at 30.

<sup>131</sup> Brunkhorst, op. cit., n. 38, pp. 329–337.

<sup>132</sup> See for example C. Thornhill, 'The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism' (2016) 79 *Modern Law Rev.* 207.

<sup>133</sup> C. Mac Amhlaigh, 'Who's Afraid of Suprastate Constitutional Theory? Two Reasons to Be Sceptical of the Sceptic' in *Legitimacy: The State and Beyond*, eds W. Sadurski et al. (2019) 182.

successfully projected beyond the state under the current condition, the epistemic-political constitution in global governance is underdeveloped. As a result, the legitimacy challenge facing expertise-steered global governance is further intensified as more and more crisis responses are expected from governance institutions beyond the state. Uncovering the underlying social dynamic of the knowledgeable state's constitutional foundation can help us to better appreciate the project of constitutional governance when it is extended to the suprastate political landscape.

### ACKNOWLEDGEMENTS

This article has benefitted from comments from Joxerramon Bengoetxea, Gábor Halmai, Christian Joerges, Kalypso Nicolaïdis, and Jiří Přibáň at the CLS Annual Conference in 2021. Any errors are mine.

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**How to cite this article:** Kuo M-S. Democracy and emergency: finding the constitutional foundation of the knowledgeable state in social dynamics. *Journal of Law and Society*. 2023;1–20. <https://doi.org/10.1111/jols.12432>