

Between State of Exception and the Rule of Law: A Theoretical Exploration and the Development of a New Model

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Abstract

Facing the outbreak of the Covid-19 pandemic in early 2020, our government took a distinct approach by abstaining from the direct utilization of presidential emergency decrees. Instead, it anchored its strategies for epidemic prevention and control within the framework of ordinary and special legislation, thereby sidestepping the formal proclamation of a state of emergency, a recourse employed by numerous other nations in recent years. While the constitutionality of these measures spurred vigorous debates among legal scholars, there exists a dearth of profound theoretical reflections. This article aims to fill this void.

Commencing with a concise retrospective analysis of theories of sovereignty and constitutional dictatorship around the World War II, notably elucidated by the contributions of Carl Schmitt and Clinton Rossiter, this article subsequently delves into three distinct theoretical paradigms concerning states of emergency within the context of the "war against terrorism" post-September 11. These paradigms encompass the emergency constitution model (as formulated by Bruce Ackerman), the extra-legal measures model (represented by Oren Gross), and the legality model (embodied by David Dyzenhaus). Through a meticulous examination of these models, this article endeavors to construct an innovative framework by synthesizing and comparing their core tenets.

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The novel framework is underpinned by four fundamental principles: dynamic and substantive constitutional assessment, expeditious legislative action, the delicate interplay of separations of power, and a clear demarcation between normalcy and emergency. Drawing from these principles, this article addresses pivotal questions pertinent to states of emergency: Is the constitutionality of emergency measures an absolute requirement? Can a more lenient standard of constitutional scrutiny be warranted during emergencies? If so, where should the boundary be drawn? Is an open-ended legislative mandate permissible? Does a presidential emergency decree stand as the exclusive constitutional response to a state of emergency within our legal system? How can parliamentary and judicial oversight be bolstered during emergencies? And how should the challenge posed by the potential normalization of the state of exception be confronted?

By offering comprehensive responses to these inquiries, the novel framework has the potential to provide valuable insights into prevailing epidemic control strategies and to lay the groundwork for reforming existing institutional arrangements.

Keywords: Covid-19, epidemic prevention and control, anti-terrorism, state of emergency, state of exception, emergency power, emergency constitution, constitutional dictatorship, sovereignty, rule of law