

Permanent States of Emergency and the Rule of Law

Constitutions in an Age of Crisis

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Permanent States of Emergency and Constituent Power

Introduction

In chapter two, I argued that the emergency paradigm was not obsolete; rather, permanent states of emergency are largely caused by the subjective assessment of the decision-maker empowered to declare and perpetuate the emergency. In light of this, in this chapter I aim to establish what controls are necessary in order to ground this declaration of emergency within the legal order. In this regard, arguments pertaining to human rights or substantive conceptions of the rule of law which dominate the current literature on emergency powers will be avoided. The goal here instead is to move the debate away from these factors towards a more fundamental, theoretical understanding of the location of emergency powers within the constitutional structure. This will be done by invoking the concept of ‘constituent power’ against which the power to declare a state of emergency will be evaluated. In so doing, the aforementioned normative factors such as human rights or substantive conceptions of the rule of law may potentially be vindicated by stressing the importance of conceptualising the power to declare a state of emergency as a constituted power of the legal order—an argument that will be returned to in chapter five.¹

The key to ensuring the juridical status of the state of emergency lies in Hans Kelsen’s Identity Thesis and the idea that the state is identical to the legal order.² This will be compared and contrasted with the challenge posed by Carl Schmitt: that the state cannot be identical to the legal order as the state must exist prior to the legal order in order to create the stable conditions necessary for the founding of a constitution.³ Schmitt thus preserves the potential for state power to

¹ See text to nn 127–44 in ch 5 of this book.

² See generally, Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967), hereinafter *PTL*, and Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1949), hereinafter *GTLS*.

³ The primary sources of Schmitt’s work from which I shall draw are: Carl Schmitt, *Constitutional Theory*, trans J Seitzer (Duke University Press, 2008); Carl Schmitt, *The Concept of the Political*, trans G Schwab (University of Chicago Press, 2007); and Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans G Schwab (University of Chicago Press, 2005).

be exercised that is not dependent upon legal validation. Schmitt's challenge to Kelsen's Identity Thesis will then be explored through the lens of emergency powers, and the consequences of stretching the concept of legality to rebut Schmitt by 'purifying' law from all other factors and creating a purely formal concept of legitimacy that is synonymous with legality. I will then outline an argument in favour of a robust enforceable constitution requiring a commensurably robust judiciary as a necessity in order to confront the 'Schmittian challenge' and affirm Kelsen's Identity Thesis. This will be established by elaborating on the relation between validity and effectiveness of constitutional norms, the hierarchy of norms within a constitution, and the possibility of unconstitutional norms or unconstitutional amendments. It will be shown that a permanent emergency has the potential to render constitutional norms invalid by making them permanently ineffective. Consequently, I argue that a permanent emergency has the potential to amount to a 'proxy-constitutional amendment' which can act as a claim for the constituent power. Such a claim must, however, be rejected.

Power beyond Law? The State of Emergency and the Legal Order

The juridical status of the state of emergency exposes the mechanics at the heart of the state and the legal order. As it appears that the law or the legal order is being departed from, states of emergency raise the question of whether this power is located within, or outside the law—whether it is a legal or political decision.⁴ A superficial answer to this would be to argue that as the power to declare a state of emergency is enumerated in a legal norm, then it follows that it is legal in nature. This answer, however, while *prima facie* appearing uncomplicated, begs the question somewhat. Moreover, it reveals an understanding of the relation between law and state power that Carl Schmitt's critique focuses on.

Subsuming all state power within the law was the primary objective of Hans Kelsen's 'Pure Theory' of law.⁵ According to Joseph Raz, the Identity Thesis—a fundamental component of the Pure Theory—attempts to solve three separate problems: the existence of law and its efficacy; the difference between making a new law and applying an existing one; and, finally, the relation between law and the state.⁶ Kelsen's Identity Thesis considers the state to be identical to the legal

⁴ Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm—Exception" Dichotomy' (1999–2000) 21 *Cardozo Law Review* 1825, 1833; David Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005, 2006–07.

⁵ See generally Kelsen (n 2) *PTL* and *GTLS*.

⁶ Joseph Raz, 'The Identity of Legal Systems' (1971) 59 *California Law Review* 795, 801.

order. No action can be attributed to the state that does not derive its validity from this legal order and no state power can exist outside of this legal order. Kelsen contended that there is a principle of legality which is the central feature of any legal system and which requires that all official action be in accordance with law.⁷ For Kelsen, therefore, the law is supreme, autonomous and supersedes politics.

The legal order envisaged by Kelsen's Pure Theory is one of a unified hierarchy of norms. Like Immanuel Kant, Kelsen distinguishes a norm—an 'ought' statement—from an 'is' statement.⁸ Unlike scientific theories, which are either true or false as based upon observation and causation, a norm, instead, is either valid or invalid by a process of imputation.⁹ Thus when A occurs, the legal scientist is not concerned with what actually occurs subsequently, but rather with what *ought* to occur in a 'factually predictive' sense (as distinct from what ought *morally* to occur).¹⁰ What renders a norm valid is its conformity with a higher norm: only norms may validate another norm.¹¹ It is this clear separation of the 'is' from the 'ought' that gives Kelsen's theory its 'pure' nature. For Kelsen 'is' and 'ought' (*sein* and *sollen*) 'denote different, illogically reconcilable structures of thought'.¹² The Pure Theory is thus 'pure' in the sense that it is purged of all other values or sociological insights that attempt to explain or legitimise legal norms. Law may be referred only back onto itself. It is therefore a pure and closed normative order.¹³

Kelsen's hierarchical normative order cannot and does not continue ad infinitum. One eventually reaches a norm that does not need a higher norm to validate it—the 'basic norm' or *Grundnorm* or *Ursprungsnorm* (origin norm).¹⁴ Thus, if the statement 'a person who steals ought to be punished' is contained in a statute, then it would follow through a process of regression that 'one ought to obey the legislature'. In turn, if this norm of obeying the legislature is contained in the constitution, one would impute that 'one ought to obey the constitution'. If this process of regression is continued, 'Ultimately, we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly'.¹⁵ On the validity of the basic norm, Kelsen argues that it is simply 'presupposed'. The validity of this first constitution is that presupposition, 'the final postulate, upon which the validity of all the norms of our legal

⁷ David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press, 1997) 116.

⁸ Ronald Moore, *Legal Norms and Legal Science: A Critical Study of Kelsen's Pure Theory of Law* (University of Hawaii Press, 1978) 7–12.

⁹ *PTL*, 76–83.

¹⁰ *ibid.*

¹¹ *ibid.*, 193.

¹² Sylvie Delacroix, 'Schmitt's Critique of Kelsenian Normativism' (2005) 18 *Ratio Juris* 30, 31.

¹³ This position has been subjected to substantial criticism from both positivist and anti-positivist schools. See text to n 114 in ch 4 for further discussion of this separation from the perspective of Ronald Dworkin. It is submitted, however, that these critiques are not fatal to my argument regarding the justiciability of the decision to declare a state of emergency.

¹⁴ *PTL*, 193–211; *GTLS*, 115–18.

¹⁵ *ibid.*

order depends.¹⁶ This is the basic norm: coercive acts ought to be carried out only under the conditions and in the way determined by the ‘fathers’ of the constitution or the organs delegated by them.¹⁷ The basic norm is not, however, the constitution itself. The constitution is merely a collection of various norms that facilitate and guide the creation of further norms. The collection of norms that composes the historically first constitution is itself validated by the basic norm: one ought to obey the historically first constitution.

The State of Emergency and the Pure Theory of Law

Suggesting that the decision to declare a state of emergency is contained within a legal order permits one to assert that every action of the state may be validated by a legal norm, and, consequently, that the state is identical to the legal order. However, this syllogism also raises the peculiar instance of law being used to suspend itself. Law is a unique discipline in that it regulates its own creation, and in certain instances, law may be used to invalidate law.¹⁸ However, a state of emergency is notably different in that it is not necessarily new law replacing old law; rather, law is being used to say that particular elements of law are no longer applicable. As noted in chapter one, these ‘particular elements of law’ may be the very fundamental norms that give the legal order its constitutional identity. Thus, for the Roman Republic, the dictator harkened back to the very elements of monarchical tyranny that the Republic was founded to protect against, breaking free from the inter-consular veto and the right of the Roman citizen to appeal through *provocatio*.¹⁹ In modern constitutions, it may be core values such as human rights, democracy and the rule of law that are vulnerable.

Law’s unique capacity to regulate its own creation is understood by the Pure Theory through what Kelsen terms the two aspects of legal normative orders: the static and the dynamic aspect. A static normative order is one in which the content of the lower-order norms may be derived from a higher norm.²⁰ In essence, the lower norm is merely a manifestation of an aspect of the higher norm. Thus, for example, the norm that ‘one ought to have access to proper healthcare’ may be derived from the higher-order norm that ‘one has a right to life’. In contrast, a dynamic normative order is one in which the higher-order norm gives no guidance as to the substantive content of lower-order norms but instead confers power onto certain institutions to create the lower-order norms.²¹ Thus, a constitution

¹⁶ *ibid.*

¹⁷ *GTLS*, 116.

¹⁸ *PTL*, 209; *GTLS*, 122–23.

¹⁹ See text to n 172 in ch 1.

²⁰ *PTL*, ch IV.

²¹ *PTL*, ch V; Moore (n 8) 87–88.

may confer law-making power on a legislature. Most constitutions, therefore, are a collection of both dynamic and static aspects.²² They are dynamic in that they specify specific institutions and confer norm-creating powers upon them and they may also be static in that they may prescribe what the contents of such norms ought to be and proscribe what they should not be. This is the primary role of rights provisions in constitutions, as any lower-order norms ought to conform with and respect the rights contained in the higher-order constitutional norms.

The dynamic aspect of the constitution may potentially explain the juridical status of the state of emergency. A state of emergency contained in constitutional provisions may be construed as a norm-creating power conferred on the body in question to act as it sees fit in an emergency. For example, if an emergency executive order is pronounced that empowers the police to ‘in their absolute discretion, search the property of any individual without a warrant’, then the syllogistic logic employed by the individual subject to such a search order would be:

The order issued by the police to me is validated by the executive order. This executive order is validated by the declaration of a state of emergency, which is itself contained in the constitution. As one ought to obey the constitution, it follows that I ought to obey the directions of the police and consent to my property being searched.

Such syllogism would present no conflict to the basic norm and the validity of a state of emergency would flow from the existing, presupposed basic norm.

Power beyond the Law: Rejecting the Identity Thesis?

This syllogism is, however, based primarily upon the dynamic aspect of the constitution and would completely ignore any static norms of such a constitution. This would theoretically validate in law any emergency law, no matter how abhorrent or repugnant to the constitutional norms enshrined and effective under the constitution when in a state of normalcy. Even in a constitutional order that does not contain substantive human rights provisions, conceptualising a state of emergency as a dynamic norm-creating device is, nevertheless, problematic as the new method of producing legal norms—for example, through executive decree or truncated legislative procedure—invariably stands in conflict with the normal method prescribed by the constitution.²³ There must, by definition, be a conflict between the state of emergency and the prior existing legal order as it is the very constraints on power that exist in normalcy that necessitate the declaration of a state of emergency. Thus, prolonged emergency rule through the use of executive decree may call into question the legislature’s role as the principal law-maker in a state. This apparent conflict may be countered and resolved by stating that the

²² *GTLS*, 125–26.

²³ See text to n 158 in ch 5 regarding the challenges posed to the substantive limits to emergency powers supposedly explicit in Art 48 of the Weimar constitution.

emergency provision ‘trumps’ the ordinary mechanism of norm creation and so this is not a problem for the Identity Thesis; as long, however, as the emergency remains exceptional, ie temporary.

Kelsen is committed to subsuming all state power within the legal order and his basic norm is an attempt to do this by capping and enclosing the legal order with a metaphysical norm. For Kelsen, the sovereignty of a legal order is not an attribute of the one who possesses supreme power, but simply the expression of the autonomy of that legal order from all other normative orders; an autonomy which is assured by the basic norm.²⁴ The insistence on a separation between ‘is’ and ‘ought’ that lies at the heart of Kelsen’s conception of law collapses the question of legitimacy into the question of legality. For Kelsen, therefore, every state is a *Rechtstaat*. This focus on form and ignoring the substantive content of law that lies at the basis of positivist constitutionalism led Carl Schmitt to argue that in such a system, ‘a purely formal concept of law, independent of all content, is conceivable and tolerable.’²⁵ According to David Dyzenhaus, Schmitt

thus alleged that the liberal equation of constitution with written constitution would turn an entire constitution into something provisional, a ‘blank cheque statute’. A genuine constitution should not contain the discretionary power to grant another, radically different constitution.²⁶

The above answer that the state of emergency can be constrained by the dynamic nature of the legal order therefore conceptualises the state as identical to the legal order but at the cost of reducing the constitution to ‘a blank cheque statute’. Other theorists attempt to reject viewing all state power as legal. John Locke’s theory of the prerogative—the power to do good without a rule and sometimes even against this—attempts to circumscribe the state within the rule of law, but still leave a zone beyond law in which the sovereign could act.²⁷ Locke, therefore, does not create a model of the state as identical to the legal order but leaves a zone beyond it. Again, however, this raises problem of the legitimacy of this power and its accountability as if the sovereign is above, or beyond the law, how can it be accountable to it? On this issue, Locke said that this could only take the form of public acquiescence. If the public did disagree with the approach taken by the holder of the prerogative, they had no recourse except to throw their arms to heaven.²⁸ Similarly, Clinton Rossiter, despite laying down eleven criteria for assessing whether an emergency is

²⁴ Dyzenhaus (n 7) 103.

²⁵ Carl Schmitt, *Legality and Legitimacy* (Duke University Press 2004) 20; Gary Jeffery Jacobson, ‘An Unconstitutional Constitution? A Comparative Perspective’ (2006) 4 *International Journal of Constitutional Law* 460, 466.

²⁶ Dyzenhaus (n 7) 52–53.

²⁷ John Locke, *Second Treatise of Government*, ed CB McPherson (Hackett Publishing, 1980) 84–88. See text to nn 174–84 in ch 6 for a more detailed discussion of Locke’s theory of the prerogative and what Oren Gross terms ‘extra-legal measures’ to confront crises.

²⁸ *ibid.*

constitutional or not, admitted that ‘whatever the theory, in moments of extreme national emergency the facts have always been with ... John Locke.’²⁹

Carl Schmitt and the State of Exception

Theories such as Locke’s therefore envisage state power existing beyond the law. This difficulty that a liberal-democratic constitutional order has in dealing with the state of emergency by either recognising a power beyond the law, or by attempting to circumscribe the exception within the law, forms the lynchpin of Schmitt’s critique of liberalism and its political realisation by way of parliamentary democracy.

The Concept of the Political: The Friend–Enemy Distinction

Schmitt’s challenge to conceptualising the state as identical to the legal order is that this deduction starts by assuming that stability and order within the state already exist, completely ignoring the fundamental importance of how this order was established in the first instance: by an irrational decision taken by the sovereign when it distinguished friend from enemy.³⁰ Ernst-Wolfgang Böckenförde argues that there are two common misconceptions about Schmitt’s friend–enemy distinction.³¹ Firstly, that the friend–enemy distinction turns political debate within the state to a friend–enemy distinction, ie opposing political parties or ideologies conceptualise themselves as friends and enemies; and secondly, that the friend–enemy distinction constitutes a normative theory of politics and the political order. Addressing the first misconception, the friend–enemy distinction refers not to politics within the state but instead constitutes the distinction that identifies the state as separate from other nations and groupings. Schmitt conceptualised a state as presupposing a relatively ethnically homogeneous populace or *Volk*.³² However, identification of what exactly unites this population is not traceable back to a rational or objectively derivable constituent. Rather, what unites the *Volk* or nation is an irrational decision. Schmitt saw all ideologies and doctrines as metaphysical and claimed that conflicts between such ideologies

²⁹ Dyzenhaus (n 4) 2014, quoting Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers, 2002) 219.

³⁰ Schmitt, *The Concept of the Political* (n 3) 38–39.

³¹ Ernst-Wolfgang Böckenförde, ‘The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory’ (1997) 10 *Canadian Journal of Law and Jurisprudence* 5, 5–6.

³² WE Scheuerman, ‘Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt’ (1997) 10 *Canadian Journal of Law and Jurisprudence* 141, 143; Dyzenhaus (n 7) 57; Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014) 56.

cannot be resolved through rational thought. Instead, such can only be resolved by an arbitrary or irrational decision.³³ When distinguishing between friend and enemy, this decision, therefore, is also lacking rationality.³⁴ As this decision is both constitutive and expressive of the state, it follows that the state is founded on this arbitrary decision of the sovereign. Relatedly, the nature of this decision as lacking rationality means that its legitimacy stems from its authority, not from its truth.³⁵ The decision made by the sovereign in distinguishing between those who are within the state (friend), and those who are outside of it (enemy) permits the founding of a state.³⁶ Only states, therefore, and not just any domestic or international association, are the bearers of politics.³⁷ To address the second misconception of the friend–enemy distinction: Schmitt did not posit the friend–enemy distinction as a normative theory, but as descriptive of how the political actually operates.³⁸

Schmitt thus contends that Kelsen’s Identity Thesis starts at the point at which the distinction between friend and enemy has already been made and the state is stable enough for Kelsen to postulate that the state is identical to the legal order. Schmitt considered the friend–enemy distinction to be vital, and argued that its intensity must be so extreme as to make war a possibility. Schmitt thus describes war as the ‘existential negation of the enemy’.³⁹ It is only by defeating the enemy that the friend can be secure, and it is only by war that the enemy can be negated.⁴⁰ It follows from this that:

Constitutional law then appears as the binding normative order and form determining the existence, maintenance, and capability for action of a political unity in the above sense. It is and must be the specific telos of constitutional law to facilitate, preserve and support the state as a political order and unity.⁴¹

³³ David Dyzenhaus, ‘“Now the Machine Runs Itself”: Carl Schmitt on Hobbes and Kelsen’ (1994–95) 16 *Cardozo Law Review* 1, 3.

³⁴ Nevertheless, the distinction must also have some grounding in fact in order for it to be effective and produce the requisite stability necessary to establish the legal order. See Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 10.

³⁵ Or *autoritas non veritas facit legem*. See Schmitt, *Political Theology* (n 3) 52; Dyzenhaus (n 7) 58.

³⁶ Bökenförde (n 31) 10–12; Schmitt, *The Concept of the Political* (n 3) 44–45.

³⁷ George Schwab, ‘Introduction’ in Schmitt, *The Concept of the Political* (n 3) 6. The development of branches of law such as global constitutionalism and international political organisations such as the European Union has led to inquiries into constituent power at a level beyond the state. For example, see O’Donoghue (n 32); Neil Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’ in Loughlin and Walker (n 34) 247; and Bardo Fassbender, ‘“We the People of the United Nations”: Constituent Power and Constitutional Form in International Law’ in Loughlin and Walker (n 34) 269.

³⁸ Bökenförde (n 31) 10. That stated, Schmitt’s utilisation of the friend–enemy distinction as a sledgehammer against liberalism is certainly making a normative argument. See text to n 46 below.

³⁹ Schmitt, *The Concept of the Political* (n 3) 33.

⁴⁰ *ibid.*

⁴¹ Bökenförde (n 31) 8.

Schmitt's decisionism reveals itself by this founding of the state upon this presupposition of the political. Once the distinction between friend and enemy is made, the 'relative ethnic homogeneity' of the people is established and the order necessary to found a legal order is created.⁴²

Schmitt's Critique of Liberalism: The State of Exception

While Böckenförde is keen to stress that Schmitt's friend–enemy distinction does not turn debate within a state into this distinction, as, in general, these contestations are not of the requisite intensity, he does argue that domestic groups which form and oppose each other within the state can potentially escalate in intensity to become equivalent to this friend–enemy distinction. It therefore becomes necessary to stabilise the domestic order to pre-empt looming tensions and prevent contestations from spiralling out of control and crossing the threshold of intensity necessary to satisfy the friend–enemy distinction being met.⁴³ In this regard, Schmitt argues that a liberal legal order is incapable of intervening to stabilise such tensions. Instead, liberalism perpetually postpones the decision necessary to distinguish friend from enemy and bring the order required to permit the establishment of a legal order.⁴⁴ Liberalism is the 'enemy of enemies' and Kelsen's Pure Theory was the embodiment of this liberal order.⁴⁵ Dyzenhaus argues that Carl Schmitt's critique of liberalism does not claim that liberalism is committed to

a global neutrality between ideologies or to a position that attempts to find some substantive basis for contesting ideologies that assert a global superiority for themselves. He does not claim that liberalism is more naturally aligned with a positivist view about the nature of law or with a view that claims there is a higher law beyond the positive law to which the positive law is somehow subject. He does not claim that liberalism either presupposes its own truth or makes no claim to truth. And he does not claim that liberalism is either political or anti-or apolitical. Rather, what is distinctive about his position is its thesis that liberalism is doomed to shuttle back and forth between these various alternatives.⁴⁶

Schmitt's position that the political supersedes the legal thus axiomatically stands as the antithesis of Kelsen's Identity Thesis. Kelsen's basic norm—that 'coercive acts ought to be carried out only under the conditions and in the way determined by the "fathers" of the constitution or the organs delegated by them'⁴⁷—marks the point at which the legal scientist stops her inquiry and presupposes the validity

⁴² Dyzenhaus (n 7) 57. Again, however, note the paradox that this entails as there must be a degree of relative homogeneity of the people already in factual existence prior to this decision being made. See Lindahl (n 34).

⁴³ Böckenförde (n 31) 8.

⁴⁴ *ibid.*

⁴⁵ Dyzenhaus (n 7) 41.

⁴⁶ *ibid.*, 38–39.

⁴⁷ *GTLS*, 116.

of this basic norm. It is at this point, however, that Schmitt's critique of Kelsenian normativism begins. Kelsen and other liberal theorists presuppose the political and social stability that makes their subsequent presupposition possible, failing to inquire into what caused or permitted this stability to exist in the first instance.⁴⁸ For theorists such as Kelsen, 'the machine runs itself'.⁴⁹ However, Schmitt argues that it is disingenuous and incorrect to stop inquiry at this point. It is only by taking this 'order' as already established that they have the confidence to presuppose the validity of the basic norm.⁵⁰ For Schmitt, however, it is an existential decision, not some ultimate norm, that is the basis of a constitution.⁵¹ It is the decision of the sovereign to distinguish between friend and enemy that delineates the parameters of the state, creating the relative cultural homogeneity within the state and the stability and order that flows from this. By ignoring the decision upon which the state is founded, this fiction allows liberal legal theorists such as Kelsen to believe that the state *is* the legal order and that no state action can be attributed to that which is not done through law.

Carl Schmitt and the State of Exception

This liberal fiction is fundamentally exposed, however, by the inevitable appearance of a 'state of exception'. Schmitt's famous declaration that '[s]overeign is he who decides on [*über*] the exception'⁵² refers both to whether an exception exists or not and what ought to be done in such an exception. Despite the forcefulness and confidence of this declaration, Schmitt's conflation of these two separate questions is not *prima facie* clear. John P McCormick argues that this stems from Schmitt's deliberately ambiguous use of the word 'on' (*über*). This blurs the distinction between the two separate questions and belies his endorsement of such a separation a year earlier in *The Dictatorship* when discussing the institutional separation of these two questions in the Roman Republic.⁵³ This marks the evolution in Schmitt's thought from commissarial to sovereign dictatorship. In turn, these two separate questions are what Dyzenhaus identifies as the 'Schmittian Challenge'.

⁴⁸ Dyzenhaus (n 7) 68–70.

⁴⁹ See Dyzenhaus (n 33).

⁵⁰ Sylvie Delacroix, 'Schmitt's Critique of Kelsenian Normativism' (2005) 18 *Ratio Juris* 30, 33; Scheuerman (n 32) 143.

⁵¹ Dyzenhaus (n 7) 52.

⁵² Schmitt, *Political Theology* (n 3) 1.

⁵³ John P McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 *Canadian Journal of Law and Jurisprudence* 163, 169. McCormick argues that this conflation is subsequently made deliberate when Schmitt states later in *Political Theology* that: '[H]e decides whether there is an extreme emergency as well as what must be done to eliminate it'. See Schmitt (n 3) 7. See also Dyzenhaus (n 7) 41 where he argues that Schmitt's critique of liberalism is 'dangerously unsystematic' because he had 'a genuine obsession with the arcane and the aphoristic and because he did not want to reveal his hand too clearly'.

In *The Dictatorship*, published in 1921, Schmitt follows the archetypal normalcy—emergency dichotomy and endorses a commissarial constitutional dictatorship to accommodate emergencies.⁵⁴ This commissarial dictatorship would follow closely the Roman dictatorship and the key elements of the emergency paradigm identified in chapter one, ie a crisis identified and labelled by a state to be of such magnitude that it is deemed to cross a threat-severity threshold, necessitating urgent, exceptional and consequently temporary actions by the state not permissible when normal conditions exist. However, only a year later, in 1922, Schmitt abandons this constitutional dictatorship in *Political Theology*, endorsing a potentially all-powerful sovereign that must not only operate in a period of emergency but would be a permanent feature of the state's legal and political landscape.⁵⁵

For Schmitt, it is the essence of sovereignty both to decide what an exceptional situation is, and to make the decisions appropriate to that exception.⁵⁶ Schmitt draws an analogy between the sovereign's ability to intervene and act without legal authority and sometimes even against it, to the theological idea of a miracle by divine intervention which cannot be explained by the scientific laws of the universe.⁵⁷ Thus, what characterises the exception is unlimited authority; the suspension of the legal order.⁵⁸ With this decision, the exception, according to Schmitt, reveals the true nature of the state's authority.⁵⁹ In a manner similar to how the political necessarily existed prior to the establishment of the legal order, so too can it intervene in this legal order when it is necessary and it is for the sovereign, not the legal order, to decide when that is and what that intervention should entail. Schmitt argues, therefore, that the spectre of the initial decision made by the sovereign continues to haunt the legal order that is subsequently established thereunder.

Gross describes Schmitt's theory of the exception as his 'main weapon in his attack on liberalism'.⁶⁰ According to Schmitt, the decision as to the existence of the exception is a decision in the truest sense of the word:

Because a general norm as represented by an ordinary legal prescription can never encompass a total exception, the decision that a real exception exists cannot be entirely derived from this norm.⁶¹

⁵⁴ See Carl Schmitt, *Dictatorship*, trans Michael Hoelzl and Graham Ward (Polity Press, 2014); Gross (n 4) 1834.

⁵⁵ McCormick (n 53) 163.

⁵⁶ Schwab, 'Introduction' in Schmitt (n 37) xii.

⁵⁷ Schmitt, *Political Theology* (n 3) 36 where Schmitt expressly states that: '[T]he exception in jurisprudence is analogous to the miracle in theology'; Noa Ben-Asher, 'Legal Holes' (2009) 5 *Unbound* 1, 3–6.

⁵⁸ Schmitt, *Political Theology* (n 3) 12.

⁵⁹ *ibid*, 13.

⁶⁰ Gross (n 4) 1827.

⁶¹ Schmitt, *Political Theology* (n 3) 6.

As a legal norm requires a level of certainty and clarity to be effective, Schmitt argues that the exception cannot be circumscribed by law as there can be no norm applicable to chaos.⁶² In so doing, Schmitt also reveals that he considers ‘clarity and effectiveness’ to be fundamental aspects of law and, in turn, the rule of law. While the paradigmatic example of a state of exception is war, the Schmittian exception relates to a much broader array of political phenomena that cannot be considered to be circumscribed by legal rules.⁶³ At best it can be ‘characterised as a case of extreme peril, a danger to the existence of the state, or the like.’⁶⁴ Schmitt considers the exception therefore to be the ‘purest expression and reflection of the political.’⁶⁵ This decisionist nature of Schmitt’s theory is, according to Gross, normatively indefensible as it can lead to the justification of authoritarian dictatorship.⁶⁶

Schmitt justifies dictatorial action on the basis of the pre-constitutional sovereign will of the people and not the principles embodied within the constitution itself.⁶⁷ Thus Aoife O’Donoghue argues that Schmitt’s idea of the nation is associated with the commonality of the community.⁶⁸ In this regard, some may claim that Schmitt ‘aims to rescue the primacy of democracy over the rule of law’, given the prominence he appears to accord to the ‘pre-constitutional sovereign will of the people.’⁶⁹ Schmitt, however, can only be considered ‘democratic’ in the extremely thin sense that he considers the legitimacy of the state to derive from the people or *Volk* as distinct from God.⁷⁰ Among the political regimes and constitutional orders that Schmitt was perfectly content to consider democratic was no less than the Third Reich. Thus, Christoph Möllers, suggests that the ‘construction of the *Führer* permitted the establishment of a permanent revolutionary subject which, right to the very end of the Nazi era, referred to the German people as the source of its own legitimacy.’⁷¹ The people therefore are a convenient substitute for God, albeit they are given a voice through an all-powerful sovereign speaking on their behalf.⁷² In this regard, it is important to note the innate religious dimension that is latent in Schmitt’s work and that is fundamentally

⁶² *ibid*, 13.

⁶³ Gross (n 4) 1832.

⁶⁴ Schmitt, *Political Theology* (n 3) 6.

⁶⁵ Gross (n 4) 1831; Schmitt, *Political Theology* (n 3) 6.

⁶⁶ Gross (n 4) 1828.

⁶⁷ McCormick (n 53) 177.

⁶⁸ O’Donoghue (n 32) 56.

⁶⁹ Lindahl (n 34) 21.

⁷⁰ Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004) 176–78.

⁷¹ Christoph Möllers, ‘“We Are (Afraid of) the People”: Constituent Power in German Constitutionalism’ in Loughlin and Walker (n 34) 87, 98.

⁷² Thus, Ulrich K Preuss describes Schmitt’s conception of the constituent power as the secularised version of the divine power to create the world *ex nihilo*: Ulrich K Preuss, ‘Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution’ (1992) 14 *Cardozo Law Review* 639, 640.

influenced by his strong Catholic faith.⁷³ Thus, Schmitt's fidelity to 'the people' is questionable at best. Rather, what is key is that, for Schmitt, constitutionalism can only be realised and made possible by a wilful exercise of political power.⁷⁴ Constitutionalism is therefore dependent on an underlying positive decision and not a norm of presupposed validity.⁷⁵ Consequently, Schmitt considers that the state cannot be equated to the legal order as there will always be actions of the state beyond law. From this, Schmitt deduces that: 'Sovereign is he who decides the exception.'⁷⁶

Confronting the State of Exception: Preserving the Identity Thesis

Kelsen was aware that Schmitt believed his legal science was simply a neutral mask for liberalism's particular metaphysics.⁷⁷ NE Simmonds, evaluating Dyzenhaus' work on Schmitt, Kelsen and Heller, states that: 'Kelsen's relentless pursuit of a value-free legal science has the paradoxical effect of exposing the liberal legal order's rootedness in existential choice, so that the Pure Theory tends to confirm Schmitt's decisionism as the truth of liberal jurisprudence.'⁷⁸ To resist Carl Schmitt's challenge, Dyzenhaus argues that we must refuse to accept the two limbs of the Schmittian challenge—that the Sovereign can both decide on the existence of a state of exception and what must be done in lieu of this declaration. To do this, Dyzenhaus argues for maintenance of the rule of law during a state of emergency and that such a conception of the rule of law must be substantive or 'thick'.⁷⁹ One must imbue the legal order with some sense of value and avoid the positivist disposition of collapsing the issue of legitimacy into a thin form of legality. Consequently, Dyzenhaus rejects the contention that the state of emergency can satisfy rule-of-law constraints simply because it conforms with Kelsen's 'dynamic aspect' of a legal order.⁸⁰ This syllogism would, however, also be rejected by Schmitt: such an empty-formalistic conception of the rule of law is in fact a recognition of the failure of the liberal-democratic order, a cloaking device hiding the true nature of

⁷³ Kennedy (n 70).

⁷⁴ Scheuerman (n 32) 143.

⁷⁵ *ibid.*

⁷⁶ Schmitt, *Political Theology* (n 3) 1.

⁷⁷ Dyzenhaus (n 7) 120.

⁷⁸ NE Simmonds, "Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar" by David Dyzenhaus [Oxford: Clarendon Press 1997] (1998) 57 *Cambridge Law Journal* 195, 199.

⁷⁹ See D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

⁸⁰ See text to n 22 above.

the state, namely that: ‘Sovereign is he who decides the exception.’⁸¹ In this regard, Schmitt himself clings to a concept of the formalist conception of the rule of law thicker than mere ‘rule by law’⁸² to argue that the state of exception cannot be prescribed by law. Given that the exception cannot be constrained by law as it is too vague a concept and so lacking clarity and certainty, Schmitt reveals himself as believing that clarity and certainty are necessary prerequisites for a norm to satisfy in order for it to be considered to be part of a legal order.⁸³

In turn, I also reject arguments that a state of emergency contained within a constitutional provision can be described wholly by the dynamic aspect of law as such a power cannot be explained by reference to the hierarchy of norms alone. Instead, such a syllogism must reach for a more embryonic power, ie constituent power; a power beyond law which establishes the constitution and legal order in the first instance.⁸⁴ While this may suggest that I agree with Schmitt, I, however, take the opposite conclusion and contend that this claim for the constituent power through the state of exception must be rejected. Thus, the power to declare a state of emergency, while exceptional in the sense that it should be exercised rarely, must nevertheless be located within the legal order. The body exercising emergency powers must respect the constitutional constraints on the exercise of that power and, logically, there must also be constraints on this power for it to be legal.⁸⁵ These constraints must, I contend, be judicial in nature.

Conflicts between Norms: The Hierarchy of Norms

From a ‘legal constitutionalist’ perspective, the status of a constitution as a collection of the highest legal norms in a state is inextricably linked to the possibility of lower-order norms such as legislation being invalidated on the grounds that they are incompatible with constitutional norms.⁸⁶ This superiority of a constitution is necessarily and indelibly linked to whether judicial review of legislative action is available.⁸⁷ Alexander Hamilton in the *Federalist Papers* stated that:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission, under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above

⁸¹ Schmitt, *Political Theology* (n 3) 1.

⁸² Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2007) 92–93.

⁸³ Schmitt, *Political Theology* (n 3) 13.

⁸⁴ See text to n 147–68 below.

⁸⁵ Dyzenhaus (n 4) 2007.

⁸⁶ See text from nn 98–119 in ch 4 for a critique of judicial review from a political constitutionalist perspective.

⁸⁷ Carl Joachim Friedrich, ‘The Issue of Judicial Review in Germany’ (1928) 43 *Political Science Quarterly* 188, 195.

his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.⁸⁸

The procedural peculiarity surrounding the amendment of a constitution when compared against other norm-creating procedures (eg the ordinary legislative process) may also indicate a constitution's legal superiority. Thus, while law may be dynamic in the sense that it regulates its own creation, constitutional norms must possess a certain degree of resistance to change or repeal that distinguishes them from other legal norms such as legislation. In certain instances, this resistance to law's dynamic nature may be entwined with the issue of the availability of judicial review of legislative acts, as evidenced by debates in Weimar Germany.⁸⁹ Like the US Constitution, the matter as to whether judicial scrutiny of legislative acts for conformity with the constitution was possible was not expressly enumerated in the Weimar Constitution.⁹⁰ Gerhard Amschütz argued that no such power was available to the judiciary under the Weimar Constitution as this constitution could be amended by ordinary legislation.⁹¹ Amschütz concluded that 'the Constitution and the statute are manifestations of the will of the very same power, the legislative power.'⁹² Consequently, he argued that there was no distinction between ordinary legislative power and constitution-making power—the constituent power or *pouvoir constituant*. The constitution, therefore, under this argument, was not above the legislature but rather 'at its disposal' and the fact that qualifying majorities were required to amend the constitution did not alter this conclusion.⁹³ Carl Joachim Friedrich therefore argued that 'those in favour of judicial review must concentrate upon this central question: "is the Constitution a superior legal rule and a fundamental law or not?"'⁹⁴ Kelsen echoes this position, arguing that if a constitution lays down certain prescriptions and these are not followed, it must foresee this possibility and account for it:

The constitution may then designate the organ that has to decide whether or not the prescriptions regulating the legislative function were observed. If this organ is different from the legislative organ, it forms an authority above the legislator. ... If no organ different from the legislative is called upon to inquire into the constitutionality of statutes, the

⁸⁸ Alexander Hamilton, 'Federalist No 78' in Clinton Rossiter (ed), *The Federalist Papers* (Signet Classics, 2003) 465–66.

⁸⁹ See Friedrich (n 87); Bernd J Hartmann, 'The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919' (2003–04) 18 *BYU Journal of Public Law* 107.

⁹⁰ Hartmann, *ibid*, 1; in *Marbury v Madison* (1803) 5 US 137, the US Supreme Court held it had such a power to review the constitutionality of legislation. See text to nn 74–81 in ch 4 for further discussion of *Marbury v Madison*.

⁹¹ Gottfried Dietze, 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany' (1956) 42 *Virginia Law Review* 1, 7–8.

⁹² Friedrich (n 87) 192.

⁹³ *ibid*, 193.

⁹⁴ *ibid*.

question whether or not a statute is constitutional has to be decided ... by the legislative organ itself. Then, everything that is passed by the legislative organ as a statute has to be accepted as a statute in the sense of the constitution. In this case, no statute enacted by the legislative organ can be considered to be unconstitutional.⁹⁵

It was also suggested in Weimar Germany that not expressly prohibiting judicial review of the constitutionality of legislation would, like in the United States, eventually lead to the *Reichsgericht* (Weimar Germany Federal Supreme Court) declaring that it had such a power to do so.⁹⁶ This proved to be prophetic with the *Reichsgericht* eventually holding on 4 November 1925 that it had the power to review the constitutionality of statutes:

Since the national Constitution itself contains no provisions according to which the decision of constitutionality of national statutes has been taken away from the courts, and has been transferred to another determinate authority, the right and the obligation of the judge to examine the constitutionality of statutes must be recognised.⁹⁷

Amschütz's argument, therefore, was rejected by the *Reichsgericht* and consequently, in Weimar Germany, there was a fundamental difference between legislative power and 'constitution-making power'. This distinction is of fundamental importance for a state seeking to establish a constitutionalist framework for the control and exercise of state power. This is corroborated to an extent by Schmitt who argued that a genuine constitution would never permit its alteration into a fundamentally different document.⁹⁸ A constitution of a republic, for example, should not allow its alteration into an absolute monarchy. Thus, Schmitt also draws a distinction between the constitutional amendment power and the constituent power which can radically alter and transform the constitution.⁹⁹ That stated, the rejection of Amschütz's argument did not save the Weimar Constitution as it was through the use of the emergency clause in Article 48 that the constitution was reduced to a 'blank cheque statute' and this radical transformation of the constitutional order could take place.¹⁰⁰

Conflicts between Constitutional Norms

The Pure Theory of law's concept of the unity of a legal order allows for no conflict between norms. Where there is conflict, Kelsen suggests that the Pure Theory can

⁹⁵ *GTLS*, 156.

⁹⁶ Friedrich (n 87) 190.

⁹⁷ (1920) 111 RGZ 320; per Friedrich's translation, Friedrich (n 87) 197; Hartmann (n 89) 124; Schmitt, *Constitutional Theory* (n 3) 230.

⁹⁸ Dyzenhaus (n 7) 52–53.

⁹⁹ See also Joel I Colón-Ríos who draws a distinction between constitutional amendments and constitutional amendments to the 'fundamental core' of the constitution, the latter of which amounts to an expression of the constituent power. See Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012) ch 7.

¹⁰⁰ See text to nn 159–69 in ch 5.

rectify it. Conflict between two norms of different hierarchal status are resolved by the higher-order norm superseding the lower-order norm so that in effect there is no conflict.¹⁰¹ If there is a conflict between norms of hierarchal parity, Kelsen argues that this can be resolved by either of two ways. Firstly, the most recently created norm must be considered as having priority over the older norm and the older norm must be considered to have been repealed by the newer norm in accordance with the principle *lex posterior derogate priori*.¹⁰² Secondly, if both norms are created simultaneously, such as norms contained within the same piece of legislation constitution, such conflicts ought to be resolved through a process of holistic interpretation. A holistic or harmonious approach to constitutional interpretation views the constitutional norm in question to be part of a collection of norms, a broader tapestry revealing its true intention and meaning when viewed as a whole.¹⁰³ The constitutional norm in question is but one part of the jigsaw that is the constitution. This approach seeks to avoid conflicting constitutional norms that may arise when interpreting a norm solely in isolation. Instead, if there are two apparently conflicting constitutional norms, a harmonious interpretation seeks to resolve this conflict by reaching an understanding of the constitution that mediates between the conflicting norms.

Conflicts between constitutional norms may also be resolved by identifying a hierarchy of norms within the constitution itself.¹⁰⁴ This approach does not consider every norm contained within a constitution to be of equal importance, but instead identifies those norms which are most important, accords them the requisite position of hierarchy, and resolves conflicts between norms in favour of the higher norm. Constitutional norms may be identified as higher than others by an explicit indication in the text that accords them this superiority, or through a process of interpretation by the judiciary.¹⁰⁵ A hierarchy of constitutional norms may be invoked to resolve conflicts between different constitutional rights with some rights identified as more important and, consequently, ‘trumping’ others in certain situations.¹⁰⁶ Thus, bearing this in mind, how does one resolve a conflict between norms when one norm explicitly states that it must be interpreted in isolation, thereby excluding the possibility of harmonious interpretation? Is this requirement of interpretive isolation also a claim to hierarchal superiority? This question is particularly relevant when it involves constitutional emergency powers that permit the suspension of other constitutional norms.

¹⁰¹ *GTLS*, 153–55.

¹⁰² *GTLS*, 402.

¹⁰³ Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution*, 3rd edn (Lexis Nexis, 1994) ci–civ.

¹⁰⁴ *ibid*, civ–cv.

¹⁰⁵ *ibid*, cvi–cvii.

¹⁰⁶ See, for example, *The People v Shaw* [1982] IR 1 where the Irish Supreme Court held that the right to life of a victim trumped the right to liberty of an individual who was suspected to have kidnapped her and was detained by the police longer than lawfully permitted in order to extract a confession as to her whereabouts. An express hierarchy of constitutional rights was acknowledged by Kenny J in this case. See also Hogan and Whyte, *ibid*.

When dealing with a constitutional norm that enables a state of emergency, one could potentially resolve any possible conflict of norms by arguing that the other norms are rendered conditional by the constitutional norm that enables a state of emergency. In other words, one ought to interpret every right or constitutional conferral of power as applicable only when a state of normalcy exists. If this is the case, then there is no conflict as the other norms are not applicable in a period of emergency. In effect, the constitutional norm that enables a state of emergency supersedes all other constitutional norms. However, according emergency powers a position of constitutional hierarchy vindicates Carl Schmitt, or at the very least, makes the legal order vulnerable to the Schmittian Challenge by reducing the constitution to a 'blank-cheque statute' in order to cling on to this thread of legality. Conversely, recognising a hierarchy of norms within a constitution is to argue instead that it gives rise to the potential for 'unconstitutional constitutional norms' or an interpretation of constitutional norms that is unconstitutional. This idea can assist in removing the state of emergency from its apparent constitutional apex and establishing the primacy of judicial review as a necessary control on the decision to declare a state of emergency in order to conceptualise it as validated by the legal order and successfully confront the Schmittian Challenge.

Unconstitutional Constitutional Norms: The Case for Judicial Review

The idea of unconstitutional constitutional norms appears, at first instance, to be oxymoronic. If a norm is enumerated in a constitution, then it is, axiomatically, a constitutional norm and therefore constitutional. Notwithstanding this, the concept of an unconstitutional norm has been approached by supreme and constitutional courts in a number of jurisdictions.¹⁰⁷ In order to identify whether unconstitutional constitutional norms or amendments may be possible, Rory O'Connell identifies four factors that need to be considered: (i) What is the amending procedure provided in the constitution? (ii) Does the constitution explicitly state that some provisions cannot be amended? (iii) Is there an express provision that amendments may be subject to judicial review? (iv) Does the constitution explicitly state that some provisions are hierarchically superior to others?¹⁰⁸

¹⁰⁷ For an analysis of unconstitutional constitutional norms, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017); Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 *Journal of Civil Liberties* 48; Jacobson (n 25); Aileen Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012); Richard Stith, 'Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court' (1996) 11 *American University International Law Review* 47.

¹⁰⁸ O'Connell, *ibid*, 52.

In the German and Indian constitutions, for example, there exists a clear hierarchy of norms within the constitution itself.¹⁰⁹ Other constitutions contain what are termed ‘eternity clauses’—provisions that are stated to be unamendable and therefore ‘eternal’.¹¹⁰ If another constitutional norm conflicts with this higher constitutional norm, the conflict ought to be resolved in favour of the higher norm. This may take the form of interpreting the subservient constitutional norm in a manner so that it does not conflict with the higher constitutional norm, or in the most extreme cases, it will involve a declaration of invalidity of the offending constitutional norm. Such a declaration generally comes to light in instances involving constitutional amendments, as opposed to norms that have existed in a constitution since its inception; however, there is no conceptual reason why it should only be limited to amendments. Instead, such constitutional norms may remain unapplied by the courts, or may be cited as inapplicable and in this manner the superior constitutional norm is able to prevail. In this manner, such norms may lose their validity through a process of constitutional desuetude.¹¹¹

The existence of unconstitutional constitutional norms requires that a state’s constitutional or supreme court be empowered to invalidate constitutional amendments or provisions.¹¹² Judicial supremacy is mandated by these higher norms, but also must be constrained by them. Therefore, the exercise of judicial power in contravention of these norms would also be invalid and illegitimate. The issue of unconstitutional constitutional amendments came to the fore in India following Indira Gandhi’s victory in the 1971 election and her party securing two-thirds of the seats in parliament. Parliament enacted the 24th, 25th, 26th and 29th Amendments to restrict judges’ power, and property rights. However, in *Kesavananda v Kerala*¹¹³ the Supreme Court again reviewed the constitutionality of constitutional amendments. Firstly, the court overruled the majority in *Golak Nath* which held that the human rights provisions of the Indian Constitution could not be amended,¹¹⁴ arguing that Article 368 of the Indian Constitution (the amendment

¹⁰⁹ O’Connell, *ibid*; Dietze (n 91) 13–16.

¹¹⁰ Colón-Ríos (n 99) 127.

¹¹¹ See text from nn 126–39 below.

¹¹² In *Golak Nath v Punjab*, AIR [1967] SC 1643, six of the eleven judges of the Indian Supreme Court held that the Indian Constitution does not permit the abridgment of rights, even by a constitutional amendment. The Constitution gives such rights a place of prominence within the constitution itself, ie that a hierarchy of norms could be identified within the constitution. Germany’s constitution or Basic Law (*Grundgesetz*) was initially passed as a transitory document in 1949; however, withstanding the test of time, the Basic Law has remained in force and taken on the characteristics of a fully-fledged constitution. Art 1 of the Basic Law accords dignity a special place in the constitutional order, requiring all state authority to respect. Art 20 further declares the state as founded on popular sovereignty, the rule of law and separation of powers. Art 79 precludes the amendment of Arts 1 and 20, and also prohibits amendment of the federal nature of the German state. To date, the German Constitutional Court has not yet invalidated an amendment to the Constitution, or declared a constitutional norm invalid, yet the prospect remains that it does have the power to do so. See Donald P Konners, ‘German Constitutionalism: A Prolegomenon’ (1991) 40 *Emory Law Journal* 837, 837.

¹¹³ AIR [1973] SC 1461.

¹¹⁴ See n 112 above.

article) permitted the amendment of any part of the Constitution. However, the Court instead homed in on the concept of ‘amendment’, declaring that Parliament could only amend the Constitution and not abolish its essential features.¹¹⁵ Some judges identified these essential features based on the fundamental values identified in the Indian Constitution. The six dissenting judges, however, argued that all parts of the Constitution were of the same hierarchy and therefore none could be given priority over others.¹¹⁶

The clash between Gandhi and the Supreme Court came to a head in 1975. In June 1975 the High Court declared Gandhi’s victory in the 1971 election invalid due to the corrupt practices she and her party were found to have engaged in. Following this, Gandhi’s Parliament passed the 38th Amendment, which provided that any decision to declare an emergency under India’s constitution was unreviewable by the courts, and the 39th Amendment, which retrospectively altered the laws under which Gandhi was convicted of committing election offences.¹¹⁷ Yet again, however, the Supreme Court struck down a constitutional amendment, this time the 39th Amendment on the grounds that precluding judicial review of electoral matters would render the concept of free and fair elections a myth.¹¹⁸

Once again, Gandhi responded with another constitutional amendment—the 42nd Amendment—which O’Connell describes as ‘a war against the judiciary’.¹¹⁹ This Amendment declared Parliament’s constituent power to be absolute, asserted the superiority of legislation implementing directive policies over fundamental rights, and restricted the Court’s range of remedies and actions. In response to this, the Supreme Court held in *Minerva Mills* that:

Since the Constitution had conferred a limited amending power on Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed.¹²⁰

The Indian experience of unconstitutional constitutional amendments illustrates how the amendment power has a close relation to the constituent power—the power that posits or founds the constitution in the first instance—yet the amendment power must still be conceptualised as a constituted power. The Indian approach is thus to state that an unlimited amendment power amounts to a claim for the constituent power and, consequently, such an interpretation would reduce the constitution to what Schmitt would term a ‘blank cheque statute’. Consequently, the Indian Supreme Court found that the Indian Constitution did not prescribe an unlimited amending power. Indeed, it is debatable whether such power can actually be prescribed by law as such a power would, in reality, be the

¹¹⁵ O’Connell (n 107) 69.

¹¹⁶ *ibid.*, 70.

¹¹⁷ *ibid.*, 70–71.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, 71.

¹²⁰ *Minerva Mills* AIR [1980] SC 1789.

constituent power—the powers constituted by the Constitution cannot reach or claim for a power that is beyond them. Therefore, the power to amend the Indian Constitution through the process prescribed by it is a constituted power. In this manner, the Indian Supreme Court essentially recognised the argument made by Schmitt that a true constitution cannot enumerate a power for it to be radically altered into a fundamentally different constitutional order.¹²¹

The Permanent State of Emergency as an Unconstitutional Constitutional Amendment

As established in chapter one, a state of emergency should, ideally, be a reactive or defensive mechanism. Its justification rests in the fact that it is temporary; required to restore normalcy and therefore negating its own necessity. A state of emergency should therefore be temporary and non-transformative.¹²² Carl Schmitt's concept of sovereign dictatorship is not justified on the grounds of restoring normalcy, however; it is permanent. It is seen as always being needed and, as such, is not defensive but transformative. Even if the constitutional order established creates, for example, a parliamentary democracy based on a separation of powers, the constituent power possessed by the sovereign stands in the shadows, waiting to be revealed in the moment of exception. Relatedly, the communist dictatorship of the proletariat is, like commissarial dictatorship, envisaged to be temporary, but rather than restoring the prior status quo, its goal is to usher in a new communist utopian conception of society.¹²³ It is temporary, but transformative. The question this raises is the nature of the dictatorial power created by the state of exception and its relation to the intention of the dictator. If the form of the dictatorial regime and power invested in this office are identical, does the *raison d'être* of the dictatorship make a difference to its relationship with the pre-existing legal order? Is that pre-existing legal order or the norms contained therein still valid? Must we look to the intention of those deciding that an emergency exists and still exists in order to assess whether a declared state of emergency is defensive or revolutionary? Is the only answer to this question that one ought to look at the intention of whoever has declared a state of emergency?

As stated previously, Kelsen's Pure Theory of law views the legal order as a system of norms validated by higher norms, all made valid by presupposing

¹²¹ See text to n 101 above.

¹²² Thus, McCormick argues that the change in Schmitt's thoughts between writing *The Dictator* and writing *Political Theology* was a change from commissarial to sovereign dictatorship. McCormick (n 53) 163; Rossiter also insists that the temporariness of a state of emergency is necessary, stating that: 'It is the crisis alone which makes the dictatorship constitutional; the end of the crisis makes its continued existence unconstitutional': Rossiter (n 29) 306.

¹²³ McCormick (n 53) 165–67.

the validity of the basic norm. To state that a norm's validity is imputed from a higher norm is not the entire picture, however. Kelsen asserts that the relationship between the validity and effectiveness—whether a norm is actually followed or not—of a legal norm is one of the most difficult problems in positivist legal theory.¹²⁴ Two diametrically opposed streams of thought on this issue can be identified: first, that which asserts a norm is valid, regardless of its efficacy; and second, that which holds that a norm is not valid unless it is effective.¹²⁵ Kelsen rejects the first argument—that a norm is valid regardless of its efficacy—as this ignores the observed reality that a legal norm, and, indeed, a legal order as a whole, ceases to be effective to such an extent that they no longer actually exist.¹²⁶ In such instances it is wrong to say that such norms are still valid. The second position—that validity and effectiveness are identical—is also problematic as it falls into the trap of confusing the 'is' with the 'ought'¹²⁷ and conceptualises norms as true or false, rather than valid or invalid.¹²⁸ As a result, Kelsen settles upon a medium between these two conflicting positions, arguing that effectiveness is a necessary condition of validity, but it is not identical to validity.¹²⁹ Deriving from this, Kelsen recognises the concept of desuetude or *desuetudo*: that a norm can become invalidated if it falls into disuse and is ineffective for a substantial period of time.¹³⁰

Constitutional Desuetude

Kelsen describes desuetude as a 'negative custom' surrounding a norm. While the norm in question exists in the sense that it is enumerated in the manner in which the legal order stipulates that a valid norm has been created, it has not been exercised for an extended period of time. In this regard, the norm in question is lacking the modicum of effectiveness necessary to ensure its validity. Desuetude is generally concerned with norms contained in statutes, particularly in civil legal systems; however, constitutional theorists have begun to explore the concept of desuetude in the context of constitutional norms. Richard Albert, for example, argues that desuetude requires three elements: (1) sustained (2) conscious non-use, and (3) political repudiation are necessary in order to render a rule desuetudinal.¹³¹ Albert then applies this theory to the British

¹²⁴ *PTL*, 211.

¹²⁵ Raz (n 6) 801.

¹²⁶ *PTL*, 211.

¹²⁷ *ibid.*, 212.

¹²⁸ *ibid.*

¹²⁹ *ibid.*, 211–14; *GTLS*, 122.

¹³⁰ *GTLS*, 119–20.

¹³¹ Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 *American Journal of Comparative Law* 641, 651.

powers of disallowance and reservation which are entrenched in the Canadian Constitution to argue that they evince evidence of desuetude.¹³²

Non-use of a constitutional power is also a key indicator of what Adrian Vermeule describes as ‘constitutional atrophy’.¹³³ Vermeule argues that certain constitutional provisions may, due to their disuse over time, lose their political legitimacy such that a future attempt to revive the power amounts to ‘an illegitimate attempt to change the rules of the political game’.¹³⁴ Albert argues that the vehicle for constitutional amendment by desuetude is custom. Custom or ‘convention’ is also a key factor in Vermeule’s argument regarding the atrophy of constitutional powers. A political actor may fail to exercise a power out of fear that they will face a political backlash. Vermeule gives the example of the Crown veto over legislation in the UK as an illustration of this point with the last veto over legislation exercised by Queen Anne in 1708.¹³⁵ Today, it is unimaginable that the Crown would now veto a piece of legislation. The distinction between atrophy and desuetude appears to be this relation between validity and effectiveness, with Vermeule stating that constitutional powers that have atrophied lose their legitimacy; he does not, however, go so far as to say they lose their legal validity. This may be due to the fact that desuetude is not recognised in many common law legal systems, owing to the fact that ineffective legal norms can often be repealed or amended by a simple act of parliament.¹³⁶ Albert, in contrast, argues that constitutions may be amended through desuetude, which would suggest that the prior existing constitutional norms that have been amended have lost their validity. However, he uses the term ‘political validity’ as distinct from legal validity, which again may be symptomatic of the contested status of desuetude in the legal orders from which his examples are drawn.¹³⁷ In this regard, I argue that such norms do not merely lose their political validity but, in line with Kelsen’s theory on the relation between the validity and effectiveness of legal norms, their legal validity too. Albert further contends that constitutional desuetude is only possible in jurisdictions covered by

¹³² *ibid*, 656–69.

¹³³ Adrian Vermeule, ‘The Atrophy of Constitutional Powers’ (2012) 32 *OJLS* 421.

¹³⁴ *ibid*, 423.

¹³⁵ *ibid*, 432.

¹³⁶ Moreover, the fact that a statute can be simply repealed means that British constitutional law is reluctant to label many constitutional changes as permanent. Thus, for example, where statute supersedes prerogative powers, these powers are considered to go into ‘abeyance’ and thus the possibility of their restoration remains. See *De Keyser’s Royal Hotel* [1920] AC 508, 539–40; Robert Craig, ‘Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum’ (2016) 79 *MLR* 1019; Gavin Phillipson, ‘A Dive into Constitutional Waters: Article 50, the Prerogative and Parliament’ (2016) 79 *MLR* 1064. While a detailed analysis of the abeyance of prerogative powers is beyond the scope of this book, the relationship between the validity and effectiveness of legal norms would, I suggest, cast doubt over whether or not the prerogative power in question is actually in abeyance or whether it is actually invalid. Rather, much would depend upon the circumstances surrounding repeal of the legislation in question that has forced the prerogative into abeyance which would raise questions as to the validity of the aforementioned prerogative power and whether it has been repudiated.

¹³⁷ Albert (n 131) 654.

a written constitution.¹³⁸ Moreover, while Albert and Vermeule focus mostly on the constitutional powers of specific actors—ie dynamic constitutional norms—there is no reason why the idea of constitutional desuetude or atrophy cannot apply to other static constitutional norms, eg constitutional rights.¹³⁹ In addition, Vermeule’s theory of constitutional atrophy applies to both written and unwritten constitutions. I will return to this issue in chapter six when discussing how unwritten constitutional orders such as that of the UK which proclaim the sovereignty of Parliament confront the Schmittian challenge and whether norms in the British Constitution can be identified as falling into desuetude.¹⁴⁰

The Permanent State of Emergency and the Validity and Effectiveness of Constitutional Norms

This potential for norms to lose their validity through desuetude establishes the primacy of ‘temporariness’ in order to ensure a state of emergency is contained within the legal order and Kelsen’s Identity Thesis is maintained. A declaration of a state of emergency as prescribed by the constitution has the potential to suspend certain constitutional provisions by rendering them temporarily ineffective. Thus, if the state of emergency has suspended the writ of habeas corpus, one cannot petition the court for relief using this writ. A situation may arise, however, where such norms have been suspended perpetually and have not been applicable for years or even decades. If a norm or norms within a constitution are by and large ineffective, and have been so for a prolonged period of time, it would be disingenuous to describe them as norms as the ‘ought’ that they prescribe is not being obeyed. According to Raz:

Laws guide human behaviour. ... A law, the existence of which is unknown, or that is never acted on by the police nor enforced by judges or juries does not guide the behaviour of most people, not even that of law-abiding people. There seems, therefore, to be no reason to regard it as part of the legal system, since its complete inefficacy has deprived it of the main characteristic of law, that of guiding behaviour.¹⁴¹

The constitutional norms perpetually suspended by the permanent emergency lack the necessary element of efficacy required for a norm to be valid. This has stemmed from the factual reality that the emergency has not fulfilled its raison

¹³⁸ *ibid*, 650.

¹³⁹ The ineffectiveness of such norms may be more difficult, however, due to their status as ‘principles’ rather than hard-and-fast rules. See text to nn 126–30 in ch 6 regarding Dworkin’s distinction between rules and principles and the impact that the Schmittian Challenge has on conceptualising rights as principles.

¹⁴⁰ See text to nn 83–172 in ch 6.

¹⁴¹ Raz (n 6) 802.

d'être; that it is a temporary aberration from the status quo. A declaration of a state of emergency that has the potential to render certain constitutional norms ineffective and create a permanent state of emergency can render constitutional norms permanently ineffective and therefore invalid. The constitution, therefore, has been changed in a manner inconsistent with the ordinary amendment procedure. If there is no possibility for judicial review of the decision to declare a state of emergency, then there is no reason in law to assume that it will be temporary. It is only by the possibility of this decision being subject to scrutiny that one can consider it to be potentially temporary. To recap, the assessment of an issue that acts as a limit on the power of a decision-maker, if it truly is to be a limit on their power, cannot be exclusively assessed by the decision-maker and consequently is amenable to judicial review. Thus, if the existence of a state of emergency is wholly at the discretion of those who declared it, then the requirement that it be temporary is not a legal one.

The logical question that flows from this issue is assessing the permanence of a state of emergency. At what stage does the derogation or suspension of a legal norm impact upon its efficacy to such an extent that it loses its validity? Like the concept of emergency itself, 'temporariness' is a term that eludes precise definition. When an emergency is declared, and constitutional norms are suspended or derogated from, they arguably become immediately ineffective but one cannot say that these norms have immediately lost their validity. This ineffectiveness can, however, be explained initially by a harmonious interpretation between the emergency power and the suspended constitutional norm by interpreting the suspended norms as 'one ought to obey, but not during a period of emergency'. This harmonious interpretation only works, however, upon the assumption of a separation between normalcy and emergency, with restoration of normalcy being the *raison d'être* of the emergency. Without this assumption, harmonious interpretation fails and a conflict between the two constitutional norms remains. It would be disingenuous to resolve the conflict in favour of the perpetually suspended norm as it is a norm that is clearly not being obeyed. If one resolves it in favour of the emergency constitutional norm, then one is back to the position of the emergency constitutional power being used to invalidate another constitutional norm. The issue this points to therefore is not when an emergency becomes permanent, but whether there is a *possibility* of a permanent emergency coming into existence under the constitutional structure. It is a thought experiment designed to highlight the difficulties and consequences of perpetuating an emergency at the discretion of a political actor. This thought experiment shows that the decision to declare and perpetuate a state of emergency must be subject to the rule of law and judicial review in order to permit a harmonious interpretation of the constitution. An interpretation of a constitutional provision that precludes judicial review of the existence of a state of emergency has the potential to permit a permanent state of emergency as the reasons pertaining to the existence of a state of emergency do not have to be substantially justified in law.

The problem of the perpetuation of a state of emergency even when judicial review is available can be solved, I contend, by arguing that each time the emergency is reviewed by the judiciary, it is still done so on the grounds that it is temporary and with a view to bringing it to an end. The suspended norms still exert their existence in the assessment process, with the existence of the emergency being referred back to the necessity of such powers, and consequently the necessity of derogation from the suspended norms.¹⁴² In contrast, when the existence and perpetuation of an emergency is at the sole discretion of a body, the decision is justified on the grounds of authority, not on a reasonable calculation of the costs and opportunity costs of declaring an emergency, ie one cannot say that it was done in accordance with the rule of law by reference back to the suspended norms and their influence.

Permanent States of Emergency and the Repudiation of Constitutional Norms

Albert argues that constitutional desuetude can be distinguished by dormancy. A dormant constitutional provision is one that has not been used in some time; however, it has not been subjected to the public repudiation that the norm subject to constitutional desuetude has been.¹⁴³ A dormant constitutional norm, therefore, does not suffer from the same illegitimacy that the desuetudinal one does and so its revival is perfectly legitimate. With regards to constitutional norms indefinitely suspended as a result of a permanent state of emergency, it may be argued that these norms are not potentially desuetudinal but merely dormant, waiting for the right conditions to arise whereby they can be revived. The difficulty, however, with this is that it may fall prey to the Schmittian challenge by once again stretching the concept of legality so broadly as to legitimise any action of the state from a legal perspective. One making such an argument would do well to heed Ellen Kennedy's assertion that to state that an individual has rights even though they cannot enforce them is to fall into the sinister trap laid by Schmitt.¹⁴⁴

In the context of emergency powers, it is highly unlikely that suspended constitutional norms will be expressly repudiated in the sense that, for example, political actors or the courts state that these norms no longer have a value. This argument, however, ignores the fact that a declaration of a state of emergency *is* an express assertion that the impugned constitutional norms in question should not be followed; that they are, at best inappropriate for the exceptional conditions facing the state, or, at worst, that they counterproductive and jeopardising the security

¹⁴² See, however, ch 5 for a discussion regarding the contention that such review may, however, be carried out in such a deferential fashion that it acts as a mere cloak of legality, thus doing more harm than good to the rule of law.

¹⁴³ Albert (n 131) 675–77.

¹⁴⁴ Kennedy (n 70) 176–178.

of the state. A declaration of a state of emergency therefore *is* a repudiation of the suspended constitutional norms and repeated assertions that the emergency cannot be ended amount to a repeated repudiation of the suspended constitutional norms. In essence, a state of emergency is a declaration that the rules of the game have changed and a renewal of the declaration is a restatement of the fact that the rules of the game have still changed. However, it should also be a declaration that they have only *temporarily* changed. Consequently, temporariness is of paramount importance when assessing whether a permanent state of emergency has caused certain constitutional norms to fall into desuetude.

The Permanent State of Emergency as a Claim for the Constituent Power

In a legal system where the legislature lacks the power to amend the constitution, a statute that attempts to do so will be invalid. It is invalid, not because it is in conflict with a higher normative value such as dignity, but because it lacks the power to act in the way it has attempted to act, ie it is *ultra vires* the powers given to the legislature by the constitution. It is attempting to do something that the constitution has not empowered it to do.¹⁴⁵ While this statement is incredibly rudimentary, it is of vital importance as it applies in instances where the legislature in a state may not necessarily intend to amend the constitution explicitly but the statute they pass in actuality has this effect; or, in instances where an interpretation of the constitution or a constitutional norm proffered would have the effect of transferring the power to amend the constitution from one branch to another. In other words, it would be an attempt by the legislature to claim the amendment power that may not be prescribed to it under the constitution.

As noted above, Schmitt's theory of sovereignty and the decision to declare a state of exception can be viewed as an expression of, or a claim for, the constituent power that founds the constitution. Andreas Kalyvas discusses the merging of these conceptions of sovereignty and constituent power, arguing that sovereignty's traditional understanding as command-based authority has had a negative effect on the normative value of sovereignty in political and legal science. Instead,

¹⁴⁵ Thus, if the Irish Oireachtas attempted to amend the Constitution without a referendum, such a statute would be invalid on the grounds that it encroaches on the power of the people to amend the Constitution under Art 46 of the Irish Constitution. Indeed, in his dissenting judgment in *State (Ryan) v Lennon* [1935] 1 IR 170, Kennedy CJ argued that even though Art 50 of the Constitution of Saorstát Éireann gave the power to amend the Constitution via ordinary legislation to the Oireachtas within the first eight years of the Constitution's operation, it was not an unlimited power. Rather, it was subject to the 'ultimate authority of the people'. This was evidenced by that fact that Art 50 contained the words 'subject to the provisions of Article 47' which contained the ordinary amendment procedure by referendum. [1935] 1 IR 170, 213 fn 26. See also Kavanagh (n 107).

Kalyvas suggests that a better understanding of sovereignty is to consider it in terms of constituent power, an understanding he attributes to (amongst others) Carl Schmitt.¹⁴⁶ For Schmitt, sovereignty is not the ultimate ‘coercive power of command’ but is instead the power to found, to posit or constitute, ie a constitutive power.¹⁴⁷ Emmanuel Joseph Sieyès recognised this formulation of the constituent power as ‘the moment of a constitution’s founding and an expression of the essential relation between the people and the state’.¹⁴⁸ Under this understanding, the constituent power determines the constitutional structure. Hence, the constituent power creates the ‘constituted powers’ that derive their validity from the constitution and are exercised through institutions created by the constitution. The constitution thus presupposes the constituent power and Illan Rua Wall argues that Sieyès makes constituent power into the very constitution itself.¹⁴⁹ The constitution, therefore, is an expression of the constituent power.¹⁵⁰

Martin Loughlin argues that Hans Kelsen and others who try to conceptualise a legal order as a closed system of norms ignore this constructive concept of the constituent power.¹⁵¹ According to this ‘normative’ account, what authorises the ‘original constitution’, ie what is the constituent power, cannot be answered through law but can only be presupposed. Again, this is the critique of the Pure Theory of law as only being pure because it ignores the foundational moment, permitting the assumption of a closed system of norms, thus collapsing the concept of legitimacy into the concept of legality.¹⁵² While Schmitt’s conception of the constituent power can be understood as constructive, there is also a tense and ambivalent relation towards the constitutional order by the constituent power that has founded it.¹⁵³ Constituent power therefore is both constructive and destructive.¹⁵⁴ It is constructive in the sense that it posits or creates the new constitutional order; however, it is also potentially destructive too, as it negates

¹⁴⁶ Andreas Kalyvas, ‘Popular Sovereignty, Democracy and the Constituent Power’ (2005) 12 *Constellations* 223, 225.

¹⁴⁷ *ibid.*

¹⁴⁸ Emmanuel-Joseph Sieyès, *What Is the Third Estate?* [1789] <<http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>> accessed 11 August 2017; Illan rua Wall, ‘Notes on an “Open” Constituent Power’ (1 May 2013) available at SSRN: <<http://ssrn.com/abstract=2259008> or <http://dx.doi.org/10.2139/ssrn.2259008>> accessed 7 August 2013, 1.

¹⁴⁹ Illan rua Wall, ‘A Different Constituent Power: Agamben & Tunisia’ (25 November 2011) in *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press/Routledge, 2012) available at SSRN: <http://ssrn.com/abstract=2090896> (accessed 7 August 2017) 15.

¹⁵⁰ *ibid.*

¹⁵¹ Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 13 *European Journal of Political Theory* 218, 221–23.

¹⁵² Kelsen rejects the notion of a people or *Volk* existing prior to the legal order and possessing the constituent power as it is only by the ratification of the constitution and presupposition of the *Grundnorm* that can one recognise the *Volk*. This is the so-called ‘paradoxical self-creation’ at the heart of the constituted order. See generally Loughlin and Walker (n 34); Illan rua Wall, *Human Rights and Constituent Power* (Routledge, 2012) 79.

¹⁵³ Kalyvas (n 146) 227.

¹⁵⁴ Wall (n 148) 2.

or destroys the established interests of the prior order.¹⁵⁵ For some theorists of constituent power, this potential for destruction remains, even when the new order is established. The constituent power is a ‘moment without end’¹⁵⁶ and thus constituent power has ‘an open sense of temporality’.¹⁵⁷

In other words, the constituent power under Schmitt’s ‘open’ formulation is not subservient to the constitutional order it has founded. It existed prior to, or outside of, any legal norm and cannot therefore be subsumed within one. The spectre of the initial decision haunts the order it has established and as ‘[s]overeign is he who decides upon the exception’, Schmitt intimates a clear link between constituent power and the state of emergency. Schmitt appears to suggest that deciding when an exception exists indicates where sovereignty and therefore the constituent power lies. The two distinct decisions to declare and act in a state of exception are therefore conflated by Schmitt, which he considers to amount to an expression of the constituent power. Under this understanding, there is no possibility that law can control the decision as to the existence of a state of emergency as it is the exercise of the constituent power which lies beyond the law.

The ‘tense and ambivalent’ relation between constituent power and the constitution has been termed ‘the paradox of constitutionalism’: ‘that government power is generated from the people while at the same time must be divided and constrained through institutional forms’.¹⁵⁸ Conceptualisations of constituent power often stress a fundamental link between constituent power and the people, with constituent power being invoked as a legitimating principle of authority emerging from the people from the ‘bottom up’ in contrast to the ‘divine right of kings’ which legitimated monarchies.¹⁵⁹ Thus, Sieyès’ conception of constituent power is aimed at liberating the potential of the Third Estate in France, arming it with the political philosophy necessary to engage in nation building.¹⁶⁰ For some, constituent power therefore has become bound to the idea of democracy, with Antonio Negri boldly proclaiming that: ‘When we talk about constituent power we are talking about democracy.’¹⁶¹ As noted above, Schmitt’s invocation of the *Volk* has been seen by some to be him preferring democracy over the rule of law. However, I also argued that Schmitt can only be considered democratic in the sense that he considers the legitimacy of the state to derive from the people or *Volk* as distinct from God. Consequently, I contended that what is key is that, for

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*; Loughlin (n 151) 227–31. Wall also attributes ‘open’ constituent power to Giorgio Agamben and Antonio Negri. See Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans Maurizia Boscagli (University of Minnesota Press, 1999); Kevin Attell, ‘Potentiality, Actuality, Constituent Power’ (2009) 39 *Contemporary Italian Thought* 35. See text to nn 153–72 in ch 6 for a discussion of ‘open’ ‘relational’ constituent power in the context of the UK.

¹⁵⁸ Martin Loughlin and Neil Walker, ‘Introduction’ in Loughlin and Walker (n 34) 1.

¹⁵⁹ Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 223–24.

¹⁶⁰ Sieyès (n 148).

¹⁶¹ Negri (n 157).

Schmitt, constitutionalism can only be realised and made possible by a wilful exercise of political power.¹⁶²

While Kelsen's theory has been criticised for beginning only at the point at which the legal order has already been established, the idea of constituent power can, I contend, nevertheless help the Identity Thesis confront the Schmittian challenge to which Kelsen's theory is potentially vulnerable. Constituent power is a necessary concept in order to demonstrate the limits of the constituted order and, by extension, the emergency powers contained therein. Thus, O'Donoghue argues that the 'pivot of constituent and constituted powers underpins constitutional orders'.¹⁶³ In this regard, formal constitutional amendment powers must be considered to be constituted powers. This is clear from the intricate procedures enumerated by constitutions that regulate the amendment procedure. Even in constitutions that can be amended by plebiscite of the people, 'the people' in such form are not exercising constituent power. Rather, both the people and the manner in which they speak are defined or constituted by the constitution. However, when changes are wrought to the constitutional order beyond that envisaged by the constitution, or the constitutional order altered so radically that it no longer resembles the initial order envisaged by the constitution, these changes cannot be explained through Kelsen's Identity Thesis without resorting to simply the dynamic understanding of the constitution outlined above; an argument that, I contend, is vulnerable to the Schmittian Challenge. Rather, this must be explained instead as amounting to a *claim* for the constituent power—a power beyond the law. It is only by recognising this possibility that the Identity Thesis can be saved from the Schmittian Challenge. However, by recognising this as a 'claim', the Identity Thesis mandates that it must also be rejected as it is not for a constitutional court, or, indeed, any constituted organ, to declare whether or not a claim for the constituent power has been successful. In this regard, the idea of 'constituent power' guides and shapes the evolution of the constitution in stipulating what must be considered 'constituted powers'. Consequently, it must be considered as revealing the limits of these powers so as to avoid vindicating the Schmittian Challenge.

As stated previously, Schmitt's infamous statement that '[s]overeign is he who decides upon the exception' is actually a conflation of two separate decisions: sovereign is he who both decides as to whether an exception exists and what ought to be done in order to confront the exception.¹⁶⁴ Consequently, I contend that Schmitt's merging of the constituent power with the exception is therefore dependent upon these two questions being decided by the same party. If the constitutional emergency provisions apply the principle of heteroinvestiture¹⁶⁵ as applied by the Roman dictatorship and separate these two questions, then the emergency

¹⁶² Scheuerman (n 32) 143.

¹⁶³ O'Donoghue (n 32) 56.

¹⁶⁴ See McCormick (n 54).

¹⁶⁵ See text to n 48 in ch 1.

provisions do not equate to Schmitt's 'sovereign', ie they are not a manifestation of the constituent power. Schmitt may have argued on this point that even if an emergency provision were to apply the principle of heteroinvestiture, nevertheless in a period of true existential crisis where there is no possibility of following the legal protocols enumerated in the constitution, then the sovereign would reveal itself and decide accordingly. However, such a criticism would not only be valid against a constitution that recognises a separation of normalcy and emergency, but also one that also professes that 'the same law in war applies in peace'.

To reiterate, a permanent state of emergency can amount to an amendment of the constitution by rendering the impinged norms in question invalid by permanently removing their effectiveness. As effectiveness is a necessary condition of validity, one cannot say that the impinged norms are still valid. An argument, therefore, that permanent emergencies are possible under constitutional emergency provisions must also contend with the concept of a declaration of a state of emergency acting as a proxy-constitutional amendment. It is not a power, however, that is a limited amendment power such as that envisaged by the Indian Supreme Court.¹⁶⁶ Nor is it an amendment power envisaged by the constituent power as it is one that conflicts with the express constitutional amendment protocol enumerated in the constitution, ie it is not a constituted power. A claim grounded in law that the constitution permits one body the exclusive right to assess the existence of a state of emergency must fail, precisely because it requires one to reach for the constituent power to legitimate it, ie it requires one to argue a Schmittian understanding of the state of exception in a court. It requires that emergencies be potentially permanent and that such emergencies therefore are not reactive/defensive mechanisms; that is to say, they are not commissarial dictatorships, but amount to sovereign dictatorships. Such a claim, by excluding judicial review and reaching for the constituent power, claims a power that lies beyond the law and therefore such an argument cannot be grounded in law. Such an argument therefore must be rejected.

Constituent Power and the State of Emergency: The Case of Ireland

A concrete example of this possibility can be seen from the provision of emergency powers in the Irish Constitution. Enacted in 1937, Ireland's Constitution provides for emergency powers as follows:

Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the

¹⁶⁶ See *Minerva Mills* (n 120); O'Connell (n 107) 71.

public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law.¹⁶⁷

With the words ‘Nothing in this Constitution’, the Oireachtas—the Irish legislature—is almost given carte blanche not only to suspend basic fundamental rights but theoretically also to revise the operation of the separation of powers in Ireland, and in essence rewrite the Constitution, eg by enlarging the government and decreasing the powers of the president.¹⁶⁸ Since the Twenty-First Amendment of the Constitution Act 2001, however, the Oireachtas may not introduce the death penalty even during a state of emergency. To date, an emergency has been declared in Ireland twice. The first was declared on 2 September 1939 following the outbreak of World War II. This lasted until September 1976 with the government on numerous occasions refusing to lift the declaration for precautionary reasons.¹⁶⁹ On the day the emergency was lifted in September 1976, another emergency was immediately declared arising out of the escalation of hostilities in Northern Ireland. This was to last until February 1995, bringing the 56-year long emergency to an end. As the Irish Constitution entered into force in 1937, the state has therefore been in a *de jure* state of emergency for longer than it has been in a state of normalcy.

Despite a state of emergency existing in Ireland from 1939 to 1995, the impact of this entrenched emergency on the legal order was minimal. Once the Emergency Powers Act 1939—the principal legislation enacted in lieu of this declaration of emergency—was allowed to lapse on 2 September 1946, no legislation derived its validity from a declaration of a state of emergency, notwithstanding the repeated refusal by successive governments to repeal the state of emergency in subsequent decades.¹⁷⁰ The result was that even though the Oireachtas had the capacity to pass legislation that would be incompatible with the ordinary provisions of the Constitution, it did not do so. The resultant legal order during the state of emergency from 1946 to September 1976 was therefore identical to how the legal order would have existed were the state in a period of normalcy. The Constitution and

¹⁶⁷ Art 28.3.3° continues: ‘In this sub-section “time of war” includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and “time of war or armed rebellion” includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.’ For analysis of the drafting and amendment of Art 28.3.3°, see Alan Greene, ‘The Historical Evolution of Article 28.3.3° of the Irish Constitution’ (2012) 47 *Irish Jurist* 117.

¹⁶⁸ James Casey, *Constitutional Law in Ireland*, 3rd edn (Roundhall Sweet & Maxwell, 2000) 181; Alan Greene, ‘Declaring a State of Emergency under Article 28.3.3° of the Irish Constitution: A Purely Political Question?’ in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury, 2012).

¹⁶⁹ Greene (n 167) 139–40.

¹⁷⁰ Greene (n 167) 140.

all the norms contained therein, therefore, were 'by and large effective' with every provision enforceable at all times. One could not say, therefore, during Ireland's perpetual emergency that certain constitutional norms were invalidated as they were rendered ineffective by the emergency. This is not to say, however, that the theoretical state of emergency posed no threat at all to the Irish constitutional order. Rather, the perpetuation of the state of emergency indicates the weakness of the quarantining effect of Article 28.3.3°, notwithstanding the comparatively narrow conditions of war, armed conflict or armed rebellion which the Irish Constitution states should exist for an emergency to be declared. There is no mention of natural disaster or other 'public emergencies threatening the life of the nation'. In the Irish context, scrutiny of the existence of a state of emergency by the political branches alone is a weak control on such emergency powers, potentially setting a precedent for a more malevolent government to take advantage of.

If Article 28.3.3° is interpreted so as to permit suspension of constitutional norms and to preclude judicial review of the decision to declare an emergency, then such an interpretation cannot be grounded in law to legitimise it. While initially this interpretation could be explained by the dynamic nature of legal systems—by conceptualising Article 28.3.3° as a norm-creating power conferred on the Oireachtas—if such emergency norms were created that rendered other constitutional norms ineffective for the duration of the emergency, this argument would lose its legitimacy if the emergency became permanent. This would result in the perpetual suspension of constitutional norms, rendering them perpetually ineffective and depriving them of their validity, amounting to a proxy-constitutional amendment. This is irreconcilable with a conception of the state as identical with the legal order. Such an interpretation, by attempting to argue that it was in conformance with the Constitution, would reduce the Irish Constitution to 'a blank cheque statute'. This is not just repugnant to even a formalist conception of the rule of law, it is antithetical to it. It is a claim, not for a power that is conferred on the Oireachtas by the Constitution but a claim for the power that conceived the Oireachtas in the first instance. It would permit the invalidation of constitutional norms by proxy and in a manner not foreseen by the constitutional drafters.

Consequently, this interpretation of Article 28.3.3° would, in actuality, be an affirmation of Carl Schmitt's concept of sovereignty, or a claim to the constituent power that founded the Constitution; a claim for a power that lies beyond the legal order exists beyond the state that has a 'tense and ambivalent relation' with the order that it founded.¹⁷¹ It would therefore mean that the state is not identical to the legal order. This power, like Schmitt's sovereign, would then reveal itself in a time of emergency. Legality could only be clung on to by harkening back to the dynamic nature of Article 28.3.3°, emptying the discrete enumerated conditions of war, armed rebellion or armed conflict threatening the vital interests of the state of any real meaning. Consequently, conceptualising the powers conferred under

¹⁷¹ Kalyvas (n 146) 227.

Article 28.3.3° as ‘temporary’ would be incorrect. Article 28.3.3°, therefore, can be conceptualised as a legal norm-creating power only if judicial review of the decision to declare a state of emergency is available. Only in this way can the requirement that an emergency be temporary be a legal one, and only if this *raison d’être* of Article 28.3.3° is put on a legal foothold can it prevent a commissarial dictatorship transforming in to a revolutionary, transformative sovereign dictatorship.

Conclusion

If an emergency is intended to restore normalcy once a particular severity threshold has been reached, as argued in chapter one, then emergency provisions only make sense in law if they are interpreted as permitting temporary derogations from constitutional norms. There must therefore be some mechanism of reviewing the decision to declare a state of emergency in order to ensure it fulfils its *raison d’être*. A legalistic argument attempting to preclude judicial review of the state of emergency must fail as it removes the requirement that a state of emergency be a temporary departure from the status quo. With this temporariness not grounded in law, constitutional emergency powers have the capacity to become permanent, thus rendering other constitutional norms ineffective and depriving them of their validity. This argument is, in essence, a claim for the constituent power that has constituted the constitutional order in the first instance. It is a reformulation of the ‘Schmittian Challenge’ to the idea that all state power can be circumscribed by law. For this reason, it must be rejected.