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CONSTITUTIONAL THEORIES OF EMERGENCY POWERS AND THEIR LIMITS: PERSPECTIVES FROM VIETNAM, INDIA AND CANADA

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Abstract

This paper seeks to examine the available constitutional models of theories of emergency powers. Part I of the paper traces the historical origins and the subsequent development of emergency states, drawing lessons from the works of Machiavelli, Schmitt, Rossiter, Rousseau… Part II presents and discusses some of the most important contemporary theories of emergency powers that propose different views and perspectives on the central issue of the attribution and exercise of State powers in times of emergency, i.e., either in the hands of the executive, the legislative or the judicial branch of the state, and why. Part III illustrates the concerns pertaining to emergency powers by looking at examples of three specific countries, namely Vietnam, India and Canada.

Keywords: *emergency powers, constitutional law, Vietnam, India, Canada*

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When an author made a nonchalant remark that "emerging infectious diseases have become emergencies in waiting",[1] little did he know how true his statement would turn out to be. The current pandemic has ignited a resurgence of interest in emergencies and emergency powers. Most democracies have codified their emergency regimes, which legitimizes emergency powers since a society must be equipped to face extreme and urgent challenges. However, the question remains as to whether the existing basic legal and political structures are adequate to tackle an emergency. Constitutional theorists continue to grapple with questions of appropriate conditions of imposition of a state of emergency and how to constrain the emergency powers invoked by the state in addition to the pertinent narrower issue of devolution of emergency powers in a state.

This paper seeks to examine the available constitutional models of theories of emergency powers. Part I of the paper traces the historical origins and the subsequent development of emergency states, drawing lessons from the works of Machiavelli, Schmitt, Rossiter, Rousseau… Part II presents and discusses some of the most important contemporary theories of emergency powers that propose different views and perspectives on the central issue of the attribution and exercise of State powers in times of emergency, i.e., either in the hands of the executive, the legislative or the judicial branch of the state, and why. Part III illustrates the concerns pertaining to emergency powers by looking at examples of three specific countries, namely Vietnam, India and Canada. The diversity of legal regimes existing in these countries affords a wide array of contexts to choose from while addressing and dealing with issues related to emergency powers. The aim of this article is to engage with constitutional theory from three different democratic perspectives, using their experiences to understand constitutional theories of emergency powers in different domains.

1. Emergency regimes: Historical narratives

The features of Roman dictatorship that are "are often regarded as setting the basic guidelines for modern-day constitutional emergency regimes"[2] are a definite precursor to examining the

[1] Hinchliffe S., Bingham N., Allen J., and Carter S. (2017), *Pathological Lives: Disease, Space and Biopolitics*, First Edition, John Wiley & Sons, Ltd, p. 3.

[2] Gross O. (2011), 'Constitutions and Emergency Regimes' in Ginsburg, Tom; Dixon, Rosalind (eds.), *Comparative Constitutional Law*, Edward Elgar Publishing, p. 335.

theories of emergency powers. Not only was the Roman Empire that ruled from 27 BC to 476 AD one of the largest and most powerful in history, but the Roman Republic, that preceded it from 509 BC to 27 BC, was quite important. In addition to being best known for writing *The Prince* published in 1532, Machiavelli "*regards the institution of the Roman dictatorship as one of the major contributors to Rome's greatness*."[3] The Roman Republic often serves as a point of reference today when studying the framework of emergency powers in a country. The use of this reference may be explained by the fact that *"[t]he separation of powers in the Roman Republic [is] much like modern states today*".[4] However, this does not mean that it is "*synonymous with the three branches of legislature, executive and judiciary seen in modern states today*."[5] In the Roman Republic, when there was a state of emergency, powers were concentrated in the executive branch of government.[6] With a contemporary perspective, Rossiter opines, "*[i]n normal times the separation of powers forms a distinct obstruction to arbitrary governmental action [whereas] in abnormal times it may form an insurmountable barrier to decisive emergency action in behalf of the state and its independent existence*."[7]

To speak in Weberian terms, the 'ideal type' of emergency is also characterized by the extraordinary constitutional office of the dictatorship of the Roman Republic.[8] Extraordinary because the dictator was appointed to exercise emergency powers[9] and was then given immense (but not unlimited[10]) powers.[11] Dictators could, for instance, suspend ordinary laws or the fundamental constitutional order, but they could not amend or change it[12] or adopt new legislations, for instance, which is a task that remained in the hands of the Senate. As Rossiter puts it with respect to modern political regimes, the power of the State in crisis must "*be freed from the normal*

3 Gross O. and Ní Aoláin F. (2006), *Law in Times of Crisis: Emergency Powers in Theory and* Practice, Cambridge University Press, p. 35.

4 Greene A. (2018), *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford: Hart Publishing, pp. 4-5.

5 *Ibid*., p. 5.

6 *Ibid*., p. 25.

7 Rossiter C. (1948), *Constitutional Dictatorship*: *Crisis Government in the Modern Democracies*, Princeton University Press, pp. 289-290.

8 Greene A. (2018), *supra* note 4, p. 3.

9 Ackerman B. (2004), 'The Emergency Constitution', 113 *Yale Law Journal* 1029, p. 1046.

10 Lazar N. (2009), *States of Emergency in Liberal Democracies*, Cambridge University Press, p. 128: "he could not himself decide to launch an offensive war."

11 Greene A. (2018), *supra* note 4, p. 27

12 ibid; Gross O. (2011), *supra* note 2, p. 335; Dyzenhaus D. (2006), *The Constitution of Law: Legality in a Time of Emergency*, Cambridge University Press, pp. 37-38.

system of constitutional and legal limitations. One of the basic features of emergency powers is the release of the government from the 'paralysis of constitutional constraints.'"[13]

For Machiavelli and Rousseau, the dictator of the Roman Republic is "*an exceptional figure, not governed by the usual normative restrictions or even the rule of everyday law. [The dictator's] activities are bounded only by the restriction that he must not change*",[14] like the constitution. Normalcy and emergency were mutually exclusive conditions[15] assuming that they can be separated,[16] and also emergencies were deemed to be temporary[17] and exceptional.

Machiavelli argues that "*the only way a Republic may survive is if it contemplates and accommodates every probable scenario that may confront it.*"[18] The very same point was made centuries later, in 1948, by Rossiter when he stated, "*[a] constitution which fails to provide for whatever emergency action may become necessary to defend the state is simply defective.*"[19] Therefore, it then becomes interesting to shed some light on the Roman dictatorship because it represents "*the prototype for most modern forms of models of accommodation.*"[20]

Powers given to the dictator were expressly limited in time and could not be extended. For Rossiter, the decision to put an end to the dictatorship should not be in the hands of the dictator himself.[21] The dictator was also "*expected to step down and relinquish his powers once he overcame the particular crisis*"[22] in order to prevent "*the unpleasant possibility that such dictatorship will… become permanent and unconstitutional.*"[23] For Machiavelli, the time limit imposed to the Roman dictator is the most important element of control against a potential tyranny.[24] Rousseau shares a similar opinion.[25] In 1762, he

13 Rossiter C. (1948), *supra* note 7, p. 290 referring to Watkins F. M. (1939), *The Failure of Constitutional Emergency powers under the German Republic*, Cambridge, p. 36.
14 Lazar N. (2009), *supra* note 10, p. 33
15 *Ibid*., p. 27.
16 *Ibid*., p. 28.
17 *Ibid*., p. 28.
18 Greene A. (2018), *supra* note 4, p. 24
19 Rossiter C. (1948), *supra* note 7, p. 301.
20 Gross O. (2011), *supra* note 2, p. 334.
21 Rossiter C. (1948), *supra* note 7, p. 305.
22 Gross O. (2011), *supra* note 2, p. 335.
23 Rossiter C. (1948), *supra* note 7 p. 294.
24 Greene A. (2018), *supra* note 4, p. 205; Gross O. and Ní Aoláin F. (2006), *supra* note 3, p. 25.
25 Gross O. and Ní Aoláin F. (2006), *supra* note 3, p. 2; Gross O. (2000), 'The Normless nd Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy', 21 *Cardozo L. Rev*. 1825, p. 1840.

wrote in *The Social Contract* regarding the treatment of emergencies: "*if… the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws and suspend for a moment the sovereign authority.*"[26] This is also one of the criteria suggested by Rossiter for a dictatorship to remain constitutional.[27] Nowadays, "*many modern constitutions contain explicit, frequently detailed, emergency provisions*",[28] and many of them also provide for time limitations that are imposed for the exercise of emergency powers in a State.[29]

Contrary to most dictatorships that occurred and are still in place in modern times, the dictatorship of the Roman Republic was also part of the constitutional order.[30] The power of the dictator was "*inherently constitutional*"[31], and in practice, it was "*institutionalized*"[32] and "*normalized*"[33]. This is what Rossiter called in 1948 a '*constitutional dictatorship*'[34], i.e. the dictatorship necessary to respond to an emergency can be constitutional, in what remains "*one of the leading studies of the state of emergency*".[35] However, Dyzenhaus criticizes it, stating, among other things, that "'*constitutional' turns out not to mean what we usually take it to mean; rather, it is a misleading name for the hope that the person who assumes dictatorial powers does so because of a good faith evaluation that this is really necessary and with the honest and steadfast intention to return to the ordinary way of doing things as soon as possible*".[36]

The dictatorship only existed in the Roman Republic "*in times of emergency, when the normal constitutional structures were considered unable to deal with a crisis in a satisfactory manner*";[37] dictators were given a mandate to get things done.[38] One of the safeguards that existed in the Roman Republic to prevent against authoritarian

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26 Gross O. (2000), *ibid.*, p. 1839.
27 Rossiter C. (1948), *supra* note 7, p. 301.
28 Gross O. and Ní Aoláin F. (2006), *supra* note 3, p. 36.
29 *Ibid.*, p. 29.
30 *Ibid.*, p. 4.
31 *Ibid.*, p. 17 and p. 27.
32 *Ibid.*, p. 241.
33 *Ibid.*
34 Greene A. (2018), *supra* note 4, p. 24.
35 Dyzenhaus D. (2006), *supra* note 12, pp. 35-36; Dyzenhaus D. (2005), 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?', 27 *Cardozo Law Review*, pp. 2011-2012.
36 Dyzenhaus D. (2006), *ibid*, p. 2014.
37 Greene A. (2018), *supra* note 4, p. 6.
38 *Ibid.*

dictatorship was that "*who decided that a dictator should be appointed could not himself become a dictator.*"[39] This became one of the criteria in Rossiter's list in his book titled *Constitutional Dictatorship*, greatly inspired from the Roman Republic (but also from Machiavelli), which contains eleven criteria that include "*a wide range of formal and informal restrictions*" that need to be met by the leader of a democratic country for a socalled dictatorship to remain constitutional in times of an emergency[40] since, according to Rossiter, "*all uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements.*"[41] In that spirit, Rossiter opines that the dictatorship "*should be coalition government*".[42] But how could the coalition government, usually gathering together political forces that would not necessarily see things alike, but who have agreed on certain points, prevent against, as said earlier, "*an insurmountable barrier to decisive emergency action*"? Coalition governments may not agree on the right measure to be taken on such and such occasions, then substantial time may be spent simply on negotiations inside the coalition government itself, then how would this work efficiently and *fast* in the context of an emergency?

In addition, Rossiter argues that three 'fundamental facts' provide the rationale for constitutional dictatorship. Summarily, first, the democratic state is designed to function during peace; second, in a time of crisis, the system of government must be temporarily altered; and third, this altered government can have only one purpose, i.e. the "*preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.*"[43] Although we may agree or not with Rossiter's ideas and with the applicability of his criteria to a State emergency, the following remark he made remains, in our opinion, compelling: "*Every emergency leaves its mark on the pattern of constitutional government and democratic society. Every period of democratic autocracy leaves democracy just a little more autocratic than before.*"[44]

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39 *Ibid.*, p. 8; Rossiter C. (1948), *supra* note 7, p. 299.

40 Lazar N. (2009), *supra* note 10, p. 128; Dyzenhaus D. (2006), *supra* note 12, p. 36; Dyzenhaus D. (2005), *supra* note 35, p. 2012.

41 Rossiter C. (1948), *supra* note 7, p. 300.

42 *Ibid.*, p. 304.

43 Rossiter C. (1948), *supra* note 7, p. 298; Dyzenhaus D. (2005), *supra* note 35, p. 2012.

44 Rossiter C. (1948), *supra* note 7, p. 307.

The challenges posed by the Roman dictatorship concerning the preservation of democracy in times of crisis contributed to the development of important legal discussions about the essence of emergencies in our modern times, especially in respect to liberal democracies. Carl Schmitt is generally considered as the father of contemporary constitutional exceptionalism in the early 20th century whose views posed a challenge to liberal perspectives on emergencies.[45] Summarily, he isolated two types of dictatorship in times of emergencies: one that rules outside the law but still preserves the constitution, and another one that violates the constitution to establish a new legal order.[46] Dicey's conception of a state of emergency is opposed to Schmitt's exceptionalism, and is rather based on the prevalence of the liberal and democratic legal order. Unlike Schmitt, Dicey is a proponent of the state of emergency being inside the legal order.[47]

Post a discussion on the historicity of emergency regimes, it would be pertinent to engender a critical overview of the contemporary models of theories of emergency powers in constitutional theory.

2. Models of contemporary theories of emergency powers

The concept of emergency powers under a constitutional system is not new. The classic idea of an emergency that affected the political *status quo* originated in the Roman Republic, wherein the elected Senate thought it wise to give its power to a dictator during an emergency. The dictator inevitably was expected to hand over the power after the cessation of the emergency but had absolute power during the duration of the emergency.[48] However, such an idea has become more and more unpalatable in recent times, especially for democracies which now choose to progressively codify their "*emergency regimes as an expression of democratic legitimisation of emergency powers*"[49] in the context where "*[t]he existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes.*"[50]

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45 Lazar N. (2009), *supra* note 10, p. 20.

46 Schmitt C. (2014), *From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle,* translated by Michael Hoelzland Graham Ward, Cambridge: Polity Press, pp. xxiii, 1-2, 25.

47 Dyzenhaus D. (2005), *supra* note 35, p. 2007.

48 Mueller S. (2016), 'Turning Emergency Powers Inside Out: Are Extraordinary Powers Creeping into Ordinary Legislation?', 18 *Flinders LJ* 295, p. 295.

49 *Ibid*., p. 296.

50 Gross O. (2011), *supra* note 2, p. 334.

Emergencies of various kinds, including wars, terrorist attacks, natural disasters, pandemics, undeniably challenge the normal constitutional order even though "*bright-line distinctions between normalcy and emergency are frequently untenable.*"[51] During an emergency, public powers usually remain trapped in legal constraints where nothing is envisaged and provided for. Constitutional order and the fundamental values, in terms of the form of threats to common values or a 'way of life',[52] may be threatened during such situations.[53]

The choice of a normative thesis that applies to such situations refers primarily to the legal framing of emergency situations. The aim being to understand constitutional theory and emergency powers beyond the familiar domain of liberal democracies. The most remarkable and debated contribution on the subject has been made by Carl Schmitt who claims that a state of emergency exposes the limits of law in liberal democracies.[54]

What "*provides a particularly useful starting point … with respect to institutional design for crisis government*"[55] is the debate between Gross and Dyzenhaus. The latter stated that in a "*state of exception or emergency*", the "*law recedes, leaving the state to act unconstrained by law.*"[56] Gross while articulating on such an eventuality offers two traditional models to respond to emergency situations. The "*business as usual*" model which asserts that the existing legal framework has within itself the resources to deal with a state of emergency, and accordingly no substantive changes are required under law.[57] The other model of emergency powers is grouped under the "*models of accommodation*" that asks for significant changes to the existing order to accommodate considerations of security, for example, without considerably disturbing the ordinary system.[58] However,

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51 *Ibid.*, p. 349.

52 Jayasuriya K. (2008), 'The struggle over legality in the midnight hour: governing the international state of emergency' in Ramraj, V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 379.

53 Tusseau G. (2011), 'The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach', *Archives for Philosophy of Law and Social Philosophy*, 97(4), p. 500.

54 Schmitt C. (1985, 2005), *Political Theology: Four Chapters on the Concept of Sovereignty*, University of Chicago Press.

55 Lazar N. (2009), *supra* note 10, p. 139.

56 Dyzenhaus D. (2005), *supra* note 35, p. 2027.

57 Gross O. (2003), 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?', 112 *Yale Law Journal* 1011, p. 1021.

58 *Ibid.*

these models are based on two assumptions – "*the assumption of separation between the normal and the exceptional*", defined by the ability to separate emergencies from normalcy[59] and the "assumption of constitutionality", where responses to emergencies are limited within the constitution.[60] Dyzenhaus does not agree with such assumptions as "*the assumption of separation between the normal and the exceptional ignores the way in which emergency government has become the norm … and the assumption of constitutionality … risks undermining the legal order.*"[61] The "business as usual" model is criticised for ignoring the necessity of governmental exercise of extraordinary measures during an emergency. Contrastingly, the "models of accommodation" undermine the ordinary system by importing measures to tackle an emergency.[62] This must all be understood in the context where "*[t]he existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes.*"[63] Gross thereafter responds with a new model - the extra-legal measures model.

Lazar suggests that emergencies in today's times are a part of ordinary life. The concept of an emergency as an exception is progressively becoming "*unrealistic*".[64] This approach seems to go in line with the 'broadening' of the term emergency to encompass more 'banal' or quotidian' crises [that] is a key driver of permanent emergencies. Conversely, the decision not to declare a state of emergency, but then for the government to act for all intents and purposes as if one exists, in turn raises further challenges to the claim that permanent emergencies are an objective inevitability today.[65]

Resultantly, the contemporary debate over emergency powers takes place at two levels: one being the level of specific emergency powers like preventive detention and torture in cases where the security of a State is alleged to be challenged, wherein the effectiveness of such powers is measured against the threat that such powers pose to constitutional or human rights. The other being at the level of fundamental notions of legality, as a response to Carl

59 *Ibid.,* p. 1022.
60 *Ibid.,* p. 1023.
61 Dyzenhaus D. (2005), *supra* note 35, p. 2028.
62 *Ibid.,* p. 2027.
63 Gross O. (2011), *supra* note 2, p. 334.
64 Silverstein G. (2010), 'Can Constitutional Democracies and Emergency Power Coexist?', 45 *Tulsa L. Rev.* 619, p. 619.
65 Greene A. (2018), *supra* note 4, pp. 49-50.

Schmitt's challenge to the legal order itself,[66] the issue being how does the state manage to preserve legality in times of emergency. This part of the paper on contemporary theories of emergency powers focuses on the latter issue, wherein we commence with the assumption of the "*presence of liberal-democratic institutions, a developed legal infrastructure, and an entrenched culture of accountability*", with the objective of preserving legality.[67]

The solutions may incorporate either a constitutional emergency framework which specifies in advance the powers to be exercised during emergencies under the constitution, also referred to as the 'neo-Roman' model;[68] or an 'ordinary legislation' model which is a statutory framework providing for emergency powers;[69] or a 'judicial review' model wherein the courts and special tribunals play a key role in scrutinising the emergency powers;[70] or an 'extra-legal measures' model wherein public officials seek public ratification for disobeying the law in the face of grave danger.[71] Given the classical debate in political liberalism between liberty and security, the choice of adopting a particular measure as a solution will ultimately be based on the preference given to *ex ante* or *ex post* checks[72] on powers. These two key variables assist us in deciding, are we to do what we will do before or after an emergency.[73]

In furtherance of the "*business-as-usual*" model, Campbell contends that though some variations may be required to "*deal with technological changes*", the "*Western, liberal constitutional democracies are quite capable of handling emergency.*"[74] Roach also supports the thesis

66 Schmitt C. (1985, 2005), *supra* note 54.

67 Ramraj V. V. (2008), 'The emergency powers paradox' in Ramraj V. V. and Thiruvengadam A. K., *Emergency Powers in Asia: Exploring the Limits of Legality*, Cambridge University Press, p. 24.

68 Ferejohn J. and Pasquino P. (2004), 'The Law of the Exception: A Typology of Emergency Powers', 2 *International Journal of Constitutional Law* 210, p. 213.

69 Campbell T. (2008), 'Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory' and Roach K. (2008), 'The Ordinary Law of Emergencies and Democratic Derogation from Rights', in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, respectively pp. 201-228 and pp. 229-257.

70 Dyzenhaus D. (2005), 'The State of Emergency in Legal Theory' in Ramraj V. V., Hor M. and Roach K. (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, pp. 65-89.

71 Gross O. (2003), *supra* note 57; Gross O. (2005), 'Stability and flexibility: A Dicey business', in Ramraj V. V., Hor M. and Roach K. (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, pp. 90–106.

72 Ramraj V. V. (2008), *supra* note 67, p. 25.

73 Silverstein G. (2010), *supra* note 64, p. 620.

74 *Ibid*.

that the "*existing institutions, rules, and provisions, particularly existing framework emergency laws*" readily facilitate rules and institutional practices to deal with most challenges.[75] Lazar, on the other hand, theorises that institutions are and should be "*means to normative ends*" and accordingly advocates that we need new and different institutions to manage emergencies.[76]

Carl Schmitt's notorious insistence that during an emergency "*the state remains, whereas the law recedes*", is a challenge to contemporary theorists. The proposal of solutions, viz. constitutional, legislative or judicial and whether they be *ex ante* or *ex post* are in effect a response to the "*question of whether and, if so, how the state can preserve legality in times of crisis*."[77] Schmitt is a precursor of Gross with his extra-legal measures model.[78] Responding to Schmitt's challenge, Gross accepts that public officials may be required to act outside the law in the face of extreme danger, but he believes that "*ex post democratic-political and legal checks*" on such extra-legal measures will act as a deterrent for the officials. In his opinion, the extra-legal measures model, in the long term, will eventually be able to preserve legality in a better manner, without meddling with the core values of a legal order.[79] In fact, extra-legal measures, according to Gross, is "*the best way to protect the rule of law in liberal democracies during an emergency*".[80] Geertsema explains that this "*approach considers the problem of whether exceptional circumstances should happen with the ambit of the rule of law or outside of it.*"[81] In that respect, Gross "*hold that while emergency power might best be exercised outside the law to protect the law's integrity, no moral justification can actually erase or trump a violation of law, even though it might justify it*".[82]

Dyzenhaus, on the other hand, views the courts as the key players in the preservation of legality in an emergency, albeit with certain modifications in the separation of powers to address concerns of

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75 Roach K. (2008), *supra* note 69, p. 234.

76 Lazar N. (2008), 'A topography of emergency power' in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 157.

77 Ramraj V. V. (2008), *supra* note 67, p. 25.

78 Geertsema J. (2008), 'Exceptions, bare life and colonialism' in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 342.

79 Gross O. (2008), 'Extra-legality and the ethic of political responsibility' in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 62.

80 Geertsema J. (2008), *supra* note 78, p. 341.

81 *Id.*

82 Lazar N. (2009), *supra* note 10, p. 138.

national security.[83] Other theorists do not place belief in the courts, advocating the entrenchment of powers in the constitution.[84]

At the danger of over-simplification, we may attempt to answer the imposing question of how to survive shattering emergencies by adopting Victor Ramraj's models.[85] He divides the contemporary theories of emergency powers into three models, according to the type of check on emergency powers they favour i.e., the legality model, the neo-Roman model and the extra-legal measures model.[86] The legality model views emergencies as a threat to legality. Legality herein perceives that the sovereign power is subject to law. This model therefore focuses on the courts and the power of judicial review as the most significant check on emergency powers. The courts preserve the legal order and consequently counter the threat to legality. The neo-Roman model, on account of its concern about the ability of courts to check executive powers in times of crisis, proposes the imposition of *ex ante* procedural checks on emergency powers. According to this model a procedural check which typically involves the legislative branch, is likely to be more effective. The extra-legal measures model also displays a similar scepticism of the "*ability of the courts to limit executive power*" and therefore proposes a "*political check instead on power*". Such a check on executive power ultimately rests with the society or "*the people*".[87]

2.1. The legality model

The legality model promotes the judiciary or courts as the most appropriate institution to constrain and check the exercise of powers by the executive during emergencies. This is actuated on account of the peculiar advantages available to the courts of hindsight, interpretive attitude in the context of specific cases as opposed to abstract cases, and the necessity of providing valid

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83 Dyzenhaus D. (2012), 'The State of Emergency' in Rosenfeld M. and Sajó A., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press.

84 Dyzenhaus D. (2006), *supra* note 12, p. 17.

85 Victor Ramraj produced a volume which was a product of an engaging conference held at the National University of Singapore. He explores the two conflicting answers to the question of how liberal constitutional democracies can manage, or survive, emergencies and crises.

86 Ramraj V. V. (2011), 'Emergency Powers and Constitutional Theory', 41 *Hong Kong LJ* 165, p. 168.

87 *Ibid*., pp. 168-169.

reasons for their decisions.[88] It is David Dyzenhaus, the most prominent contemporary supporter of the legality model, who understands that law to be law, has to abide by definite moral limits and uncompromisable barriers. According to him, it is the judges who "*can and will patrol and protect these legal and moral borders.*"[89] On the other hand, Gross does not believe that such barriers will hold as people will abandon the barriers when they are confronted with emergency or conditions of crisis.[90] Dyzenhaus disagrees with Gross and "*proposes that emergency rule be directly subordinated to the rule of law, interpreted as embodying an ambitious collection of substantive moral and legal values, including ideals of fairness, reasonableness and equality before the law.*"[91] Although every governmental institution is expected to be committed to 'important moral values', "*judges have a special role to play as guardians of the rule of law during emergencies.*"[92]

Dyzenhaus places his confidence in "*independent judges*" who are "*more insulated*" and are consequently able to resist pressures to "*trade liberty for security*" during a crisis.[93] However, the question remains as to whether the judges when faced with a life-threatening emergency, would continue to stand firm on principles and values. Lee Epstein does not believe so and they proceed to demonstrate that the rulings of courts in civil liberties cases during wartime tend to be less favourable to individual rights.[94]

However, Ramraj himself acknowledges a drawback of an unqualified reliance on the courts, in cases of national security matters which generally lie outside their institutional expertise. This is problematic as "*national security cases typically involve sensitive security intelligence information that governments are unwilling to furnish in open court.*"[95] Dyzenhaus refutes such concerns by stating that they can be addressed through "*imaginative experiments in institutional*

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88 Cole D. (2004), 'The Priority of Morality: The Emergency Constitution's Blind Spot', 113 *Yale Law Journal* 1753, p. 1762.

89 Silverstein G. (2010), *supra* note 64, p. 621.

90 *Ibid*.

91 Scheuerman W. E. (2008), 'Presidentialism and emergency government' in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 273.

92 *Ibid*., p. 274; see also Dyzenhaus D. (2003), 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security', 28 *Australian Journal of Legal Philosophy* 13.

93 Silverstein G. (2010), *supra* note 64, p. 626.

94 Epstein L., Ho Daniel E., King G. and Segal Jeffrey A. (2005), 'The Effect of War on the Supreme Court', 8 *N.Y.U. L. Rev*. 1.

95 Ramraj V. V. (2011), *supra* note 86, p. 169.

design".[96] He preserves constitutional norms through the "*use of innovative institutional arrangements that acknowledge the needs of national security operations while respecting the demands of legality.*"[97] The judges according to him, continue to play an important role in upholding the rule of law when the legislature and executive do not.

2.2. Neo-Roman model

Unconvinced about the ability of courts as a check on emergency powers, the neo-Roman model places reliance on procedural checks, especially in the form of a constitutional framework. The supporters of this model are inspired by the constitutional practice of the Roman Republic of appointing a dictator with unlimited powers for a limited time because, for example, "*[t]he separation of normalcy from emergency is often facilitated by the use of time limits and the belief that emergencies are only temporary*",[98] and the period of normality that follows the emergency is not expected to merge with the latter or set precedents for it.[99] They also draw stimulus from Clinton Rossiter's work, *Constitutional Dictatorship*.[100]

Inspired by the South African Constitution,[101] and favouring a constitutionally entrenched state of emergency provision, Ackerman argues for emergency powers accruing to the executive to be made subject to "*an escalating cascade of supermajorities*".[102] He calls it the "*supermajoritarian escalator*" according to which "*every (temporally limited) extension of emergency power would require more extensive legislative support than previous promulgations.*"[103] The objective being to ensure that the emergency government is a representative of the citizens and not a partisan weapon of an incumbent executive.[104] Ackerman observes, "*The need for a new vote every two months publicly marks the regime as provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians,*

96 Dyzenhaus D. (2005), *supra* note 70, p. 67.
97 Ramraj V. V. (2008), *supra* note 67, p. 28.
98 Greene A. (2018), *supra* note 4, pp. 28-31.
99 White J. (2015), 'Authority after Emergency Rule', 78 *The Modern law Review* 4, pp. 593-594.
100 Rossiter C. (1948), *supra* note 7.
101 After 21 days, extensions of emergency power have to be approved by 60 per cent of the National Assembly and a state of emergency can never be extended for more than three months.
102 Ackerman B. (2004), *supra* note 9, p. 1047.
103 Scheuerman W. E. (2008), *supra* note 91, p. 280; Dyzenhaus D. (2005), *supra* note 35, p. 2016.
104 Rossiter C. (1948), *supra* note 7, p. xiii.

the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?"[105]

This implies that there would be "*return to a status quo ante at the end of the emergency.*"[106] Dyzenhaus thinks that the defect in constitutionalised emergency powers is that it is the emergency executive that makes judgments about necessary measures, which means that the criteria are not real limitations but ultimately decisions of the executive.[107] Scheuerman reminds us of its virtue by highlighting that it "*provides for demanding institutional tests by means of which the polity can at least minimise the executive's tendency to monopolise such judgements [about what measures are necessary]; emergency rulers are made strictly dependent on other institutional actors and their potentially competing conceptions of necessity.*"[108]

Drawing a similar conclusion about constitutionally entrenched emergency powers, Ferejohn and Pasquino, aim to display why the neo-Roman model (which permits delegation of powers to a president or any constitutional authority) is preferable to a legislative model (where ordinary statutes delegate special powers to the executive). According to them the main features are: "*first, the primary purpose of emergency powers is to restore the constitutional order as quickly as possible; second, the agency determining the existence of an emergency is separate from the agency exercising the emergency powers; and third, the regulation and oversight of emergency powers happens ex ante and ex post the emergency, but not during the emergency.*"[109]

Since the aim of the neo-Roman model is to restore the constitutional order to its original state, it is better as compared to ordinary emergency legislation. Ordinary legislation may result in permanent changes to the law.[110] In essence, the Neo-Roman model creates a super-constitutional emergency government which relies on constitutional mechanisms empowering the executive for exercising extraordinary powers for a limited specified time, the

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105 Ackerman B. (2004), *supra* note 9, p. 1048.

106 Jayasuriya K. (2008), *supra* note 52, p. 360.

107 Dyzenhaus D. (2005), *supra* note 35, p. 109.

108 Scheuerman W. E. (2008), *supra* note 91, p. 283.

109 Article 16 of the most recent Constitution of France dated 1958 enables the activation of a *pouvoir exceptionnel* [state of exception], and its article 36 provides for the possibility of a *État de siege* [state of siege]. Another example is article 48 of the Constitution of the Weimar Republic. See e.g. Mueller S. (2016), *supra* note 48, pp. 300-301.

110 Ferejohn J. and Pasquino P. (2004), *supra* note 68, p. 217.

goal being to restore constitutional order.[111] Although this model relies on the formal legal framework of a constitution, it does not accept the courts as the primary check on executive power that may "*overreact in a period of emergency*",[112] and therefore it is a step away from the legality model. To reduce the abuse of emergency powers, the solution is to provide for *ex ante* constitutional procedures that manifest "*the classic legal virtues of clarity, publicity, generality, prospectiveness and stability*". [113]

It is stated that this model effectively deals with emergencies but insulates and protects the constitution. However, the biggest disadvantage is that the suspension of the constitution, albeit for a limited time and extent, sanctions the emergency executive to act outside the rule of law. And since the actions of the executive cannot be reviewed, especially during the emergency, the model allows for abuse as seen in Germany under Article 48 of the Weimar Constitution.[114]

The inherent danger of the model is especially seen in modern times, wherein it is the executive which actually "*determines and declares the existence of an emergency and it wields the resulting emergency powers.*"[115] The proponents of the model, nevertheless believe that if the powers of the emergency executive are regulated with circumspection and strict oversight, the neo-Roman model continues to be a good option.[116]

2.3. Extra-legal measures model

While accepting that the courts and legislature may sometimes constrain emergency powers, the extra-legal measures model places a definitive constraint on executive power in the "*informal, social and political realities of the society that is subject to emergency rule.*"[117]

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111 Ramraj V. V. (2008), *supra* note 67, p. 28.

112 Greene A. (2018), *supra* note 4, p. 53.

113 Scheuerman W. E. (2006), 'Emergency Powers and the Rule of Law After 9/11', 14 *Journal of Political Philosophy* 61, p. 76.

114 The Weimar Constitution provided for an extremely strong *Reichspresident* [President], where he was empowered to take emergency measures if public safety and order were seriously disturbed. This was done mostly to counter fears of a powerful parliament controlled by a left majority. However, successive Presidents made increasing use of these provisions, which led to a steady shift of decision making power from parliament to the President between 1918 and 1933.

115 Mueller S. (2016), *supra* note 48, p. 302.

116 Scheuerman W. E. (2006), 'Emergency powers', 2(1) *Annual Review of Law and Social Science* 257, p. 283; see also Ackerman B. (2004), *supra* note 9, p. 1047.

117 Ramraj V. V. (2011), *supra* note 86, p. 173.

Gross, puts forth the extra-legal measures model[118] which allows public officials to respond extra-legally when they "*believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions.*"[119] The public officials are eventually bound to disclose the nature of their actions taken during the emergency and they ultimately hope for "*direct or indirect ex post ratification*", either through the courts, the executive, or the legislature.[120] Gross's model postulates that in an emergency, when public officials are of the opinion that they must act contrary to law to prevent a calamity, they may do so, however thereafter they must publicly acknowledge their extra-legal conduct and allow the people to assess the nature of their actions. It is the people who then decide, directly or indirectly (through their elected representatives), the validity of such actions. The people may choose to hold the officials accountable for their actions, who then must make "*legal and political reparations*".[121] This indicates a level of commitment to legal principles and values. The people, alternatively, may allow an *ex post* approval of the extra-legal actions of the officials thereby exempting them. He believes that the model preserves the "*fundamental principles and tenets*" of the constitutional order since such a process promotes both popular deliberation and individual accountability.[122] In order to accept this model, Gross calls for an agreement on three points:[123]

(1) emergencies call for extraordinary governmental responses;

(2) constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies, and;

(3) there is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis.

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118 Gross O. (2003), *supra* note 57.

119 *Ibid.*, p. 1023.

120 *Ibid.*, p. 1024.

121 *Ibid.*, p. 1023. Even though exceptionalism as a concept is fundamentally opposed to democratic accountability, the challenge can be met by post-hoc deliberative public scrutiny of the emergency measures e.g. referendum. *See* White J. (2015), *supra* note 99, p. 609.

122 Dyzenhaus D. (2005), *supra* note 35, p. 2028.

123 Gross O. (2003), *supra* note 57, p. 1097.

Gross finds support for his model in Dicey's acknowledgement that officials might need to resort to illegal action during an emergency and that, if they acted in good faith, they should be entitled to an Act of Indemnity to "*legalise their illegality*".[124] Tushnet, while distinguishing his view from Gross's, also believes that the ultimate check on emergency powers emanates from a social and political source as opposed to a legal one. According to him, the rule of law "*cannot succeed at all … without sociology and politics at their back*"[125] and that "*politics is the obvious alternative to law as a means of regulating the exercise of emergency powers - not politics as a mere preference or the exercise of power for its own sake, but a principled or moralised politics*".[126] As Gross presupposes a "*democratic political culture that stands outside law as a check on state powers*", Tushnet contends that "institutional and sociological factors might operate, together with formal legality, to constrain state power in times of crisis."[127]

For his thesis, even though Gross relies on Schmitt's argument that "*legal norms cannot apply to exceptions*", he is unable to stick to this contention.[128] Law plays an important role, since it is through the use of law that the public reacts to "*official lawlessness*", whether by permitting punishment of officials for their crimes or by exempting or indemnifying the officials through law.[129] Dyzenhaus therefore believes that Gross's reliance on this component of the Extra-Legal Measures model demonstrates the "*compulsion of legality that operates in any authentic democratic account of the appropriate response to states of emergency.*"[130] Resultantly, "*Gross reproduces the normative instability in one of his chief sources of inspiration, John Locke's account of the prerogative, by vacillating between external realism and the robust account of legality offered by Dicey.*"[131] Gross's scepticism of the courts stems from the tendency of courts to defer to the executive in

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124 Dicey A. V. (1959), *Introduction to the Study of the Law of the Constitution*, 10th ed., London, Macmillan; New York, St. Martin's Press, p. 145.

125 Tushnet M. (2008), 'The political constitution of emergency powers: some conceptual issues' in Ramraj, V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, pp. 145-155.

126 *Ibid.*, p. 147.

127 Ramraj V. V. (2011), *supra* note 86, p. 175.

128 Dyzenhaus D. (2005), *supra* note 35, p. 2029.

129 *Ibid.*

130 Dyzenhaus D. (2008), 'The compulsion of legality' in Ramraj V. V. (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, p. 51.

131 *Ibid.*, p. 34.

times of crisis. He regards both constitutional emergency powers and ordinary emergency legislation as problematic, since officials are able to "*mould and shape the legal system, including the constitutional edifice, under the pretence of fighting off an emergency*".[132] While Ramraj believes that Gross may have underestimated the ability of constitutional mechanisms to check the executive and that of the courts to interpret these provisions, his reliance on deliberative democracy ("*public deliberation and … the taking of responsibility by each and every member of the community*"[133]) is a decisive check on executive power.[134]

This extra-legal measures model "*informs public officials that they may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions.*"[135] Therefore, public opinion is a relevant factor, but, Gross does not explain how opinion in itself provides a basis for authority. To provide such an answer for authority, he ultimately takes refuge in the legal constitution.[136]

Though this model posits a "*diametrically opposite approach*" to the other models, Gross believes that it seeks to "*preserve the long-term relevance of, and obedience to, legal principles, rules, and norms.*"[137] He places his faith in the theory advocated by William Shakespeare, "*to do a great right, do a little wrong*".[138] For the ultimate preservation of the constitutional order, and the fundamental principles and tenets, it is fine if the officials act extra-legally.

Gross's model attempts to maintain a commitment to constitutional and legal limits and boundaries, and at the same time makes it possible for societies to manage emergencies and crises. He derives his inspiration from Cicero who managed to thwart a conspiracy to invade Rome. Having successfully foiled the plot, Cicero advocated and ordered the execution of the conspirators, a decision which was not within his legal rights. This ultimately

132 Gross O. (2003), *supra* note 57, p. 1068.
133 *Ibid*., at 1126.
134 Ramraj V. V. (2011), *supra* note 86, p. 173.
135 Gross O. (2003), *supra* note 57, p. 1023.
136 Dyzenhaus D. (2008), *supra* note 130, p. 45.
137 Gross O. (2003), *supra* note 57, p. 1024.
138 "To do a great right, do a little wrong" is the advice given by Bassanio to Portia. William Shakespeare, The Merchant of Venice, Act 4, scene 1.

resulted in his condemnation and exile.[139] Eventually Cicero was allowed to return to Rome, however, this did not "*expunge that earlier experience nor did it act to legalise his earlier actions.*"[140] Accordingly, Gross concludes that this model sustains a vital degree of uncertainty for the officials, as to whether their actions will be ratified or not.[141] This uncertainty is crucial for ensuring that extra-legal actions are the last resort and are imposed with caution and circumspection.

2.4. Which model will work?

Dyzenhaus rejects Gross's extra-legal model and advocates fidelity to the rule of law embodying moral and legal values of "*fairness, reasonableness and equality before the law*".[142] He understands, like Gross and many others, that emergencies need "*novel legal and regulatory innovations.*"[143] Although all institutions must work towards such realisation, judges have a distinct role to play as guardians of the rule of law during emergencies[144] whereas, according to Ackerman, "*judges have at best a minimal role to play during a state of emergency.*"[145] Undoubtedly, preservation of the rule of law requires more cooperation between different branches of government, as put forth by Dyzenhaus.

Relying on Dicey, Gross identified that emergency legislation authorises extraordinary powers *ex ante* i.e., prior to the exercise of powers by the executive and can be limited thereafter with *ex post* acts of indemnity (described by Dicey) under the extra-legal measures model.[146] Roach and Dyzenhaus favour the *ex ante* approach as they believe it accords "*better with legality by authorising and limiting the actions that will be taken in an emergency.*"[147] Additionally, it supports democracy as it mandates legislatures to act prior to the exercise of extraordinary powers.

The ideal emergency legislation needs to necessarily incorporate the challenge posed by Dyzenhaus of ensuring that every branch

139 Gross O. (2008), *supra* note 79, p. 70.
140 *Ibid.*, at 71.
141 Silverstein G. (2010), *supra* note 64, p. 623.
142 Scheuerman W. E. (2008), *supra* note 91, p. 274.
143 *Ibid.*
144 Dyzenhaus D. (2004), 'Intimations of Legality and the Clash of Arms', 2 *International Journal of Constitutional Law* 248; Greene A. (2018), *supra* note 4, p. 25.
145 Dyzenhaus D. (2005), *supra* note 35, p. 2016.
146 Gross O. (2005), *supra* note 71, p. 92.
147 Roach K. (2008), *supra* note 69, p. 234.

of government is committed to the rule of law while emphasising controlled and limited power; and "*effective legislative, executive and judicial review of state's conduct during emergencies.*"[148] Although no model can provide an assurance against the danger of a permanent emergency, however, wisely designed emergency laws can ensure that the exercise of extraordinary powers are scrutinised democratically and are subject to review with the objective of maintaining the rule of law.

Without moving away from the theory of emergency powers, the authors rather suggest to apply the theory to a few practical case studies, namely those of Vietnam, India and Canada, in order to see the distinctions that may exist between them in that regard, and to also examine some of the differences that may exist in their respective legal framework with respect to emergency powers.

3. Perspectives from Vietnam, India and Canada

3.1. Vietnam

In Vietnam, the declaration of an emergency usually follows two stages: "*the decision stage and the announcement stage. The decision-making stage is defined by the Constitution on the authority of the National Assembly or the Standing Committee of the National Assembly. The announcement process falls under the authority of the head of state - the State President.*"[149] Bùi Tiến Đạt wisely specifies that "*[p]rovisions on specific issues will be specified in subconstitutional documents.*"[150] For example, the Emergency Ordinance 2000 was issued by the Vietnam government, in turn, Decree 71/2002 was issued. The latter "*specifies the execution of several articles of this ordinance in case of*

148 *Ibid*., p. 256.

149 Dung N. D. (January 15, 2021), "Tình trạng khẩn cấp theo quy định của Hiến pháp và Công ước" [State of emergency under the provisions of the Constitution and the law], *Legal Research*. Retrieved from: http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210680 [accessed on 30 April 2021]. In the original: "Trình tự của việc quyết định và công bố thường chia 2 công đoạn: công đoạn quyết định và công đoạn công bố. Công đoạn quyết định được Hiến pháp quy định thẩm quyền của Quốc hội hoặc UBTVQH. Công đoạn công bố thuộc thẩm quyền của nguyên thủ quốc gia - Chủ tịch nước." [translated from Vietnamese by Sébastien Lafrance].

150 Dat B. T. (2020), 'Making Law on The State of Emergency in Vietnam from the Perspective of Constitutional Rights Limitation' in the *Law on the State of Emergency*, p. 84. Retrieved from https://law.unimelb.edu.au/centres/alc/news-and-events/law-on-the-state-of-emergency-online-conference/papers [accessed on 30 April 2021].

major disasters and dangerous epidemics."[151]

Even though Vietnam does not apply core principles such as the separation of powers and the check and balance system as some other States do, it would be possible to attach its emergency legal framework to the neo-Roman Model because Vietnam incorporates it in its constitution. The relevancy of examining the constitutional framework of Vietnam in light of what has been seen, and also in comparison with other countries, lies in the fact that for most "*debates on law reform in Vietnam, solutions abroad are significant reference markers*"[152], not forgetting at the same time that Vietnam's experience also illustrates legal borrowing[153] from other countries such as France and the former Soviet Union. Bùi Ngọc Sơn also observes that the "*[c]omparative constitutional inquiry into the crossnational constitutional influence has been dominated by the propensity towards positive convergence.*"[154] However, as Ramraj aptly puts it:[155]

"*… the difference between liberal-democratic and Southeast Asian experiences of emergency powers can best be understood by distinguishing between two constitutional contexts in which emergency powers are invoked: where states seek to establish legality and where they seek to preserve it. The implications of this distinction are crucial because emergency powers operate differently in an established rule-of-law state than in a state in which the basic constitutional infrastructure and culture of accountability are weak or lacking.*"

In Vietnam, "*Constitution-makers, like constitutional judges, also resist transnational influence.*"[156] In addition, the discussion on Vietnam in that context requires some caution since theories, like Ackerman's 'supermajoritarian escalator', would hardly find application in Vietnam because it depends, for example, "*on the*

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151 *Ibid.*, p. 85; Vu Hong Anh and Phan Trung Ly (2020), 'Assurance of Human Rights in an Emergency under the Legal Regulation of Vietnam' in the *Law on the State of Emergency*, *ibid.*, p. 141: It "also provides supplemental provisions on restrictions on human right and citizen's right compared to the Ordinance".

152 Sidel M. (2009), *The Constitution of Vietnam: A Contextual Analysis*, London: Hart Publishing, p. 209.

153 Rose C. V. (1998), 'The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study', 32 *Law & Society Review* 1.

154 Son B. N. (2018), 'Why Do Countries Decide Not to Adopt Constitutional Review? The Case of Vietnam' in Chen, Albert H. Y. and Harding A. (eds), *Constitutional Courts in Asia*: *A Comparative Perspective*, Cambridge University Press, p. 348.

155 Ramraj V. V. (2008), *supra* note 67, p. 22 (italics in the original).

156 Son B. N. (2018), *supra* note 154, p. 350.

existence of an independent legislature that, in practice, plays a significant role in checking the power of the executive - an assumption that is dubious in some Southeast Asian countries",[157] including Vietnam. As said, Vietnam does not apply the principle of the separation of powers.

Therefore, the possible review of executive or legislative measures taken by a State like Vietnam during a state of emergency may not always fit squarely in the models presented in this paper. For example, the concept and application of constitutional review was not accepted in Vietnam's most recent Constitution adopted in 2013.[158] The reason for this rejection may be that "*[i]n the socialist world, legislation was traditionally conceived as expressive of the people's will beyond the review of judicial bodies*",[159] and "*[j]udicial review was also inconsistent with the socialist understanding of the constitution.*"[160] However, it is interesting to note that Vietnamese constitutional scholars have discussed the potential creation of constitutional review since the beginning of the twenty-first century.[161] In that respect, Sidel argues that, "*Constitutional review and enforcement… would give some force to constitutional provisions, including some force to the constitutional idea that the constitution is the 'fundamental law' of Vietnam superior to all others.*"[162]

In accordance with Article 88(5) of the 2013 Constitution of the Socialist Republic of Vietnam, "*[t]he President has jurisdiction to … 'proclaim or abolish states of emergency' [if the National Standing Committee cannot meet and] he can also 'declare or abolish states of emergency nationwide or locally*'".[163] The power to proclaim a state of emergency is also held by the National Assembly of Vietnam[164] and by its Standing Committee.[165]

Contrary to many existing constitutional or legislative emergency provisions that exist in other countries[166], which provide for time limitations that are imposed for the exercise of emergency

157 Ramraj V. V. (2008), *supra* note 67, pp. 25-26.
158 Son B. N. (2018), *supra* note 154, p. 336.
159 *Ibid*., p. 337.
160 *Ibid*., p. 338.
161 Sidel M. (2009), *supra* note 152, p. 183; *Ibid*., p. 339.
162 Sidel M. (2009), *ibid*., p. 207.
163 2013 Constitution of the Socialist Republic of Vietnam, Article 88(5).
164 *Ibid*., Article 70(13).
165 *Ibid*., Article 74(10).
166 Gross O. and Ní Aoláin F. (2006), *supra* note 3, p. 36.

powers in order to prevent an abuse of power from the executive, Vietnam does not seem to have such provisions. Professor Nguyễn Đăng Dung confirms this statement: "*The laws of Vietnam have not yet provided these 'cotter' of power to those who have the power to decide on an emergency situation.*"[167] Therefore, a state of emergency (and the increased power of the executive in such times) could hypothetically remain in force as long as the State wishes, even though an emergency could factually be long gone. In addition, in the absence of constitutional review mechanisms, the Acts that were adopted to cover emergency situations, such as the Emergency Ordinance 2000 and the Decree 71/2002, could potentially be abusive on human rights without giving the possibility to citizens to have it checked or reviewed by the courts.

3.2. India

The state of emergency in India is provided for under its Constitution wherein the emergency is regulated through provisions in the constitution and not through legislative enactments or executive orders.[168] It is therefore based on the neo-Roman Model favouring a constitutionally entrenched state of emergency in the form of a "*higher law to deal with emergency situations*".[169] Though the classification of emergency in India is "*neither scientific nor exhaustive*",[170] Part XVIII of the Constitution of India provides for three types of emergencies: national emergency; state emergency;[171] and financial emergency.[172]

At the central level, the Indian Constitution provides for separation of powers between the executive (headed by the President), the legislature (Parliament) and the judiciary (Supreme

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167 Dung N. D. (January 15, 2021) (January 15, 2021), *supra* note 149. In the original: "Pháp luật của Việt Nam chưa quy định những "chốt hãm" quyền lực này với các chủ thể có quyền quyết định tình trạng khẩn cấp." [translated from Vietnamese by Sébastien Lafrance].

168 Shankar S. (2018), 'The State of Emergency in India: Böckenförde's Model in a Sub-National Context', 19(2), *German Law Journal,* p. 205.

169 For Neo-Roman model, see Mueller S. (2016), *supra* note 48, p. 297.

170 Das B. C. (1977), 'Emergency provisions in the Indian Constitution: A study in comparative analysis', 38(7) *Indian Journal of Political Science*, p. 241.

171 The Indian State is sub-divided into different states based on a federal structure. The central government has the power to declare emergency in a state in case of breakdown of constitutional machinery in the state.

172 Singhvi A. M. and Gautam K. (2020), 'Emergency Powers in India' in *The Law of Emergency Powers: Comparative Common Law Perspectives*, Springer, p. 211.

Court of India).[173] Article 352 of the Constitution empowers the President to declare a national emergency when satisfied that "*a grave emergency exists, whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion.*"[174] The declaration of emergency entails the administration and legislation for states to be undertaken by the Union Executive and Union Parliament respectively.[175] In case of war or external aggression, Article 19 (fundamental freedoms including freedom of speech and expression) can be suspended by the President[176] and for violation of fundamental rights (except articles 20 and 21), the right to approach the courts may be suspended.[177]

The constitutional arrangement provides for various checks on the power of the executive to preserve legality in times of emergency. The President can issue a proclamation only after receiving such instruction in writing from the cabinet.[178] It further requires approval or ratification from the legislature, else the proclamation will lapse within a month.[179] Both houses of the Parliament are required to confirm the continuation of the emergency every six months.[180] Though this does not provide for Ackerman's supermajoritarian escalator, the executive power continues to be restrained by *ex post* parliamentary control.

In the second type of emergency envisaged by the Constitution, the President can declare state emergency/President's rule under Article 356, when the President is satisfied that the government of the State cannot be carried on in accordance with the provisions of the Constitution.[181] The President then assumes to himself all or any of the functions of the government of the State, and the legislative

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173 The same structure of separation of powers is also followed at the state level, wherein the state executive is headed by a Governor.

174 Constitution of India 1950, article 352 (1). Until 1975, the grounds for declaration of national emergency remained the same. However, after Indira Gandhi's declaration of emergency in June 1975, leading to misuse of the provision, the ground of 'internal disturbance' was substituted for 'armed rebellion'.

175 *Ibid.,* articles 353 (a) and 353 (b).

176 *Ibid.,* art. 358 (1).

177 *Ibid.,* art. 359 (1).

178 *Ibid.,* art. 352 (3).

179 *Ibid.,* article 352 (4) and (6). A resolution may be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting.

180 *Ibid.,* art. 352 (5).

181 *Ibid.,* art. 356 (1).

powers are taken over by the Parliament.[182] The safeguards include the expiry of the proclamation after two months unless approved by the house of the Parliament.[183] It can be extended every six months but cannot be extended beyond a year unless there is a national security emergency.[184]

The third type of emergency anticipated is financial under Article 360. The President can proclaim such an emergency when he is satisfied that a situation has arisen whereby the "*financial stability or credit of India or of any part of the territory thereof*" is threatened.[185] The Union Executive then acquires the right to give directions to States to observe financial propriety. The President may also reduce the salaries of public officials, including judges.[186] The safeguards envisaged are similar to those of state emergency.[187]

The state of normalcy or separation of powers is suspended during the state of exception where there is concentration of power in the hands of the executive. However, the constitutional provisions provide for the principle of temporal duration and strict procedures for extension of the state of emergency. In addition to the procedural limitations placed by the Constitution, the courts also act as a check on the exercise of emergency powers by reviewing the proclamation of emergency and the impact on rights of people.[188] The judges play an important role in upholding the rule of law during such times.[189] The Indian state of emergency therefore, also envisions within its proposed structure a legality model where the judges "*patrol and*

182 *Ibid.,* art. 356 (1) (a) and (b).

183 *Ibid.,* art. 356 (3).

184 *Ibid.,* art. 356 (4).

185 *Ibid.,* art. 360 (1).

186 *Ibid.,* art. 360 (4).

187 *Ibid.,* art. 360 (2).

188 *Ghulam Sarvar v. Union of India* AIR 1967 SC 1335, relevant for national emergency. *S.R. Bommai v. UOI* (1994) 3 SCC 1, relevant for state emergency. There has been no declaration of financial emergency until date, no national emergency declared after 1975 and proclamations of state emergency have speedily declined since 1994 after the directions of the courts in the *Bommai case*.

189 It is however seen that during an emergency, the courts tend to adopt a deferential attitude towards the actions of the government. This was visualised in *ADM Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521, where the judges favoured the action of the executive in denying the fundamental right to liberty to the citizens, during the 1975 emergency. The effect of the case was however, negated by the 44th amendment to the Constitution in 1978, and recently it was overruled by the Supreme Court in *K.S. Puttaswamy v. UOI* AIR 2017 SC 4161.

protect the legal and moral borders".[190] Moreover, the regulation and oversight of emergency powers happen both *ex ante* and *ex post* through the constitutional provisions of emergency, parliamentary oversight and judicial review. Under the Indian Constitution, "*the Parliament's veto power, the Supreme Court's activism and the growing pluralism of the body politic*"[191] have resulted in imposing a considered check on the executive's emergency powers and in the preservation of legality.

3.3. Canada

Gross notes, "*[i]n Canada, emergency doctrine finds its constitutional anchor in the preamble to section 91 of the Constitution Act of 1867, which permits the making of laws 'for the Peace, Order and Good Government'*"[192] While the two countries share similar legal traditions in many respects, the state of emergency in Canada, unlike India, is provided for under legislative enactments[193], i.e. the Emergencies Act ('Act')[194] adopted in 1988. Canada's approach to the state of emergency could therefore be deemed to be based on the "business-asusual" model, but it also "*has procedures somewhat similar to Ackerman's proposed supermajoritarian escalator that are designed to empower legislative minorities during an emergency.*"[195] Although Canadian law "*demonstrates how there can be a creative blurring of all three branches of government that may be particularly helpful to supervise the state during emergencies*",[196] the executive branch of government would be in charge if a state of emergency was declared.

It is noteworthy that some legislative competences, like health,[197] are shared between the provinces and the central (federal) government when other competences are exclusive to one level

190 Silverstein G. (2010), *supra* note 64, p. 621.

191 Sagar R. (2016), 'Emergency Powers' in Choudhry S. et al. eds., *The Oxford Handbook of The Indian Constitution*, Oxford University Press, p. 213.

192 Gross O. and Ní Aoláin F. (2006), *supra* note 3, p. 43.

193 Martin R. (2005), 'Notes on Emergency Powers in Canada', 54 *U.N.B.L.J.* 161, p. 162: "Many constitutions make express provision [*sic*] for both the invocation and the exercise of emergency powers. Canada does not."

194 Section 5b) *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp) ('Act').

195 Roach K. (2008), *supra* note 69, pp. 243-244.

196 *Ibid*.

197 *Carter v. Canada (Attorney General),* [2015] 1 SCR 331, para. 53: "Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic."; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, para. 32; *Schneider v. La Reine*, [1982] 2 RCS 112, p. 142.

of government, central or provincial, like the army or education respectively. This separation of jurisdiction over matters between the federal and the provincial governments is key to understanding the functioning of the Canadian legal framework, including at times of emergency, mostly because the Act "*purports to give the federal Cabinet the authority to exercise many powers constitutionally reserved to the provinces.*"[198] Nevertheless, the federal government may not always decide to rely on the Act in the context of an emergency, as shown recently during the pandemic, and it may rather prefer, when it is possible in terms of shared competences for example, to co-ordinate via political channels the actions to be taken with the provinces.

More than just addressing "public welfare" emergencies, like pandemics, under sections 5 and 6, the Act also addresses three other kinds of emergencies, i.e. for suppressing "*threats to the security of Canada*" under section 16, an "*international emergency*" under sections 28 and 29 which involve Canada and other countries, and a "*war emergency*" under sections 37 and 38 in case of real or imminent armed conflict. Nevertheless, the Act is deemed to apply to all "*national emergencies*".[199] The national nature of the emergency is a threshold that must be met to trigger the application of the Act, i.e. situations that "*exceed[s] the capacity of authority of a province to deal with it*".[200] The other threshold that must be to declare a state of emergency in Canada is that the Act requires that the situation "*cannot effectively be dealt with any other law of Canada.*"[201] This may explain, in part, the reluctance of the current Prime Minister to declare a state of emergency regarding the pandemic since the use of 'any other law' would be first privileged before resorting to the Act.[202]

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198 Rosenthal P. (1991), 'The New Emergencies Act: Four Times the War Measures Act', 20-3 *Manitoba Law Journal* 563, p. 565.

199 Roach K. (2008), *supra* note 69, p. 241.

200 Section 3(a) of the Act.

201 Section 3 *in fine* of the Act.

202 Global News (2020), "Canada not at the point of declaring a federal emergency over COVID-19: Trudeau" (March 22). Retrieved from https://globalnews.ca/news/6715159/coronavirus-canada-federal-emergency/ [accessed on 30 April 2021]. See also, more recently, Patel R. (2021), 'Garneau won't rule out invoking Emergencies Act to limit pandemic travel', Canada Broadcasting Corporation (CBC) (January 24). Retrieved from https://www.cbc.ca/news/politics/garneau-emergencies-act-pandemic-travel-1.5885770 [accessed on 30 April 2021].

The Act also provides that "*the initial duration of each proclaimed emergency varies (from 30 days in the case of 'public order' up to 120 days when 'war emergency' is concerned') and so do the nature and scope of permissible emergency powers granted to the federal government.*"[203] This is in line with the principles we have seen with respect to time limitations of a state of emergency that go back to the time of the Roman Republic, which principles were also reiterated by modern thinkers.

Roach notes, "*one of the most important and unique features of the [Act] is its pre-commitment to respecting non-discrimination norms during an emergency*",[204] which is provided by section 4(b). This unique provision in the Act may be linked to Canada's history where Japanese-Canadians were interned during the Second World War, and also, linked to what happened in 1970 during what is commonly called the October Crisis when a state of "*apprehended insurrection*" was declared;[205] "468 people were arrested without warrants, 435 of whom were eventually released without charge."[206] This was before the Act was enacted in a time where its predecessor, the War Measures Act,[207] also an ordinary federal statute, "*provided little in the way of objective restraints on the exercise of executive power and the courts generally deferred to the exercise of executive power.*"[208] In addition, because of the language used in section 2 of the War Measures Act, judicial review of any proclamation of emergency was made "*unlikely*".[209] This was changed with the adoption of the Act, adopted *after* the enactment of Charter of Rights and Freedoms[210] ('Charter'). In fact, as Scheppele argues, it would be, indeed, "*hard to reconcile*" the War Measures Act with the Charter, which "*featured human rights at its core*".[211]

Also, the Act provides that the regulation and oversight of

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203 Roach K. (2008), *supra* note 69, p. 244; see also respectively sections 18(2) (public order) and 39(2) (war emergency) of the Act.

204 *Ibid.*, p. 240.

205 See, e.g., Scheppele K. L. (2006), 'North American Emergencies: The Use of Emergency Powers in Canada and the United States', 4 *International Journal of Constitutional Law* 213, pp. 229-230.

206 *Ibid.*, p. 229.

207 5 George V, Chap. 2.

208 Roach K. (2008), *supra* note 69, p. 240.

209 Martin R. (2005), *supra* note 193, p. 162.

210 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c.1.

211 Scheppele K. L. (2006), *supra* note 205, p. 230.

emergency powers happen both *ex ante*[212] and *ex post*[213] through the Act, the legislation - rather than through the Constitution as in India, by the creation of a non-partisan Parliamentary Review Committee. The judiciary would also be involved in it since, by tradition, a sitting or retired judge heads those committees.[214] Judicial scrutiny of any orders or regulations would not be precluded after the proclamation of a state of emergency since they could still be eventually challenged in court either on the basis of possible inconsistencies of a governmental measure or an act adopted through the powers given by the Act or, more broadly, inconsistencies with the Constitution, including the Charter, or both. However, let us recall that it is "*not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation.*"[215]

Conclusion

The objective of this paper was, on one hand, to explain and clarify some of the most important theories of emergency powers and, on the other hand, to apply this theoretical framework to a few selected countries in order to highlight the similarities and also the differences, sometimes major - as illustrated by the comparison of Vietnam, India and Canada -, that may distinguish how this and that State chooses to address, implement and deal with emergency powers.

That being said, let us clarify that it would be wrong to equate the sole factual existence of an emergency with the automatic reliance by a State on emergency powers in the context of the declaration of a state of emergency. Depending on the circumstances, a State may prefer to circumvent the need for the declaration of a state of emergency, and then proceed with other measures, which may remain exceptional and unusual, but which would still not fall into the rigid legal scheme of a state of emergency.

212 Section 62(1) of the Act: "The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose."

213 Section 63(1) of the Act: "The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency."

214 Roach K. (2008), *supra* note 69, p. 242.

215 The Canadian Encyclopedia Digest, Constitutional Law VII.2, Thomson Reuters, para. 140.

On a personal note, the authors sincerely hope to have contributed, to a certain extent, to the development of and the debates surrounding the issues related to emergency powers, and to have shed some light on possible areas of uncertainty in that regard, especially for the Vietnamese readership. ●

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