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ARTICLE

"We Can Do Anything We Want": Martial Law and the Liberal-Democratic Making of Normalized Emergency[1]

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ABSTRACT

Martial law and state of emergency provisions in most constitutions have the same logic: in an emergency, they suspend the application of law to protect the lawful order. In the Philippines, these provisions can be traced to the 1916 Jones Law and manifested as the application of imperial violence on colonized peoples. After decolonization, this logic has escalated into a global trend of normalized emergency powers, reminding us of Benjamin's warning that the state of emergency in which we live is the rule.

This essay follows Neocleous' account of this development which he attributes to the liberal insistence that the law must be made sufficient for emergencies. This is provoked by the "Schmittian challenge"—the claim that emergency powers are the prerogative of the sovereign. But the dynamic of the liberal and Schmittian positions is what drives the process of normalizing emergency. Liberals fear the arbitrary exceptional powers invoked under martial law, so they encode these powers into law to enable an independent judicial oversight. Instead, this has normalized the acceptance and application of martial law and its associated powers. This essay asserts that Rodrigo Duterte's drug war which is continuously waged by the present Marcos administration is normalized emergency.

KEYWORDS

martial law, emergency/exception, normalized emergency, Duterte drug war, Carl Schmitt

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From Martial Law to Permanent Emergency

How can the extra-judicial slaughter of thousands, in Rodrigo Duterte and his government's campaign against dangerous drugs, be tolerated by Philippine society and its laws? How are the exceptional or emergency powers invoked in the campaign even possible after EDSA? What is the relation of these normalized exceptional powers to our experience of martial law powers? Before we answer these questions and understand its underlying assertion that the horrifying Duterte drug war—now overseen by the new Ferdinand Marcos Jr. administration[2]—is

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normalized emergency, we must understand how the drug war fits into the global trend of states declaring emergencies and invoking extra powers to deal with such crises. This trend is typically understood as having begun with the United States' declaration of a state of emergency three days after the September 11 terrorist attack in 2001, which was then followed by policies that undermined liberal jurisprudence and constitutional democracy with practices such as rendition, illegal detention, torture, and other inhumane methods of war that were deployed in the years that followed. This trend is said to be illustrative of Walter Benjamin's (2003 [1940]) contention that indeed, in our time, the state of emergency has become the rule (392). But Mark Neocleous (2006) challenges this simplistic and ahistorical application of Benjamin's thesis on the US War on Terror. Instead, he asserts that the emergency powers that the US government has brought the world to bear were enabled by a long history of escalating emergency powers that have become, through legalization, the norm (191-94, 206).

In another article, Neocleous (2007a) traces the history of states of emergency starting with martial law and the substantial alteration in the use of the term. Originally in England, martial law meant military rules that applied "to the members of the armed forces and its jurisdiction ended at the battleground" (491). Civilians caught during battle might be subject to martial law but never outside of it nor in the time of peace. This use and understanding was the case until the shift in meaning that came with the deployment of the military and the application of its rules in the subjugation and eventual occupation of territories overseas:

> Where on the mainland the British state could muddle through well enough with sporadic use of the Riot Act to maintain order…it was quite clear that martial law most definitely was being used in that standard locale of political experimentation, the colonies: in Barbados in 1805 and 1816; Demerara in 1823; Jamaica in 1831-32 and 1865; Canada in 1837-38; Ceylon in 1817 and 1848…Cape of Good Hope in 1834-35, 1849-51, and 1852…and on several occasions in Ireland. (492)

In these instances, "martial law seemed to involve a kind of suspension of law," and this prompted constitutional authorities in the UK to contemplate the necessity and rationality of temporarily halting the application of constitutional norms in times of crisis or emergencies. As one constitutional expert observed: "It has been usual for all governments, during an actual rebellion, to proclaim martial law or the suspension of civil jurisdiction."[3] Neocleous notes that the new meaning of martial law displayed two dimensions: 1) that it suspends fundamental liberties and the law as such, and 2) that it is justified on the grounds of necessity. These eventually came back to haunt the colonizing state that saw the "mechanisms of violence used in the colonies become integrated back into the juridical regime and political practices" of the West (492-93).

This was clear in the suppression of the popular and democratic attempt by Rhode Islanders to adopt a written constitution and elect officials for a people's

government for their state. Since "the military was being used in a way never before seen in American history," Rhode Islanders believed that their warrantless arrests and detentions without charges would not stand the test of law. In the intervening time between the filing of suits in 1841 and 1844 and the Supreme Court decision in 1849, a debate concerning the understanding of martial law concluded that martial law is allowed by the Constitution as a means of defense in emergency conditions (494-495). Meanwhile, the war in 1846 substantially increased the size of the US, "which now contained a considerable 'alien' population supposedly unfamiliar with American institutions and apparently incapable of self-government… surely martial law might be appropriate for such a situation and such people?" (495). The 1849 decision upheld the new thinking on martial law, ruling that what happened in Rhode Island was an insurrection and that this constituted a situation of emergency or war thus necessitating martial law. This was followed by other landmark cases. Neocleous cites *Ex parte Marais* in 1902 and Moyer vs. Peabody in 1909. These designated martial law as "acts done by necessity for the defence of the Commonwealth when there is war within the realm" and held that "when it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment."[4]

What was at stake, Neocleous asserts, "was the possibility of using martial law during times of 'peace' or, rather, reconceptualizing 'war' so that broader moments of crisis…could be easily brought under its remit" (497). Thus, the powers of martial law shifted eventually from military to a political register, from military operations to addressing problems of internal security and public order. Further, these developments occurred in states that were on their way to becoming the foremost liberal democracies of today, arming them with a "maneuver that provided a means of simultaneously liberating executive power from constitutional restraints and suspending basic liberties."[5] However, the ruling elite within these liberal democracies recognized that "within the broader context of an increasingly democratized polity, declarations of martial law were becoming increasingly inflammatory to the new citizenship…[m]artial law was a solution…but also a problem" (498). What was required was a new way of articulation that did not openly refer to military rule and violence but still enabled the implementation of martial law powers during peacetime—a system rooted in the concepts of necessity and emergencies (499).

The Defense of the Realm Act of 1914 (DORA) bridged the practice of the state of emergency with the techniques of martial law. Debating in 1922 whether to put Ireland under martial law, the British Cabinet realized that "martial law powers were, in effect, being exercised." DORA granted sweeping regulatory powers that included the use of detention and court martial. As a general puts it in a cabinet meeting with Irish executives: "the difficulty behind martial law is that you would put certain persons in prison, and they would hunger-strike…[w]hat would the people in England say?"[6] DORA provided the answer for the ruling needs of

the time. It was "a hurriedly devised translation of martial rule and prerogative concepts into statutory provisions"—martial law measures were euphemized into "regulations" designed for the "defence of the realm" (499-500). The operative word here is "regulations," as states of emergency policies are products of legislation that become parts of the law of the land.[7] Thus, there was no need to declare martial law as the practices under it could be implemented under DORA—"a form of Statutory Martial Law" (501-02).

The definitive move was the Emergency Powers Act (EPA) of 1920 which granted the government broad powers, including the deployment of the military to address problems of security and order with a corresponding suspension of basic rights and liberties. Thus, in Northern Ireland, this meant that "the usual mish-mash of martial law powers" became understood as "special" powers. Neocleous emphasizes the timing of the EPA. For all the talks about "war" necessitating such powers, the real "focus of the legislation was very clearly industrial disputes and labor revolts." The immediate postwar years in the UK were a period of "intense class conflict," exemplified by numerous workers' strikes in 1919 and 1920. The height of the unrest was the overlapping October 16 and 21 strikes in 1920 by miners and railway workers. The proposed legislation that became the EPA was "presented to the Commons on October 22 and rushed through Parliament in a week" (501-03). It was then followed by the 1939 and 1940 EPAs and reinforced by some 377 Defence (or General) Regulations approved between August 1939 and May 1945. These were used to suppress the strikes of dock workers in 1948 and 1949; railway workers in 1955; seamen in 1966; power workers in 1970; miners and dock workers in 1972; miners, power workers, transport workers, and Glasgow fire workers in 1973; refuse collectors in 1975; and fire workers in 1977–78 (503). Moreover, these emergency powers were also deployed in the general administration of the public sphere and policing of society, which then further broadened the definition and scope of what can be deemed emergencies.

This was the case in the US, which likewise transitioned from declaring martial law to emergency regulations while maintaining the original military language. The New Deal of the 1930s was precisely broad executive emergency powers founded on "the leadership of this great army of our people" and deployed to "wage a war against the emergency" that "covered the whole economic and therefore the whole structure of the country."[8] This meant, in addition to the emergency measures that addressed banking, agriculture, and the general economic crises, military intervention in thirty-one labor disputes from 1930 to 1935. In 1973, the Senate Special Committee on the Termination of the National Emergency[9] found that the US had been governed under states of emergency after states of emergency (declared on December 16, 1950, March 23, 1970, and August 15, 1971) for forty years since 1933, after which the US declared forty more emergencies up to the emergency responses that enabled the War on Terror (505-506).

Meanwhile, in 1963, the Inter-American Commission on Human Rights reported that over a hundred states of emergency had been declared by Organization of African States (OAS) members in the previous decade. In 1978, thirty countries all over the world were in states of emergency. In 1986, the International Law Association revealed that seventy countries were in one emergency or another. In 1997, a United Nations report found that more than one hundred states (over half of its members) had at some point been in a state of emergency since the previous decade. Neocleous (2006) illustratively quotes the International Commission of Jurists in 1983: "It is probably no exaggeration to say that at any given time in recent history, a considerable part of humanity has been living under a state of emergency" (197-198).

In the Philippines, the Philippine Center for Investigative Journalism or PCIJ (2006) identified fourteen states of emergencies declared in the country since January 31, 1905, when Executive Order No. 6 signed by Governor General Luke E. Wright suspended the writ of habeas corpus for Cavite and Batangas. The list includes declarations of emergency by the Commonwealth government during the Second World War, Ferdinand Marcos Sr.'s 1972 martial law, and the states of emergency declared in response to military coups in the Corazon Aquino and Gloria Macapagal Arroyo governments. The list was part of a primer on the state of emergency before the Arroyo administration declared a state of emergency on February 24, 2006. In 2009, Arroyo declared martial law in the province of Maguindanao. Duterte's Proclamation No. 55 makes it state of emergency number seventeen, and Proclamation No. 216, which declared martial law in the whole of Mindanao, makes the total count eighteen. But in another article on "extraordinary presidential powers," PCIJ (2005) also cites instances wherein former presidents Joseph Estrada and Arroyo called on the Philippine armed forces to suppress lawless violence, which were upheld by the Supreme Court in Integrated Bar of the Philippines (IBP) vs. Zamora to be "discretionary power solely vested in [the president's] wisdom." These instances are similar to Duterte's earlier proclamation of a state of lawlessness that preceded his declaration of martial law. Further, the PCIJ list excludes declarations of emergency that do not involve armed conflicts. An article in the Philippine e-Legal Forum explains that "emergency" as envisioned in the 1987 Constitution includes "rebellion, economic crisis, pestilence or epidemic, typhoon, flood, or other…catastrophe of nationwide proportion of effect." It traces this expansive conception from the interpretation of emergency by the "legislature or the executive in the United States since 1933" (P&L Law). Indeed, even a state of national calamity empowers the government to deploy the military and police against rioters and looters during shortages of food and other necessities.[10]

In all these emergencies that spanned the globe are three interrelated processes: First, the enlargement of what is deemed emergencies beyond that of military conflict. But these are represented as military campaigns or wars—wars against disasters or calamities, wars against economic crises, wars against crime and drugs,

etc. Second, the extensive and drastic increase in the forms of emergency powers. Thus, at the time of the Senate report on the states of emergency in the US, "the President may seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens" (Neocleous 2006, 198-199). In the War on Terror, the US president's emergency powers were demonstrated in the capture, incarceration, and torture—euphemized as "enhanced interrogation technique"—of suspected terrorists in US military camps, the extensive powers of surveillance of suspected terrorists and American citizens in general, and the assassination of citizens suspected of terrorism.[11] More recently, in the US war against illegal immigrants, the Supreme Court upheld the power of the president to indefinitely detain refugees (Wolf 2018). Third, these new forms of emergency powers putatively demanded by exceptional situations "end up becoming permanent and normalized" in legal structures, statutes, and ordinary legislations amounting to what Neocleous describes as the normalization or "liberalization of martial law" (2006, 200-204; 2007b, 13).

The Catastrophe of Permanent Emergency in the Philippines

Is this nightmarish process, not the concrete unfolding of the liberal demand that the law must be made sufficient for emergencies—that emergency powers must be accounted for within the rule of law? David Dyzenhaus (2009) defends the liberal perspective and argues that locating the discourse of martial law powers within the legal frame disciplines the discourse by excluding the narrative "in which the centralized coercive apparatus of the state, its monopoly on violence, is uncontrolled by law" (60). This is practically realized through the virtuous "compulsion of legality" wherein "the institutions of legal order cooperate in devising controls on public actors that ensure that their decisions comply with the principle of legality, understood as a substantive conception of the rule of law" (60-61). But for this to work, exceptional executive powers and their limits must first be encoded—detailed in statutes. Is this not what Neocleous has documented as the normalization of emergency? Here, emergency powers are defined and legalized and put under the scrutiny of legal institutions. The hope is that such scrutiny will enable restrictions and discourage abuse. Dyzenhaus is hopeful even when the compulsion of legality turns dark—when the law is only formal, and arbitrariness is "covered over by…a 'thin veneer of legality.'" Even in this "sham" compulsion of legality, "the laws' potential to discipline political power" is maintained, as those in this dark side "at least pay lip service to the legal frame as providing the discursive boundaries for the adjudication of [emergency or security] issues." Dyzenhaus asserts that "in participating even in this way in maintaining the legal frame, they make it possible for other participants to set in motion the virtuous cycle of legality" (61).

However, this hopeful stance is not tenable in practice.[12] For example, this is apparent in how the late Marcos justified martial law by stressing its constitutional legality through a system of presidential decrees buttressed by his insistence on the president's power to make laws during martial rule. Even Duterte made use of constitutional provisions on the state of lawlessness, emergency, and martial law, buttressed by support from the legislature and judiciary, to justify his actions. The point is that authoritarians do recognize the need to legally justify their actions. But this does not stop them from using their emergency powers to the full. The effect is the same on the ground; the veneer of legality makes no difference to their victims. Even the legal remedies hard won by martial law victims did not prevent continued extra-judicial killings in subsequent administrations.

In an earlier paper where Dyzenhaus (2006) expounds on A.V. Dicey's legal theory, he identifies an ambiguity in the idea of the rule of law by differentiating between the rule of law—"the rule of substantive principles"—and rule by law—where a legal warrant for government acts means agreement with the rule of law. This difference corresponds, more or less, with the distinction made between the lawful order and the mere existence of law. The rule *of* law requires a lawful order that accords with the general values of the political community (as enshrined in its constitution, for example) and this is usually decided by the courts. On the other hand, the mere existence of a supporting law sanctioning acts of government satisfies the requirements of rule *by* law—Marcos' martial law as supported by a system of Presidential Decrees and legislations can be interpreted as a rule by law. This adds a complication to the concept of the compulsion of legality. From Dyzenhaus's and Dicey's position of a substantive conception of the rule of law, rule by law can derail the rule of law and "can take one off the continuum of legality" (2031). Thus, even in cases where emergency powers are given a statutory guarantee, rule by law can effectively undermine itself (2034). The way out is for statutory or legal warrants—rule by law—to be supplemented with independent and informed oversight that ensures government decisions and acts comply or are made with the spirit of legality that contextualizes all statutes—rule of law. Again, here, Dyzenhaus puts his trust in legal institutions of oversight if such institutions "adopt as a regulative assumption of their role the view that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law" (2036).

To some extent, this is the case with emergency powers in the Philippines. The declaration of martial law and/or state of emergency is allowed by the 1935, 1973, and 1987 constitutions. As such, we can say that both types of exceptional powers are legal and constitutionally sanctioned. At the minimum, they fit Dyzenhaus's description of "rule by law" or Neocleous's point about the normalization of exceptional powers into "regulations." This minimum situation, as Dyzenhaus notes, opens the way for oversight and scrutiny and, as such, to his thicker concept[13]

of the "rule of law." Accordingly, the 1987 Constitution provides legislative and judicial constraints, including that of oversight, over the president's power to declare martial law (Tan 2012, 523-604, Peria 2016, P&L Law 2007). But even the 1935 Constitution, by formally inscribing martial law within its body, recognized the Supreme Court as the highest authority over the interpretation of its intent. Institutions of legal order always have this recourse for the rule of law—sometimes they make use of this remedy and sometimes do not. Thus, it is always possible for the "rule of law" to be thrown out altogether. Here, we need only mention the two decades of Marcos' dictatorship. But the Philippines' history of exceptional powers did not stop here, and so we need to refer to Duterte's recently completed authoritarian rule (Editorial Board 2019, Peralta 2021).[14] Marcos and Duterte were the catastrophic failures of Dyzenhaus's hope. The Philippines' experience is that the institutions of legal order cannot withstand, much less defeat, the executive determined on a despotic rule. Not even an activist or politically interventionist Supreme Court wielding its powers of rulemaking and judicial review was able to contain the less-than-resolute authoritarianism of then-President Arroyo. And, ironically, when this same activism was displayed against the liberal presidency of Benigno "Noynoy" Aquino, the chief justice was impeached (Tan 2012)—reducing the Supreme Court to its compliant state that enabled Duterte at every turn.[15] The executive wields the bulk of state power and, more importantly, its arms. This power is already overwhelming. Theoretically, this power is constrained; but the fundamental law allows varying degrees of its unleashing.

In the 1935, 1973, and 1987 versions of the Philippine constitution, the powers of emergency are legislative powers that can only be delegated to the president. Meanwhile, martial law provisions within the same charters identify it as a power of the president. It is no wonder that Marcos Sr. (1978) preferred martial law and kept on insisting on the ascendancy of the chief executive in its declaration in his speeches rationalizing its 1972 declaration (263-69, 317). Duterte, meanwhile, effectively deployed both. He declared a state of national emergency citing lawless violence in Mindanao after the Davao City night market bombing in September 2016. But in Proclamation 55, he referred to Article VII Section 18 of the 1987 Constitution, which is also the same provision that identifies his power to proclaim martial law (Government of the Philippines 2016). The proclamation thus stopped short of declaring martial law by only referring to the first sentence of the constitutional provision that states the president's power, as commander-in-chief, to "call out" the armed forces to suppress lawless violence. This putative restraint came to naught, however, as he eventually declared martial law in the whole of Mindanao during the Marawi siege in May 2017. All these were then punctuated by the landmark decision of the Supreme Court the following July that affirmed the legality of Duterte's martial law declaration by arguing that the 1987 Constitution "grants him the *prerogative* whether to put the entire Philippines or any part thereof under martial law" (Supreme Court 2017). The decision is an escalation

and is highlighted by the use of "prerogative" to describe the power of the president to declare martial law when the drafters of the Constitution took pains to exclude the term from its body. This may be gleaned from the proceedings and debates of the 1986 Constitutional Commission that placed the constraints on the president's martial law powers, making sure to portray such power as dependent on legislative and judicial oversight and, as such, limited (The Constitutional Commission of 1986, 65-90, 250, 380). These efforts likewise came to naught as the Supreme Court decision also put "power" and prerogative together into the super term—"powers and/or prerogatives"—that appeared fourteen times in the decision, in addition to the numerous times that "prerogative" appeared in its no less powerful lonesome but that is sometimes clarified as "exclusive." And to put the proverbial cherry on top: for the Supreme Court, this prerogative is precisely what is threatened by the rebellion/invasion in Marawi. According to the decision, the Maute terrorists in Marawi "deprive the Chief Executive of the assertion and exercise of his powers and prerogatives therein" (Supreme Court 2017).[16] And thus, we come upon an instance of paradoxical reasoning that is the hallmark of martial law's logic: the president's prerogative to declare martial law is the means for the protection of the president's powers and prerogatives.

However, we cannot say that the Philippine state prefers martial law over a state of emergency. In PCIJ's count, but updated with our count, there were only four declarations of martial law compared to the innumerable times that states of emergency were declared. This is not surprising as an emergency can be declared during natural calamities, which we no longer bother to count, and also during economic crises. In Neocleous's account of the normalization of martial rule, we cannot say that martial law and a state of emergency are different. Martial law in the Philippines has been legal, guaranteed by all of its constitutions, from the very beginning. Instead, we can say that Duterte has laid down martial law in Mindanao on a bed of states of emergency. And let us not forget that before this, the bed is already occupied by his war on drugs that by then have killed thousands (Amnesty International 2017, Gavilan 2022b). For that was what it is: the war on drugs is both martial law and normalized emergency in its logic. It is state exceptional power in its purest form, close to the concept of the Supreme Court's choice word "prerogative," closer to that potent tandem "power and prerogative." This is because while the Drug War does away with any limitations or constraints by being declared purely on the then President Duterte's prerogative—no law sanctioned it, it is, nevertheless, dependent on the deployment of the "law" and its agents as its cleansing force. And, in return, the drug war guaranteed and continues to guarantee this deployment (Curato 2017, Human Rights Watch 2021). Did not Duterte tell this to his police executioners all the time? In Duterte's Drug War, we heard echoes of martial law's application in the colonial situation, of martial law as colonization: It was a response to the *emergency* of "narcopolitics." It is the *doubled law/arbitrary rule* directed against the intransigent and ungovernable. It is *terror*

conducted in a campaign akin to a war. It is the power of exception—the power to delineate those who are going to be killed, to put them in the space of law and non-law where they stand or plead or run, to end their life. "I will kill you," warned Duterte. The law, in neither sanctioning nor prohibiting the drug war that releases the state's exceptional powers at its core, practically tells Duterte: you can! To the victims of the drug war—old and young, all genders, all body types, balding, or mopped, at home or in the streets—but mostly poor (Gavilan 2017, Enano 2018, Gavilan 2022a), Duterte said, "I did not hear that a son of Lucio Tan or Gokongwei sold drugs." "If you die, I am sorry" (quoted in Jerusalem 2017).

The Logic of the State of Exception is the Reason of the State

The commonplace objection to Dyzenhaus's position is that it is too idealistic, it ignores the workings of realpolitik—that the institutions of the legal order may be compromised by interests, by fear, by delusions. Thus, there was no real institutional challenge to Marcos's martial law; and individual obstructions were easily dealt with through martial law itself. Meanwhile, there was institutional silence, if not support, for Duterte's war on drugs, and institutional sustenance for his extended martial law in Mindanao. Is it enough then to blame the contingent realities of the political for our past and recent impasse? Dyzenhaus (2009) argues that the "decisions taken by legal and political actors [that] undermine [the substantive] principles [of moral constitutionality] *does not* demonstrate that there is a plurality of constitutional narrative"—"one can choose 'the cause of…the inviolability of law, just procedure…or one could choose' arbitrary rule…and strange prerogative" (60).

But this is misleading. As we saw, the demand to make the powers needed to address emergencies accountable conflated with the state's effort to mitigate the bad image of exceptional powers. This armed the state with draconian authority codified in emergency measures and statutes euphemized as regulations applied to a normal/abnormal situation—the normal situation of a continuous emergency or crisis. This normalization or liberalization of martial law is a universal feature of the "nonabsolutist western legal tradition" as John Ferejohn and Pasquale Pasquino (2004) assert (239). This observation is precisely Neocleous' claim (2006, 2007a, 2007b) in his historical analyses of the normalization of emergencies. As will be explained later, while authoritarianism through martial law or a state of emergency may be law-based (sanctioned by the Constitution), the resulting powers are not legally defined or described. The effort to encode these exceptional powers into law, on the other hand, is driven by what Dyzenhaus (2009) describes as the liberal effort to instill a virtuous cycle of legality (61). But in Ferejohn and Pasquino, the alternative position of liberal dualism maintains that there is such a thing as "the constitutional authority to use law to suspend law, thus creating an exceptional regime alongside the regime of ordinary law." As expected, they also suggest that the exceptional regime must be constrained, overseen, and scrutinized (223-26).

Meanwhile, Dyzenhaus' more inflexible liberal position[17] is arrayed against liberal outright or qualified acceptance of the exception. But while denying the state of exception by claiming that the legal order of institutions and laws give it no place or reason and asserting at the same time that it can be dealt with by the norm, it feeds into the process of dualism by giving it fodder. It is the impossible demand that gives impetus to the guilty normalization of emergency—"Yes, emergency power is needed, but let us ensure that it is also held accountable." The compulsion for legality pushes and enlarges the drive to codify emergency measures, methods, and acts. While this has the effect of clearly putting such authority under oversight and scrutiny, it also has the effect of militarizing the norm.

But the combined Dicey and Dyzenhaus (Dicey-Dyzenhaus) position is only half the process of normalization of emergency. There is also that other side of Dyzenhaus' putative choice: arbitrary rule and strange prerogative—Carl Schmitt's (2014 [1921]) concept of the *sovereign* that was developed over several works. As Dyzenhaus acknowledges, Schmitt presents a challenge: "There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists."[18] Further, in the immediately succeeding paragraph of Schmitt's (2010 [1922]) most relevant work:

> The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty…not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law. (13)

But here, Schmitt appears to present a position that is much more complicated than Dyzenhaus's narrative of "arbitrary rule…and strange prerogative." Schmitt subscribes to the dichotomy of the "normal situation" when ordinary rules and laws operate, and the "exception" when the legal norm does not apply. The exception appears to be a condition when the law is produced "not based on law" but on the power of decision. But what facilitates the state of exception in practical terms? A few pages back in the *Political Theology*, we see that Schmitt writes primarily from the experience of the Weimar Republic and identifies Article 48 of the Weimar Constitution as the source of the power of the head of the Reich to declare the exception and as granting "unlimited power" when applied without check. For Schmitt, the liberal constitutional control over Article 48—the "division and mutual control of competences"[19]—only applies to the invocation of exceptional powers and not to its content (11). Nonetheless, not all emergency measure or emergency decree is necessarily exception: "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order." Here, the law recedes and only the state remains. But not in anarchy or chaos, as "order in the juristic sense still prevails even if not of the ordinary kind" (12). Moreover:

> The state suspends the law in the exception on the basis of its right of self-preservation…. The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike in the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. (12)

Thus, the elements of Schmitt's pair are not asserted to exist at the same time as in Ferejohn and Pasquino, but rather, the state of exception exists in the normal as a potential—as Article 8 of the Weimar Constitution for example—and the normal is shattered by the exception. This is the interpretation of the exception that liberals vehemently oppose, that the state of exception or emergency suspends the normal working of the law or, worse, overturns it completely and leads to a dictatorship or tyrannical rule. To liberals, this is the Schmittian monstrosity of the sovereign as an absolute state.

But then, we come to the section that Dyzenhaus quotes: "…a normal situation must exist." This situation—"in which legal prescriptions can be valid"—must be brought about when the "exception appears in its absolute form" (13). There can be no norm or law without "a normal, everyday frame of life" to which it can be applied. A norm cannot apply to chaos—the sovereign decides whether a normal situation exists—the sovereign decision makes and guarantees the normal situation. Put differently, the state of exception as potential in the norm produces and guarantees the normal situation to which the norm applies.

Would Schmitt choose one narrative over the other as Dyzenhaus suggests? The problem with Schmitt is that his reputation is rightly ruined by his short-lived association, from 1933 to 1936, with the National Socialists or Nazis[20] who were elected but then brought down the Weimar Republic. The irony is that the Republic enabled this ascent, and as such, caused its own demise. Schmitt initially regarded the Third Reich as a legally constituted authority. However, he later denounced the Nazis and regretted his ambition to be their principal theorist—but it was too late.[21] Schmitt's *Dictatorship* (1921) and *Political Theology* (1922) were written a decade before this association. Thus, he was writing for a different time. He accepted the liberal constitutionalist arrangement but saw in it a debilitating weakness: state power is divided and set against itself. Schmitt "was determined to reinstate the personal element in sovereignty [that unites all power of government in one person or entity] and make it indivisible once more." This was because "he considered the restoration of the personal element vital for the preservation of the modern constitutional state" (Schwab xlii). But Schmitt's prescription is anticipated by the laws of the Republic: "he considered the emergency provision of the Weimar constitution adequate for meeting crises; and…he acknowledged the interdependence of the state and the constitution…[but in his view] interpreting the provision of the constitution in a manner that strengthened the state's *raison d'etre*…would enable the constitutional order of the state to function normally" (Schwab 2010, xliv-xlv).

The state of exception, even when anticipated by the fundamental law or the constitution, is asserted to be exceptional: one cannot invoke it in a situation of normality. Schmitt's "sovereign slumbers in normal times but suddenly awakens when a normal situation threatens to be an exception" (Schwab 2010, xliv). Present as a potential in the constitution, it is a guarantee of the state's ability to deal with the exception. But for Schmitt, the exception is also an explanation of the legal order. Exception is a limit concept useful in elucidating the normal. Schmitt refers us to Soren Kierkegaard approvingly:

> The exception explains the general and itself….It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on the other hand, thinks the general with intense passion. (Quoted in Schmitt 2010 [1922], 15)[22]

So, Schmitt would choose the normal liberal constitutional order that includes the potential for deciding the exception. As already asserted, he chooses this to retain within the liberal constitutional order the capacity of the state to act in unity. How is this different from the Dicey-Dyzenhaus resistance to the Ferejohn-Pasquino liberal dualism that deploys "the idea that they associate with absolutism and Hobbes—the idea that the legal order is unitary" (Dyzenhaus 2006, 2010)? Here, Dyzenhaus cites Hans Kelsen's[23] identity thesis—"the thesis that the state is totally constituted by law…[according to which] when a political entity acts outside of the law, its acts can no longer be attributed to the state and so they have no authority" (2010). While this idea of unity inverts that of Schmitt, who argues for the independence and unity of the state from the legal order, it nevertheless presents a position of the same unyielding whole.

Schmitt acknowledges that his position goes against the prevailing view of the liberal constitutionalists of his time—most notable are Dicey and Kelsen (already introduced to us by Dyzenhaus), but also Adolf Merkl (Kelsen's collaborator) and Herman Heller (Scheuerman 1996, Hampsher-Mok and Zimmerman 2007). Dyzenhaus polemically opposes his reinterpretation of Dicey to Schmitt. Is this opposition an adequate reading of their works when, individually, each seems unable to explain what Neocleous documents as the normalization of the exception? Here, we see that liberal dualism, which accepts the exceptional regime that applies to emergencies and the normal regime that applies to ordinary situations, fares better. But reality exceeds this dualism at the point where both emergency and the measures that address it have become normalized as the situation and as regulation.

Thomas Poole (2016) suggests that "the political emergency framework overdramatizes the legal problematic we face, and liberal idealism seeks to almost wish the problem away" (3). First, the logic and language of political emergency or the exception is appropriate to crucial or existential constitutional situations, but it is not clear that we are in the midst of such a situation at any time. Poole argues

that much of what politically happens are undramatic works in ways that can be mundane. And the on/off workings of the norm/exception dualism cannot make sense of the long-term development in which "[m]any laws initially justified as emergency measure stay on the books after the emergency is over…as part of the normal legal framework" (5). Although we might fault Poole's critique here when applied specifically to Schmitt, he is responding to the general position that accepts the dualism of norm and exception. Meanwhile for Poole, liberal idealism "is all norm and no fact." It focuses on the *negative* dimension of the legal framework, of checks and oversight, but has no real proposal as to the *positive* dimension, on how state power is deployed and adjusted. As such, liberal idealism overestimates the abilities of the legal order to handle emergencies (8).

Instead, Poole proposes the "logic of reason of state"—an authority claim that takes into consideration exceptional measures substantiated by the principle that invokes the state's role as a protector or *custos* of the constitution. Poole asserts that this is a more robust explanatory framework that works well where political emergency and liberal idealism fail—it sidesteps the on/off dualism of norm and exception and makes sense of actual legal situations through a superior descriptive power. It does this by recognizing an intermingling of norm and exception that takes place on different levels: at the level of institutions, it recognizes the "semi-normal and semi-permanent" way in which norm/exception is operationalized through thick legal networks that are rarely arbitrary; and conceptually, it does recognize the possibility of a draconian and extremely secretive practice of reason of state but deemphasizes these as rare cases that are done "outside the law" (9-10)[24]—that is, what occurs most of the time is secrecy and discretion guaranteed or at least recognized by law.

Here, Poole proposes a promising alternative, but his demonstration lacks theoretical or philosophical substance. He misses out theoretically because he cuts off his concept of "reason of state" from its ties to "classic early-modern *raison d'état* narratives [that] emphasize the interplay of self-interested political power." This is because, as he eventually renames his position "liberal reason of state," he shares with the liberal idealists the "fear that the state as custodian will cannibalize the normative state, an indicator of which would be the declension of reason of state into princely prerogative or *raison d'état*, now no doubt run through bureaucracies but in the interests of a governing elite." But is this not already something that Neocleous asserted and proved? And is this not, ultimately, the position of liberal dualism, which accepts the state of emergency with the proviso that it be constrained? And thus, Poole misses out, finally, on the point that reason of state is potentially a catchall framework for the Dicey-Dyzenhaus and Schmitt positions. Indeed, combined, they make the reason of state but not only in the commonplace sense of reason as the interest of the currently ruling—fundamentally, it is *reason of state as state rationality that identifies the reason of the state as the state itself.*[25]

Or to put it in a form agreeable to the liberal position: the reason of the state is the rationality of the legal order that designates the reason or purpose of the legal order as the legal order itself.

Liberalism and Schmitt Make Normalized Emergency's Rationalization

Neocleous proposes a simple alternative explanation to what he traces as the history of the normalization of emergencies. This explanation fits within the logic of reason of state that retains the modifier "liberal" and that reconnects the concept with the tradition of *raison d'état* (see Viroli 1992). Neocleous (2006) contends that the state of emergency is what emerges from the rule of law when violence needs to be deployed and when the law's limits must be overcome (207). The violence of the state of emergency is deployed in what he details as the "fabrication of social order"—the state project of policing class antagonism.[26] But Neocleous scoffs at the concept of the state of exception and disdains its analysis (204-09), which leaves his excellent summation—shown in the etymological tracing of "emergency" to "what emerges"—without theoretical or philosophical justification. Thus, his position is beset with questions of theoretical weight: What is the relation of the state of emergency that emerges from law to the rule of law? Does this emerging mean that among the laws that apply are emergency measures that are dormant and do not, at the moment, apply? But is this not precisely what Schmitt claims? Let us assume that Neocleous means something else; that is, that emergency measures have been normalized and are placed in the heart of the rule of law. If so, what is the status of these emergency powers vis-a-vis the law? Where did they come from? How can they be there and not undermine the normal workings of their host? Or is there a gap within the rule of law from which the state of emergency and its measures emerge? What is the status of this gap within the rule of law from which emergency powers and state violence emerge? And what happens to the rule of law whose limits are breached by the emergence of the state of emergency when state violence erupts? And so on.

Neocleous also misses out on the function of the logic of the state of exception within an ideological process that underpins the reason of the state. Earlier, we have characterized Dyzenhaus' reinterpretation of Dicey as an inflexible liberal position. As such, it acts like a Freudian/Lacanian superego (Zizek 2005b, 247) that continuously issues impossible demands. While denying the state of exception by claiming that the legal order of institutions and laws gives it no place and asserting at the same time that the exception can be dealt with by the norm, liberal idealism feeds into the process of normalization of emergency by giving it impetus. Specifically, because of the impossible demand for the norm to deal with the emergency, the compulsion for legality pushes and enlarges the drive to codify[27] emergency measures. Meanwhile, Schmitt's sovereign—the spectral obverse of

Dicey-Dyzenhaus' impossible position of denial—is the fantasmatic figure (Zizek 2005a, 226-33) denied but acknowledged by the denial itself. It scares the wits out of the liberal compulsion for legality: the Nazi totalitarian bogeyman! The despotic absolute authority! Legalize! Codify!—or else be overtaken by the specter of the sovereign in the state of exception.

And again, in the Philippines' tragic case, martial law and prerogative talk—whether for or against—insist on the Dicey-Dyzenhaus vs. Schmitt/liberal vs. exceptional construal, ignoring the truth of their doubled political dynamics—that they are two sides of a coin and that normalized emergency in the country is a fact. Structurally, the catastrophe of dictatorship—whether Marcos' or Duterte's—is an effect of the liberal-Schmittian dynamics, of the arbitrary powers arising from the executive prerogative to declare martial law and the liberal demand to encode/regulate these exceptional powers. And (Marcos/Duterte) martial law is the fantasmatic figure of blame while all law is nothing other than normalized emergency.

This does not mean that the fantasmatic figure has no existence in reality. Martial law did exist. Fantasy has a material actuality and is sourced from this actuality. Actual martial law kills, tortures, incarcerates, and disappears people without a trace. But martial law also functions as a rationalization for the liberal democratic order at the point when it fails. Martial law's fantasmatic spectral deployment as the enemy of democracy, as obstructing its fulfillment, justifies the liberal order. In the Philippines' Duterte predicament, the country agonized about the possibility of martial rule for the whole country, intoning "Never again to Martial Law" unironically in rallies and mobilizations. At the same time, martial law in Mindanao was extended and the drug war continued unabated. Deployed as specter, the menace of martial law allows the liberal democratic order to deny that it is buttressed by normalized emergency. But understood as fantasy, martial law indicates a repressed antagonism in the heart of Philippine society.

In sum, the fantasmatic Schmittian *specter* of the despotic sovereign and the Dicey-Dyzenhaus liberal symbolic *fiction* make the ideology that structures our contemporary *reality* of normalized emergency. In a different context but applicable here, Slavoj Zizek (2005a) asks: "Why, then, is there no reality without the spectre?" The answer is: "[R]eality is not the 'thing itself,' it is always-already symbolized, constituted, structured by way of symbolic mechanisms." The problem is that this "symbolization ultimately always fails…it never succeeds in fully 'covering' the Real…(the part of reality that remains non-symbolized)," which then returns in the appearance of the fantasmatic specter. Zizek clarifies that the fantasy of a specter should not be confused with symbolic fiction—with "the fact that reality itself has the structure of a fiction in that it is symbolically (or, as some sociologists put it, 'socially') constructed" (Zizek 2005a, 229-30). The notions of fiction and specter are distinct but co-dependent:

> Fantasy1 and fantasy2, symbolic fiction and spectral apparition, are thus like the front and the reverse of the same coin: insofar as a community experiences

> its reality as regulated, structured, by fantasy1, it has to disavow its inherent impossibility, the antagonism in its very heart—and fantasy2…gives body to this disavowal. In short, the effectiveness of fantasy2 is the condition for fantasy1 to maintain its hold (233).

Here, then, we discover that the Dicey-Dyzenhaus position cannot escape Schmitt's challenge. The liberal position can only be successful in its symbolic representation of political reality if Schmitt's challenge successfully hides the failure of liberal representation. And what exactly is this liberal failure?

To wrench us from sublime abstraction and throw us back into untenable reality, the following Philippine cases are proposed as an answer: The Philippine National Police (PNP) chief and the director and deputy director for administration of the Criminal Investigation and Detection Group (CIDG) recently acquired subpoena powers in a new law. Provided in Republic Act 10973, it raised fears of abuse—that it is subjective, it is intimidating, it can lead to a charge of contempt, it may lead to warrantless arrests, etc. "It's a legalization of a step that they could otherwise not do." The power to subpoena is a way to summon individuals who may shed light on an ongoing investigation. It can also be used to demand books or documents that may be seen as evidence or that may be material to the investigation. The law has been defended as giving the power back to the PNP as it had subpoena powers before, during the Marcos regime when it was still the Integrated National Police attached to the Philippine Constabulary as the vicious PC-INP tandem—dreaded enforcers of Marcos' martial law. That the legislation passed the Lower House of the Philippine Congress was no surprise—Duterte's party controlled the lower house. That it passed the Senate, however, where there is a strong presence of the Liberal Party and independent senators, was incomprehensible. Even Senator Leila De Lima, imprisoned based on flimsy drug charges that eventually were overturned, voted in favor of the law. Meanwhile, the Liberal Party stalwart and then-Senate Minority Leader Franklin Drilon believed that there is "every reason to grant such authority to the PNP Chief" (Buan 2018; Dalangin-Fernandez 2018).

Moreover, Republic Act 11479 or the Anti-Terror Law is now in full deployment to suppress those deemed enemies of the state: the organized left and all legitimate dissent, and the Lumads, the Dumagats, Negros farmers, the poor, and the oppressed. Unsurprisingly, in July 2020, the *Inquirer* reported on Drilon's readiness to defend his "tactical" vote for the terror law against anyone (Ramos 2020). Notwithstanding numerous complaints on the law's constitutionality—the terror law is asserted to violate fifteen fundamental rights including freedom from unreasonable searches and seizures, the presumption of innocence, and the right against torture and incommunicado detention—the Supreme Court ruled to uphold most of the law (Tupas 2021).

In other words, the liberal position is complicit in the contemporary drive to normalize emergency measures.[28] This is because it is afraid of the uncodified Schmittian challenge. Put differently, the liberal position is more comfortable with a law-bound Duterte/PNP tandem than the tandem expressed in the drug war's

Operation Tokhang. In the defeatist tone of one who supported the PNP subpoena law but otherwise is a staunch Duterte critic: guidelines must be worked out and oversight measures must be worked in (Cupin 2018). Meanwhile, the liberal and independent-minded senators who voted for the measure, but on normal days are critical of Duterte, remained silent. The final word was that of Malacañang, the subpoena powers are "reserved for extreme circumstances" (Ballaran 2018). This drama repeated with the Anti-Terror Law and state terror gets the last word.

Nonetheless, all these still leave us with the question: *What is the spectral Schmittian absolute sovereign concealing?* Or put into words reflective of the Philippine predicament: *What was hidden by Duterte's authoritarian mien?* And finally, to make sense of the country's tyrannical past, opening it to the present's power of redemption (Benjamin 2003/1940, 390): *What did Marcos' martial law suppress?*

Here, Zizek continues to provide guidance: "What the spectre conceals is not reality but its 'primordially repressed,' the unrepresentable X on whose 'repression' reality itself is founded" (2005a, 230). And thus, on this note that requires recalling Neocleous claim that the contemporary normalization of emergency is oriented towards the repression of class antagonism, we end with the eighth theses of Benjamin's (2003/1940) "On the Concept of History":

> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about *a real state of emergency*, and this will improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm.—The current amazement that the things we are experiencing are "still" possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge—unless it is the knowledge that the view of history which gives rise to it is untenable. (392)

Endnotes

1. This paper is the second of three standalone essays on martial law and state of emergency. The first asserts that colonialism is martial law. This is true not only in the sense of Ferdinand Marcos Sr. (1978) tracing its origins in colonial law. But also, as shown in the practices of two rules of empire, the colonial application of terror, and the suspension of law in colonial wars—including the Philippine-American War. This essay tracks the expansion and development of what Mark Neocleous (2006, 2007a, 2007b) observed as the normalization or liberalization of emergency in the Philippines and the world. It makes the assertion that Duterte's Drug War, continuously waged by the present Marcos Jr. administration, is normalized emergency. The third essay traces the lineage of the theoretical debate surrounding the meaning of martial law or state of emergency in what Agamben (2005) names as "gigantomachy concerning a void"—the philosophical debate between Carl Schmitt and Walter Benjamin on the concept and practice of "exception." The quoted text in the title is matter-of-factly stated by a soldier who abducted and tortured Hilda Narciso in 1983, two years after martial law was lifted (Robles 2016, 5).

2. For the most recent documentation of President Rodrigo Duterte's Drug War atrocities that has continued in the current administration, please see "*Dahas*: Violence, Human Rights, and Democracy in the Philippines" by the Third World Studies Center (n.d.).
3. Quoted in Neocleous (2007a, 492). It is through this lens that we can understand the declaration of a "state of war" in eight provinces in the Philippines by then Governor General Ramon Blanco on August 30, 1896 as martial law. In the said declaration, it became "mandatory for submission to the jurisdiction of war any person accused of crimes that affect public order, those of treason, those that compromise the peace and independence of the state or against the form of Government, those moderates who are disrespectful of the Authorities and their agents, and the common crimes that may result on the account of rebellion or sedition." The Council of War under the "Code of Military Justice" was given jurisdiction over prisoners who committed these infractions (Arcella 2002, 37-38).
4. Excerpts from *Ex parte Marais* and Moyer vs. Peabody, quoted in Neocleous (497).
5. Neocleous (2007a) notes that a similar development can be traced for the understanding for the analogous "stage of siege" in civil law countries (498).
6. Quoted in Neocleous (500).
7. The declaration of a state of emergency is allowed by the 1935, 1973, and 1987 Philippine constitutions. While the president is given the authority to declare it, the actual emergency powers are delegated by the legislative branch of government to the executive. Thus, states of emergency may be declared through presidential decrees or proclamations, but the actual exceptional "regulatory" powers are delegated through republic acts (legislations).
8. The quotes are from Franklin Roosevelt's inaugural address in 1933 and his formal declaration of state of emergency in 1934 (Neocleous 2007a, 504).
9. Created by the US Senate over fears of emergency powers being used in the Vietnam War.
10. The connection between the state of calamity and the state of exception has been applied to the Philippine setting, but the insistence of the exception's relationship with human rights is misleading (see Lanuza and Martin 2016, 38-62).
11. Also, assassination of British citizens, presumably sanctioned by the British government (see Jenkins 2018).
12. This is apparent in how the late Marcos Sr. justified martial law by stressing its constitutional legality and through a system of Presidential Decrees buttressed by his then newly minted power to make law. Even Duterte made use of constitutional provisions on the state of lawlessness, emergency, and martial law, buttressed by support from the legislature and judiciary, to justify his actions. The point is that authoritarians do recognize the need to legally justify their actions. But this does not stop them from using their emergency powers to the full. The effect is the same on the ground, the veneer of legality makes no difference to their victims. Even the legal remedies hard won by martial law victims did not prevent continued extra-judicial killings in subsequent administrations.
13. Here, "thicker concept" refers to the "rule of law" and "thinner concept" refers to "rule by law." These are conceptually differentiated in the previous paragraph.
14. A recently concluded research project led by Kawanaka Takeshi and funded by the Institute of Developing Economies (IDE) describes the Duterte administration as an authoritarian backlash (Kawanaka and Suzuki 2023).
15. This is my conclusion, which is contrary to the intent of the article by Tan. In the article, he argues that the Supreme Court power of judicial review, expanded post-EDSA, exposes the presidency to an imbalance of power: "constitutional design generally exposes his every action to a judicial labeling of grave abuse of discretion." But Tan (2012) here is referring to a particular President—

Noynoy Aquino—set against a Supreme Court mostly appointed by his predecessor. Thus, while he has misgivings about the popular activism of the Supreme Court contra Gloria Macapagal Arroyo, he unequivocally opposes the Court's intransigence contra PNoy: "The citizenry, particularly the media and the academe who are crucial in communicating constitutional interpretation to them, must keep aware of this imbalance and ensure that the expanded judicial power is deployed in accordance with their wishes instead of hamstringing their popularly elected leaders" (523-604). Or will Tan interpret the Supreme Court decisions on the legality and extension of martial law in Mindanao as judicial activism and rulemaking that corrects the imbalance in favor of the president? (Buan 2017).

16. This actually echoes Duterte's contention in Proclamation 216 that the activities of the Maute terrorist group "deprive the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety in Mindanao." The whole proclamation is quoted in the Supreme Court (2017) decision.
17. See Dyzenhaus typology of liberal response to the problem of exception that includes Locke's prerogative, a position similar to Ferejohn and Pasquino, and Dicey's outright (but ambivalent) denial ("Schmitt v. Dicey…" 2007-9).
18. Schmitt as quoted by Dyzenhaus (2006, 2005). This is also in Schmitt (2010 [1922], 13).
19. Equivalent to democratic separation of powers, and check and balance.
20. National Socialist German Workers Party.
21. Schmitt also weighed in on an anti-Semitic position in the Jewish question (Schwab 2010, xxxix). Schmitt remained a member of the Nazi Party until 1945; although in his testimony at Nuremberg, he said that he "renounced the devil" in 1936, presumably when he lost favor in the party after his reputation was attacked (Strong 2010, xxxv).
22. Schwab notes that this quote is from Soren Kierkegaard's *Repetition* (2010, 15 footnote 7).
23. Schmitt's liberal adversary mentioned several times in the *Political Theology* (2010 [1922]).
24. But is this not the liberal idealist theory of identity that Dyzenhaus credits to Kelsen? Poole actually argues that most secrecy and executive discretion are defined within the existing juridical order.
25. Poole's appropriation of the concept of the "reason of state"—that grounds authority claims for special powers in the state's capacity as guardian or protector of the constitution—provides an alternative position that is still within the limits of liberal thought. This contrasts with the Dicey-Dyzenhaus' position of normalizing exceptional powers as law and the Ferejohn and Pasquino position of norm/exception dualism. All these are alternatives within liberalism that are deployed to counter the Schmittian absolute position of insisting that the normal must give way to the fullness of exceptional powers during emergencies. Poole's reference to the reason of the state or *raison d'état* actually ties exceptional powers to the requirements of national interest, which has contemporary resonance. Against these apparent alternatives, this essay asserts that they actually make a dynamic that drives the normalization of emergency while maintaining the dualism of norm and prerogative —but unfolding dialectically: to the norm of exceptional powers and the prerogative of exceptional powers. It is this that is finally asserted to be the reason of the state: the point of exceptional powers, whether normalized or prerogative, is the preservation of the state order. The particular interests of rulers might manifest in the deployment of exceptional powers, but they do not structure how exceptional powers are produced. For other works on the concept and practice of reason of state other than Viroli (1992), see Rosenberg (1992), Wolf (1999), and Sanecka-Tyczyńska (2015).
26. In *The Fabrication of Social Order* (Neocleous 2000), policing is more than violent ordering. It also means administering through instruction, control of sickness and disease, time and leisure management, etc.

27. A relevant example of a non-codified and eventually codified exception already discussed above is RA 11479 or the Anti-Terrorism Act of 2020. The Act codified the extra-ordinary powers of designation (as terrorist), warrantless arrest, and surveillance, etc. These have real-life effects such as red-tagging, enforced disappearances or extra-judicial killings, and loss of privacy and curtailment of the freedom of speech. Of course, the police and the military were already documented to have done these prior to the Anti-Terrorism Act taking effect. The question then is: Did codification mitigate these powers through judicial oversight? In Gavilan (2021), human rights groups recorded a total of 593 arrests with detention of activists from June 2016 to June 2019. This increased to 973 in June 2020 and 1,126 in June 2021. Meanwhile, 266 activists were killed, and 404 activists were victims of frustrated extra-judicial killings from June 2016 to June 2019. These increased to 328 killed and 463 almost killed in June 2020 and to 414 killed and 497 almost killed in June 2021. The point is that whether normalized or prerogative, exceptional powers have the same consequence at the level of practice.
28. Can we say that the contemporary drive to codify exceptional powers is driven by some purpose other than the liberal goal to eliminate the basis for possible absolutism? This is, of course possible, but it must be established theoretically at the level of the structure of laws and how such is produced and reproduced politically. For example, the codification of emergency powers agrees with the neoliberal push for an independent market free from arbitrary state intervention. But this does not necessarily negate the original assertion—an order of rule by law, at the minimum, is still less arbitrary than absolutism. Meanwhile, those who benefit from corruption and state weakness also benefit from arbitrary powers—codification will, theoretically, limit the opportunities for private interests in government.

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