CONSTITUTIONAL DICTATORSHIPS, FROM COLONIALISM TO COVID-19

Jens Meierhenrich

Director
Centre for International Studies
Department of International Relations
London School of Economics and Political Science
Houghton Street
London WC2A 2AE

j.meierhenrich@lse.ac.uk

April 1, 2021

[T]hose republics which have no recourse during the most pressing dangers either to a dictator or to some similar authority will always come to ruin during serious misfortunes.

Niccolò Machiavelli ([1531] 1997, pp. 95-96)

I do therefore grant that a power like to the dictatorian, limited in time, circumscribed by law, and kept perpetually under the supreme authority of the people, may, by virtuous and well-disciplin'd nations, upon some occasions, be prudently granted to a virtuous man.

Algernon Sidney ([1680] 1996, p. 152)

The tradition of the oppressed teaches us the state of emergency in which we live is not the exception but the rule.

Walter Benjamin ([1940] 2006, p. 392)

INTRODUCTION

In 1850, John Greenleaf Whittier, the American abolitionist best known for his anti-slavery writings, reflected gravely on the violence of the U.S. Constitution. On his mind was what Mark Graber (2010) has called "the problem of constitutional evil." For Whittier, as for Graber, slavery represented an example of constitutional violence.[1] With his poem "Ichabod" (Whittier [1850] 1889), he excoriated Daniel Webster, the Massachusetts senator who had lobbied for the so-called Compromise of 1850, which, to Whittier's chagrin, included a new Fugitive Slave Law (see Blackett, 2017). Whittier, like many Northerners, thought Webster's support for the negotiated settlement—which the U. S. Congress crafted to prevent the outbreak of a civil war between the country's free states and slave states—unconscionable. "I saw," Whittier (1850, p. 61) recalled, "the Slave Power arrogant and defiant, strengthened and encouraged to carry out its scheme for the extension of its baleful system, or the dissolution of the Union, the guarantee of personal liberty in the free States broken down, and the whole country made the hunting ground of slave catchers."

"Each crisis," our poet mused later in life, "brings its word and deed" (Whittier [1880] 1889, p. 65). The word with which I am concerned in this article is the concept of "constitutional dictatorship" (Watkins 1937; Rossiter 1948), the deed that of constitutional violence, and the crisis that of governing the emergency—real or contrived—from colonialism to Covid-19. What Whittier feared as he contemplated the long-run consequences of the Compromise of 1850 was, in the vernacular of our age, a permanent state of exception (see, abstractly, Frankenberg 2014; concretely, Alford 2017; and, generally,

[1] For one of the very few attempts to make sense of the phenomenon of constitutional violence, see Ninet 2013.

Greene 2018). He was right to be fearful. At the time of his writing, the fledgling American republic was well on its way of consolidating a constitutional dictatorship.

The concept of constitutional dictatorship is of great heuristic value in the study of comparative constitutional law. Sanford Levinson and Jack Balkin recognized this a while back. They were among the first to revive the concept a decade ago. Seized by the constitutional violence that the so-called war against terror in the United States was generating, they insisted that "we should be concerned about the proliferation of features of constitutional dictatorship" (Levinson and Balkin 2010, p. 1851). They were perturbed by the logic of violence in constitutional law—the causes of constitutional dictatorship. They were less concerned about the legacies of constitutional dictatorship—with constitutional violence over the *longue durée*. Siding "firmly," as they put it, with Niccolò Machiavelli, Levinson and Balkin figured that constitutional dictatorship was "a reality that every modern democracy (like every ancient one) must eventually face" (p. 1866). Fearful of the idea of constitutional dictatorship *per se* they were not: "Whatever problems may attend the design of emergency powers in a constitutional democracy, it would be even worse to slide into patently unconstitutional dictatorships" (Levinson and Balkin 2010, p. 1866). Or would it? Could it be that the number of "virtuous and well-disciplin'd nations" capable of reining in "a power like to the dictatorian" is considerably smaller than Algernon Sidney ([1680] 1996, p. 152) thought they were, when he—three centuries before Levinson and Balkin—set out in defense of constitutional dictatorship? And might unconstitutional dictatorships perhaps be preferable to constitutional ones because they dispense with the justice facade?

A recent account of "constitutional Tsarism" from the nineteenth century to the twenty-first speaks to the urgency of thinking about constitutional dictatorships anew—and

to rethink the rhetoric of constitutionalism (see also Loughlin forthcoming). "In Russia," as Anastasia Edel (2020) writes, "the constitution has rarely been a covenant of good governance between the state and the people. Rather, it is a tool to enshrine imposed order and provide a legal pretext for cracking down on dissent. Even a cursory look at Russia's history suggests that if 'they'—which is the way Russians routinely refer to the authorities—are reaching for the constitution, bad things are afoot." This is no time for liberal smugness, however. When *bona fide* democrats reach for the constitution, liberty is no less imperilled (generally, see Negretto and Sánchez-Talanquer 2021).

In times of constitutional populism (e.g., Czarnota, Krygier, and Sadurski forthcoming), dysfunction (e.g., Farrier 2019), crisis (e.g., Graber, Levinson, and Tushnet 2018), failure (e.g., Barber 2014), coups (e.g., Scheppele 2017), and breakdown (e.g., Sadurski 2019), thinking about the long-run consequences of constitutional dictatorships is more timely than ever. Indeed, if we believe Graber (2018, p. 668), in comparative constitutional law the question of what is to be done about constitutional dictatorship "is replacing 'democratic deficits' or, in the United States, the 'counter-majoritarian difficulty,' as the central institutional problem of constitutional democracy." Why might this be so? One plausible explanation is that the violence of constitutional law is more insidious—and thus increasingly perceived as more dangerous—than that of other branches of law. In the criminal law, the violence of law manifests qua punishment—in the realm of constitutional law it is transmuted by procedures. The spectacle of punishment can be rousing, the rule of procedures is humdrum, which is why law's violence is routinely hidden there. When the terrain of constitutional law turns into a battleground for lawfare (Meierhenrich forthcoming), as happened in countries from Chile to Egypt, Hungary to Pakistan, and

Turkey to the United States, saving a constitutional democracy (Ginsburg and Huq 2018) may no longer be an option, which perhaps is why Graber accords such significance to the problem of constitutional dictatorships.

Manipulating the constitutional rules of the game is playing the long game. It is a strategy of conflict, as Thomas Schelling (1980) used the term, not just a short-term tactic. This, I argue, is why the institution of constitutional dictatorship is so pernicious—and in need of more rigorous socio-legal study. What many, including Levinson and Balkin, think of as a temporary form of government is "becoming permanent" (Graber 2018, p. 682) the world over. This constitutional logic of violence is not new, but it is playing out on a larger stage.

The latest push toward permanence in many countries came in the shadow of the coronavirus pandemic. With publics cowed, and legislatures quieter than usual, a plethora of executives saw a window of opportunity to embed emergency government in everyday constitutional life. If the previous wave of constitutional dictatorships—by which I mean their proliferation at the beginning of the millennium of crisis governments to combat terrorism—is anything to go by, we should expect a large number of bodies politic to emerge disfigured after Covid-19. For as Kim Lane Scheppele (2010, p. 124) warned at the crest of the previous wave, when the temptation to experiment with constitutional dictatorship was as strong as it is now, "[c]risis government, once established, leaves scars on the body politic." She, like me, is more circumspect than Machiavelli and Sidney—and Levinson and Balkin—about constitutionalizing emergencies:

> Though each crisis has elements specific to time and place, there are common features that emergencies tend to share when one examines

> them empirically. Regardless of whether an emergency is declared by a right-wing dictator or a left-wing insurgent or whether an emergency is brought about by a war, coup, pandemic, or earthquake, emergency government tends to have a predictable "emergency script" that unites these different causes in a common set of tactics. The emergency script generally starts slowly with a hollowing out of governmental institutions apart from the executive branch, and the signature abuses that signal a real crisis are generally late in arriving. By the time an emergency is arguably over, these abusive practices have found new rationales for their continued maintenance, and so it is difficult to repeal them (Scheppele 2010, p. 135).

The intervening decade has borne out this finding about the long-run consequences of constitutional dictatorship. Scheppele arrived at it by revisiting a study of crisis government in eighteen countries worldwide, from Canada to Uruguay, that the International Commission of Jurists had released in 1983. If one goes farther back in time—to legal histories of colonialism, say—the number of constitutional dictatorships in operation is striking.

The outlook for constitutionalism post-Covid-19 is no less gloomy. The last decade has shown that consolidated democracies are susceptible to constitutional violence—and have a habit of perpetuating it. If such "constitutional rot" (Balkin 2018) spreads, it can weaken any framework of democracy. Weimar Germany used to be the paradigmatic case to cite. These days, the United States are an equally useful reference point. As are France and

the United Kingdom—and the new and improved Germany with its *Grundgesetz* and constitutional patriotism. Over the course of the twentieth century, and especially since the terrorist attacks of 9/11, these erstwhile bastions of liberty have become cradles of constitutional dictatorship. They have normalized the exception. Three data points must suffice.

In 1922, the British Parliament enacted the Civil Authorities (Special Powers) Act (Northern Ireland). The legislation initially created an emergency regime for one year. Despite parliamentary oversight and the Act's invasive nature, it was renewed annually until 1928, when it was extended for a five-year period. Eventually the exception became the norm—and the violence it licensed a permanent feature of U.K. constitutional law. This particular institutional design, with origins in Britain's empire project, ushered in "a permanent state of emergency: the government could ban meetings, and certain types of speech, and could search and arrest people without warrants and imprison them indefinitely without trial" (Keefe 2018, p. 19).

A century later, in 2020, Germany's federal government, enabled by a timid *Bundestag*, set up what one of the country's most respected legal commentators termed a "parallel system of law" ("*ungesetzliche Parallelrechtsordnung*"), one that was not only exceptional but also illegal (Prantl 2021, p. 9). This institutional design, governed by the *Infektionsschutzgesetz* (Infection Protection Act) of 2000, gave pride of place to *Rechtsverordnungen* and executive decree authority (see generally Carey and Shugart, 1998). Legislative oversight was relegated to the sidelines of this crisis government. During the country's really existing "*Ausnahmezustand*" (Prantl 2021, p. 9), "*Maßnahmen*" stood in for legislation. With paragraph 5 of the amended Infection Protection Act, Germany's parliament issued the executive a

"blanc check" ("*Blankovollmacht*")(Heinig et al. 2020, p. 868). To govern the country's health emergency, it authorized the executive to modify, if need be, more than one thousand legal provisions (Heinig et al. 2020, p. 868). The *ad hoc* constitutional order evoked distant memories of Ernst Fraenkel's "*Maßnahmenstaat*" (Fraenkel [1941] 2017), this prerogative state whose institutional development in the 1930s he traced in *The Dual State* (Meierhenrich 2018).

Across the Atlantic, the USA PATRIOT Act of 2001 had a similar life cycle as the Special Powers Act in the UK. There, too, temporary provisions became permanent. "On July 21, 2005, the same day as the second round of terrorist attacks on London's transportation system, the United States House of Representatives voted by a wide margin to extend indefinitely and make permanent practically all the provisions" of the controversial law, with the U.S. Senate following suit a week later (Gross 2018, p. 588). This legislative assent marked the entrenchment in everyday life of the Act's far-reaching surveillance and investigative powers—powers that the administration of U.S. President Barack Obama did not repeal but renewed, a move that confirmed the suspicion of those who do not share Algernon Sidney's faith in "virtuous man." It is not easy to break a habit of constitutional violence, no matter how progressive—or charismatic—the leader. The promise of an executive unbound (Posner and Vermeule 2010) is too alluring to pass up for ambitious leaders from Hungary's Viktor Orbán to Rwanda's Paul Kagame. Graber (2018, p. 668) is right: "Nelson Mandela's legacy is in far more jeopardy than that of James Madison." The global appetite for "transformative constitutionalism" (Klare 1998) has been sated, the hunger for "authoritarian constitutionalism" (Tushnet 2016; Alvia García and Frankenberg 2019) is enormous, as the history of the present attests.

I use the concept of constitutional dictatorship as a heuristic, as a way of thinking more explicitly about constitutional violence than is customary in comparative constitutional law. My goal is to stage an analytical irruption—by relating the emergency to the everyday, and both to coloniality (see also Kato 2015, 2016; Meierhenrich and Tushnet forthcoming). My decision to lead into the subject matter via a circuitous route was deliberate. Returning to the beginnings of constitutional thought in the United States—and revisiting what became a much-admired template for constitutional democracy—I seek to make constitutional law strange again.

In this article, I trace *nomoi* and narratives of constitutional dictatorship from colonialism to Covid-19. We know from Robert Cover (1983) that language, and the stories we tell about constitutional law, matter. As performatives, they can instantiate violence, conceal violence, and turn constitutional law into a performance. As Cover remarked, "[f]or every constitution there is an epic" (4). Constitutional dictatorship is an epic concept. It is capable of illuminating—and retelling—epic histories of constitutional law, of alerting us to commonalities in constitutional practices of domination—and thus of violence—that would otherwise remain shrouded in legal orientalism. By foregrounding what, arguably, is the most epic history of constitutional law—that of the United States—I aspire to unsettle our understanding of that constitution (for other attempts, see, *inter alia*, Levinson 2008; Ackerman 2010; Posner and Vermeule 2010; Nelson 2014; Conlin 2019; Prakash 2020). By taking the U.S. constitution *out of context*, and by inserting it in a global history of constitutional dictatorships, I seek to shed light on the violence of constitutional law *tout court*.

"A Wide-Spreading Monarchy"

At one of the Virginia Conventions, the one of June 1788, a slim majority of American delegates ratified the U.S. Constitution. On that occasion James Wilson, one of the six original Associate Justices of the U. S. Supreme Court, argued vehemently for including in the fledgling republic' fundamental law provisions that conjoined liberty and monarchy. Alexander Hamilton, though he rarely spoke up in America's founding assemblies, too, was a fervent advocate of a constitutional design that would vest "indefinite authority" (as quoted in Rasmussen 2021, p. 67) in a single executive so as to enable its elected holder to play "constitutional hardball" (Tushnet 2004; Balkin 2008) whenever the need arose. In *The Federalist* No. 70, to give but one example, Hamilton ([1788] 2009) asserted that "Energy in the Executive is a leading character in the definition of good government" (p. 354). He took that truth to be self-evident: "Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well as against the intrigues of ambitious individuals who aspired to the tyranny" (p. 354). This idealized view of constitutional dictatorship, with its admiration for the Roman power of *imperium* (Straumann 2016; Kalyvas 2007 has endured to this day—and blighted its study.

Their "zealous defense of Royalist constitutionalism" (Nelson 2014, p. 195), Wilson, Marshall, and Hamilton performed throughout the founding period, roughly from 1775 to 1791. Their impetus to write rules of the U.S. constitutional game that favored, over the long-run, the institutional emergence of hyperpresidentialism, however, came not from closet royalists but from staunch republicans. Let us listen in on Wilson:

> In planning, forming, and arranging laws, deliberation is always becoming, and always useful. But in the active scenes of government, there are emergencies, in which the man, as, in other cases, the woman, who deliberates is lost. […] How much time will be consumed […] and when it is consumed, how little business will be done! When the time is elapsed; when the business is finished; when the state is in distress, perhaps on the verge of destruction, on whom shall we fix the blame? (quoted in DiClerico, 1987, p. 305).

Wilson was the "principal architect of the executive branch" (McConnell 2019, p. 23; innovatively, see also Bartoloni-Tuazon 2014). He was also one of the eight Founding Fathers who signed the Declaration of Independence (DiClerico 1987, p. 301). With the imprimatur of this doyen of early constitutional design, the idea of laying the groundwork for an "imperial presidency" (Schlesinger, Jr 1973) for many in the constituent assembly was positively exciting.[2] Though the idea of wielding "power without persuasion" (Howell 2003) had a whiff of royal prerogative about it (see Poole 2015; Fatovic and Kleinerman 2013), it inspired confidence, not dread, in the founders' circle. Gone was Americans' fear of

[2] For recent scholarship on the institution of the U.S. presidency, and its development over time, see, *inter alia*, Prakash 2020; Howell and Moe 2020; Ginsburg 2016; Howell 2013; Howell, Jackman, and Rogowski 2013; Calabresi and Yoo 2012; Beckmann 2010.

sovereign dictatorship that had caused so many of them to flee the British monarchy. Forgotten was Thomas Paine's *Common Sense* ([1776] 2015, p. TBA), the bestselling, incendiary pamphlet of 1776 in which he had rallied against "crowned ruffians" and inveighed against the idea of constitutional monarchy in general and the constitutional practice of George III of England in particular, thereby stoking revolution (see, e.g., Jordan 1973). Even "the Almighty," Paine wrote, "hath here entered his protest against monarchical government" (TBA). Given the strength of this sentiment, and the *nomos* of the Enlightenment from which it drew its ire, it is astonishing how quickly the elites of America took to the idea of constitutional dictatorship, to crafting an institutional design in which, as Wilson ([1787] 1998, p. 81) put it, at the Pennsylvania Convention of 1787, "the vigor and decision of a wide-spreading monarchy may be joined to the freedom and beneficence of a contracted republic."

This constitutional prescription for prerogative rule was "a far cry from the avowed principles of the Revolution," as Clement Fatovic (2009, p. 177) has pointed out. Yet support for Wilson was widespread. Roger Sherman of Connecticut, who flew the flag of whig constitutionalism, was one of the few who dissented. The bogeyman of "Legislative tyranny" did not frighten Sherman. What did was the clear and future danger of an "Executive magistracy" (quoted in Nelson 2014, p. 195), but it made no difference. In the ten-year period between the Declaration of Independence and the adoption of the U. S. Constitution, one constitutional faith supplanted another. It was a remarkable *volte face*: "The stench of monarchy still lingered in the nostrils of individuals who had just carried out a revolution against the outrages of executive power when they began to sense that a strong executive might be necessary to ward off the even more pungent odor of chaos" (Nelson 2014, p. 158).

Theirs was "a revolution in favor of government" (Edling 2003; but see Mortenson 2019), a "royalist revolution," in Eric Nelson's (2014) apt phrase, that prepared the ground for centuries of hyperpresidentialism.

These audacious beginnings—in a country long regarded as the bastion of constitutional democracy—tell a cautionary tale about the idea of constitutional dictatorship. After this vignette from the land of liberty *and* monarchy, I now turn to the theory of constitutional dictatorship, beginning with the appellation itself. The neologism, which dates from the 1930s, is intriguing because of its oxymoronic denotation, its schizophrenic connotations, and its "paradoxical ring" (Watkins 1940, p. 324). This "contradiction in terms" (Levinson and Balkin 2010, p. 1795), I find appealing because it makes no bones about law's violence. The concept comes with a warning to handle with care the idea it enunciates. This warning label reminds, or at least it should, of the fear and loathing that the long arm of the law, constitutional and otherwise, for centuries has instilled in populations most everywhere—from the colony to the postcolony.[3]

I speak of constitutional dictatorship to denote all regimes of exception (see, most recently, Gerstle and Isaac 2020). "Exceptions can be required by any, or typically all, of the features of an emergency: the emergency may not have been anticipated by general rules, it may require forms of action explicitly forbidden by general rules, or it may require a swifter response than ordinary procedures allow for" (Zuckerman 2006, p. 523). To me, the term

[3] See, among others, Chanock 1985; Moore 1986; Loveman 1993; Mamdani 1996; Comaroff and Comaroff 2006; Meierhenrich 2008; Kolsky 2010; Siddique 2013; Massoud 2013; Chakravarty 2015; Cheesman 2015; Reynolds 2017; Dwyer and Nettelbeck 2018; Erman 2019; Gerstle and Isaac 2020; Nichols 2020; Meierhenrich 2021.

constitutional dictatorship is preferable to speaking about "models of emergency powers," as John Ferejohn and Pascale Pasquino (2004), for example, do. The semantic emphasis is on "dictatorship," the adjective constitutional merely adjusts this focus. The idea of dictatorship, as we moderns have come to use the term—as opposed to, say, the Romans—is a regime type worthy of moral opprobrium, not imitation, promotion, or transplantation. To speak of "emergency powers" does not have the same effect. The term is vaguely unsettling but simultaneously reassuring because it communicates faith in the power of legal paternalism. The moniker removes the sting of violence from the phenomenon it names. The stress is on the exigency, not the constitutional violence it justifies. Given the real-world stakes involved in "norming the exception" (Cohen 2004, p. 24), the term's blandness reminds of a technical term. This euphemistic connotation runs the risk of normalizing the exception semantically.

The remainder is organized into five parts. Parts I and II offer a rudimentary *Begriffsgeschichte* of the concept of constitutional dictatorship. I distinguish *emergency constitutionalism* from *extremist constitutionalism* to make the concept usable across time and space, especially in the Global South. Scattered throughout are empirical vignettes about crisis government in the colony/postcolony. I think of them as prolegomena to a critical theory of constitutional dictatorship. With that larger project in mind, Part III reflects on the temporality of constitutional dictatorship, before Part IV concludes with a paean to constitutional ethnography.

TOWARD A *BEGRIFFSGESCHICHTE* OF CONSTITUTIONAL DICTATORSHIP

Ever since the Renaissance, modern political thinkers have contemplated the idea of constitutional dictatorship. Machiavelli set the tone in 1531. Few treatises are as thought-provoking as the *Discourses on Livy*. Posthumously published, Machiavelli's meditations on constitutional design were lessons from antiquity—specifically from Roman political thought—addressed to the moderns. Even more interesting than Machiavelli's is another discursive intervention from the distant past: that of Algernon Sidney. In 1680, with *Discourses concerning Government*, Sidney followed in the footsteps of the Florentine. By theorizing "the dictatorian" possibilities of constitutionalism, he influenced the practice of constitutional dictatorship *avant la lettre*, especially the American way of law. Regarding the latter, it has been said that Sidney's constitutional thought "represents better" than John Locke's "the spirit of American republicanism" (West 1989, p. xxvii).

More relevant for the purpose of this analysis is that Sidney's emergency script directly influenced Clinton Rossiter's 1948 book *Constitutional Dictatorship*, notably the "criteria" for the usage of constitutional violence set out there (Rossiter 1948, esp. pp. 297-313). The conceptual history to come is, by necessity, incomplete.[4] A proper genealogy would drill more deeply into the concept's *Stammbaum*. It would reach into more pasts—and different pasts—than the Eurocentric histories of constitutional dictatorship in our possession are wont to do. Given that constitutional dictatorships were an integral part of "the colonial matrix of power" (Mignolo 2018, 141-145), a comprehensive *Begriffsgeschichte* of constitutional dictatorship would relate "the Rest" to the West.

The West and "the Rest"

[4] For a complementary effort, see also Isaac 2020.

It was Frederick Watkins, who, in 1937, coined the term "constitutional dictatorship." It originated in a little-known dissertation that Carl J. Friedrich, the doyen of constitutional theory in the United States at that time, supervised. A few years later Harvard University Press brought out Watkins's take on how to save a constitutional democracy (Watkins 1939; see also Ginsburg and Huq, 2018). The book's publication likely was hastened by Weimar Germany's transition to authoritarian rule. For in his slim volume Watkins had traced with great skill the constitutional breakdown in the Weimar Republic. His was the first—and remains one of the best—accounts of that country's constitutional deformation: from constitutional rot (e.g., Balkin 2018) to constitutional crisis (e.g., Finn 1991) to constitutional failure (e.g., Barber 2014).

I begin my global account of constitutional dictatorship with the case of Weimar Germany only to sidestep it. Like Rome's constitutional dictatorship—that of Weimar is frequently invoked but infrequently studied. In the United States, the Weimar analogy has—for worse, not for better—shaped generations of constitutional thought (Bessner 2017). Rare is the publication that dares to ignore the practice of emergency powers in the 1930s that inspired Watkins to coin the concept of constitutional dictatorship. Rarer still is the publication that dispenses with the odious thought of Weimar Germany's most infamous constitutional theorist—Carl Schmitt (see Meierhenrich and Simons 2016). Standard accounts of the theory of constitutional dictatorship obscure the rich and varied history of constitutional dictatorships. As a type of rule, "exceptional constitutionalism" (Meierhenrich 2016; 2020), to which the practice of constitutional dictatorship belongs, predated the twentieth century, especially in the colonies. Unfortunately, the fast-growing historiography of these colonial regimes of exception has left barely a mark on the study of constitutional

dictatorship. Much of this owes to the veneration of men like Machiavelli and Sidney—but also to constitutional theory writ large.

Enter Rossiter. It was he who, in the wake of World War II, advanced Watkins's idea of constitutional dictatorship by enlarging ever so slightly the *n*, the units of analysis. His book began where Watkins had left off—with the fall of Weimar. Rossiter gave two reasons for including the case into his comparative study of "crisis government," as he called it, in four modern democracies (the others being France, Great Britain, and the United States). Firstly, he told his readers, "the [c]onstitution of that unhappy democracy contained the most forthright provision for emergency dictatorship in modern constitutional history," and, secondly, Rossiter argued, that provision—the infamous Article 48—"contributed heavily to the destruction of the Republic it was instituted to defend" (p. vii). Despite the deformation of constitutional dictatorship in Weimar Germany, and the fateful transition to authoritarian rule that it facilitated, Rossiter did not hesitate to start writing an emergency script.

He defended his political theory of dictatorship on practical grounds. Refusing to distinguish sharply between democracy and dictatorship, as twenty-first century theorists like Barbara Geddes, Joseph Wright, and Erica Frantz (2018) do, Rossiter wanted to demonstrate "how the institutions of and methods of dictatorship have been used by the free men of the modern democracies during periods of severe national emergency" (Rossiter 1948, p. vii). His was a liberal defense of "illiberal democracy" (Zakaria 1997).

In Defense of Dictatorship

Rossiter mounted his defense of constitutional violence less than a generation after the era of "European dictatorships" (e.g., Lee 2016) had ended. Given the history of death and

destruction they had brought, and to more than one continent, it is astonishing to hear him assuage the fears of his readers by telling them, in the late 1940s, that "[t]he word *dictatorship* should be no cause for alarm" (p. 4). The qualifying adjective "constitutional," he tried to reassure them, was "almost redundant" (p. 4). Never mind the absolute destruction that Europe's dictatorships had just visited on the world, the wasteland into which these authoritarian or totalitarian regimes, above all the Nazi dictatorship, had turned Europe and its colonies. Rossiter, despite this outcome knowledge, glossed over the violence of dictatorship in the immediate present and emphasized instead the virtues of violence in the distant past, for example, when he pointed out, "[t]hat the original dictatorship, that of the Roman Republic, involved the legal bestowal of autocratic power on a trusted man who was to govern the state in some grave emergency, restore normal times and government, and hand back this power to the regular authorities just as soon as its purposes had been fulfilled" (pp. 4-5).

The great-man-theory of governance was alive and well in 1948. Hitler's Germany, Mussolini's Italy, Franco's Spain, and Salazar's Portugal were not on Rossiter's radar. The experience of catastrophe, which Rossiter in the opening pages of *Constitutional Dictatorship* referred to blithely as "the crisis of the second World War" (p. 4), was no match for his utopian imagination. Even in the wake of the Holocaust, he held constitutional theory in higher esteem than constitutional experience. In Rossiter's time, as in ours, constitutional exegesis counted for more than constitutional *mētis*.

Rossiter, like Machiavelli ([1531] 1997), reasoned that no republic would ever be perfect unless its laws contained "a provision for everything," until its rules included a remedy for every exigency (p. 95). His goal was to develop constitutional principles—he

called them "criteria"—for the kind of government that would see off "a severe national emergency" (p. 3; for a contemporary account, see also Hertzler 1940). Although written with an eye toward "four large modern democracies" in the Global North, the ideas contained in Rossiter's work are also relevant for understanding constitutional dictatorships in the Global South. As a heuristic, the concept of constitutional dictatorship is immediately relevant for illuminating further what Lauren Benton and Lisa Ford (2021, p. 101; see also Benton and Ford 2016) call the dynamics of "arbitrary justice and legal ordering" in the creation and maintenance of overseas empires. Its critical usage would bring neglected evidence from "unfamiliar cultures" (Schaffer 1998) into the august—predominantly white—domain of constitutional law, this most sovereign of law fields.

A TYPOLOGY OF CONSTITUTIONAL DICTATORSHIP

Thinking about constitutional dictatorships needs no justification, not in our time. "Over the past two decades," as Will Smiley and John Fabian Witt (2019, p. 1) have pointed out,

> the problem of emergencies in constitutional democracies has come to seem ever more urgent. National security controversies, financial panics, natural disasters, and political turmoil have revived questions about what constitutions are for, about what they accomplish, and about what constitutionalism can accomplish in moments of emergency.

To help answer the question of "what constitutions are for," I distinguish between two contending forms of constitutional dictatorship. The first type is about saving the

country. I think of it as an instantiation of *emergency constitutionalism* (Witt 2018; Ackerman 2004). The second type is about stealing the state (see also Solnick 1998). I subsume this variant of constitutional dictatorship under a category I call *extremist constitutionalism*, which in turn is a manifestation of what I have elsewhere theorized as "extremist institutionalism" (Meierhenrich 2016). My typology echoes, but is distinct from, Carl Schmitt's ([1921] 2014) political theory of dictatorship (see especially Arato 2000; McCormick 2004; Kelly 2016; Meierhenrich 2016; and Scheuerman 2016), notably his well-worn distinction between "*kommissarischer Diktatur*" ("commissarial dictatorship") and "*souveräner Diktatur*" ("sovereign dictatorship").

My use of the adjective "constitutional" is deliberately broad. I subsume under the rubric of constitutional scholarship a whole range of technologies for legal ordering. I take my lead from Scheppele (2004). For her the adjective constitutional "identifies the complex of relations between law and politics that regulate governance," a conception that is useful when thinking about constitutional violence, because it reduces the centrality of sovereignty as a conceptual variable (p. 395). Thinking in terms of networks of violence—rather than hierarchies—provides a more sociological, and thus realistic, perspective on the dynamics of legal contention.

Emergency Constitutionalism

Francis Lieber, one of Abraham Lincoln's trusted legal advisers, was the co-author, together with his son, G. Norman Lieber, of a treatise on constitutional dictatorship—except that the Liebers termed what they prescribed "Martial Law Proper" (Lieber and Lieber ([n. d.] 2019, p. 93). Their theory of emergency constitutionalism anticipated key ideas of Rossiter's classic.

They reasoned that the preservation of a constitutional order could not be assured unless an emergency script existed. By far the most important of the *dramatis personae* in the script they wrote was the U.S. president, who, they felt, alone should have the authority to decide the exception. But a blueprint for sovereign dictatorship à la Schmitt theirs was not. Although their institutional design for Martial Law Proper "conferred broad authority to take or destroy property and lives, either summarily or through trials for crimes, and either on the battlefield or distant from it" (Smiley and Witt 2019, p. 21), the Liebers also put institutional safeguards in place. "Whatever is done by the virtue of this power," as they put it, "must be connected with the necessity which is looked to for its justification" (p. 98). This is more remarkable a requirement than it sounds.

In the nineteenth century, the idea of martial law was retrograde (see generally Collins 2016). *A Treatise on Martial Law*, William Francis Finlason's 1866 emergency script for the colonies, was *inscribing* violence, not proscribing it. His design was not about tempering constitutional dictatorship—but about weaponizing it. It was a constitutional manifesto—for violence. Finlason was his era's "foremost authority on the legal technology of terror" (Kostal 2005, p. 229; see also Dyzenhaus 2009). Whereas Matthew Hale in the seventeenth century had equated martial law with lawlessness, and William Blackstone ([1765] 1979) in the eighteenth century had looked askance at this body of law, believing, as he did, that it was "built upon no settled principles" and "entirely arbitrary in its decisions" (p. TBA), Finlason endeavored to turn this vice of violence into a virtue. His was a theory of extremist constitutionalism.[5] By prescribing it, he turned constitutional violence into a habit of legality—with far-reaching consequences for the colonies

[5] On Blackstone, see also Fatovic 2009, pp. 124-156.

Finlason's argument about martial law as "an indispensable tool of imperial statecraft" (Kostal, p. 230) shares intellectual connective tissue with the idea of emergency constitutionalism. The Liebers recognized this—and labored hard to distinguish their theory of the emergency constitution from his (Lieber and Lieber ([n. d.] 2019, p. 84). The principle of necessity, which Finlason rejected, did much of the heavy lifting in their emergency script. A second institutional safeguard they introduced was that of judicial review. Like Rossiter's, theirs was an effort "that threaded the needle between constraint and licence" (Smiley and Witt 2019, p. 50). But in keeping with their ancestors, they favored, unlike Rossiter, a constitutional design of liberty *and* monarchy (Lieber and Lieber ([n. d.] 2019).

When they are called upon to pronounce on the legality of an emergency regime, judges, according to David Dyzenhaus (2009), generally have three options: "First, they can try to give the regime rule-of-law teeth. Second, they can say that the regime is legal without making the attempt, in which case they give the regime the imprimatur of the rule of law by equating that rule with rule by law. Finally, they might find that the regime is illegal because it is incompatible with fundamental principles of legality" (p. 42). During the last twenty years or so, all three of these options have been studied in depth, at length, and with great sophistication (see, *inter alia*, Ramraj 2008; Dyzenhaus 2006; Gross and Ní Aoláin 2006; Fatovic 2009; Honig 2009; Lazar 2009; Sarat 2010; Loevy 2016). I will not herein rehearse abstractions about regimes of exception. They are indispensable but also inherently limiting for thinking about emergency constitutionalism. As Karin Loevy (2016) notes, "the static inclination" of traditional models has prevented constitutional theorists from taking seriously "the process of emergency" (pp. 281; 311). Being attentive to the "historical dialectical aspect of emergencies" (p. 282) entails, for her, "a focus on changes in response capacities under

conditions of complex legal and political problems" (p. 315). I submit that the government of threat and care must be refracted through the lens of what I call *constitutional practices*.

"Practice approaches are fundamentally processual and tend to see the world as an ongoing routinized and recurrent accomplishment" (Nicolini 2013, p. 3), which is where my approach and Loevy's overlap. Constitutional practices are not just what people do. I define them as recurrent and meaningful constitutional activities—social or material—that are performed in a regularized fashion. They have a bearing on the lived reality of constitutional law. Constitutional practices "result from the noninstrumental and often spontaneous interplay of doing, saying, and knowing by groups of individuals" (Meierhenrich 2013, p. 19). Tracing them, is methodologically demanding. Practice tracing, as Vincent Pouliot (2015) explains,

> is a hybrid methodological form that rests on two relatively simple tenets: social causality is to be established locally, but with an eye to producing analytically general insights. The first tenet, drawn primarily from interpretivism, posits the singularity of causal accounts: it is meaningful contexts that give practices their social effectiveness and generative power in and on the world. The second tenet, in tune with process analytics, holds that no social relationships and practices are so unique as to foreclose the possibility of theorization and categorization. Practice tracing seeks to occupy a methodological middle ground where patterns of meaningful action may be abstracted away from local contexts in the form of social mechanisms that can travel across cases (pp. 237-238).

Evidence from the French Fifth Republic illustrates my argument about constitutional practices. In 1961, France operated like a constitutional dictatorship. Charles de Gaulle's crisis government that year very much resembled "the unaccountable, unconstitutional use of emergency powers" that a few decades previously had pushed the Weimar Republic into a tailspin (Skach 2005, p. 105). The institutional deformation of democracy during the so-called Algeria emergency was a quintessential case of constitutional violence, characterized, as it was, by "opaque, nonaccountable decision-making in which the democratically elected institutions" of the country "lost their controlling capacity" (p. 105). It was an immediate outgrowth of, and expressively intertwined with, France's *other* constitutional dictatorship, the one its elites had designed for, and ruthlessly imposed on, the country's recalcitrant colony to the south (e.g., Thénault 2007; Hannoum 2010; Sessions 2011). De Gaulle's expansive use of emergency powers at home—in the metropole—revolved around Article 16 of the country's semi-presidential constitution. "The situation demanding the use of these powers," according to Cindy Skach (2005), *did* pose a serious threat to the security of the nation: "A military junta, composed of four generals of the French army, had seized power in Algiers in April 1961 and was attempting to take over the government in both Algeria and metropolitan France. This crisis of the generals lasted only four days, as soldiers from the air force and the marines refused to follow the coup" (p. 103).

The temporary solution to the problem of social order threatened to become permanent. The country's veritable state of exception lasted five months, from April 23 until September 1961. In the event, de Gaulle's use of Article 16 did not turn France's commissarial dictatorship into a sovereign dictatorship. But the fear that it might was widely

felt. A year later—after the state of emergency had formally ended—a public opinion survey revealed that 34 percent of those polled believed there was a risk that de Gaulle, if he were to base his charismatic leadership on them again, would abuse his constitutional powers (Skach 2005, p. 104).

The violent exception that de Gaulle engineered in 1961 has been dubbed "de Gaulle's Eighteenth Brumaire" (Anderson 2019, p. 233), and the historical comparison is apt. Like Napoleon III, de Gaulle, after the end of his emergency rule, was regarded with more suspicion by the French than before his interlude as constitutional dictator. The population's ambivalence about emergency constitutionalism—and de Gaulle's abuse thereof—was profound: 35 percent of those surveyed agreed with the statement that "in France, democracy is in danger" (quoted in Skach 2005a, p. 104). The awesome powers that Article 16 conferred on de Gaulle raised, in those anxious, liminal times of decolonization, the specter of a constitutional forever war. To score points, a youngish François Mitterrand (1964), with the publication of *Le Coup d'État permanent*, warned gravely of a permanent state of exception.

In theory, the idea of constitutionalizing emergency powers by way of Article 16 was sound. The emergency regime was intended to keep extremist constitutionalism at bay. It was explicitly designed to prevent emergency constitutionalism from morphing into extremist constitutionalism, from becoming emergency rule in "its detestable form," the kind that rested on "an usurpation of power" and endeavored to be "enduring" (Gicquel 1997, p. 588). The constitutional *malaise* of 1961 tested France's faith in constitutional design. By and large, that faith was justified.

Although by the end of the millennium, Article 16 had only been invoked once by a president of the Fifth Republic, one must not make too much of this reticence, which brings us back to constitutional practices. The threat of constitutional violence that Article 16 represents undeniably had a chilling effect—and still does today. For as several historians have shown, "it is a highly significant provision in that it is a symbol of the power of the President and is always there, to be used if necessary" (Hewlett 2010, p. 42). Also consider in this context the first two decades of the twenty-first century during which emergency rule became "the new normal," and a formidable constitutional practice, in France (Tayler 2016).

It is perhaps worth pointing out that the French legal system knows four modalities for governing the emergency, two are constitutional in nature, one legislative, and the fourth doctrinal (Platon 2020). Article 16 is the most controversial route to exceptional rule, not least because the collective memory of the constitutional crisis of 1961 remains vivid. Article 36 of the 1958 Constitution provides for an *état de siege*, ostensibly the gravest of emergency regimes. It goes back to two legislative acts from the nineteenth century, which a 2004 Ordinance repealed and replaced (Platon 2020). The lived reality of the 1958 Constitution suggests that de Gaulle's constitutional dictatorship à la Article 16 has created considerably more apprehension in the country than the prospect of a military state of siege pursuant to Article 36 and the legal instruments associated with it.

In recent years, French governments invoked neither of the two constitutional provisions. Instead they made use of Loi n° 55-385, the State of Emergency Act of 1955.[6] That law is from the Fourth Republic. After a decade of government instability, France's National Assembly designed rules for the game of governing in times of an *état d'urgence*. In

[6] Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence.

the last fifteen years, these legislative rules have structured France's emergency response to two major crises: the resistance and youth riots in the banlieues in 2005, and the uncertain aftermath of the terrorist attacks in Paris that began with the Bataclan massacres by ISIS gunmen on November 13, 2015, and which plunged the country into an extended crisis mode. On both occasions, the constitutional dictatorships that resulted lasted longer than anticipated—and were more extreme than permissible. If we include the recent "state of health emergency" (Platon 2020), France's *citoyens* have lived in a state of emergency for three years out of six.[7] The empirical vignette shows just how well-thumbed—and accepted—the emergency script has become in the French Fifth Republic, where it has proved central to the government of threat and care. There, as elsewhere, it looks as if "the narrative of violence" (Dyzenhaus 2009, p. 56), when the "the narrative of legality" returned to centre stage in the aftermath of constitutional dictatorship, never entirely receded. This raises thorny questions about emergency constitutionalism, specifically about legality models that put a premium on legalization as a device for averting "abusive constitutionalism" (Landau 2013). This brings me to my second type of constitutional dictatorship.

Extremist Constitutionalism

Pace Rossiter, constitutional dictatorship is not just an institutional design to stem the tide of crisis. In reality, constitutional dictatorship has also been used as a tool with which to unleash it. This type of constitutionalism is extremist in that it expresses "a normative belief in the necessity of radical or exclusionary solutions to the problem of political order" (Meierhenrich 2016, p. 196). The proliferation of authoritarian constitutionalism (e.g., Loveman 1993;

[7] Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19.

Barros 2002; Ginsburg and Simpser 2014; García and Frankenberg 2019; Chen and Fu 2020) in recent years is testament to the appeal of the rule of law as a political weapon. Waging lawfare (Meierhenrich forthcoming) supported by technologies of constitutional law is hardly new. As Brian Loveman (1993) demonstrated, in one of the first comparative historical analyses of constitutional violence, "[i]n much of Spanish America, constitutional dictatorship became the rule rather than the exception" (p. 383). The law of exception gradually ceased to be seen an institutional safeguard and increasingly came to be seen as a constitutional weapon with which to cudgel an "other" into submission—or worse. In this second type of constitutional dictatorship, the function of law, first and foremost, is to defeat a real or imagined enemy—or, if all else fails, to destroy it.

Make no mistake: *both* varieties of constitutional dictatorship in my typology generate constitutional violence (Ninet 2013; Meierhenrich 2021). In this sense, constitutional dictatorship, to borrow from Michael Oakeshott (1975) is an "unpurged relic of 'lordship'" (p. 268). Whether constitutional dictatorships are the product of a genuine emergency script or malevolent reasons of state, the logic of their violence "draws our attention to what might be called the imperial dimension of constitutional law" (Poole 2016, p. 198; see also Kelly 2016). The moniker "imperial" is fitting, says Thomas Poole, "not just because of the historical connection between reason of state and the imperial expansion of the state both outside and within its own borders, but also because of the relatively stark connection between reason of state and authority (*imperium*)" (p. 198). According to Poole, "[t]his is a side of constitutional politics that jurists often overlook," and, he is convinced, neglect to their peril (p. 198). The incessant focus in the field of comparative constitutional law "on the constraining side of constitutions," he thinks, as do I, invariably gives "an incomplete and

unreal impression" (p. 198) of the social life of constitutions. By papering over constitutional violence, originary and otherwise, the rhetoric of constitutionalism has, inadvertently or otherwise, been imbricated in the marketing of constitutions.

Authoritarian constitutionalism is an empirical regularity—and thus a defining feature—of the early twenty-first century world. After decades of democratic backsliding (Bermeo 2016), the idea of constitutional democracy is in crisis. Having crunched the numbers, Zachary Elkins (2018) believes "we are, standing on the crest of the third wave, waiting for Godot. And the signs do not look good" (p. 49). The outlook is bleak because of "real unpleasantness in the form of executive hubris, intolerance, distrust, partyism, and constrained liberty in places as diverse as Hungary, Venezuela, India, and Turkey—countries that had always shown democratic promise" (p. 49). With the world in flux, trying to understand transitions *to* and *from* constitutional dictatorship, especially its extremist variant, is a major concern of scholars and practitioners alike. Constitutional dictatorships, as Rossiter (1949) knew, make "perfect weapons for revolution" (p. 401). A vignette from the twentieth century shows how democracy dies when constitutionalism becomes extremist.

June 25, 1975 was the day democracy died in India. Although democracy was, eventually, resuscitated, the constitutional revolution begun that day set the government of Prime Minister Indira Gandhi on a violent path of no return. It was a dark path, and it led through the valley of death.[8] That night, India's President, Fakhruddin Ali Ahmed, at

[8] After revival and recuperation in the late twentieth century, India ended up on its death bed again in the early twenty-first. For this argument, or evidence in support of it, see, for example, Basu 2015; Komireddi 2020; Singh 2020; Jaffrelot 2021. For counternarratives, see

Gandhi's behest, a nationwide state of emergency. Much of the violence on which it relied was wanton and senseless. The government's was a diversionary strategy *par excellence*. It gave rise to unsavory constitutional practices. The result was a campaign of categorical destruction authorized by an act of constitutional violence—contrived by Gandhi, performed by Ahmed—to stave of resistance to what had become a neo-patrimonial regime (Jaffrelot and Anil 2020; Tir and Jasinski 2008).

"The emergency," as it is known, was a case of constitutionalism *in extremis*. Violent entrepreneurs engineered it for the purpose of governing through emergency—not to save the country from it. As Ramachandra Guha (2001: TBA) wrote, on the occasion of the twenty-fifth anniversary of the declaration of the country's state of emergency, "either before or during the Emergency there was no serious threat to the unit and integrity of India." Forty-five years after the use of constitutional violence in this postcolony, another scholar, Kristin Victoria Magistrelli Plys (2020, p. 131), in an innovative study of the correlates of resistance to dictatorship, reached the same conclusion:

> The historical evidence lends more credence to the interpretation that Gandhi was responding to an attempt to oust her from office on corruption charges by suspending democracy and taking state power rather than the interpretation that she was simply reacting to violent social protest that threatened the existence of the state.

Khosla 2020 and Varshney 2020, with the latter (an empirical political scientist) critiquing the former (a constitutional theorist) for being late to the party for Indian democracy.

One factor to which neither Guha nor Plys has given enough weight in accounting for the "Emergency," however, is the standoff between the Prime Minister and the Constitutional Court of India in the five-year span between Gandhi's sweeping election victory in 1971 and Ahmed's declaration of the state of emergency in 1975. That standoff, as well as the perverse constitutionalism that it provoked, should give pause to those, like Nomi Lazar (2009), who believe that the violence of constitutional law, in times of emergency, can be contained, its entrepreneurs stymied. So long as emergency powers are well designed and exercised, Lazar avers, constitutional dictatorships need not be feared.

Now here is the rub: India's emergency powers *were* well designed, the scale of the fabricated emergency *was* limited. And up until Gandhi's reign, an independent constitutional court had confidently upheld the country's constitutional framework. In the 1967 case of *Golaknath v. State of Punjab*, for example, it had asserted its authority vis-à-vis contending institutions in the postcolony (Ackerman 2019, esp. pp. 65-71; Jacobsohn 2003; Khosla 2020). None of these institutional safeguards, however, constrained India's constitutional dictatorship. Gandhi's transparent lawfare campaign culminated in the sovereign theft of her country. "In the twenty-one harrowing months that followed, her regime unleashed a brutal campaign of coercion and intimidation, arresting and torturing people by the tens of thousands, razing slums, and imposing compulsory sterilization on the poor" (Prakash 2019). The mobilization of constitutional violence, in certain respects, was a continuation of "the jurisprudence of power" (Kostal 2005) that Britain's empire project had begot, and which its legal imperialists had practiced, in India and elsewhere.

During the infamous "Jamaica controversy" in the nineteenth century, which concerned the violent repression, in the name of emergency, of the 1865 Morant Bay

uprising in Jamaica, the liberal internationalists of that era "hoped that an accommodation could be forged between the love of law and the love of imperial domination" (Kostal 2005, p. 488). However, as Rande Kostal (2005) has drily pointed out, "[i]t seems not to have occurred to these distinguished lawyers and politicians that empire—this 'fatal heritage'—might be the Trojan horse of English political jurisprudence" (p. 488). The case of the Morant Bay uprising, and a list of others like it, shed light on the varied uses of the rule of law as a political weapon. From colonialism to Covid-19, constitutional dictatorships have functioned as Trojan horses. Not all constitutionalism is facadist, or calculated to deceive (see, e.g., Sajó and Uitz 2017). But the violence of constitutional law, critical legal histories have shown, is a clear and present danger—and always has been. This danger bedevils liberal regimes of exception no less than illiberal ones. In both, it is but a short step from emergency constitutionalism to extremist constitutionalism.

Anil Kalhan has shown for the case of Pakistan's constitutional dictatorship in the era of General Pervez Musharraf, the country's former President. "From the perspective of constitutionalism," Kalhan writes, the country's emergency constitution of 2007, which he classifies as an "extraconstitution," has "not helped to 'establish legality' or 'preserve legality," but, instead, "repeatedly enabled actions *undermining* legality" (Kalhan 2010, p. 106). In Kalhan's telling, this act of constitutional violence, couched in the language of emergency, set in motion a path dependent dynamic of extremist constitutionalism. This logic of constitutional violence, in turn, created a self-reinforcing dictatorship:

> Pakistan's doctrine of necessity has proven remarkably durable. Since courts and lawyers have not sharply distinguished between decisions rendered under the Constitution and those under the

> extraconstitution, it has been difficult to marginalise and discredit this extraconstitutional jurisprudence as illegitimate. As a result, the jurisprudence under Pakistan's extraconstitution has been normalised and assimilated into the mainstream of Pakistani law to a considerable extent—just as the institutional role of the Pakistani Army in civilian affairs itself has become normalised (Kalhan 2010, p. 106).

In order to spot Trojan horses—like Pakistan's emergency constitution—an "ethics of experience" (Lazar 2009, p. 4), one attuned to the long-run consequences of legal development (Meierhenrich 2008), is indispensable. Without interpretive inquiry, deformations of emergency constitutionalism are easily missed, constitutional origins of dictatorship overlooked. Often, constitutional violence lurks behind a facade of "plausible legality" (Sanders 2017, p. 7). Responses to the threat of terrorism illustrate the point vividly. But so do many other, older cases, from the nineteenth-century "Irish laboratory" (Roberts 2019, p. 9) to performances of emergency rule in colonial Kenya (e.g., Reynolds 2017, pp. 138-169) and apartheid South Africa (e.g., Ellmann 1992). John Reynolds (2017) is right: "When it comes to emergency law," and thus the domain of constitutional dictatorship, "contemporary reality cannot be viewed in isolation from colonial history" (p. 17). Especially noteworthy about the imperial violence of constitutional law—at least from a perspective of the *longue durée*—is the feedback loop that Kostal (2005) and other legal historians noticed. Lawfare techniques used on the home front had been invented abroad—to rule to "the savage periphery" (Hopkins 2020).

The use of these reverse legal transplants can be illustrated, for example, with reference to the imposition of economic states of emergency, especially those declared in Britain from the 1920s. There, as William Scheuerman (2000) pointed out, the cabinet of Prime Minister Lloyd George deployed "emergency authority" in the service of "peacetime economic coordination" (p. 1878). Reynolds (2017) recently added an important twist to Scheuerman's tale of constitutional violence—by highlighting the long-run consequences of constitutional dictatorship. The constitutional violence meted out, in the form of emergency legislation, against labor movements in the U.K., followed, Reynolds argues, "the long-standing trend in the colonies, where strikes or protests by native workers were painted with the 'security threat' brush and colonial governors would declare a state of emergency to legitimise the use of force in their suppression" (p. 101). The violence of constitutional law, in other words, is not just objective, but also discursive.

From colonialism to Covid-19, the "catastrophization" (Ophir 2010) of exigencies has been commonplace. The concept, a technical term used in psychology and psychiatry, describes a cognitive bias at work. Those who catastrophize "are inclined to overgeneralize," for whatever reason, "risk-related factors and to exaggerate the chances of the worst possible thing happening" (Ophir 2010, p. 59). Whether barbarians, insurgents, or pandemics are said to be at the gates, performances of catastrophe are always *affective*—and thus frequently *effective*. There is reason to believe that the more complex the exigency, the greater the effectiveness of emergency tales (Ophir 2010, pp. 74-75). Evidence from colonialism and Covid-19 lend credence to this conjecture. Or, as Adi Ophir (2010) writes, "when catastrophization has its experts, when these experts inhabit a whole cultural field (in Bourdieu's sense of this term), where heterodoxy regularly contests orthodoxy, and when

power inheres in that field" (p. 74), the demand for constitutional dictatorship is easy to stimulate—and to manipulate.

Violent *nomoi* have perverted the social life of constitutions everywhere. The specter of extremist constitutionalism is not a thing of the past. It may be even more pronounced in the present, where extremist constitutionalism has conquered the government of threat and care. In most countries, as Witt (2021) recently noted,

> the coronavirus crisis accelerated trends toward further concentrated power at the national instead of the local level. Sometimes, this was because presidents and prime ministers used the crisis to consolidate power. In Hungary, the parliament handed Prime Minister Viktor Orban sweeping new emergency powers. In China, President Xi Jinping used the crisis to expand his power over Hong Kong (p. 108).

Constitutional dictatorships—or so it suddenly seems—are everywhere. Are they here to stay?

SELF-REINFORCING CONSTITUTIONS

It was Machiavelli, who, in 1531, first contemplated the temporality—and permanence—of constitutional dictatorship. Placing institutions "in time" (Pierson 2004) is par for the course in comparative historical analysis (e.g., Pierson 2000; Mahoney and Thelen 2010). Constitutions are no exception. They can, and do, take on a life of their own. If the experience of Weimar Germany's emergency constitution holds any lesson for comparative

constitutional law, this is it (see also Meierhenrich 2020). In short, studying constitutional dictatorships over the *longue durée* takes time.

Constitutions in Time

My particular concern is with two dimensions of duration. I assume that the relative permanence of constitutional dictatorship can be a function of *longevity*, that is, sheer endurance, of staying power, or, alternatively, a product of *durability*, which typically results from the interplay between self-reinforcing institutions (e.g., Przeworski 1995) and sustainable practices (e.g., Schatzki, Knorr Cetina, and von Savigny 2001).

I distinguish constitutional dictatorships that *last* from those that are *durable*. All durable dictatorships will be lasting ones, but not all those that last will necessarily be durable. Lasting ones may survive not because they are institutionally sound—and thus self-reinforcing—but because they are on life support. They may depend for their maintenance on interventions from within or without (e.g., Brands 2010; Rabe 2015). The constitutional dictatorship in post-genocide Rwanda (Chakravarty 2015; Meierhenrich 2006, 2021; Wrong 2021) is a case in point. By contrast, constitutional dictatorships that are durable, achieve longevity because they generate positive feedback. They self-adjust and re-equilibrate. Founding legacies are an important mechanism of authoritarian reproduction (Levitsky and Way 2016, p. 217; see also Meierhenrich 2008). As Steven Levitsky and Lucan Way write, "the key institutional structures underlying durable authoritarian rule tend to be inherited, rather than designed, by autocrats" (Levitsky and Way, p. 217). I believe this also to be true for constitutional dictatorships of the extremist kind. Although legacies of lawfare, where

they exist, will invariably be bounded, their existence should give anyone pause who is—like Rossiter was—in the business of promoting constitutional dictatorships.

The specter of "permanence" (Dyzenhaus (2001) troubled even Rossiter. As mentioned, he conceived constitutional dictatorship as a *temporary* order. A liminal regime of exception, one that "can act arbitrarily and even dictatorially in the swift adoption of measures designed to save the state and its people from the destructive effects of the particular crisis," he wrote, has one purpose, and one purpose only, namely "to end the crisis and restore normal times" (Rossiter 1948, p. 7). Yet Rossiter recognized that the practice of constitutional dictatorship could generate path dependent dynamics—and unleash logics of violence that make a return to normality costly, perhaps even prohibitive. "Constitutional dictatorship," he admitted, "is a dangerous thing" (p. 294). The gravest danger he saw was "the unpleasant possibility that such dictatorship will abandon its qualifying adjective and become permanent and unconstitutional" (p. 294). Several paths, he averred, led to a state of permanence:

> A declaration of martial law or the passage of an enabling act is a step which must always be feared and sometimes bitterly resisted, for it is at once an admission of the incapacity of democratic institutions to defend the order within which they function and a too conscious employment of powers and methods long ago outlawed as destructive of constitutional government. Executive legislation, state control of popular liberties, military courts, and arbitrary executive action were governmental features attacked by the men who fought for freedom not because they were ineffective or unsuccessful, but because they were dangerous and

> oppressive. The reinstitution of any of these features is a perilous matter, a step to be taken only when the dangers to a free state will be greater if the dictatorial institution is not adopted (p. 294).

Elsewhere Rossiter allowed that "[n]o democracy ever went through a period of thoroughgoing constitutional dictatorship without some permanent and often unfavourable alteration in its governmental scheme" (p. 13). The case of France comes to mind—again (Saint-Bonnet 2001). There Napoleonic legacies of crisis government have—institutionally and attitudinally—left an imprint on constitutional practices, and thus on the country's emergency responses from the battle of Algiers to the attack on the Bataclan.

Toward the end of *Constitutional Dictatorship*, Rossiter besmirched the constitutional utopia he just spent 300 pages portraying. Returning to the case of Napoleon III, he reminded the reader—and himself—that France's first constitutional dictator had abused the institution of the *état de siege*—one of the technologies of constitutional dictatorship—in order "to destroy" a constitution (p. 295). The emperor, Rossiter marvelled, had wielded the law of exception "even more effectively" than the World War government did in the twentieth century "to defend one" (p. 295). France's short-lived Second Republic was fatally injured by the constitutional violence that Napoleon III, as its duly elected President, inflicted on it.

Here is how he did it. First, he reimagined the new 1848 constitution as a suicide pact. Its Article 106 constitutionalized the state of siege, making provision for its regulation in an act of parliament. This act, passed on August 9, 1849, gave Napoleon III a powerful weapon

with which to inflict damage on his adversaries and enemies, notably the legislature, the National Assembly.

When Napoleon III octroyed the Constitution of 1852, its Article 12 transferred the authority of declaring a state of siege from the legislature to him. The violent fallout was tremendous, as Rossiter pointed out: "During the Franco-Prussian War and the ensuring internal agitation the institution [of the *état de siege*] was employed on a scale hitherto unknown" (Rossiter 1948, 81). More than forty of the country's initially 83 *départements* "were placed under the state of siege for several years" (pp. 81-82). In four of the larger ones, emergency government only ended on April 4, 1876—a full five years after the cessation of the Franco-Prussian War. Although the National Assembly, in 1878, altered the law of the exception, France's legality regime was feeble. To speak of "legislative ascendency," as Rossiter (1948, p. 84) did, is hyperbole. Parliament's assertion of authority was a token gesture, "a reaction to the abuses of the state of siege" (Barthélemy 1917, p. 147) under Napoleon III, yes, but a bulwark against extremist institutionalism it was not. Even Rossiter conceded as much when he reminded his readers that the laws of 1849 and 1878 were "not constitutional provisions, but ordinary statutes" (p. 83). These legislative provisions, while moderately constraining, were incapable of preventing a turn from emergency to extremist constitutionalism—from commissarial to sovereign dictatorship, if you will—because they were "completely alterable at the latter's discretion," and, as such, "never bound the French Parliament in any formal way" (p. 83).

Legality models of emergency constitutionalism may not be futureproof, for legality rarely is a match for radicality, nor for charisma. The French experience between the fall of the July Monarchy in 1848 and the failure of Napoleon III's experiment in extremist

constitutionalism in 1870 demonstrates as much. Acts of parliament constrain; but they also enable—and conceal. Constitutional dictatorships, when left to their own devices, are prone to hiding constitutional violence behind a justice facade. And when they do, what emerges in the constitutional interstices, can turn lawfare into warfare.

Three decades before Walter Benjamin ([1940] 2006) declared that had learned from "the tradition of the oppressed" that crisis government is "not the exception but the rule" (p. 392), Bal Gangadhar Tilak, the first leader of the Indian Independence Movement, observed that "[t]he Goddess of British justice though blind, is able to distinguish unmistakably black from white" (as quoted in Kolsky, p. 4). The quote cuts to the heart of what the late Nasser Hussain (2003) called "the jurisprudence of emergency." A brief vignette from the colony/postcolony illustrates the thrust of these three intersecting, decolonial arguments about constitutional violence.

With particular reference to the Indian subcontinent, Hussain crafted an incisive argument about constitutional lethality. "British India was a regime of conquest, not incapable of creating certain levels of political legitimacy, but consistently dependent upon the discretionary authority of its executive and the force of its army" (p. 6). Hussain's was an argument about constitutional dictatorship—though the concept makes only a passing appearance in his book. This brief appearance is noteworthy, however. For it points to a glaring—and rarely acknowledged—shortcoming in Rossiter's treatise, and the scholarship on constitutional dictatorship it has inspired in the last 75 years.

A conventional reading of *Constitutional Dictatorship*, the kind that Rossiter hoped for, does not suggest an easy applicability to colonial regimes of exception. It never occurred to him—on account of a decidedly Eurocentric conception of world politics (Hobson 2012)—

to look beyond the histories of the so-called great powers, to think about constitutional law in relation to its others. "Rossiter's text," wrote Hussain (2003, p. 18), "has little relevance for the decidedly unfree rule of colonialism." I think this is not quite true. The fact that Hussain thought it could be is probably a function of Rossiter's *explanandum*. For the thing he set out to explain was regrettably narrow. His was a normative project content with mere description. It was a leading example of the old institutionalism. His imagination was utopian, not critical. The jurisprudence of emergency requires us to place "the modern democracies" (Rossiter 1948) in a different light—and to take a closer look at the violence of constitutional law in the colony/postcolony.

John Finn (p. 199), who studied the institution of constitutional dictatorship in the late twentieth century, observed that "[d]esperate measures have a way of enduring beyond the life of the situations that give rise to them" (p. 54). It was the case of Northern Ireland, which Finn compared to that of Weimar Republic, that drove him to this conclusion. The British occupation there, he argued, blurred the line between empire and liberalism. demonstrates that the colony/postcolony binary that has long informed the study of constitutional dictatorship is not helpful. The population of Northern Ireland lived in an exceptional state, and occasionally also a state of exception, for much of the twentieth century. A number of the emergency measures the British government imposed on the postcolony, hailed from overseas territories.

Fear of exigency, in Finn's account, counted for more than fidelity to the British constitution, which is how constitutionalism became perverted. The conclusion he drew from his longitudinal account of constitutional dictatorship in the UK was dispiriting, and entirely in line with the Weimar experience and the cumulative radicalization of its

"intermittent sovereigns" (Radin 1930). As Finn put it, "The need that gives rise to emergency powers tends to expire long before the legislation passed to cope with it does. In this sense, effective emergency legislation threatens constitutional values even when it succeeds, for then the temptation to make such powers permanent increases" (p. 134).

Given the widespread use of constitutional dictatorship to advance "the empire project" (Darwin 2009), and the rise of constitutional dictatorships over the course of the Covid-19 pandemic, ours is an opportune moment to examine more fully the viciousness—and the perniciousness—of law's constitutional violence. The long-run consequences of constitutional dictatorship require greater attention than they have received. Even a cursory look at constitutional history suggests that the permanence of the temporary is a far greater danger than constitutional theorists—from Machiavelli to Sidney to Rossiter and beyond—have led us to believe. In a pioneering analysis of the interplay between emergency constitutionalism and extremist constitutionalism in the colony/postcolony, Loveman (1993) three decades ago gave a chilling account of the long-run consequences of constitutional dictatorship:

> The foundations of constitutional dictatorship survived the nineteenth century to be the pillars of Spanish American politics as the twentieth century ends. The constitution of tyranny is intact; the consequences between 1959 and 1992 include thousands more incarcerated, tortured, "disappeared," and murdered, from the islands of the Caribbean to the highlands of Guatemala and the steppes and archipelagos of the Argentine and Chilean Patagonia. The display of severed heads and dangling corpses in plazas and forests favored by

> the Peruvian, Uruguayan, Argentine, Salvadoran, and Honduran caudillos in the nineteenth century has given way to corpses floating in rivers, left on the sides of roads, or dumped in mass graves in clandestine cemeteries. The rack and thumbscrews gave way to the parrot's perch and the *parilla*. What has not given way is the constitution of tyranny (p. 405).

The deformation of constitutional dictatorship over the *longue durée* is a recurring feature of the emergency constitution. There is strong evidence to suggest, *pace* Machiavelli, that those republics that do have recourse during the most pressing dangers either to a dictator or to some similar authority are likely to come to ruin (or regret) during serious misfortunes. The faith that he, as well as Sidney and Rossiter, had in "a power like to the dictatorian, limited in time" (Sidney ([1680] 1996, p. 152) was, we now know, misplaced. History has shown that even "virtuous and well-disciplined nations" (p. 158)—and sometimes especially those—cannot be trusted with concentrating the awesome power of deciding the exception. Intermittent sovereigns rarely stay that way.

In response to the Covid-19 pandemic, more than a few of the world's governments have learned to live with—and some to love—the trappings of constitutional dictatorship (e.g., Cofre 2020; Chua and Lee 2021). In some of these countries, a path-dependent logic of constitutional dictatorship is emergent (see, in general, Stasavage 2020; Thomson and Ip 2021; and, in particular, Drinóczi and Bień-Kacala 2020; Greitens 2020). This is likely because "actors who operate in a social context of high complexity and opacity are heavily biased in the way they filter information into existing 'mental maps'" (Pierson 2004, p. 38).

Constitutional dictatorships *are* mental maps. They, too, incorporate confirming information and filter out disconfirming information (p. 39). Few social contexts in recent decades have been as complex and opaque as the global coronavirus pandemic. This is one of the reasons why the catastrophization of Covid-19 fuelled the demand for constitutional dictatorships—and the supply of constitutional violence.

CONCLUSION

The question of how to respond to "the most pressing dangers" so as to avert "serious misfortunes," as Machiavelli put it in 1531, is as pressing in the twenty-first century as it was in the sixteenth. From the "economic emergency" to the "refugee crisis," and from Covid-19 to the "climate emergency," few questions in socio-legal studies are of greater significance than how to govern in times of exigency.

Norming the exception is not enough, however. Questions about emergency politics are not questions of constitutional design alone. Bonnie Honig is persuasive on this point. Like Scheppele, she is uncomfortable with emergency scripts. "One worry," writes Honig (2009), "is that we contribute to the very account of sovereignty we mean to oppose" (p. 1). For her developing "criteria," as Rossiter called them, for optimizing constitutional dictatorships was anathema to thinking the exigency:

> If we ask what rules, procedures, norms, or considerations ought to guide or constrain the decisions to invoke emergency, we may think we constrain the decisions to invoke emergency, we may think we constrain or limit sovereignty—and we may indeed do so, when our

> arguments find favor with judges or administrators—but we also adopt a certain kind of sovereign perspective and enter into the decision. When we treat sovereignty as if it is top down and yet governable by norms we affirm, we help marginalize rather than empower important alternatives (p. 1).

Constitutional dictatorships have governed throughout history—sometimes intermittently, at other times enduringly. If this history of violence teaches us anything, it is that constitutional dictatorships are not benign, not ever. One need not be a critical legal theorist, a feminist legal theorist, a critical race theorist, or a decolonial theorist to see that the *nomoi* and narratives of constitutional law from colonialism to Covid-19 have been imbricated with all kinds of violence: ontological, epistemic, symbolic. To locate these repertoires of constitutional violence, it can be positively unsettling to look at the underneath of things.

Constitutional Ethnography

The study of constitutional dictatorship ought to be concerned less with the doctrine of constitutional law—and with designing "emergency scripts" (Scheppele 2010)—and more with practice tracing (Pouliot 2015) constitutional violence. Brand-new, even policy-relevant knowledge stands to be gained, if constitutional theorists deemphasized the philosophical foundations of constitutional law and reemphasized the phenomenology of its violence. Such a decentering of the *telos* of constitutional scholarship would require an adjustment of both teaching and training. The rise of quantitative methodology in comparative constitutional

law, for one, would need to be counterbalanced by a re-investment in interpretive methodologies. However, absent a greater appreciation of, and instruction in, constitutional ethnography (Scheppele 2004; De 2018), the social life of constitutions—and the violence of constitutional law—will remain shielded from view.

I propose that we think of the interpretive study of constitutional law not as an indulgence but as an integral part of constitutional scholarship. The interpretive study of constitutions belongs to "the cultural study of law" (Kahn 1999; see also 2003). This socio-legal approach rejects purely causal and other reductionist arguments and is interested, above all, in law's signification. Studying constitutional dictatorships in unfamiliar cultures—whether in the colony or postcolony—is not easy. In her call for "constitutional ethnography," Scheppele (2004) wrote of a "commitment to collecting whole specimens of social life" (p. 397, emphasis removed) as a defining feature of this constitutional craft. I call it constitutional *mētis*.

Constitutional *mētis*

Extant models of constitutional dictatorship are imperfect. "[T]hey all draw," as Karin Loevy (2016) wrties, "on profoundly static visions of political reality" (p. 280). The language of "necessity" (e.g., Crocker 2020), a recurring feature in debates about constitutional dictatorship, is a case in point. The trope's centrality in debates about the legality of crisis government, however, deflects from socio-legal reality. With Victor Ramraj (2017), I have doubts about "the elusive quest for precision in a messy pluralist reality" (p. 373).

Thick descriptions of constitutional law (e.g., De 2018) are not sure (and not generally interested in being sure) about how to solve the problem of social order. Solving "the

megaproblem of the sustainable ordering of human affairs," searching for "summary equation, an E=mc2, for human behavior" (Caldwell 2000, p. 73) is not what they are about—and the study of constitutional dictatorship should not be either.

Enter John Dickinson. Known as the "American Burke," Dickinson was a practicing lawyer from Philadelphia, a delegate to the First and Second Continental Congress and also to the Constitutional Convention. On August 13, 1787, in his speech at the Constitutional Convention, Dickinson called for a reality check: "Experience," he told his fellow delegates in the constituent assembly, "must be our only guide" (as quoted in White 1987, p. 45). Dickinson was unconvinced by rationalist approaches to constitutional design. "Reason," he felt, "may mislead us" (as quoted in White 1987, p. 45). I have chosen to read Dickinson's intervention—and his theory to institutional design—as a forgotten plea for "real social science" (Flyvbjerg, Landman, and Schram 2012), or applied phronesis.

Dickinson's, I venture, was an argument for taking constitutional history—and the constitutional practices that can be found there—more seriously than constitutional theory. Such counsel is apposite in the twenty-first century. Scholars—in the hope of escaping the everyday life of constitutional law (which is messy and noisy and forever pregnant with meaning)—decamp in droves to the province of jurisprudence, and the dizzying heights of constitutional thought one can climb there.

Phronetic social science (Flyvbjerg 2001) has much to offer the study of constitutional dictatorship—and possibly more than the philosophy of constitutional law, which already has a deep knowledge base (for a survey, see Dyzenhaus and Thorburn 2016). And unlike the other increasingly dominant branch in the study of comparative constitutional law—Empirical Legal Studies—interpretivists are inherently "sceptical of the type of expert-

based, social engineering that typically follows from the practice-as-applied-theory point of view" (Flyvbjerg, Landman, and Schram 2012b). They emphasize instead the role of *mētis*—local, practical knowledge that guards against "thin simplifications" (Scott 1998, p. 309). Phronetic social scientists, in other words, see eye to eye with Dickinson. Dickinson's fear of grounding the barely established American way of constitutional law on a slippery slope toward an authoritarian rule of law (Whiting 2017; Meierhenrich 2018, pp. 225-252; Meierhenrich and Tushnet forthcoming) was what caused him to speak up that summer of 1787.

Constitutional violence is all around us still. Experiences from colonialism to Covid-19 points to the many risks associated with constitutional dictatorships. Invented for governing emergencies, constitutional dictatorships structure the ordinary life of constitutions more violently—and durably—than constitutional theorists from Machiavelli to Rossiter thought possible—or ideal. Whenever they do, a path dependent logic of constitutional violence is often at work. Dickinson was attentive to such "downstream processes of further institutional change" (Pierson 2004, p. 135)—and fearful of them. To stay abreast of constitutional pathology, he privileged, as do I, a phenomenological approach to thinking about constitutional dictatorship. Could it be that constitutional ethnography—not constitutional theory—is our best defence against extremist constitutionalism? Real social science is not much to go on in times of emergency; but it is something.