

## Emergency Powers and Covid-19 in Thailand: Carl Schmitt's Constitutional Emergency Model Reconsidered<sup>1</sup>

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### ABSTRACT

Carl Schmitt was an anti-liberal conservative jurist during the Weimar Republic in Germany whose position on emergency powers sponsors a hardline form of 'realism'. To restore peace and order qua the homogeneity of the people in times of crises, he sponsors the role of the sovereign in deciding on an extreme emergency even by transgressing the wordings of a written constitution. However, this article seeks to use the case of the Thai government's response to Covid-19 through the invocation of emergency powers to expose deficiencies pertaining to the Schmittian model. Rather than calling for the politics of exclusion, the present outbreak of Covid-19 in Thailand reiterates the essence of legality and communitarian and social solidarity.

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## 1. Introduction

Carl Schmitt (1888-1985) was a prominent jurist during the Weimar period in Germany (1919-1933) that witnessed a struggle for establishing parliamentary democracy and a series of political crises which provoked the imposition of emergency powers. Having experienced a political instability during his professorship, Schmitt developed his arguments proposing the legal-political institutional framework concerning the nature and use of emergency powers to repress this situation. As a right-wing conservative, his position in this regard mirrors an authoritarian form of 'realism'. He advocated the use of emergency powers by a person who unites the people as one – the sovereign – to eliminate public enemies or threats to national survival.

Nevertheless, study of Schmitt's constitutional emergency model should not be confined to but can be extended beyond the Weimar context. In the present global health crisis, many national governments choose to activate emergency powers to tackle the outbreak of Covid-19. One of those countries is Thailand. Struggling with the rising number of domestic infections, the Thai government declared a nationwide state of emergency by invoking the 2005 Decree on Public Administration in State of Emergency ('the 2005 Decree') on 26 March. The coronavirus is also pilloried as a public enemy, while the 2005 Decree allows the Prime Minister ('PM') to take a commanding role in domestic response to the pestilence. This approach thereby enables the PM to take up the role of the sovereign in the Schmittian sense. Here, I seek to explore: *To what extent does Schmitt's position on the nature and use of emergency powers apply to the present climate of Covid-19 crisis in Thailand? Are there any elements pertaining to his constitutional emergency model which requires reconsideration in order to accommodate the Thai experience?* I argue that adverse effects entailed by the use of emergency powers by the Thai government challenge the assumptions underlying Schmitt's constitutional emergency mode, notably his emphasis on *jus belli* and the politics of exclusion.

In Section 2, the full picture of Schmitt's constitutional emergency model together with the facilitative conditions for its implementation will be primarily drawn. Section 3 will provide an outlook of Covid-19 spread in Thailand as well as legal and regulatory responses adopted by the government. Finally, I will assess in Section 4 how the Thai experience challenges the Schmittian model of constitutional emergencies. The Thai case exemplifies how a resort to the Schmittian model exacerbates, rather than mitigates, adverse socio-political impacts already bred by the pandemic.

## 2. Schmittian sovereign authority and its facilitative conditions

In general, Schmitt's position on emergency powers is intertwined with his effort to deal with the problem of how political stability, order, and peace are to be maintained.<sup>2</sup> It puts emphasis on two key elements: *sovereign authority* and *the politics of exclusion*. At the outset, the Schmittian position challenges the liberal standpoint of *normativism* which asserts that state officials can claim to act *qua* state solely provided that they derive their authority from predetermined, impersonal legal norms.<sup>3</sup> For him, this

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<sup>2</sup> Carl Schmitt, *The Concept of the Political* (George Schwab (tr), University of Chicago Press 2007) ['The CoP'].

<sup>3</sup> Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky (tr), Praeger 2004), pp 48, 52.

standpoint hampers state officials from having recourse to intrinsically necessary, yet not legally prescribed, mechanisms for forestalling the collapse of the state.<sup>4</sup> In other words, such a position fails to ensure the continuity of political unity.<sup>5</sup> He also believed that emergency provisions enshrined in legal statutes or decrees are simply ‘a fig leaf of legal justification’ for any resort to ‘sheer powers’ by the executive.<sup>6</sup> Put another way, these provisions are structurally unable completely to foresee the unpredictable nature of an emergency situation. Rule is therefore not of law but requires the enforcement by men.<sup>7</sup> Besides, for Schmitt, the liberal approach to legality enables ‘individuals [to] gain protection from the state [in such a way that] escape[s] the responsibilities they should have towards the state.’<sup>8</sup>

Having preferred ‘realism’ over ‘normativism’, Schmitt ultimately called for the sovereign who represents the people and holds the supreme authority to make decisions in times of exceptional political situations as he famously wrote, ‘Sovereign is he who decides on the exception.’<sup>9</sup> According to Schmitt, not only does the sovereign hold the authority to decide whether a grave public emergency threatening the nation’s survival exists, but also whether emergency measures, including the suspension of legal provisions, should be imposed to resolve it.<sup>10</sup> In other words, both the legislative and executive powers are unified in the hands of the sovereign.<sup>11</sup> The authority to impose the state of exception by suspending any legal provisions and transcending their constraints itself marks the hallmark of state sovereignty as well as ‘an inescapable dimension of all political life’.<sup>12</sup> Legitimacy, for Schmitt, therefore takes priority over a rigorous commitment to legality. Schmitt further pointed out that such an ability is vital for bringing members of a particular society out of chaos as well as for ensuring the survival of the state. If the state collapses, it is then no longer meaningful to speak about peace, order, normalcy, and, most importantly, the existence of a collective entity – the people.<sup>13</sup> As ‘the supreme source and judge of all right and law’, the sovereign must apply emergency powers to exclude public enemies or threats to these elements.<sup>14</sup> By sponsoring the exercise of emergency powers by the sovereign to separate friends from enemies, Schmitt then emphasised the role of the

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<sup>4</sup> Carl Schmitt, *Legality and legitimacy* (Jeffrey Seitzer (tr), Duke University Press 2004), p 10.

<sup>5</sup> Sandrine Baume, *Hans Kelsen and the case for democracy* (ECPR Press 2012), p 10.

<sup>6</sup> Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton University Press 1948), p 8; Mark Tushnet, ‘Emergencies and the Idea of Constitutionalism’ in Mark Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press 2005), p 49.

<sup>7</sup> Tracy B. Strong, ‘Foreword’ in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab (tr), The University of Chicago Press 2005), p xvii.

<sup>8</sup> Qi Zheng, Carl Schmitt, *Mao Zedong and the Politics of Transition* (PalgraveMacmillan 2016), pp 56-57.

<sup>9</sup> Schmitt, *Political Theology*, p 5.

<sup>10</sup> *Ibid*, p 7.

<sup>11</sup> Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (George Schwab and Ema Hilfstein (trs), Greenwood Press 1996), p 71; Schmitt, *Legality and legitimacy*, p 71.

<sup>12</sup> Jeremy Moses, ‘The limits of R2P and the case of pacifism’ in Aidan Hehir and Robert W. Murray (eds), *Protecting Human Rights in the 21st Century* (Routledge 2017), p 220.

<sup>13</sup> Schmitt, *The Leviathan*, p 72.

<sup>14</sup> David Dyzenhaus, ‘The state of emergency in liberal theory’ in Victor V. Ramraj, Michael Hor, and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005), p 71.

sovereign as the embodiment of the people qua political unity. Such an emphasis signifies that the term 'the people' in his work does not refer to 'free people' who possesses a wide range of freedoms, but to 'passive people' who hold the obligation not to resist sovereign authority, including the use of emergency powers.<sup>15</sup>

In total, by adopting the radical notion of communitarianism which prioritises the state's survival over its subjects, Schmitt recognised that the protection of human rights can be extensively compromised in order to protect national unity.<sup>16</sup> Having expounded Schmitt's view on the nature and use of emergency powers, the next section will elaborate the Covid-19 spread in Thailand and emergency responses adopted by the government.

### 3. Covid-19 as 'public enemy': public health emergency in Thailand

Like other countries in the world, Thailand has been harshly convulsed by the spread of the newly discovered coronavirus. By January 2020, the first positive coronavirus case, a Chinese tourist from Wuhan, was confirmed.<sup>17</sup> On 23 January, a 73-year-old woman who has previously travelled to Wuhan became the first Thai citizen confirmed infected with the virus.<sup>18</sup> Due to the growing number of positive cases, Covid-19 was later declared 'a dangerous communicable disease' under Section 6 of the Communicable Diseases Act 2015 by the public health minister on 1 March. However, given the continuously rising number of infections, PM Prayuth Chan-ocha decided to impose a nationwide state of emergency by virtue of the 2005 Decree on 26 March. This law is not designed primarily to cope with the pestilence, but with the Malay-Muslim insurgency in the Southern provinces.

Between March and May 2020, the government succeeded in controlling the first wave of the virus spread. However, this came with a trade-off between health and the protection of human rights as the government chose to enforce excessively harsh measures under the 2005 Decree. Struggling with the return of anti-junta protests sparked by the economic fallout from the pandemic, Prayuth, a former army chief who came to power through a military coup in 2014, chose to prolong emergency powers, and, in fact, used them to suppressing the protesters. As of March 2021, the declaration of an emergency situation has been extended 10 times. Having paid excessive attention on quieting dissenting voices, the government accordingly overlooked the deteriorating Covid-19 situation in Myanmar. Illegal migration from Myanmar eventually sparked the second round of spread in Thailand which began in December 2020 with Samut Sakhon as the epicentre of the virus.<sup>19</sup> In January 2021, the situation

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<sup>15</sup> Schmitt, *Legality and legitimacy*, p 29.

<sup>16</sup> Ibid; David Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality' (1996) 16 Oxford Journal of Legal Studies 641, p 645.

<sup>17</sup> Elizabeth Cheung. Wuhan pneumonia: Thailand confirms first case of virus outside China (South China Morning Post, 13 January 2020) <<https://www.scmp.com/news/hong-kong/health-environment/article/3045902/wuhan-pneumonia-thailand-confirms-first-case>> accessed 10 April 2021.

<sup>18</sup> 'First Thai infected with coronavirus' (*Bangkok Post*, 23 January 2020) <<https://www.bangkokpost.com/learning/easy/1841869/first-thai-infected-with-coronavirus>> accessed 29 March 2021.

<sup>19</sup> Emmy Sasipornkarn, 'Thailand: COVID outbreak among Myanmar workers sparks anti-migrant backlash' (*DW*, 28 December 2020) <[https://www.dw.com/en/thailand-covid-](https://www.dw.com/en/thailand-covid-19-outbreak-among-myanmar-workers-sparks-anti-migrant-backlash/a-56884444)

deteriorated after illegal gambling dens in Rayong were found to be new sources of the virus spread. The situation continued to deteriorate, however. In both instances, border officers, some police officials and bureaucrats were blamed for having been involved in trafficking illegal workers and for colluding to permit gambling dens to continue their operation in Rayong.<sup>20</sup> By April 2021, the government confirmed new Covid-19 clusters at several nightspots in Bangkok, causing hundreds of infections per day. Similar to the first wave, the government primarily resorts to the 2005 Decree to address the outbreak. Below, I seek to illustrate legal and regulatory responses to Covid-19 adopted by the Thai government.

As of March 2021, 18 regulations have been issued by the PM to tackle the spread of the virus. Recently, five categories of Covid-19 control zone are designated by Regulation no.18, namely *the dark red zone* or the maximum and strict control zone, which is epicentre of the outbreak, *the red zone* where maximum control measures apply, *the orange zone* or the control zone, *the yellow zone* or the close surveillance zone, and *the green zone* or the surveillance zone whereby the least strict measures are put in force.<sup>21</sup> Different types of 'closedown' measures apply to each zone. In the dark red zone, the use of premises of all schools, colleges, and universities is absolutely prohibited. Teaching and conferences have to be moved online.<sup>22</sup> Other places, notably pubs, gyms and fitness shops, boxing bouts, massage parlours, and amusement parks are also closed down.<sup>23</sup> Restaurants and department stores are allowed to open until 9 pm. However, alcohol is prohibited, while the arrangement of tables and dining spaces must be strictly complied with social-distancing practices.<sup>24</sup> Markets and factories are also allowed to operate on the condition of strict social-distancing rules – a cap on a number of customers applies to the former.<sup>25</sup> In other zones, educational institutions are still allowed to open. In the red zone, sport events can be organised with no spectators.<sup>26</sup> Restaurants in this zone as well as the orange zone can offer dine-in services based on strict social distancing practices until 11 pm,<sup>27</sup> while those in the yellow zone are allowed to open until 12 am.<sup>28</sup>

In addition to closedown measures, social gatherings are strictly prohibited.<sup>29</sup> Any distribution of fake or false news on the pandemic<sup>30</sup> and the hoarding of goods

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[outbreak-among-myanmar-workers-sparks-anti-migrant-backlash/a-56075165](https://www.bangkokpost.com/thailand/general/2065351/10-officials-linked-to-rayong-gambling-dens)> accessed 10 April 2021.

<sup>20</sup> '10 officials linked to Rayong gambling dens' (*Bangkok Post*, 9 February 2021) <<https://www.bangkokpost.com/thailand/general/2065351/10-officials-linked-to-rayong-gambling-dens>> accessed 10 April 2021; '20 police and 10 officials implicated in trafficking illegal workers from Myanmar' (*PhuketTimes*, 14 January 2021) <<https://phuketimes.com/20-police-and-10-officials-implicated-in-trafficking-illegal-workers-from-myanmar/>> accessed 10 April 2021.

<sup>21</sup> Regulation no.18, clause 1.

<sup>22</sup> Regulation no.18, clauses 2 and 3.

<sup>23</sup> Regulation no.18, clause 3(1).

<sup>24</sup> Regulation no.18, clauses 3(3)(kor kai) and (kor kai).

<sup>25</sup> Regulation no.18, clause 3(3)(kor kwaai).

<sup>26</sup> Regulation no.18, clauses 4 to 6.

<sup>27</sup> Regulation no. 18, clauses 4(2) and 5(2).

<sup>28</sup> Regulation no. 18, clause 6(3)

<sup>29</sup> Regulation no.1, clause 10.

<sup>30</sup> Regulation no.1, clause 6.



especially surgical masks<sup>31</sup> are also harshly penalised. Besides, Regulation no.1 further imposes 'the travel condition'. Inbound passengers, both Thais and foreigners, are all required to present before airport officials a 72-hour fit-to-fly health certificate declaring Covid-free and certified by the Royal Thai Embassy before embarking upon an aircraft.<sup>32</sup> Finally, apart from the aforesaid preventive and proactive measures, In Regulation no.17, the government also requests all Thai citizens to install the mobile applications designed to track Covid-19 cases known as 'Mor Chana' ('Doctors win') and 'Thai Chana' ('Thais win').<sup>33</sup>

Given that the 2005 Decree was enacted to deal, in principle, with the Southern Insurgency, it no doubt licenses impunity for the exercise of the above emergency powers. Not only does the Decree empower the PM to impose a state of emergency throughout the Kingdom or in any particular part(s) thereof for a period of no more than three months.<sup>34</sup> An emergency declaration and all uses of emergency powers are all exempted from parliamentary checks and judicial review.<sup>35</sup> Regrettably, in 2010, the Constitutional Court had upheld the constitutionality of the ouster clause, citing its essence in suppressing threats to national security.<sup>36</sup> Its invocation therefore turns the PM into a *de facto* sovereign in the Schmittian sense, while the virus is also labeled as 'public enemy' equivalent to terrorists.<sup>37</sup>

#### **4. Disproportionate emergency responses and their adverse socio-political effects in Thailand: the failure of Carl Schmitt's constitutional emergency model?**

As a staunch anti-liberal jurist, Schmitt, as already illustrated, strove to apply his theory of sovereignty to undermine the liberal position. Yet, its successful implementation, I argue, cannot be detached from the facilitative conditions as follows. Due to Schmitt's scepticism about the rule-bound response to an emergency situation, the successful implementation of his thesis has primarily to presume the linkage between sovereign authority and '*jus belli*, i.e., the real possibility of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity.'<sup>38</sup> By advocating the politics of exclusion, it subsequently follows that the aforesaid effectiveness does not lie within equal and extensive political participation among the citizens but rather within 'a homogeneity from the perspective of one crucial point that constructs political identity and provides the basis for order.'<sup>39</sup> This requires the presence of concrete media, notably ideology, myth, and belief, which help define who and what threaten the collectivity of the people and are therefore 'the

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<sup>31</sup> Regulation no.1, clause 4.

<sup>32</sup> Regulation no.1, clause 3.

<sup>33</sup> Regulation no.17, clause 1.

<sup>34</sup> The 2005 Decree, Section 5.

<sup>35</sup> The 2005 Decree, Sections 5 and 16.

<sup>36</sup> The Constitutional Court Decision no.9/2553.

<sup>37</sup> Leelapatana and Tangthavorn, 'Thailand: Emergency Responses or More Social Turbulence?', p 167.

<sup>38</sup> Schmitt, *The CoP*, pp 19, 22, 45 (emphasis added).

<sup>39</sup> David Pan, 'Carl Schmitt on Culture and Violence in the Political Decision' (2008) 142 *Telos* 49, p 70.

others'.<sup>40</sup> Such a requirement accordingly entails that anyone expressing doubt about it accordingly professes himself as a public enemy. The main role of the people under his theory is then limited merely to acclaiming the sovereign.<sup>41</sup> Below, I argue that adverse effects entailed by the use of emergency powers by the Thai government challenge all the above assumptions underlying Schmitt's constitutional emergency model in two main ways.

#### 4.1 Sovereign authority and *jus belli* as the source of social turbulence and polarisation

Against Schmitt's assumed intrinsic connection between sovereign authority and *jus belli*, the invocation of the 2005 Decree by the Thai government, turning the virus into a public enemy, exacerbates, rather than attenuates, grievances already bred by the pestilence. In other words, rather than facilitating peace and order, vast and unlimited emergency powers precipitate chaos.

As I pointed out earlier, the current Thai PM, General Prayuth Chan-ocha, rose to premiership through the military takeover in 2014. Since then, strong-arm tactics have become a common feature for the expression of state authority in Thailand. Khemthong Tonsakulrungruang and Rawin Leelapatana accordingly observe that 'the rise of militarism in recent years has oriented the entire bureaucracy towards national security concerns ... rendering it ill-suited to the pandemic which presents a totally new kind of threat.'<sup>42</sup> Regulation no.1 implements the unqualified prohibition of social gathering - no distinction is made between a peaceful assembly and that which instigates chaos.<sup>43</sup> Regrettably, this authority was enforced by the police against several philanthropists who organised food donations to alleviate grievances of those losing their jobs due to Covid-19 economic meltdown. In April 2020, the picture of long lines of unemployed people queuing up for donated food became prevalent in many provinces across Thailand. Given the absolute ban on social gathering, these donors were nevertheless criminally charged.<sup>44</sup> Rather than candidly striving to alleviate the above adverse consequences such as by ensuring food security or by robustly inspecting any hoarding of all necessary goods, notably medicines, food, and face masks, the military-backed government instead planned to spend a large amount of Bahts for the palace and procuring arms.<sup>45</sup> Some of ruling-government politicians were

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<sup>40</sup> Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer (tr), Duke University Press 2008), p 258; Schmitt, *The CoP*, pp 27-28.

<sup>41</sup> Lars Vinx, 'Carl Schmitt's defence of sovereignty' in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2015), p 116.

<sup>42</sup> Tonsakulrungruang and Leelapatana, 'Health Before Rights and Liberties' <<https://verfassungsblog.de/health-before-rights-and-liberties-thailands-response-to-covid-19/>>.

<sup>43</sup> International Commission of Jurists, 'The Implementation of Thailand's emergency Decree in response to protests in 2020' (ICJ Legal Briefing, 22 October 2020), pp 18-20.

<sup>44</sup> 'Prosecuting a lady launching a food donation campaign for violating the Emergency Decree' (*Komchadluek*, 21 April 2020) <<https://www.komchadluek.net/news/crime/428117>> accessed 10 April 2021.

<sup>45</sup> Tonsakulrungruang and Leelapatana, 'Health Before Rights and Liberties' <<https://verfassungsblog.de/health-before-rights-and-liberties-thailands-response-to-covid-19/>>.

also accused of having been involved in hoarding a large amount of face masks.<sup>46</sup> However, despite the presence of the emergency regulation against the hoarding of goods, investigation on the issue has been swept under the carpet. Worse, the government was also publicly reprimanded for its delay in providing vaccination for everyone within the Kingdom. It was not until February 2021 that the first 200,000 doses of Covid-19 vaccines were delivered to Thailand from China.<sup>47</sup> Economic fallout, corruption scandals, and huge government spending on the monarchy and arms during this extremely precarious time eventually sparked a new wave of youth-led anti-government protests, which began in August 2020. The prohibition of social gatherings enshrined in Regulation no.1 was in consequence turned into an instrumental tool for imposing criminal charges against some protesters.<sup>48</sup> By contrast, no roughly equivalent action was taken against the mobilisation of pro-monarchy/government supporters.<sup>49</sup> These scenarios reveal that strong-arm tactics do more harm than good by exacerbating the feeling of hopelessness and a cauldron of rage among a large number of the Thais. Meanwhile, due to their restrictive yet partisan application to ordinary people and anti-government protesters, these emergency measures further inflame the feeling of double-standards, and deepens social polarisation.

Grievances suffered by Thais living and studying abroad were no less worrisome. The emergency rule imposed by the PM, as I expounded above, requires all inbound passengers to present before boarding an aircraft a 72-hour fit-to-fly health certificate declaring Covid-free and certified by the Royal Thai Embassy. This requirement, I nevertheless argue, runs counter to rules on the limitation of individual rights and liberties articulated in the current Constitution. Section 26 of the Constitution prohibits the government from imposing any measures which would lead to the total deprivation of individual rights and liberties. Instead, it requires any government measures aimed at restricting rights and liberties of an individual to comply strictly with the three-pronged principle of proportionality. The first test is the *suitability* test. These measures must be capable of demonstrating 'a casual link to the purpose being pursued, in that it is capable of achieving that object'.<sup>50</sup> The next test is the *necessity* test which requires that 'when there is a choice between several appropriate measures recourse must be had to the least onerous'.<sup>51</sup> The final test - *the principle of proportionality in the narrow sense* - underlines the need to balance between 'public interest' and 'adverse costs incurred to individual rights and liberties'. An interference

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<sup>46</sup> 'Thai minister says aide not involved in massive mask- hoarding' (*The Thaiger*, 9 March 2020) <https://thethaiger.com/hot-news/politics/minister-says-aide-not-involved-in-massive-mask-hoarding> accessed 10 April 2021.

<sup>47</sup> 'First Covid-19 vaccine arrives' (*Bangkok Post*, 24 February 2021) < <https://www.bangkokpost.com/thailand/general/2073735/first-covid-19-vaccine-arrives> > accessed 10 April 2021.

<sup>48</sup> 'Thai protests: Tens of thousands gather again in mass defiance of government' (*BBC*, 15 October 2020) < <https://www.bbc.com/news/world-asia-54548988> > accessed 10 April 2021.

<sup>49</sup> 'Thailand royalists show support for king' (*Aljazeera*, 27 October 2020) < <https://www.aljazeera.com/news/2020/10/27/thailand-royalists-show-support-for-king> > accessed 10 April 2021.

<sup>50</sup> Nicolas de Sadeleer, *Environmental Law Principles: From Political Slogans to Legal Rules* (2<sup>nd</sup> edn, Oxford University Press 2020), p 438.

<sup>51</sup> Case C-331/88 *Fedesa* [1990] ECR I-4023, para 13.



to individual rights and liberties must not be too costly economically.<sup>52</sup> The fit-to-fly requirement ostensibly runs counter from the outset to the suitability test. Given that the incubation period of the coronavirus – the duration of time from exposure to it to the onset of symptoms – varies between 1 and 14 days, it is questionable whether the 72-hour window before departure can genuinely indicate that its holder is Covid-free.<sup>53</sup> Besides, the Thai government previously required all inbound passengers to be placed in the mandatory 14-day state quarantine. The period is later reduced to 10 days, starting from 1 April 2021 onwards. From the perspective of the necessity test, not only is this measure more effective, but it is also less onerous compared to the fit-to-fly requirement, for preventing the virus transmission.<sup>54</sup> Lastly, against the principle of proportionality in the narrow sense, rather than subsidising any costs related to the obtainment of the fit-to-fly requirement which might be up to \$200, such a burden is instead carried by all inbound passengers, including returning Thais.<sup>55</sup> This financial burden, in parallel, severely impedes the exercise of Thai citizens' right to enter their own country which is guaranteed by Article 12 of the International Covenant on Civil and Political Rights as well as Section 39 of the Constitution.<sup>56</sup> The fact that the ouster clause enshrined in Section 16 of the 2005 Decree prevents the Administrative Court from setting aside such an emergency regulation further worsens existing grievances.<sup>57</sup>

#### 4.2 Solidarity and inclusion as the solution

As elaborated earlier, the effective realisation of the Schmittian model of constitutional emergencies hinges upon a shared belief in 'homogeneity'. In other words, the maintenance of the friend-enemy dichotomy enables the sovereign to sustain his authority to suppress public enemies and establish a pacified political unity. A successful response to Covid-19 however rests on the different assumption. It is commonly known at present that the coronavirus disease is transmitted mainly through droplets and aerosol particles. The containment of its spread accordingly requires a strict compliance with social distancing practice. The allocation of face masks together with the control of their supply become vital for facilitating such a practice. Nevertheless, the Thai government, I already discussed, failed to conduct effective investigation into mask hoarding scandals which involves some ruling-government politicians.

Apart from the control over the supply and distribution of face masks, lessons from a high-risk Covid-19 country like Taiwan indicate the importance of 'a communitarian-oriented approach', notably the use of Covid-19 mobile tracing applications, in

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<sup>52</sup> Ibid.

<sup>53</sup> Leelapatana and Tangthavorn, 'Thailand: Emergency Responses or More Social Turbulence?', p 168.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid, p 169; 'Fit- to- fly does not help prevent COVID- 19' (TDRI, 4 April 2020) <<https://tdri.or.th/2020/04/fit-to-fly-certificate-covid-19/>> accessed 10 April 2021.

<sup>56</sup> Torpong Kittianupong, 'Returning home is a constitutional right' ['การเดินทางกลับบ้านเป็นสิทธิตามรัฐธรรมนูญ'] (Faculty of Law, Thammasat University, 6 April 2020) <<https://www.law.tu.ac.th/tulawcovid19-right-of-return/>> accessed 10 April 2021.

<sup>57</sup> The Administrative Court Red case no. 446/ 2563.

mitigating the infection risk.<sup>58</sup> Like in many other countries, the Thai government urges all residing in the Kingdom to download two Covid-19 tracing applications, Mor Chana and Thai Chana. Mor Chana is designed to track its users' locations through GPS and Bluetooth so as to inform them whether they are in a high-risk Covid-19 place and whether they are approached by those infected.<sup>59</sup> Meanwhile, Thai Chana is related to the scanning of QR code to register entries and exits of visitors to/from public venues. Where the Taiwanese experience reveals that – against Schmitt who advocated the politics of exclusion – effective Covid-19 control relies on communities and social solidarity, the Thai case further suggests that the Schmittian strong-arm-oriented approach to public emergency compromises the realisation of its communitarian-oriented counterpart. In comparison with other mobile tracing applications used in other ASEAN countries, more types of personal details and information are collected by Mor Chana. These include locations, camera, browsing data stored in a mobile phone's cache, microphone, and history of WiFi connection. By way of comparison, sensitive data, namely browsing data and history of WiFi connection, are not collected by tracing applications in Indonesia, Singapore, Vietnam, and the Philippines.<sup>60</sup> Given the Prayuth government's past authoritarian-oriented practices, many Thais hesitate to install these applications on their smartphones due to their scepticism that the government might misuse collected information for political purposes.<sup>61</sup> Regrettably, due to their dreadful fear of the virus, they have no choice but to install Mor Chana and Thai Chana, however. Should a trade-off between health and human rights protection, especially the right to privacy, be made? The answer is obviously negative. What the Thai government should do, I argue, is not to perpetuate sovereign authority, but to ensure the compliance of the use of these mobile applications with human rights standards. It should publicly declare specific rules on the storage of personal data on the government's server, notably its length and termination, and minimises the types of sensitive personal data to be stored.

## 5. Conclusion

Overall, the present public health crisis in Thailand significantly challenges Carl Schmitt's constitutional emergency model which priorities 'common good qua the maintenance of political homogeneity' over 'individual rights and liberties'. The solution to the crisis however does not lie within how to balance sovereign authority to transcend human rights standards with the global trends towards democratization and liberalisation as Criddle and Fox-Decent advocate. Criddle and Fox-Decent share with

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<sup>58</sup> Marcin Jerzewski and Kuan- Ting Chen, 'Taiwan's Health Diplomacy Didn't Start with the COVID- 19 Crisis' (*The Diplomat*, 16 April 2020) <<https://thediplomat.com/2020/04/taiwans-health-diplomacy-didnt-start-with-the-covid-19-crisis/>> accessed 10 April 2021.

<sup>59</sup> Chanida Piromyindee, 'Facts about 'MorChana App' Covid-19 Tracking Mobile Application' (*Thai News Agency*, 8 January 2021) <<https://tna.mcot.net/latest-news-613511>> accessed 9 April 2021.

<sup>60</sup> ผู้ซึ่ง 'หมอมชนะ/MorChana' ชนะเลิศ! เรื่องเข้าถึง 'ข้อมูลส่วนบุคคล' [Have you already known 'Mor Chana' triumphs! In the matter of personal details collection'] (*Bangkokbiznews*) <<https://www.bangkokbiznews.com/news/detail/882907>> accessed 9 April 2021.

<sup>61</sup> Jerzewski and Chen, 'Taiwan's Health Diplomacy Didn't Start with the COVID- 19 Crisis' (<<https://thediplomat.com/2020/04/taiwans-health-diplomacy-didnt-start-with-the-covid-19-crisis/>>).

Schmitt the view that an emergency situation is not always predictable, thus requiring a room for sovereign authority to be left open. However, they seek to ensure safe uses of such an authority by placing it under the control of *the fiduciary principle*.<sup>62</sup> According to this principle, the sovereign can claim to wield his authority on behalf of its people only provided such an authority respects the latter's *intrinsic worth as a person*.<sup>63</sup> He therefore holds an obligation primarily to ensure that the interests of the citizens prevails over political expediency, thus treating them 'as ends-in-themselves' (the principle of integrity) as well as equal bearers of human rights (the principle of formal moral equality).<sup>64</sup> Nevertheless, the Thai experience suggests that the successful response to Covid-19 hinges upon a communitarian-oriented approach together with a respect paid to the role of law in controlling state authority rather than the adoption of extra-legal, heavy-handed authority. More importantly, it instead calls for the need to take into account David Dyzenhaus's argument against the Schmittian standpoint. At the outset, Dyzenhaus emphasises the essence of liberal democratic standards in modern-day emergencies by distinguishing 'rule of law' from 'rule by law' or 'the use of law as a brute instrument to achieve the ends of those with power'.<sup>65</sup> He thereby attacks Schmitt's position for enabling the sovereign to act however he prefers subject to no legal constraints, and instead urges that emergency powers 'must be ... enforced in accordance with ... [a] discourse of human rights'.<sup>66</sup> In the present climate of public health crisis in Thailand, the more addressees of these powers are treated 'primarily as a bearer of human rights', the more the tension between state authority and individual autonomy as well as the problem of social turbulence are mitigated.<sup>67</sup>

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<sup>62</sup> Evan J. Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 Human Rights Quarterly 39, p 41.

<sup>63</sup> Evan Fox-Decent and Evan J. Criddle, 'The Fiduciary Constitution of Human Rights' (2009) 15 Legal

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<sup>64</sup> Ibid, 318.

<sup>65</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006), pp 6-30.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid; David Dyzenhaus, s, 'The compulsion of legality' in Victor Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press 2012), p 59.

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