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Materia Reipublicae: Democracy, State of Exception, and the Dialectics of Demos and Population
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In this paper I want to discuss the relation between individual human rights and the state of exception. After pointing to the tension between the two phenomena (1), I will, rather generally, outline their conjunction in the democratic constitutional state and focus on the relation of individual rights and state power (2). In the next step, I want to show how not only the state of exception but also individual rights function as a strategy of government and explain what I call the difference between *demos* and *population* (3). I will then, referring to the early modern period, focus on the legal ›management‹ of individual freedom as a means of the evolving state (4), in order to shed light on the present relation between a politics of rights and a politics of exception (5). It is this relation in which I see a dialectic between *demos* and *population* as indicated in the title.

1.

 Apparently, human rights and the state of exception are conflicting legal phenomena. They pursue different goals. Human rights, at least in their classical form as liberty rights, aim at the protection of the individual. The state of exception, however, aims at the preservation of the political and juridical order of the state. The state of exception is precisely the situation in which the mere difference between these two aims turns into a conflict. For the state of exception not only brings an extension of executive competences but also goes along
with the limitation and suspension of individual rights: Constitutional individual rights are suspended, in order to preserve the state. In Carl Schmitt’s words: »if the existence of the constitution is threatened, it must be protected by means of a temporal suspension of the constitution.«¹ At this point, it becomes clear that individual rights and the state of exception are not only different and conflicting regarding their aim. They are different as well regarding their position within the legal system of the constitutional state, of the *Rechtsstaat* or the *État de Droit*: Individual rights, in their institutionalized shape of constitutional rights, are considered as fundamental principles of the constitutional state; they are positioned at the ground or in the center of the legal order. The state of exception however, is positioned at the edge of the legal order: In the often-quoted beginning of his book *Political Theology*, Carl Schmitt speaks of the state of exception as a »borderline case«.² Individual rights and the state of exception are, in this perspective, opposing phenomena in two regards: Firstly, regarding their aim, secondly regarding their position within the legal order of the constitutional state.

2.
There is, however, as well a clear conjunction between individual rights and the state of exception. This conjunction is the framework of the state. As I mentioned, the state of exception is about the preservation of the state and human rights, in their classical form as liberty rights, are about the protection of the individuals. The fact that human rights are meant to protect the individuals against the state, does not mean that they are external to the state. In their form as constitutional rights, human rights are guaranteed by the state itself. For human rights to be effective, the protection by the state is crucial. This was Hannah Arendt’s point in her article »There is only one single human right« (1949) as well as in her book about »The Origins


² As a borderline case, the state of exception is appropriate to define »sovereignty« as a concept »pertaining to the outermost sphere« of the legal order: Carl Schmitt, Political Theology. Four Chapters on the Concept of Sovereignty, transl. by George Schwab, Chicago: University of Chicago Press 2005, 5.
Human rights are meant to limit the power of the state, but conversely, the protection they provide relies on state power itself. This leads to a familiar justification of the state of exception: Rights have to be suspended in order to uphold the state order which is solely able to guarantee the liberty they provide.

This is one way to explain why human rights are, in their form as constitutional individual rights, not external to the state: Rights need the force of the state to become reality. However, not only the state serves the realization of individual rights but individual rights benefit the state as well. For the constitutional state, individual rights seem to be highly important, at least if and insofar it claims to be a democratic constitutional state. This point was made by Jürgen Habermas in his book *Between Facts and Norms*, which is, as the German subtitle makes clear, about the democratic constitutional state (orig. *demokratischer Rechtsstaat*). Democracy, as a sphere of public autonomy, relies on private autonomy, i.e. on rights (and vice versa). For democracy, understood as the rule of the demos, means the identity of those who rule and those who are ruled. In a constitutional state this means: The citizens can enact the laws which, under the rule of law, are applied to them. The precondition of this democratic sovereignty (public autonomy) is an institutionalized legislation process which is based on human rights (private autonomy). Consequently, individual rights are the precondition of the democratic state in its legal form. This still fits well with what I

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3 Arendt emphasized that human rights only have an impact when they are civil rights, i.e. the rights of citizens, guaranteed by the state they belong to. Different from the situation of 1949, the international human rights protection has developed substantially to this day: Statelessness does not mean any more to be expelled from the legal sphere. Cf. Hauke Brunkhorst, «Menschenrechte und Souveränität – ein Dilemma?», in: Hauke Brunkhorst, Wolfgang R. Köhler and Matthias Lutz-Bachman (ed.), Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik, Frankfurt am Main: Suhrkamp 1999, 157-175, here: 174.


5 Cf. ibid., 84-104.

6 Cf. ibid., 104: «The substance of human rights then [deciphered in discourse-theoretic terms, JH] resides in the formal conditions for the legal institutionalization of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character.»
have said before. The state benefits the individuals since it realizes the order they themselves establish. The reason why the state needs the rights then is the following: The legitimation of the public will of the state lies in the private liberty of the individuals who constitute »the people«. In this democratic-theoretic account (focused on legitimation) the individuals figure as people in the sense of demos, of the active political subject.

3. There is, again, another aspect in which the state needs the rights of the individuals: The individuals are not only important for the legitimation but also for the existence of the state. In this perspective, the individuals do not appear in the form of the demos, but of the population. This was the point emphasized by Michel Foucault, especially in his Lectures on »Security, Territory, Population«. I have now reached the point which is in the focus of my interest here. Demos and population are two different ways to consider the individuals, appearing as a collective entity towards the state. How can this difference be described? At first glance, it may seem that the individuals as demos, as people in the political sense, are active whereas the population is passive: The concept of demos denominates an entity which governs, and the population an entity which is governed. The remarks of Foucault are illuminating here because they insist that we cannot think of the population as merely passive. It is for this reason he speaks of the population not as the object of the government, but as ›subject-object‹.

The demos, too, is a subject-object. The individuals of the demos (the citizens) are subjects insofar they have the possibility to participate in the legislation process; and they are objects insofar the laws are applied to them. The population according to Foucault, however, is a ›subject-object‹ in a different way. Population is, for Foucault, not a legal-political category, not a category of public law,
but a category of political economy.7 The population is conceived (since the mid-18th century) as a phenomenon of the vivid nature: not passive, not stable, not restful, but constantly endeavoring to satisfy its desires and needs. Thus, the population appears as dynamic, mobile, and active – and in this sense as a subject. But as a subject which is predictable: The collective subject of the population is seen as a natural process accessible to calculations and open to influence. As such the population is an object of government. The strategies of this government are based on a specific knowledge which is, in the 18th century and famously by Rousseau, called »political economy«.8 Political economy is the knowledge of the, as Foucault calls it, »naturalness« of the population.9 In this context, the expression of »economic government« in the meaning of good government becomes important during the 18th century. What are the features of such an economic government? What is, firstly, its object? It is not the territory which is governed; governed are rather issues, i.e. men in connection with ›things‹ like resources, means of subsistence and epidemics, but as well with ›things‹ like »customs, habits, ways of acting and thinking‹.10 If not the territory but issues are governed, such a government requires a specific strategy. What is, secondly, this strategy or method? Foucault speaks of a »general management that is characteristic of government«.11 »Management« here designates a government which is not primarily juridical. It is not based on legal norms, but consists in »security mechanisms« which intervene directly on the level of the factual reality:

»These mechanisms do not tend to a nullification of phenomena in the form of the prohibition, ›you will not do this,‹ nor even, ›this will not happen,‹ but in the form of a progressive self-cancellation of phenomena by the phenomena themselves. In a way, they involve

8 Cf. ibid., 106: »The constitution of a knowledge (savoir) of government is absolutely inseparable from the constitution of a knowledge of all the processes revolving around population in the wider sense of what we now call ›the economy‹.«
9 Cf. ibid., 70, 72, 74.
10 Ibid., 96.
11 Ibid., 97 and the like 70, 73.
the delimitation of phenomena within acceptable limits, rather than the imposition of a law that says no to them. So mechanisms of security are not put to work on the sovereign-subjects axis or in the form of the prohibition.«\[12\]

The government of the population relies on such non-legal mechanisms. Not only since the 18th, but already since the 15th and 16th century, there is, according to Foucault, a shift from the state of justice into the »administrative state«.\[13\] For Foucault it is clear, that the population which is addressed by this government, »is not, then, a collection of juridical subjects«.\[14\] Insofar the individual is a component of the population, it does not figure as the ›subject of right‹ but simply as ›man‹: »man is to population what the subject of right was to the sovereign«.\[15\]

I find Foucault’s account of the emergence of the population very convincing. There is, however, one important aspect or conclusion which I am less convinced by. More precisely, I have doubts concerning three related aspects: Firstly, Foucault assumes that the economic individual stands in contrast to the subject of right; secondly, he assumes that the population consists of economic individuals and not of subjects of right. Thirdly, Foucault suggests, that the emergence of the population necessarily ends juridical sovereignty. Against Foucault, I want to argue, that there is, in contrast, a strong relation between the law and the government of the population. I want to show, how the population is present both in the juridical figure of individual rights and in the state of exception.

What is the link between the state of exception and the population? The state of exception is a means by which the state power acts directly – not by medium of laws – upon the population. The juridical measures which substitute the laws and the deprivation of rights are two ways in which the state forms the population: The exceptional measures restrict the democratic action and disempower the individuals as demos, i.e. treat them only as population; by the

\[12\] Ibid., 66.
\[13\] Cf. ibid., 108f.
\[14\] Ibid., 74.
\[15\] Ibid., 79.
deprivation of individual rights the state of exception protects this population – it excludes from it those individuals who could disrupt it. On the other hand, it is precisely the provision of individual rights which generates the population; in what follows, I want to discuss this latter point first. Since only if it becomes clear how individual rights facilitate building the population, it is comprehensible how the state of exception protects this population by withdrawing individual rights.

4.

The fact that the phenomenon of the population evolves in the 17th century is not only stated by Foucault. The historian and political scientist Hans Maier writes in regard to the treatise of Georg Obrecht, a Strasbourg councilman from the beginning of the 17th century: »For the first time, the individual independent from its estates-based relations, the abstract ›population‹ is discovered as object of management [Verwaltung]. «16 This management of the population is not so much oriented toward an idea of the common good, than it aims at the enhancement of the state’s strength. The population increasingly appears as the matter of the state – which is reflected as well in Latin treatises of the same time. Christian Liebenthal, a scholar from the German town Gießen, wrote in 1619: »Distinguitur proinde civitas a republica ut materia a forma.«17 (»Thus, the civitas (people/population) is distinguished from the republica (republic/state) like the matter from the form.« transl. JH.)

Important in this context is, firstly, how this matter is formed and, secondly, how it serves the enhancement of the state’s strength. Maier remarks, as the above quote shows, that the abstract population consists of individuals which are removed from their embeddedness within estates-based relations. This liberation is

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achieved by the juridical figure of individual rights. As bearer of rights, the individuals appear as equal; as equals, they are part of the abstract population. In contrast to Foucault, the subjects of rights – the legal persons (Latin: personae) and not ‘men’ – figure as equal parts of the population. The population as the matter of the state is formed by guaranteeing individual rights.

Individual rights are also important for the second question I mentioned above: How does the population serve the enhancement of the state’s strength? In the 16th and 17th century, the literature about taxes and the theories about the justification of taxes provide evidence that the financial situation of the prince and the wealth of the state can be increased by supporting the population’s economic activity. As early as around 1600, there was the idea in the agrarian sector that there is a higher yield when a field is leased to a peasant instead of being cultivated by soccage. The enhancement of the state, thus, is achieved by economic liberty – and economic liberty is provided by individual rights. It is in the discussions on tax theory that the conception of irrefutable individual rights gains importance.

From the perspective of the state, individual rights have a double impact: a) by establishing legal equality, the population is made countable and accessible to taxation; b) insofar as rights provide economic freedom, they foster economic activity and help to increase profits and thus tax income. Individual rights play a major role regarding both the constitution and the use of the population. This, again, fits very well with two other points Foucault makes: Foucault emphasizes that the emerging population is not passive, but vivid and active. And he stresses (if only regarding the 18th century) the importance of freedom. Thus, state intervention has »the function of ensuring the security of the natural phenomena of economic processes or processes intrinsic to population«; failing »to respect freedom is not only an abuse of rights with regard to the law, it is

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above all ignorance of how to govern properly.«\(^{20}\) Individual liberty rights enhance the (\textit{natural}) productivity of the population: The population is governed by being active and free. I think it is precisely in this sense that the population appears as a \textit{subject-object}. Regarding this \textit{subject-object}, however, Foucault does not address how it is constituted by the juridical figure of individual rights.\(^{21}\) I think he hence underestimates that the law, by including individual rights, is not only a negative and prohibitive, but also an enabling, permitting and in this sense productive power. The productive \textit{security mechanisms} are not only, as Foucault suggests, outside the law, but effective within the legal sphere itself.

Not the laws, but the orientation toward rights is characteristic for the modern concept of law.\(^{22}\) As Leo Strauss has pointed out, this primacy of rights goes along with the modern (Hobbesian) idea that \textit{»the individual is in every respect older than the civil society«}.\(^{23}\) It is this idea on which social contract theories since the beginning of the early modern period are based. On the one hand, there is social contract theory, and on the other – evolving in the same period – tax theory. In this latter perspective, the individual rights admittedly belong to the individuals, but their purpose or end is not the individual but the population. The concern of government is, this is the strong point made by Foucault, the \textit{security} of the population, i.e. the securing of its \textit{natural} productivity. The instrument to do this is guaranteeing individual freedom. But what if individual freedom does not serve the population? To govern the population means to manage its freedom – this means: not only to provide freedom but, if


\(^{21}\) That Foucault considers fundamental rights not as juridical in the proper sense becomes clear at the end of his last lecture of the series: \textit{»There must be a moment when, breaking all the bonds of obedience, the population will really have the right, not in juridical terms, but in terms of essential and fundamental rights, to break any bonds of obedience it has with the state and, rising up against it, to say: My law, the law of my own requirements, the law of my very nature as population, the law of my basic needs, must replace the rules of obedience.«} (ibid. 356)


\(^{23}\) Strauss, \textit{Naturrecht und Geschichte}, 190, transl. JH.
necessary, limit it. With regard to the 18th century, Foucault states: »The integration of freedom, and the specific limits to this freedom within the field of governmental practice has now become an imperative.« 24 Whereas from a social contract theory perspective, individual rights serve the individuals and their self-preservation (Hobbes), from a tax theory perspective, the freedom of the individual is only a means, and the end of individual rights is to secure the prosperity of the population. From this perspective of governing the population, it seems appropriate to limit rights when they fail to serve the purpose, i.e. to ensure the security of the population. With the issue of limiting and of suspending rights, I have reached again the question of the state of exception which characteristically goes along with the suspension of individual rights.

5.

It is neither historically nor systematically appropriate to without further ado transfer the observations considering the early modern government of population to regimes of state of exception in the constitutional nation states of the 20th century and the present age. But it can help to shed light on the question which is debated in the context of states of exception and, more generally, of increasing security measures: the question of security versus freedom. This question is debated as a conflict between two rights of the individual: the individual right to security and the individual right to freedom. To ensure our individual security we have to give up some of our individual freedom. I think that the history of government and population related to the question of the state of exception can help to adjust this picture. The security in question here is still the security of the population (not a right of the individual), and the individual freedom which is to be limited – or the rights which are to be suspended – are only the rights of 'some': of those who endanger the population and hence are outsiders who do not belong to »us« (as the population).

Here I want to refer once again to Foucault: In the context of the 18th century, those who do not belong to the population are called »the people«, »le peuple«, »das Volk«: »The people comprise those who conduct themselves in relation to the management of the population, at the level of the population, as if they were not part of the population as a collective subject-object«.\(^{25}\) The limitation and deprivation of rights is always directed towards those who are not considered to belong to the population. From the perspective of the population then, individual rights and state of exception – the provision of individual rights and their suspension – do not, or more precisely: not only, appear as opposite strategies. For firstly, they both appear as strategies of constituting or securing the population. Secondly, and more general, they both appear as actions of the state. The provision and the withdrawal of rights are, in the perspective of the ‘population’, two kinds of state action: two ways of acting which do not take the shape of general laws and still are located or locate themselves in the juridical framework – namely at the center and at the edge of the legal sphere. This also means: Both kinds of action, providing and depriving rights, operate in the manner of respecting the equality of all individuals as legal persons. When an individual is deprived of rights, it is nevertheless addressed as equal, i.e. as a legal subject. This legal equality covers that we are not all equally affected by the deprivation of rights occurring in state of exceptions. In fact specific groups with specific origin, color of skin, religion etc. are affected more than others because they are considered to endanger the security of the population (and thus not to be equally part of it).

The dialectic between demos and population takes place in these situations of exception: The state of exception is the situation in which the individuals are only regarded as – either appropriate or disruptive – parts of the population and lose their democratic quality which is to be a constitutive part of the demos. The population constituted by individual rights is the precondition of the deprivation

\(^{25}\) Ibid., 43f.
of rights in the name and for the sake of the population. This dialectic
remains unseen if individual rights are only considered in terms of the
demos (only in a normative perspective as elaborated by Habermas).
In order to oppose the dialectic occurring in the state of exception, it
is necessary to detach individual rights from the idea of an exclusive
population and to bind them more decisively to an inclusive demos –
since the antidemocratic logic of continuity between rights and state
of exception is legitimized with reference to democracy, but rooted in
population policy.

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