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Law, Democracy and the State of Emergency. A Theory Centered Analysis of the Legal State in Time of Exception
State of Exception – An Overview

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Introduction

The issue of my presentation is the relationship between democracy and law in the context of emergency. In the light of different discourses in the history of ideas I will present some systematic reflections on the theoretical question of how closely the state of exception is linked to our political and legal system and if there are alternative arrangements thinkable which minimalize the danger for democracy in the case of emergency. Hence, this presentation is divided into three parts.

The following section describes an inevitable non-law based gap in our modern legal system as a gateway for the state of emergency. It analyzes, in other words, the connection of law and exception (I). Afterwards I introduce different answers given by the theory of democracy to understand, handle or even solve the problem of crises and executive special power. The relation of democracy and exception forms the center of this second paragraph (II). The last part examines the danger and potential of the democratic exception by providing a review on the debate between the German theorists of law and politics, Carl Schmitt and Otto Kirchheimer, who were engaged in an argument about real democracy and the constitution of Weimar. With Kirchheimer I highlight the connection of two normative principles, legality and legitimacy, which can collide thus
breaking the liberal democracy apart. I will argue that the state of emergency is a danger to democracy because it deforms the relation of these ideas (III).

I. Law and Exception

Law implies force, even though force is interpreted and justified in its particular way in every law regime.¹ The ancient law still knew a just order on which it could call upon. For this reason, it took the form of a teaching body and continuously pursued the recreation of this objective system. The modern law which underwent a process of demoralization fulfills its functional purpose by utilizing disciplinary action. The legitimacy of the positive law can no longer rely on a higher authority. Hereby, it features a self-reflexive basic structure, as it justifies its own existence, constitutes its own normativity and at the same time limits itself. Its self-observation and self-reproduction are results of this mechanism.² The system theory captures this self-reflexive nature through the idea of a twofold ability of differentiation. The system of rights therefore operates with the help of a binary coding, aiming at the difference of legal and illegal – it allows to identify a certain matter of fact as lawful – and at the same time it can refer to this distinction itself, meaning it is able to qualify a certain situation as a case of legality or non-legality. Only this ability allows the legal system to distinguish itself from other social systems and refer to them as its environment. Without the capability to separate between both elements the system of rights cannot be identical with itself, as Luhmann puts it.³

Following this argumentation of a twofold distinction, a differentiation inward and outward, this also means as a consequence that the law always shows a gap, which can be described as an exception. The reason for this gap lies in the laws responsivity. Within this exception the law is confronted with its own other. Since the system of rights

¹ See Luhmann 1981: 158.
knows that a non-legal counterpart exists and that its preconditions are never fully protected, the possibility arises that, speaking with Menke, the law “has to prevail within the mode of non-legality against non-legality”.\(^4\) To put it in different words, if the law is confronted with a situation of stress that does not apply to its own operational logic it is forced to secure normality of its own form at any cost, even if it has to fall back on measures, not codified or covered by legality. After all, without a state of normality law loses its meaning. Therefore, it is caught in an aporetic fight against its own helplessness.

The provisions of the state of emergency of Schmitt and Agamben are aimed in the same direction. The former points out that the rule "only lives from the exception"\(^5\) and emphasizes that the exceptional order should not be equated with chaos. The legal system withdraws without the state abdicating. Instead, the state is furthermore responsible for restoring the normal state and for examining what "is required under the situational circumstances."\(^6\) Sovereign then is "the one who definitely decides whether this normal condition really prevails."\(^7\) Agamben in turn intentionally stresses that the state of emergency can be describes as "the legal form of something which cannot have a legal form."\(^8\) In this respect, the term describes a threshold designation in which the order of law is suspended to ensure its own existence. While the norm still stays valid, its application is intermitted. In times of exception it is the executive that, as the guardian of law, is obliged to close this open gap.\(^9\) The known weaknesses of both theories, which rely on a "static model of norm and normality" and hereby ignore, "that a suspended legal order after the annulment of its suspension" is not "easily restored", should not

\(^4\) Menke 2015: 120.
\(^6\) Schmitt 1921: 17.
\(^7\) Schmitt 1922: 19.
\(^8\) Agamben 2014: 7.
\(^9\) See Agamben 2014: 41. For Schmitt, the separation of powers doctrine is only a concealment of the question of sovereignty, an attempt to postpone its answer. In times of existential crises, however, it reveals where the sovereign authority is to be found and its location does not necessarily coincide with the executive, nor is its shape independent from the state structure. See Schmitt 1931a: 76; Schmitt 1931b: 259.
be explained in further detail at this point. Rather, they serve as examples for an in its consequences unique radicalization of this ontological determination of the legal system, especially considering its political perspective. On the basis of this characterization depending on a theory of differentiation regarding rights, two theoretical consequences can be identified which seek to counter the legal gap problem. Both of them deliver different suggestions to fill the gap of the legal system. On the one hand, there is the rightwing notion of Schmitt's concept of sovereignty, which stipulates, as already indicated, that the powerful state has the task of overcoming the stress-induced state of emergency by extended executive powers. This statist view, to be found, for example, in Forsthoff and in an alleviated form at Böckenförde, declares the state as guarantor of the legal order thus reducing the validity of the actual normative arrangements because the value it obtains is not independent but attributed by a different authority. On the other hand, we find a leftwing notion of Schmitt centered around the idea of a new form of law, a pure and pacified law, which, in Agamben's words, "does not obligate, does not command, does not forbid, but only speaks for itself." This chain of thought corresponds to Loick's efforts in developing a post-juridical law, which refrains from a law-based programming of social conditions in favor of an experimental transformation of society. The most recent works of Menke also point in a similar direction. He demands a rebellious law of "opposing rights" against the established model of "self-rights." I do not wish to participate here in the discussion about the outlook or perspective of such rights. Rather, it remains to be said that these authors demand a dynamic alternative against the exception-based legal order, a system which is meant to replace the dominant one. This alternative either opposes the state of emergency directly, or establishes a practice, which

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12 Agamben 2014: 104.
13 Loick 2017: 288f.
realizes a “true” state of emergency abolishing the necessary violence deeply connected to the system of rights. Reformulated in the terminology of Benjamin, the circle of „executive“, „lawmaking violence“ and „administrative“, “law-preserving” violence should be ruptured with recourse to a “divine”, “sovereign violence”.15 Between those two poles of reaction towards the state of emergency lies the model of the liberal constitutional state which aims at limiting the conditions of the suspension of law in a legal way. It intends to ease this suspension through codification, to tame its effects through formalized processes and non-irreducible normative principles. Herein lies the difference between the modern representative democracy and its ancient counterpart, as in the latter special power was not processed in the form of an executive prerogative, but bound to an office, which was settled beyond the normal institutional order.16 Thus, in comparison, the ancient thinking reacts to the legal gap in the opposite way. While the Greek version after Aristoteles interprets the non-legal area as not yet permeated by law, the roman model represented by Cicero construes this space as part of a degeneration process: the non-legal area is no longer composed in a legal way.

In the modern awareness that one cannot escape the paradoxically logic of the exception some cases remain “in which”, as Luhmann points out, “the law allows under legally regulated conditions legal violations of the law itself”.17 The inevitableness of this situation appears to be known by the legal state. "If the exception", as Loick reflects, "primary constitutes the law, then its excluding moment cannot be eliminated from the law."18 The intention behind the constitutionalization of the emergency case lies in the promise to keep its consequences manageable, to guarantee two things: with regard to intervention an effective, with regard to personal rights a safe living together.

15 Benjamin 1999: 204.
16 See Lemke 2017a: 3.
17 Luhmann 2013: 285.
18 Loick 2012: 222.
Table 1: The Legal Gap and its Theoretical Treatment by Competing Approaches

<table>
<thead>
<tr>
<th>diagnosis</th>
<th>legal system features a specific gap</th>
</tr>
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<tbody>
<tr>
<td>therapy</td>
<td>new form of right control and enclosure (“modus vivendi”)</td>
</tr>
<tr>
<td>approach</td>
<td>left-schmittian</td>
</tr>
</tbody>
</table>

As a result, we can state that it is impossible to conceive the modern self-reflexive law without any exception-based right suspension. The contemporary theories of democracy react to this situation in manifold ways and, as a result, assume a definition for the term “state of exception” in diverging ways. This leads, as well, to diverging normative considerations towards the phenomenon of emergency. The further illumination and problematization of this opaque relation is task of the following paragraph.

II. Democracy and Exception

The state of exception is the nightmare of any democratic ruling, because it establishes an authoritarian way of governing which runs contrary to the procedural logic of democracy. The stability of democracy depends “in times of emergency on a radical anti-democratic practice”.¹⁹ The anxiety about emergency powers, however, varies between different theories of democracy depending on their specific tradition.

Due to its closely connection to the rule of law it poses a special problem for the liberal theory of democracy if legitimacy-creating

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¹⁹ Frankenberg 2017: 12.
procedures are adjourned, if the balance of power gets softened and
the boundaries of the guaranteed basic rights are being redefined.\textsuperscript{20}
Although the early liberal theorists, particularly Locke and the authors
of the Federalist Papers, knew about the necessity of crises defense
they supported high barriers to justify the announcement of the state
of emergency. In their eyes, only the restoration of the status quo ante could serve as a justification for a concentration of power, at
which the measures for legal protection became successively broadened.
The republicanism on the other side regards the delegation of power
as a problem of minor relevance because of its essential notion of a
value-integrated citizenry. Thus, the main focus lies on the
sovereignty of the people not of the constitution. The reason for this
lies in the dominant role of forming a political will, which opposed to
the liberal idea does not just mean decision-making in order to justify
the political exercise of power. Instead, “constituting society as a
political community” is their originary function and to commit
government “programmatically to the execution of certain policies” is
one of their highest concerns.\textsuperscript{21} Relating to times of crises and under
a theory of democracy point of view this means that the political
leadership possesses a leap of faith due to its status as an effusion
of a sophisticated understanding of collective will forming. In other
words, the polity gains a particular dignity declaring the self-assertion
against any threat to a special duty. Especially the remarks of
Machiavelli and Rousseau support this movement of thought. For the
latter, it is precisely the executive that is responsible in following the
volonté générale. A legal protection is therefore not necessary, since
it is an imperative allotment of governmental tasks. As an outlet of
popular sovereignty tied to action in this very will, the government,
even in exceptional times, cannot be dangerous to the demos.
In the deliberative theory of democracy, fundamental rights and the
principle of democracy are regarded as equally original. For
Habermas, both elements are mutually supportive; their internal

\textsuperscript{20} See Schaal; Heidenreich 2016: 52-60.
\textsuperscript{21} Habermas 1999: 289.
correlation lies “in the normative content of a mode of exercising political autonomy”, which requires both legal form and discursive will-formation.\textsuperscript{22} The moralization of politics, which strongly favors this model, places strict limits on the exemption regime. In this regard, deliberative democracy is particularly close to the liberal “rule of law” idea. At the same time, the view of communicative action within civil society raises awareness of the ambiguity of the state of emergency. It can then no longer be shortened to the status of a legal tool, reduced to a moment of juridical-political decision. Rather, it is equally a “language-strategic practice” with the help of which influence can be taken on the public discourse and by which a “targeted disintegration of the pouvoir constituant” can be organized. This allows Lemke to characterize “the state of emergency as the other of democracy”.\textsuperscript{23} The quality of democracy could be measured by the extent to which the linguistic placement of the exceptional issue in public space is already well-established and by means of which plausibility patterns the wish for expanded executive powers is emphasized.

Table 2: The State of Emergency from a Theory of Democracy Perspective

<table>
<thead>
<tr>
<th>approach</th>
<th>determination of the demos</th>
<th>state of exception interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>republicanism</td>
<td>political community</td>
<td>political category</td>
</tr>
<tr>
<td>liberalism</td>
<td>community of rights</td>
<td>judicial category</td>
</tr>
<tr>
<td>deliberatism</td>
<td>community of language</td>
<td>discursive category</td>
</tr>
</tbody>
</table>

Depending on the democratic-theoretical perspective, the state of exception thus receives a different definition and normative

\textsuperscript{22} Habermas 2014: 133.
\textsuperscript{23} Lemke 2017b: 282-283.
weighting. It is particularly narrowly caught in the liberal discourse, namely as a legal phenomenon against which the democratic legal state has to defend itself by instruments anchored in the constitution. For republicanism, it is a political matter, a situation of disorder that makes it necessary to temporarily abandon the autonomy of the community for its own sake. Montesquieu's republican heritage is revealed here when he warns that the decay and anomie of the community, without the citizens also losing their virtue, must be prevented at all costs. The concept of exception in the deliberative theory of democracy is again further expanded because, thanks to its foundation in a theory of communication, it is understood as a discursive phenomenon. This widening seems unavoidable as soon as we additionally include post-structuralism and radical political thought. Already the talk of an emergency unfolds a special effect of mobilization, alarmism as well as the restriction of courses of action in the public discourse, since alternative problem-solving strategies are disqualified from the outset in the escalating logic of the emergency vocabulary.

The following section serves to concretize the relation of law and democracy in times of exception outlined above. To this end, I reconstruct the discussion between Carl Schmitt and Otto Kirchheimer, who critically accompanied the decline of the Weimar Republic. Both theoreticians draw lessons, as I will argue, from the agony of Weimar, which are still instructive for the analysis of the connection between democracy and the legality or legitimacy of an exception in terms of democratic theory.

**III. Democratic Exception and the Rule of Law**

The specific relation of law and democracy, of norm and exception under democratic conditions can be explicated by the decline of the Weimar Republic in two counts. This perspective is fertile insofar as it allows the observation of a historic-concrete transformation of a normal state into an exceptional state. At the same time, this empirical constellation produced a multifaceted theoretical discourse
that sought to analyze problems whose relevance has scarcely
declined to this day. In this configuration, the competition of the "two
sources of legitimation" of modern democracies recognized by
Habermas - popular sovereignty and the rule of law – culminated in a
radical manner.  

24 The confrontation of various schools of law and
state theory, as well as the confrontation of competing philosophical
traditions, encouraged experimentation with new ideas.

A small but for our question instructive excerpt from this debate
forms the dispute between Otto Kirchheimer and his doctoral
supervisor Carl Schmitt in the early 1930s. The previously outlined
tension comes here to light in a tangible way. It is well known that
Kirchheimer uses Schmitt’s terminology initially to analyze the
socialist state theory at that time,  

25 and later to criticize the Weimar
constitution together with its parliamentary system.  

26 Under current circumstances, the parliament is, as he writes, no
longer a "place of creative discussion" but a "place for public
declaration of opposing class interests [...], while the true decisions
on political issues are being made in private discussions, secret
committees and meetings."  

27 Earlier in his critique of
parliamentarianism Schmitt deplored the secret policy of interest that
began to undermine the basic principles of the liberal state of law and
upheld the mere facade of a formal democracy.  

28 But Kirchheimer
used the sharp rejection of liberal thinking including the idea of
parliamentarism for his own purposes and enriched it with theoretical
elements of Marxism. In this respect, his criticism takes place under

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24 Habermas 2001: 133. Even further goes Frankenberg, who characterizes the
relationship between the rule of law and democracy in the sense of an antinomy.
See Frankenberg 2010: 114.
25 See Kirchheimer 1928b: 32.
26 The personal exchange and the thematically influence of the two thinkers on
each other has been highlighted several times and therefore does not need to be
further discussed. In what follows, rather, the legal theory and the theory of
democracy aspects of the dispute come to focus. See Bavaj 2007; Kennedy 1986;
Söllner 1983; Mehring 2011; Mehring 2007.
27 Kirchheimer 1928a: 62.
28 See Schmitt 1923: 62. For a comparison of both criticisms of the liberal
parliament see Schale 2011: 144-163.
the opposite sign, since it aims at a socialist social order without sharing Schmitt's fascination of political irrationalism. 29

Using decisionistic figures of thought Kirchheimer still states in 1930 that the Weimar Constitution missed to make a fundamental value decision, 30 that it established a merely political democracy that realized a pure formal in lieu of a "substantial" equality.31 The "constitutional institution of the state of emergency", 32 the "commissarial dictatorship", 33 as Schmitt called it earlier, fulfills the sole purpose of "forcibly reintegrating" 34 the subordinated masses of a "democracy of hostile camps" 35 into the existing state. The bourgeois value system has long been outdated by the real socio-economic developments so that the constitution has degenerated to the ball of the dominant capital fraction. Although Schmitt notices similar tendencies, such as the disintegration of state unity due to the merging of state and society as well as a pluralization of loyalties, which makes a fundamental political decision impossible, 36 we witness here already first differences in their perception, 37 which sharpen as a result of the so-called "Preußenschlag" – the takeover of the Prussian state by the central government based upon emergency decrees – massively.

The beginning of the actual dispute is a text by Kirchheimer, in which he pursues the transformation of the parliamentary rule of law in the presidential emergency dictatorship. In contrast to earlier works, he

29 Thus, Schmitt emphasizes – obviously with satisfaction – that the "relative rationalism of parliamentary thinking has lost its evidence". Ibid.: 89. Söllner interprets the Weimar debate in toto as an argument between rationalism and irrationalism and points out that the authors of the Frankfurt School engage in the findings of irrationalism until they were able to discover the rationality of irrationality on the one side as well as the irrationality of rationality on the other. See Söllner 1979.
30 See Kirchheimer 1930b: 54; Schmitt 1932b: 195-198. For the difference in their term of "exception" see Llanque 2011: 75-76.
31 Kirchheimer 1930b: 34.
32 Ibid.: 19
33 Schmitt 1921: 127.
34 Kirchheimer 1930b: 19.
35 Kirchheimer 1930a: 95.
36 See Schmitt 1931a: 90.
37 Neumann rightly emphasizes that the divergences of the two at this time lie more in the field of constitutional theory than in "sociological real analysis". Neumann 1981: 241; see Luthardt 1989: 48-52.
indeed argues Marxian on the social-theoretical level, but almost 
positivistic on the level of legal theory. In his eyes, the classic 
concept of legality has lost its importance through the emergency 
regulation law. The "unification of legislation and government" has 
assumed a "permanent character, which leaves no room for the 
specific nature of legality, namely the verification of the 
adминистration based on law." 38 While democracy guarantees its 
legitimacy only through its legality, the dictatorial exceptional regime 
invokes an external legitimacy from which the legality feeds itself. 
This shift in emphasis leads to the elimination of legal barriers by 
appealing to legitimate purposes. "This 'post-democratic state' 
actually highlights highly pre-democratic elements", 39 by 
delegitimizing the self-legitimizing "legal order". 40

In his reaction, which amounts to a general attack on the constitution 
as a whole, Schmitt defends this structural change by accusing the 
rule of law of functionalism and empty formalism. For him, the liberal 
basic principles in themselves are contradictory: "But today the 
normativistic fiction of a closed system of legality occurs in a 
conspicuous and irrefutable contradiction to the legitimacy of a truly 
existing, rightful will." 41 The presuppositions of the legal system no 
longer seem to exist under conditions of pluralism. In his eyes, the 
control of the political order fell in the hands of strong organizations 
and a multiplicity of "total parties", thus separating government and 
its population. 42 What Schmitt favors as a therapy is the recourse to a 
post-liberal form of legitimacy and the need of an authority to 
determine this form, which knows how to put "the plebiscitary 
questions rightly at the right time". 43 The will of the people, as the 
foundations of political unity, 44 needs canalization for decision-

38 Kirchheimer 1932c: 13.
39 Kirchheimer 1932a: 60.
40 Kirchheimer 1932c: 26.
41 Schmitt 1932c: 10.
42 Schmitt 1933: 363.
43 Ibid.: 87.
44 "In truth, there is no political 'society' or 'association', there is only one political entity, one political 'community'." Schmitt 1932a: 42.
Accordingly, he suspects the specific activity of the people in the public acclamation, which has become impossible due to the private individual vote. 46 Then, according to Preuss, legitimate is what "expresses" the "worthy unity and substantiality" of the people. 47 Together with Leites Kirchheimer writes in a replica against this identity theory of democracy, which relies on a homogeneous conception of the people and results from a specific reading of Rousseau's work. 48 He neither shares Schmitt's constitutional analysis 49 nor his existential understanding of the people and the elitist faith in authority resulting from it. 50 Schmitt only translates abstract terminology without any reference to reality, which leads to an idea of democracy, relying exclusively on substantive equality, forgetting the relevance of freedom. 51 Unlike him, Kirchheimer recognizes the double twist of the freedom idea: "freedom in the state" and "freedom from the state". The realization of both is guaranteed only by the coexistence of political, civil and private rights, he continues. 52

Schmitt shows no sensitivity to this and ignores that democracy is not only functional but also necessary in heterogeneous societies. But, of course, an essential condition therefor are legal safeguards. 53 Schmitt attains to his desired result, the attribution of sovereignty to capable persons, who would have proved "under extraordinary circumstances", 54 on the basis of the previous self-chosen premises. There is "no structural difference between the people working in the framework of the Constitution and the Parliament; for both are 'pouvoirs constitués'", writes Kirchheimer. 55 The normativity outlined in this way results from a series of propositions that make it possible

45 See Brodocz 2009: 291-293.
46 Schmitt 1928: 245.
47 Preuß 1973: 15.
49 See Kirchheimer 1932b: 100.
50 See Kirchheimer 1932d: 65.
51 For his idea of democracy based on the term “equality” see Schmitt 1928: 225-228; Neumann 1981: 242-245.
52 See Kirchheimer 1933: 114-115.
53 Ibid.: 129.
54 Kirchheimer 1944: 92.
55 Kirchheimer 1933: 148.
for legality and legitimacy to fall apart in the first place. The opposition towards this conservative thinking allows to name his democratic constitutional theory a realistically founded one.

This discussion reflects the previously described movement of the various democratic theories against the state of emergency. The justification for Schmitt's fearlessness towards this situation, therefore, is to be found in his coalesced republican-communitarian understanding of democracy, which does not recognize an indirect chain of legitimation – which follows the principle of representation – but only a direct instructional form of legitimation. Sovereignty is conceived here from the state perspective, leading to a demos degenerated into a legitimatory stirrup for the emergency order.

Kirchheimer, on the other hand, follows a different path, the liberal skepticism towards the exceptional case, without accepting its existence as everlasting. His stated aim is to reverse the relationship of exception and norm defended by Schmitt and to think through the emergency from the rule. With him we furthermore can justify the tentative search for a social arrangement, which would be a truly democratic exception for the first time.

Bibliography


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56 In this construction lies one of the reasons why Schmitt in his correspondence with Ernst Rudolf Huber later claims that the National Socialism had the legality as well as the legitimacy on its side. See Mehring 2009: 481. The necessity of turning to the total state was described by Marcuse early on. See Marcuse 1934: 48-50.


58 One approach based on Schmitt can be found in Habermas, who brings the legitimate resistance to the legal order in the game. Here, we find a counter position because he thinks sovereignty from below. See Habermas 1985: 86-91.

59 See Kirchheimer 1944: 93.


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