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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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1 Tobias Schottdorf

2 **Law, Democracy and the State**
3 **of Emergency**
4 **A Theory Centered Analysis of the Legal**
5 **State in Time of Exception**

6 **Introduction**

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

15 The following section describes an inevitable non-law based gap in
16 our modern legal system as a gateway for the state of emergency. It
17 analyzes, in other words, the connection of *law and exception* (I).
18 Afterwards I introduce different answers given by the theory of
19 democracy to understand, handle or even solve the problem of crises
20 and executive special power. The relation of *democracy and*
21 *exception* forms the center of this second paragraph (II). The last part
22 examines the danger and potential of the democratic exception by
23 providing a review on the debate between the German theorists of
24 law and politics, Carl Schmitt and Otto Kirchheimer, who were
25 engaged in an argument about real democracy and the constitution
26 of Weimar. With Kirchheimer I highlight the connection of two
27 normative principles, legality and legitimacy, which can collide thus

28 breaking the liberal democracy apart. I will argue that the state of
29 emergency is a danger to democracy because it deforms the relation
30 of these ideas (III).

31

32 **I. Law and Exception**

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

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

¹ See Luhmann 1981: 158.

² See Teubner 1989: 28-46.

³ See Luhmann 1987: 243.

59 knows that a non-legal counterpart exists and that its preconditions
60 are never fully protected, the possibility arises that, speaking with
61 Menke, the law "has to prevail within the mode of non-legality against
62 non-legality".⁴ To put it in different words, if the law is confronted with
63 a situation of stress that does not apply to its own operational logic it
64 is forced to secure normality of its own form at any cost, even if it has
65 to fall back on measures, not codified or covered by legality. After all,
66 without a state of normality law loses its meaning. Therefore, it is
67 caught in an aporetic fight against its own helplessness.

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

⁴ Menke 2015: 120.

⁵ Schmitt 1922: 21.

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.

86 be explained in further detail at this point.¹⁰ Rather, they serve as
87 examples for an in its consequences unique radicalization of this
88 ontological determination of the legal system, especially considering
89 its political perspective.

90 On the basis of this characterization depending on a theory of
91 differentiation regarding rights, two theoretical consequences can be
92 identified which seek to counter the legal gap problem. Both of them
93 deliver different suggestions to fill the gap of the legal system. *On the*
94 *one hand*, there is the rightwing notion of Schmitt's concept of
95 sovereignty, which stipulates, as already indicated, that the powerful
96 state has the task of overcoming the stress-induced state of
97 emergency by extended executive powers. This statist view, to be
98 found, for example, in Forsthoff and in an alleviated form at
99 Böckenförde,¹¹ declares the state as guarantor of the legal order thus
100 reducing the validity of the actual normative arrangements because
101 the value it obtains is not independent but attributed by a different
102 authority. *On the other hand*, we find a leftwing notion of Schmitt
103 centered around the idea of a new form of law, a pure and pacified
104 law, which, in Agamben's words, "does not obligate, does not
105 command, does not forbid, but only speaks for itself."¹² This chain of
106 thought corresponds to Loick's efforts in developing a post-juridical
107 law, which refrains from a law-based programming of social
108 conditions in favor of an experimental transformation of society.¹³
109 The most recent works of Menke also point in a similar direction. He
110 demands a rebellious law of "opposing rights" against the established
111 model of "self-rights".¹⁴ I do not wish to participate here in the
112 discussion about the outlook or perspective of such rights.

113 Rather, it remains to be said that these authors demand a dynamic
114 alternative against the exception-based legal order, a system which
115 is meant to replace the dominant one. This alternative either opposes
116 the state of emergency directly, or establishes a practice, which

¹⁰ Frankenberg 2017: 13.

¹¹ See van Ooyen 2007; Hacke 2008.

¹² Agamben 2014: 104.

¹³ Loick 2017: 288f.

¹⁴ Menke 2015: 372.

117 realizes a “true” state of emergency abolishing the necessary
118 violence deeply connected to the system of rights. Reformulated in
119 the terminology of Benjamin, the circle of „executive“, „lawmaking
120 violence“ and „administrative“, “law-preserving” violence should be
121 ruptured with recourse to a “divine”, “sovereign violence”.¹⁵
122 Between those two poles of reaction towards the state of emergency
123 lies the model of the liberal constitutional state which aims at limiting
124 the conditions of the suspension of law in a legal way. It intends to
125 ease this suspension through codification, to tame its effects through
126 formalized processes and non-irreducible normative principles.
127 Herein lies the difference between the modern representative
128 democracy and its ancient counterpart, as in the latter special power
129 was not processed in the form of an executive prerogative, but bound
130 to an office, which was settled beyond the normal institutional
131 order.¹⁶ Thus, in comparison, the ancient thinking reacts to the legal
132 gap in the opposite way. While the Greek version after Aristoteles
133 interprets the non-legal area as not yet permeated by law, the roman
134 model represented by Cicero construes this space as part of a
135 degeneration process: the non-legal area is no longer composed in a
136 legal way.
137 In the modern awareness that one cannot escape the paradoxically
138 logic of the exception some cases remain “in which”, as Luhmann
139 points out, “the law allows under legally regulated conditions legal
140 violations of the law itself”.¹⁷ The inevitableness of this situation
141 appears to be known by the legal state. “If the exception”, as Loick
142 reflects, “primary constitutes the law, then its excluding moment
143 cannot be eliminated from the law.”¹⁸ The intention behind the
144 constitutionalization of the emergency case lies in the promise to
145 keep its consequences manageable, to guarantee two things: with
146 regard to intervention an effective, with regard to personal rights a
147 safe living together.

¹⁵ Benjamin 1999: 204.

¹⁶ See Lemke 2017a: 3.

¹⁷ Luhmann 2013: 285.

¹⁸ Loick 2012: 222.

148

149 *Table 1: The Legal Gap and its Theoretical Treatment by Competing*
150 *Approaches*

diagnosis	legal system features a specific gap		
therapy	new form of right	control and enclosure ("modus vivendi")	authoritarian shutdown
approach	left-schmittian	liberal rule of law	right-schmittian

151

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

160

161 **II. Democracy and Exception**

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

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

¹⁹ Frankenberg 2017: 12.

171 procedures are adjourned, if the balance of power gets softened and
172 the boundaries of the guaranteed basic rights are being redefined.²⁰
173 Although the early liberal theorists, particularly Locke and the authors
174 of the Federalist Papers, knew about the necessity of crises defense
175 they supported high barriers to justify the announcement of the state
176 of emergency. In their eyes, only the restoration of the status quo
177 ante could serve as a justification for a concentration of power, at
178 which the measures for legal protection became successively
179 broadened.

180 The *republicanism* on the other side regards the delegation of power
181 as a problem of minor relevance because of its essential notion of a
182 value-integrated citizenry. Thus, the main focus lies on the
183 sovereignty of the people not of the constitution. The reason for this
184 lies in the dominant role of forming a political will, which opposed to
185 the liberal idea does not just mean decision-making in order to justify
186 the political exercise of power. Instead, “constituting society as a
187 political community” is their originary function and to commit
188 government “programmatically to the execution of certain policies” is
189 one of their highest concerns.²¹ Relating to times of crises and under
190 a theory of democracy point of view this means that the political
191 leadership possesses a leap of faith due to its status as an effusion
192 of a sophisticated understanding of collective will forming. In other
193 words, the polity gains a particular dignity declaring the self-assertion
194 against any threat to a special duty. Especially the remarks of
195 Machiavelli and Rousseau support this movement of thought. For the
196 latter, it is precisely the executive that is responsible in following the
197 *volonté générale*. A legal protection is therefore not necessary, since
198 it is an imperative allotment of governmental tasks. As an outlet of
199 popular sovereignty tied to action in this very will, the government,
200 even in exceptional times, cannot be dangerous to the demos.

201 In the *deliberative* theory of democracy, fundamental rights and the
202 principle of democracy are regarded as equally original. For
203 Habermas, both elements are mutually supportive; their internal

²⁰ See Schaal; Heidenreich 2016: 52-60.

²¹ Habermas 1999: 289.

204 correlation lies “in the normative content of a mode of exercising
 205 political autonomy”, which requires both legal form and discursive
 206 will-formation.²² The moralization of politics, which strongly favors
 207 this model, places strict limits on the exemption regime. In this
 208 regard, deliberative democracy is particularly close to the liberal “rule
 209 of law” idea. At the same time, the view of communicative action
 210 within civil society raises awareness of the ambiguity of the state of
 211 emergency. It can then no longer be shortened to the status of a
 212 legal tool, reduced to a moment of juridical-political decision. Rather,
 213 it is equally a "language-strategic practice" with the help of which
 214 influence can be taken on the public discourse and by which a
 215 "targeted disintegration of the pouvoir constituant" can be organized.
 216 This allows Lemke to characterize "the state of emergency as the
 217 other of democracy".²³ The quality of democracy could be measured
 218 by the extent to which the linguistic placement of the exceptional
 219 issue in public space is already well-established and by means of
 220 which plausibility patterns the wish for expanded executive powers is
 221 emphasized.

222

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

approach	determination of the demos	state of exception interpretation
republicanism	political community	political category
liberalism	community of rights	judicial category
deliberalism	community of language	discursive category

225

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

²² Habermas 2014: 133.

²³ Lemke 2017b: 282-283.

228 weighting. It is particularly narrowly caught in the liberal discourse,
229 namely as a legal phenomenon against which the democratic legal
230 state has to defend itself by instruments anchored in the constitution.
231 For republicanism, it is a political matter, a situation of disorder that
232 makes it necessary to temporarily abandon the autonomy of the
233 community for its own sake. Montesquieu's republican heritage is
234 revealed here when he warns that the decay and anomie of the
235 community, without the citizens also losing their virtue, must be
236 prevented at all costs. The concept of exception in the deliberative
237 theory of democracy is again further expanded because, thanks to its
238 foundation in a theory of communication, it is understood as a
239 discursive phenomenon. This widening seems unavoidable as soon
240 as we additionally include post-structuralism and radical political
241 thought. Already the talk of an emergency unfolds a special effect of
242 mobilization, alarmism as well as the restriction of courses of action
243 in the public discourse, since alternative problem-solving strategies
244 are disqualified from the outset in the escalating logic of the
245 emergency vocabulary.

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

254

255

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

257 The specific relation of law and democracy, of norm and exception
258 under democratic conditions can be explicated by the decline of the
259 Weimar Republic in two counts. This perspective is fertile insofar as it
260 allows the observation of a historic-concrete transformation of a
261 normal state into an exceptional state. At the same time, this
262 empirical constellation produced a multifaceted theoretical discourse

263 that sought to analyze problems whose relevance has scarcely
264 declined to this day. In this configuration, the competition of the "two
265 sources of legitimation" of modern democracies recognized by
266 Habermas - popular sovereignty and the rule of law – culminated in a
267 radical manner.²⁴ The confrontation of various schools of law and
268 state theory, as well as the confrontation of competing philosophical
269 traditions, encouraged experimentation with new ideas.

270 A small but for our question instructive excerpt from this debate
271 forms the dispute between Otto Kirchheimer and his doctoral
272 supervisor Carl Schmitt in the early 1930s. The previously outlined
273 tension comes here to light in a tangible way. It is well known that
274 Kirchheimer uses Schmitt's terminology initially to analyze the
275 socialist state theory at that time,²⁵ and later to criticize the Weimar
276 constitution together with its parliamentary system.²⁶

277 Under current circumstances, the parliament is, as he writes, no
278 longer a "place of creative discussion" but a "place for public
279 declaration of opposing class interests [...], while the true decisions
280 on political issues are being made in private discussions, secret
281 committees and meetings."²⁷ Earlier in his critique of
282 parliamentarianism Schmitt deplored the secret policy of interest that
283 began to undermine the basic principles of the liberal state of law and
284 upheld the mere facade of a formal democracy.²⁸ But Kirchheimer
285 used the sharp rejection of liberal thinking including the idea of
286 parliamentarism for his own purposes and enriched it with theoretical
287 elements of Marxism. In this respect, his criticism takes place under

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.

288 the opposite sign, since it aims at a socialist social order without
289 sharing Schmitt's fascination of political irrationalism.²⁹

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

308 The beginning of the actual dispute is a text by Kirchheimer, in which
309 he pursues the transformation of the parliamentary rule of law in the
310 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.

311 indeed argues Marxian on the social-theoretical level, but almost
312 positivistic on the level of legal theory. In his eyes, the classic
313 concept of legality has lost its importance through the emergency
314 regulation law. The "unification of legislation and government" has
315 assumed a "permanent character, which leaves no room for the
316 specific nature of legality, namely the verification of the
317 administration based on law."³⁸ While democracy guarantees its
318 legitimacy only through its legality, the dictatorial exceptional regime
319 invokes an external legitimacy from which the legality feeds itself.
320 This shift in emphasis leads to the elimination of legal barriers by
321 appealing to legitimate purposes. "This 'post-democratic state'
322 actually highlights highly pre-democratic elements",³⁹ by
323 delegitimizing the self-legitimizing "legal order".⁴⁰

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

339 making.⁴⁵ Accordingly, he suspects the specific activity of the people
340 in the public acclamation, which has become impossible due to the
341 private individual vote.⁴⁶ Then, according to Preuss, legitimate is
342 what "expresses" the "worthy unity and substantiality" of the people.
343 ⁴⁷ Together with Leites Kirchheimer writes in a replica against this
344 identity theory of democracy, which relies on a homogeneous
345 conception of the people and results from a specific reading of
346 Rousseau's work.⁴⁸ He neither shares Schmitt's constitutional
347 analysis⁴⁹ nor his existential understanding of the people and the
348 elitist faith in authority resulting from it.⁵⁰ Schmitt only translates
349 abstract terminology without any reference to reality, which leads to
350 an idea of democracy, relying exclusively on substantive equality,
351 forgetting the relevance of freedom.⁵¹ Unlike him, Kirchheimer
352 recognizes the double twist of the freedom idea: "freedom in the
353 state" and "freedom from the state". The realization of both is
354 guaranteed only by the coexistence of political, civil and private
355 rights, he continues.⁵²

356 Schmitt shows no sensitivity to this and ignores that democracy is not
357 only functional but also necessary in heterogeneous societies. But, of
358 course, an essential condition therefor are legal safeguards.⁵³
359 Schmitt attains to his desired result, the attribution of sovereignty to
360 capable persons, who would have proved "under extraordinary
361 circumstances",⁵⁴ on the basis of the previous self-chosen premises.
362 There is "no structural difference between the people working in the
363 framework of the Constitution and the Parliament; for both are
364 'pouvoirs constitués'", writes Kirchheimer.⁵⁵ The normativity outlined
365 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.

⁴⁸ See Schmitt 1928: 272; Schmitt 1921: 117-122.

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.

366 for legality and legitimacy to fall apart in the first place.⁵⁶ The
367 opposition towards this conservative thinking allows to name his
368 democratic constitutional theory a realistically founded one.⁵⁷

369 This discussion reflects the previously described movement of the
370 various democratic theories against the state of emergency. The
371 justification for Schmitt's fearlessness towards this situation,
372 therefore, is to be found in his coalesced republican-communitarian
373 understanding of democracy, which does not recognize an indirect
374 chain of legitimation – which follows the principle of representation –
375 but only a direct instructional form of legitimation. Sovereignty is
376 conceived here from the state perspective, leading to a demos
377 degenerated into a legitimacy stirrup for the emergency order.⁵⁸
378 Kirchheimer, on the other hand, follows a different path, the liberal
379 skepticism towards the exceptional case, without accepting its
380 existence as everlasting. His stated aim is to reverse the relationship
381 of exception and norm defended by Schmitt and to think through the
382 emergency from the rule.⁵⁹ With him we furthermore can justify the
383 tentative search for a social arrangement, which would be a truly
384 democratic exception for the first time.

385

386

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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.

⁵⁷ See Perels 1989: 58-61.

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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