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A Revolutionary State of Exception: Munich, 1918/19
State of Exception – An Overview

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1. Introduction

"Of all people it is me!"1, the young jurist Carl Schmitt complained in 1915 to his diary when the Bavarian deputy High Command asked him to draft a paper on the legal boundaries of the state of siege (Belagerungszustand) in times of peace. Initially forced by his superiors, Schmitt began thinking about what was going to be a leitmotif of his legal thought: including the exception. Two years later, his ideas on the subject resulted in two articles. While one of them is rather conventional and mainly underlines the importance of an independent jurisdiction in the wartime,2 the second one is far more interesting.3 Here, Schmitt sets himself the task of explaining the difference between dictatorship and state of siege. Instead of limiting himself to a formal legal analysis, he argues at the intersection of legal, philosophical, and political thought.

First, Schmitt describes the development of the two phenomena in a historic perspective, starting with the French Revolution and ending with the Bavarian regulations from 1912. His main argument is that while both dictatorship and state of siege lead to a concentration of executive power within one institution—be it the head of state or the

military high command—only within the latter the separation of legislative and executive power is maintained. The dictator on the other hand both dictates the law and oversees its execution at the same time.4 This line of thought clearly foreshadows what Schmitt would later define as the difference between “temporary” (kommissarisch) and “sovereign” (souverän) dictatorship.5 Consequently, one might think, the state of siege may be justified as legitimate institution of the modern state under the rule of law, while the dictatorship should be considered a dangerous deviation from the principle of separation of powers.

But in a second step, Schmitt deconstructs this clear distinction by calling it a “mechanistic juxtaposition” (“mechanistische[n] Gegenüberstellung”) and argues that the separation of legislative and executive power is not the foundation but rather the consequence of modern statehood. In the beginning, there was no separation of power at all, there was just administration. The state of siege may therefore be described as a return to this “primordial order” (Urzustand).6 Here, the actual situation reveals a rupture between constitutional theory and practice. In exceptional times, such as uprisings or war, even though existing laws are not nullified, they are suspended. The practical consequences of this suppression, though, do not differ from an annulment at all. The state of siege, thus, defines a legal space outside the law: even though the power of creating and applying law theoretically still lies in the hands of two different institutions, he who has extraordinary executive power may take every necessary measure that serves a certain purpose (Zweck). The state of siege therefore is an institution characterized not by positive but negative freedom, meaning that no additional laws come into force, but existing laws are suspended. Now, only the

4 Ibid., p. 156.
5 Ibid., Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf, München/Leipzig, Duncker und Humblot, 1921. 6 Ibid., Einwirkungen, p. 157-158.
“actual condition of a concrete danger” (tatsächlichen Zustandes einer konkreten Gefahr) determines the action of those in charge.7

In sum, it is remarkable and yet confusing that Schmitt’s rather unknown article from 1917 does not distinguish between different semantic layers or dimensions of state of exception. As an aspiring jurist, he starts by discussing the technical aspects of the German law on the state of siege. But when he deconstructs the law by confronting it with the “actual” order of things, his argumentation seems to revolve around a cultural and philosophical rather than a juridical problem. And yet, although he recalls the gap between the law and its application, the practical consequences of his observations remain somewhat unclear.

Especially because Schmitt confuses these different dimensions of the state of exception, his article serves as a perfect starting point for distinguishing them in a historic perspective. As I will argue, there is always a legal, a discursive and a practical dimension to exceptional situations in the past. The legal dimension comprises the set of laws and decrees that form the material basis for regulating these situations and thereby codify the phenomenon of exceptionality within the law. While the question remains the same—how can the exception be included in the rule? —the terms used in different constitutions varies. If “state of exception” is used in the following, the concept refers to the abstract phenomenon of exceptionality, while terms such as “state of siege” refer to the concrete legal fact. The discursive dimension on the other hand consists of the act of speaking about the exceptionality of the situation. That is, how was the state of exception described, legitimized, or disputed? And in what way did it result in a kind of exceptional thinking? Finally, the way exceptional measures are used or misused, accepted or contested in everyday situations may finally be described as the practical dimension of the state of exception. Without a doubt, both size and content of these three layers change, as does the relation

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7 Ibid., Einwirkungen, p. 159.
between them. Seldom they are easily to identify and separate but they may serve as a useful tool to historicize the state of exception without being influenced by ahistorical assumptions. In the following, I will use this threefold heuristic model to analyze the German Revolution in Munich after the end of the First World War.

2. Legal Basis

Before World War I two laws regulated the state of exception in the German Empire. First, according to article 68 of the Constitution from 1871, the Emperor in his capacity as highest military commander could declare the state of war (Kriegszustand) in any part of the Reich if the “public security within the federal territory” (öffentliche Sicherheit in dem Bundesgebiete) was threatened. Since the article did not define the exact measures that might be adopted, it referred to the Prussian law on the state of siege from 1851. There, more specific regulations can be found regarding both the case of war and uprisings. In any case, once the state of siege was declared in a certain part of the Reich all executive power were transferred to the military authorities. Furthermore, the military had the right to suspend a series of constitutional rights such as the freedom of speech or press. But since the Kingdom of Bavaria was not included in the military jurisdiction of the Reich it had its own law on the state of exception which came into force in 1912. While in Prussia even local authorities could declare the state of siege in Bavaria only the King could. His declaration resulted in a transfer of executive power to the military commanders as well but not in their extension as in Prussia and the rest of the German Reich.

On July 31, 1914 both in the German Reich and in Bavaria the state of war was declared. Although initially it should only guarantee the smooth mobilization of the army, it soon became the legal basis for

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the German military’s massive expansion of power during the war, eventually resulting in a military dictatorship under General Ludendorff, head of the German High Command. After four years of war, the civilian administration had lost a great part of its autonomy while the population suffered heavily from the severe oppressive measures adopted by the military administration. Although in 1916 some minor legal changes were made to limit the military’s power they had no practical outcome. Consequentially, one of the first actions of the Council of People’s Representatives was the annulment of the state of siege on November 12, 1918. Practically, though, this had very little if no effect at all neither in Munich nor in the rest of the Reich: in Bavaria the state of siege was in force until November 4, 1919 due to its partially autonomous legislation. And even before it was suspended, the Bavarian government under Prime Minister Hoffmann had passed another law on “exceptional measures to protect the Free State” (Gesetz über außerordentliche Maßnahmen zum Schutze des Freistaates) at the end of July. It stated that the government could name “special commissioners” (besondere Beauftragte) with extraordinary executive power into those parts of the country where the public order was in danger. Furthermore, it allowed that some of the regulations based on the former law on the state of siege could be maintained. In other parts of Germany, the situation was similar. Already in mid-April 1919 Chancellor Ebert declared the state of war in Braunschweig once again, thereby making use of the former imperial constitutional rights. The Prussian government on the other hand declared the state of siege no less than fifty times between spring and autumn 1919 in different parts of its territory. In sum, when the Weimar Constitution finally came into force in August 1919 its infamous article 48 was a well-established instrument of government action both on a local, regional, and national level rather than a novelty. Its 4th paragraph stated that in case of “imminent danger” (Gefahr im Verzuge) even a State government might temporarily adopt measures to restore public order with the help of the armed forces.
There has always been an intense debate on the question of continuity among scholars of the German Revolution. Regarding the legal dimension of the state of exception it is evident that the years 1918/19 must not be interpreted as revolutionary at all. In fact, the revolution accelerated the development of an exceptional law that simplified and amplified the possibility of regulatory police and military interventions on a national, regional, and local level.

3. Discourse

To understand the importance of the state of exception, though, we must not limit our considerations to the sphere of public and criminal law. To an even greater extent, the state of exception was a powerful discursive and therefore cultural phenomenon in the aftermath of World War I—especially in Munich. That is, with different aims and nuances the exceptionality of the situation was evoked by both right-wing and left-wing politicians, by journalists, by philosophers, and by artists. In the following I will examine some writings of prominent figures of the Revolution in Munich that adopted this kind of exceptional thinking, each time with different political aims.

In a first step, we must return to the writings of the notorious Schmitt. He experienced the revolution as a young man in the Bavarian capital, still rather insecure about his professional future and struggling with private problems. Since 1915, he was employed by the Bavarian high command military on the home front in Munich, as a part of the military administration he thereby carried out those measures that had been made possible by the state of siege. His decisionistic legal thought has its origins in this experience of the war and its revolutionary aftermath between November 1918 and May 1919: the abrupt end of the monarchy, Kurt Eisner’s short presidency which ended with his assassination by an extremist nationalist in

February, the rise to power of the communists in spring, and, in the end, their outrageously violent defeat by Free Corps and the German Reichswehr. It was this period of military struggle, radical political changes, social turmoil, and violence that shaped Schmitt’s ideas on the exception. Rather than analyzing their contemporary relevance, we must locate them within the specific context of the revolutionary moment after World War I in Munich. So instead of trying to describe his understanding of the state of exception entirely, I will focus on three aspects within Schmitt’s analysis that connect directly to his situation in Munich.

First, as the passages from 1917 cited above have already shown, Schmitt’s reflections on the state, its constitution, and its sovereignty do not revolve around codified law, that is, written norms and rules but rather the “actual” state of things: “The legal order, just like every order, is based on a decision and not a norm,” he states in 1922. His writings from the interwar period, thus, can be read as an attempt to intellectually catch up with the actual political and social order, in other words, with “real life” in a city that had been turned upside down by the revolution. Eventually, this focus on the actual situation resulted in his explicit turn towards the “concrete-order thinking” (konkretes Ordnungsdenken) in 1934.

Secondly, Schmitt positions the state of exception outside the relation between cause and effect, thereby eliminating any possibility of grasping the phenomenon by conventional legal terms. Following his argumentation, neither exist unequivocal characteristics of an exceptional situation nor well-defined measures that may be adopted in such a situation. The Prussian laws on the state of siege from the 19th century were formulated according to a conditional logic: if a certain exceptional fact is given then a certain measure is the legal

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12 Ibid., Politische Theologie. Vier Kapitel zur Lehre von der Souveränität, Berlin, Duncker und Humblot, 92009 [1922], p. 16.
13 „wirklichen Lebens“, ibid., p. 21.
consequence, even if it is not part of the normal course of action. Schmitt, however, moves well beyond these traditional justifications of exceptional measures. In his eyes, the exception itself possesses an ontic quality, that is, it is legitimized by its very existence: it is no coincidence that the first part of his “Political Theology” ends with an extended quote by existentialist theologian Soren Kierkegaard.

In the end, this way of including the exception is only consequential and reflects the shortcomings of those pragmatic and less metaphysical attempts to constitutionally include the exception made in the 19th century. Nonetheless, if the whole investigation comes down to the result that in view of the concrete situation the state of exception exists and therefore matters not much is won in terms of analytical insight. But if connected, thirdly, with Schmitt’s considerations on the nature of the political it becomes evident that his concept of the exception is meant to be a powerful discursive strategy rather than an objective examination.

As is known, for Schmitt “every political term is a polemical term” and therefore “defined by its enemy”. Politics on the other hand is not limited to a certain area within society but an omnipresent possibility of dividing the world into friend and foe. Consequentially, a state’s primary task is to maintain the balance of power between potentially hostile groups. Should the state fail to do so the result is civil war. Jens Meierhenrich and Oliver Simons have recently argued that the best way to understand Schmitt is to interpret his entire work as a search for order in times of disorder. This holds especially true for the situation in Munich where every legal order had ceased to exist among competing revolutionary and counter-revolutionary forces.

The state of exception, thus, was the last possible instrument of

17 See Boldt, Rechtsstaat.
19 ibid., p. 26, footnote 1.
maintaining order within a situation of potential or even actual civil war. With this argumentation, Schmitt inserted himself in a very prominent line of thought among interventionist right-wing political forces, as I will show in the third part of this paper.

But first, I will turn the attention to two figures on the other side of the political spectrum: the anarchist, poet, and politician Gustav Landauer, and the journalist, philosopher, and first Prime Minister of the Bavarian Free State, Kurt Eisner.21 Despite all differences regarding their ideas both were united by their position outside the traditional social-democratic party structures. In 1918, Eisner was the head of the rather small branch of Bavarian minority socialists. This suddenly changed on November 7, when he managed to turn a regular anti-war demonstration into a revolutionary march and managed to overthrow the Bavarian government in a surprising coup d'état. Inspired by Eisner's actions and his immediate instalment as Prime Minister, Gustav Landauer became engaged in the newly formed Revolutionary Workers Council and thereby one of Eisner's collaborators and advisors. After Eisner's assassination and the later proclamation of the (first) Republic of Worker's Councils (Räterepublik) on April 7, Landauer became the commissioner for enlightenment and public instruction. Against the advice of his friends and family, he refused to escape from Munich during the fights in late April and was beaten to death by a group of counter-revolutionary soldiers. Although neither Eisner nor Landauer developed any theory on the state of exception—in fact, they basically did not publish on jurisdictional matters at all—they did think in similar categories of exceptionality, as I will argue in the following.

In the preface to the second edition of his “Call for Socialism”, Landauer writes on January 3, 1919 in Munich: “The socialism must be built, amongst the collapse, out of the conditions of necessity, out

of crisis, out of temporary measures it must be put into practice."22 In
Landauer's eyes, the revolution was first and foremost a period of
crisis and fundamental rupture with the past. But instead of looking
back at the military defeat he demands the creation of socialism "out
of the greatest hardship, out of the work within a state of necessity
(Notstandsarbeit) in times of crisis and provisional arrangements
(...)"23 The diagnosis of crisis and defeat, thus, implied an urgent
call for action, a call eventually answered by Eisner. His successful
intervention on behalf of the socialist revolution led to the
proclamation of the republic even before the same happened in
Berlin. This unstoppable "will to action" (Ernst Toller) was an
essential part of Eisner's self-conception.24 Just like Schmitt on the
right, both left-wing politicians experienced the revolutionary state of
exception as disorder which opened the possibility of establishing a
new order.

A second similarity can be found in the way they spoke about the
times of change, that is, the beauty and the poetic quality of the
exceptional situation. Without a doubt, the revolutionary beauty is
nowhere as pronounced as in the writings of the romantic
anarchist25 Landauer: " (...) may the new, creative spirit reach the
people out of their new tasks, the new conditions, out of the ancient
eternal and unconditioned (...) ; may religion be born out of
revolution, religion of action, of life, of love (...)".26 But the same train

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22 „Der Sozialismus also muß gebaut werden; mitten im Zusammenbruch, aus den Bedingungen der Not, der Krise, der Augenblicksvorkehrungen heraus muß er ins Werk gesetzt werden." Landauer, Gustav, Aufruf zum Sozialismus, Köln, F. J. Marcan, 19.-21. Tsd.1925 [1911], p. XIV.
23 "Wie wir aus der größten Not die größte Tugend, aus der Notstandsarbeit der Krise und des Provisoriums den anhebenden Sozialismus zu machen haben, so soll uns auch unsre Schmach zu Ehre gereichen.”, ibid., p. 16.
26 „Das Chaos ist da; neue Regsamkeit und Erschütterung zeigt sich an; die Geister erwachen; die Seelen heben sich zur Verantwortung, die Hände zur Tat; möge aus der Revolution die Wiedergeburt kommen; möge, da wir nichts so sehr brauchen als neue, reine Menschen, die aus dem Unbekannten, dem Dunkel, der Tiefe aufsteigen, mögen diese Erneuerer, Reiniger, Retter unserem Volke nicht fehlen; möge die Revolution lange leben und wachsen und sich in schweren, in wundervollen Jahren zu neuen Stufen steigern; möge den Völkern aus ihrer Aufgabe, aus den neuen Bedingungen, aus dem urtief Ewigen und Unbedingten der neue, der schaffende Geist zuströmen, der erst recht neue Verhältnisse
of thought may be found when Schmitt evokes the “power of real life which breaks the crust of a rigid mechanic of repetition”.27 To be clear, these similarities hold true only if we let alone the ideological superstructure of their argumentations. And regarding one point, there is an fundamental difference between Schmitt’s concept of the exceptionality of the revolutionary moment on the one hand and Landauer’s or Eisner’s on the other: while the former never even thought about integrating the individual as a valid entity into his considerations, the entire political thought of the latter revolves around the liberation of the individual: “The new world shall not be built because of man, but with them,” Landauer writes.28 Eisner, deeply influenced by neo-Kantian philosophy, named the “self-acting of the totality” (Selbsttätigkeit der Gesamtheit) the “deepest sense of socialism” and never ceased to underline the importance of individual self-determination.29

4. Practice

In a third step, I will look at the state of exception as a factor of political mobilization and performing the revolutionary situation, thereby exploring the practical dimension of the exception. Following Alf Lüdtke and Michael Wild, the state of exception can be understood as an „arena of possibilities, and of self-empowerments“. The state itself, thus, is “a moment of governance that is not ordered by the constitution rather than being constantly created by manifold actors, neither ‘top-down’ nor ‘bottom-up’. “30 In other words, on a practical level and in the daily revolutionary life the distinction between abstract legal order and concrete situation vanishes: once

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27 Schmitt, Politische Theologie, p. 21.
28 “(...) nicht mit den Ursachen der Menschen soll die neue Welt aufgebaut werden, sondern mit ihnen selbst.” Landauer, Aufruf, p. XIV.
29 Eisner, Wahlrede, pp. 33-34, 44.
again, we are left with the factual order of things, understood not in a 
Schmittian metaphysical way but in an empirical perspective.

As Bavaria’s political, economic, and cultural center, Munich’s urban 
space had become one the Reich’s “sensitive political stage[s]” during the war. Just like in Berlin, politics consisted in the constant 
interplay between the institutions of the state and the street. The 
revolutionary leaders’ first and maybe most difficult task after their 
rise to power, was to occupy the urban space and to become visible. 
The new order had to be communicated, that is, the difference and 
exceptionality of the situation had to be performed. This began with 
the change of those names that reminded of the old system. The 
former “Residential” and “Court” Theatres for instance were baptized 
“Great” and “Small” Theatre, while the Councils’ Republic from April 7 
insisted on the spelling Baiern instead of Bayern. It continued with 
the removal of the royal family’s statues and busts in public places 
(which sometimes were quickly reinstalled in hope of a sudden 
counterrevolution) and a different dress code adopted by the 
revolutionary soldiers. Suddenly, every royal insignia on the uniform 
might become an object of fierce dispute, while sometimes just a 
red ribbon was sufficient to be part of the Red Army. By dressing up 
as outlaws, decorating their weapons with feathers, and keeping their 
grenades ready at hand, mostly young supporters of the revolution 
not only freed themselves from the severe disciplinary system of the 
trenches. Even more, they communicated that since the old rules 
had become null and void they were ready to fight for the new ones.

Often, though, these attempts of establishing new rules resulted in

31 Jones, Mark, ’The Crowd in the German November Revolution 1918’, in: Weinhauer, 
Klaus, McElligott, Anthony und Heinsohn, Kirsten (ed.), Germany 1916-23. A Revolution in 
32 See Lindenberger, Thomas, Straßenpolitik. Zur Sozialgeschichte der öffentlichen 
Ordnung in Berlin 1900 bis 1914, Bonn, Dietz, 1995.
33 Hofmiller, Josef, Revolutionstagebuch 1918/19. Aus den Tagen der Münchner Revolution 
(=Josef Hofmillers Schriften, vol. 2), Leipzig, Rauch, 21938 [1938], p. 46, 72.
34 Kreis, Julius, Der umgestürzte Huber. Bilder aus der bayerischen Weltrevolution, 
münchen, Müller, 1920, p. 7.
35 „Die Münchner Revolutionäre gaben sich noch weit malerischer. Hinab bis zum Gürtel, 
dem mit drei bis vier langstieligen Handgranaten gespickten, baumelten breite feldgrau 
Schals, in denen Patronenrahmen staken. Es gab auch in jedem Trupp nicht wenige 
Soldaten, die den Gewehrlauf nach oben gekehrt trugen, um einen Federschmuck darin zur 
violent confrontations with opponents of the revolution who tried to preserve the old order by underlining the importance of traditional symbols.

Naturally, the revolution had to be communicated not only in this implicit manner but also by means of official statements. The radio had yet not been invented and newspapers—the only mass media at the time—were published on a very irregular basis due to paper shortages, especially in spring 1919. Therefore posters were the most reliable instrument of communication. Soon the city was wallpapered with announcements, regulations, and orders, with „giant posters as colorful as a Punch and Judy show.“ 37 Often, though, their materiality lasted longer than their content and they called for something that had already become insignificant in view of the rapid succession of those in charge. Apparently, posters were a highly dysfunctional method of communication, resulting in an everlasting confusion about the current state of affairs: “No one knows who is currently in power.” 38

This massive insecurity and lack of order created opportunities for practices of on-the-spot-mobilization, as described by Oskar Maria Graf: „Christians preached during meetings, nudists distributed their pamphlets, individualists and bible scientists [...] strange Darwinists and theorists of race, theosophists and spiritualists were plying their dreadful and yet harmless trade.“ 39 At the same time, the unreliability of all communication created an atmosphere of constant nervousness and mistrust. 40 Paired with the hardship of food shortages, the flu pandemic, and the lack of coal and gas in the winter, the collective expectation of the unexpected was maybe one of the most significant features of the practical dimension of the

36 Hofmiller, Tagebuch, p. 195
37 „Riesenplakate scheckig wie eine Kasperlgaudi“, ibid., p. 139, see also pp. 66, 71.
38 „Wer eigentlich in diesem Augenblick die Macht hat, weiß kein Mensch.“ IbId., p. 190.
40 See Hofmiller, Tagebuch, pp. 54, 65, 203-204.
revolutionary state of exception. In his “Revolutionstagebuch”, high school teacher Joseph Hofmiller wrote in 1919: “I fear that we are moving towards damn interesting times. If we are still alive next year we can tell that we took part in something extraordinary.”41 Both the revolutionary forces and the Reichswehr and Free Corps, sent to put an end to the “spartacist uprisings” in late April 1919, took advantage of this situation: pretending to act in the name of the Councils Republic, men searched private homes to find any remaining food.42 Similar practices on part of the counterrevolutionary forces induced a general of the Reichswehr give out the order that “under all circumstances (...) it must be avoided that (...) the state of siege is misused to satisfy personal feelings of revenge”. Neither should its measures bother those “parts of the population standing on the ground of the government.”43 And after the fights in Munich had ended and the leader of the communist party, the chief of the Bavarian Deputy High Command was still worried that the troops might “overstep their authority.”44

To sum up, the years 1918 and 1919 in Munich can be best described as a period of intensified exceptionality:45 legal boundaries turned out to be insufficient to cope with the actual order of things, advocates and opponents of the revolution both exploited the discourse on the exceptionality of the situation to mobilize for their political and social aims. On a practical level, this interplay

41 „Ich fürchte, wir gehen einer verdammt interessanten Zeit entgegen. Wenn wir heute in einem Jahr noch leben, können wir erzählen, daß wir etwas mitgemacht haben, das nicht alltäglich ist.” ibid., p. 185.
42 Ibid., p. 203
44 Ibid., p. 136
accelerated the dynamics of the revolution, eventually leading to the massive outburst of violence in spring 1919.

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