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The Rule of Law in Times of Crisis

A Legal Theory on the State of Emergency in the Liberal Democracy

Abstract: This article aims to contribute to the theoretical discussion about the rule of law and about its definition by looking at situations where the rule of law is put to the test – states of emergency. States of emergency and laws of exception have specific characteristics, one fundamental characteristic being that legislative power is shifted to the executive – in other words, democracies become less democratic. By analysing the principle of the rule of law in conjunction with the nature of emergencies and the structure of states of emergency, their interconnection will become more transparent. It will logically demonstrate that rules regarding states of exception concern only liberal democracies and that the rule of law has to continue its rule also within times of crisis. I will argue that there is no democracy without a conception of the rule of law. The rule of law only works in democracies and is therefore inapplicable to authoritarian regimes. Having established that, this article adds to the legal-theoretical understanding of the rules of emergency powers by elaborating them on the basis of the concepts democracy, rule of law and separation of powers.

Introduction

States of emergency have become a hot topic again particularly since the events of September 11, 2001 (hereafter: 9/11) and the subsequent reactions of states such as the United States and the United Kingdom. The popularity this topic has reached in recent years has yielded a lot of case study research on states of emergency but only little legal-theoretical work going beyond what was state of the art before 9/11. Much of the resulting academic work concerned the balance between state security and individual rights – a discussion which also unleashed broad political debates and a revival of Carl Schmitt's political philosophy. This aspect, the balance between security and public order on the one hand and civil and political rights on the other, is only a small part of what a theory on states of emergency encompasses. In general, it is not acts of terrorism that lead to most states of emergency; more commonly economic reasons, internal armed conflicts and non-man-made humanitarian crises, such as natural disasters or diseases, lead governments to declare such states of exception. Thus, the question of fundamental individual rights constitutes only a small aspect of what states are actually facing when dealing with such crises.

Another (although closely related) aspect is the question whether a state of emergency is inside or outside the legal order. This topic also found renewed interest in the scholarly community when observing reactions of states to terrorist attacks. A crystallization of sharp legal-theoretical contours of the "state of emergency" is still largely missing.

Different than the most recent book on this topic, *Law in the Times of Crisis*[1], the arguments in this essay are applicable to emergencies of all kinds; from economic and ecologic to health crises. This is due to the fact that norms of emergency in general are not specific about the type of crises that trigger emergency mechanisms. These legal regulations cannot be too specific as it remains unknown which kinds of emergencies might happen. A strict separation of different emergencies is therefore not possible out of legal-theoretical and methodological reasons. There are, however, other elements of states of emergency that can be defined more sharply, particularly when looking through the lenses of the rule of law and the principle of democracy.

States of emergency exert immense pressure on the principles of democracy and the rule of law. This article aims to clarify the smallest common denominator of these principles and elaborates what they further mean for regulations regarding states of emergency and *vice versa*. Therefore, the analysis departs from the usual method of legal case studies[2] when dealing with states of emergency. The arguments brought forward are of legal-theoretical nature based on definitions of democracy and the rule of law as used on the international level (or at least the biggest common denominator). This is done with the intention to keep these principles distinct from national interpretations and schools of thought which differ immensely in different legal traditions. I will then elaborate on what logically derives from these definitions concerning states of emergency for the ideal liberal democratic state. In order to do that, I will follow in my theoretical elaborations the Kelsenian school of thought.

Therefore, the first part of this essay will discuss the definition of "emergencies" and the "state of emergency" in general. This will be done by employing the classical legal method of looking at the *nature of things*, in this case the nature of emergencies *per se*.[3] Since emergencies (also referred to as "states of exception") have distinct features and the law is a means to an end, the nature of emergencies will lead to specific conclusions about how emergency laws should be structured. I employ a legal-theoretical thinking reflecting on the ideal of norms concerning the state of emergency. The second section will briefly discuss whether the state of emergency is inside or outside the legal order. To this end, two opposing positions, those of Hans Kelsen and Carl Schmitt, will be critically assessed. Thirdly, I will look at the international legal and political consensus on what constitutes the principles of the rule of law and democracy. The fourth section will conclude with a theoretical framework of how legal mechanisms should be designed in ideal liberal democracies.

1. Definition of States of Emergency

1.1 Working Definition

The terms that refer to states of emergency are in practice rather unclear. This has to do with at least two reasons: the fact that different legislations use different terms (e.g.

1 Oren Gross and Fionnuala N Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 4

2 These case studies are mostly of comparative nature: national/national, national/international.

3 "[…] the nature of things may be considered as one of the sources ("lato sensu") of positive law, [and it] rests upon the following assumption: the relations of social life, or putting it more generally, the facts underlying every juridical organism, carry within themselves the conditions under which they may be in equilibrium and indicate themselves, if one may say so, the rules by which they ought to be governed." Ernest Bruncken and Layton B. Register, *Science of Legal Method: Select Essays by Various Authors* (Boston Book Company, 1917), http://www.archive.org/details/scienceoflegalme00bruniala

states of emergency, states of exception, states of siege, *et cetera paribus*), and the fact that many legislations do not have a precise legal definition of what constitutes an emergency, while some constitutions have no legal definition at all.[4] There is a good reason why this is so. What situation constitutes an emergency should be decided by the state organs that have to cope with the situation, as it is unpredictable which situations will eventually constitute an emergency. Legal definitions therefore have to be broad. Normally, states of emergency have a common characteristic; they deal with cases where the nature of a situation requires the restructuring of state functions in order to mitigate the situation's negative effect on the state and its citizenry more effectively (better) and more efficiently (faster). The reason for the existence of legal regulations on states of emergency is thus to ensure the survival of a state and its citizenry and to bring the situation back to normal by temporarily changing the structure of state functions in favour of efficiency and effectiveness, as will be shown below.

Even though there is no common term and understanding of states of emergency, certain regularities can be deduced from the nature of events which allow the declaration of a state of emergency. Based on the principles that guide the conduct of a state in times of normalcy, one can also derive guidelines on state behaviour in times of emergency (Section 4). This stems from the fact that there are internationally recognized principles of state functioning, which have to be observed by states at all times. First, however, the nature of emergencies will reveal some inherent rules.

1.2 The Nature of Emergencies

1.2.1 Conditions of Necessity, Concreteness and Urgency

What is a commonly understood as a state of emergency? The *state of emergency* is a legal state different from that in times of normalcy. Problematic is, however, the term "emergency". Infinite kinds of emergencies can be thought of and all should legally be covered. Henceforth, a theoretical (and not an operational[5]) definition of emergency cannot be material but has to be structural-functional – a definition that focuses on the state. An emergency is a *de facto* situation, which, because of its nature, prompts the state to temporarily change some state structures so that it can more effectively and efficiently address the situation at hand. Such a situation, therefore, represents a condition which is rather different than the normal state of affairs under which the government usually operates. Obviously, in these situations the state needs to change the legal order, otherwise a state of emergency would not make sense. What is this need? It is conceivable that the state as such, its political design and functions, or its citizens are threatened. This threat cannot be marginal. It must be of a magnitude that severely harms the state or its citizens and of such a gravity that the state can successfully only face by changing its own structure. The necessity lies in the need to change the state structures out of a need for urgency and concreteness. (Condition of Necessity)

A general threat of terrorism or a general threat of natural disaster does not justify a state of emergency because of the lack of urgency and concreteness. Concreteness is closely related to urgency. Both describe a situation that forces the state to act and both

4 Oren Gross and Fionnuala N Aoláin, *Law in times of crisis,* 5–6

5 Common law traditions see this aspect differenty; for example some legislations refer to specific kind of emergencies, such as the Australian *Public Safety Preservation Act, 1986* that refers directly to terrorist emergencies in part 2A and chemical, biological and radiological emergencies in part 3.

reveal that the normal state functions are unable to effectively deal with the problem. Both are temporal elements. However, *urgency* describes a need for speedy action (a question of efficiency), while *concreteness* relates to its precisely defined beginning and end (see section 1.2.2 "Limitations of Time, Space, and Objective"). For example, a terrorist attack is always possible, but only a concrete terrorist attack can trigger a state of emergency, because a lack of concreteness leads to an absence of urgency. A terrorist attack will also not constitute an emergency that the government can deal with, due to its unpredictability in nature; it will in fact cause the emergency, namely public insecurity and unrest. Concrete natural disasters can also induce a state of emergency. But only if short-term pre-emption and its concrete prediction is possible (and long-term prevention is not possible, as this would otherwise require normal legislation), can a disaster then *constitute* the emergency for which a state of exception can be induced. An example is provided by the movie Armageddon, where a meteoroid is on course to hit the earth. This predictable and urgent threat of the meteoroid annihilating humanity constitutes the emergency. With only a few days left, ordinary democratic state processes would hinder a successful response. The overriding of constitutional processes in order to make the military more efficient in preventing the meteoroid from hitting the earth can be justified in these scenarios since the predictable disaster is urgent, concrete and (theoretically) avoidable. General threats of natural disasters and general threats of terrorist attacks always exist – and as long as they cannot be concretely predicted and do not cause a manifest problem (e.g., public disorder and fear), they can be dealt with by applying normal state functions; the *precautionary principle* can therefore not be applied to states of emergency. (Condition of Concreteness)

A situation that poses a concrete threat does not, however, necessarily constitute an emergency. Not every situation diverging from the state of normalcy results in a state of exception. The term "state of exception" does not sufficiently describe how circumstances must be situated in order to allow the decree that installs emergency powers. For the sake of clarity let me therefore reflect further on the term "state of emergency": The situation must be of such magnitude and such gravity that it appears to be impossible for the state to respond to the crisis without changing its structure in favour of effectiveness (e.g. by extending the powers of the executive) and/or efficiency (e.g. by reducing parliamentary control in order to increase the speed of decision making) on an *ad hoc* basis. The "state of emergency" is hence triggered by an emergency regarding the effectiveness of the executive branch, whose duty it is to directly protect the citizens, and the efficiency of speedy decision-making of the legislative. Furthermore, the emergency must be so urgent that it is impossible for the legislative to prepare for the future situation pre-emptively. This has to do with the fact that, if certain urgency is missing, appropriate channels of normal governance are still available and able to cope with such a situation in the normal way. Emergencies are therefore situations that hit the states in an unforeseen, unforeseeable, or unpreventable way when applying state functions of times of normalcy. (Condition of Urgency)

1.2.2 Limitations of Time, Space, and Objective

The emergency situation is exceptional; thus the term of a state of exception as for example used by Carl Schmitt or Giorgio Agamben.[6] The term "state of exception" is

6 Carl Schmitt, *Political theology: Four chapters on the concept of sovereignty* (University of Chicago Press, 2005); Giorgio Agamben, *State of exception* (University of Chicago Press, 2005) – for an excellent etymological elaboration based on historical perspective of the terms related to states of emergencies see Chapter 1. A good and short historical summary can be found in: Giorgio

commonly used to describe an exception to a state's normal performance (and not to describe a situation outside of the realm of the constitution). It is the nature of exceptional mechanisms that they should end after the cause for their instalment has ended and that the state should return back to its normal functions. This sounds trivial but it is necessary to take a closer look. The fact that such a state of emergency is an exception assumes that there has to be also a state of normalcy. Therefore, a state of emergency must have a beginning and usually also an end.[7] In the end, once the threat is solved and normalcy returns, the state must restore his normal structures again as otherwise the exception becomes the rule. The causal event has to be viewed as distinct from the emergency it causes and which triggers the legal "state of emergency". The state of emergency has to be evaluated detached from the causative event, because it is, although causally connected, not temporally the same. For example, a flood may already be over, while the humanitarian threat to the population caused by destruction of infrastructure and the occurrence of epidemics continues. A terrorist attack, the causal event, can cause a situation of civil unrest and fear. It can result in the destruction of infrastructure and many victims. Nevertheless, by installing a state of emergency a state cannot undo the initiating cause (the terrorist attack) since it lies in the past. The state can only mitigate the consequences. When speaking of the beginning and end of an emergency then these temporal limitations do not refer to the initiating event (which might only take a few seconds) but to the event's effects. This also means that if not the event but its consequences constitute the emergency, then the causal event cannot be the justification of a declaration of a state of emergency (something that is often being mistaken). Or we turn the argument around: if terrorism always constitutes a justification to declare a state of emergency, a single assassination could already be taken as reason. The emergency is thus a distinct crisis and should be viewed detached from its triggering event. This emergency has a beginning and an end. (Temporal Limitation)

Not every situation will threaten the entire state or make a state of emergency for the entire state necessary. If the emergency concerns only a smaller region or a city, it seems inappropriate to declare a state of emergency for the whole state. If the emergency takes place also on another state's territory, only the other state may declare an emergency on its own territory. Whether an emergency actually exists depends on the condition of necessity which derives from a state's perception of a need to change its structure. If state A, however declares war, it faces the constant threat of being directly attacked by the opposing state B. This might be very well a reason to declare a state of emergency for the state at war (even if its territory is not a place of armed violence yet) anticipating a concrete and predictable event. (Spatial and Territorial Limitations)

Closely related to the territorial location of an emergency is also the object which is threatened by an emergency. Legal-theoretically speaking, the idea of a state of emergency is to deal with the emergency and not with anything else as the power to declare an emergency is causally connected with the emergency as such. Hence, if the emergency did not happen, then there would not be emergency powers. That, however,

Agamben, "A Brief History of the State of Exception," n.d., http://www.press.uchicago.edu/Misc/Chicago/009254.html

7 (1) It is of course conceivable that a state of emergency has to be invoked for a certain situation and that this situation does not cease to exist. What was exceptional gradually becomes normal. In such a case the parliament would have to continue its function parallel to the legislative function of the executive and adapt the constitution to the new permanent situation. That this, of course, can cause legal problems can be seen with states that periodically declare the state of emergency before the legal time limit when the emergency clause expires (e.g. Egypt from 1967–1980 and 1981–2012, Israel since 1948, Syria since 1963). (2) The other possibility is that the state does not resume its normal function once a state of normalcy is again established – this case will be dealt within section 4.

also means that the emergency power should be restricted to the emergency (*ultra vires* principle). Therefore, the only objective an emergency power can be utilized for is to mitigate the emergency. (Limitation of Objective)

1.3 Formal and Material Laws in Times of Emergencies

The situation which actually triggers a legal state of emergency is a material condition to which a state seeks more effective and efficient countermeasures than is rendered possible by constitutional arrangements for times of normalcy. This means, a concrete situation requires concrete emergency measures that are necessary for safeguarding the functioning of the state and the protection of its people. However, these measures are not allowed in times of normalcy. It is therefore understandable that constitutional arrangements foresee situations that might threaten the state's and its citizens' survival, were the state otherwise incapable of reacting fast enough.

An obstacle to speedy governmental action can be found in the principle of democracy, which requires a majority consensus finding, and its legal offspring, namely different kinds of checks and balances. So in order to safeguard the survival of the democracy as such, legislative drafting had to create a paradox: reducing democratic control to increase efficiency of the executive for the purpose of ensuring the survival of the democracy. The executive's role in any case remains, however, untouched – to be of service to the citizens and the democracy. As according to the identity thesis (discussed below) any act of a state has to be based on law, it is necessary to give some executive organs the power to make laws. This is necessary for the executive as a whole in order to temporarily follow the new norms for the concrete emergency (which would not be allowed to act otherwise). These new norms differ from the norms enshrined in constitutional arrangements, which enable the executive to gain more effectiveness and efficiency (emergency powers). Thus, one can distinguish between:

- Formal emergency law: constitutional norms determining the procedures for initiation, execution and termination of the emergency powers.
- Material emergency law: *ad hoc* created norms on the basis of emergency powers granted by formal emergency law.

2. Emergency Powers '*Extra Lege*'?

It is a common (mis)perception that a state of exception (or emergency) displaces the rule of law. Merely looking at the legal wording of the "laws of exception" one can already see that there is clearly a distinction from a displacement of the rule of law ,which would have to be called an "exception to laws". Central to this definitional problem is the question whether a state of emergency poses a problem to the principle of the rule of law. In addition, one has to distinguish between the formal and material norms of states of emergency. It is useful to refer to two opposing viewpoints; let us call them the Schmittian viewpoint (exception beyond the law, established by the law) and the Kelsenian viewpoint (exception within the law and guided by the rule of law).

Schmitt's perspective on the state of exception ("Ausnahmezustand") was formulated in the inter-war period and in reference to the Weimar Republic. To Schmitt the state of exception is a time beyond the continuum of normality.[8] On one occasion, he agreed

8 Horst Bredekamp, Melissa Thorson Hause, and Jackson Bond, "From Walter Benjamin to Carl Schmitt, via Thomas Hobbes," *Critical Inquiry* 25, no. 2 (Winter 1999), 247–266

with Kelsen that the state of exception is not outside the legal order but indeed part of it when looking for example at Art. 48 of the Weimar constitution, which allowed the president to issue emergency decrees limiting constitutional civil and political rights. He finds it plausible that the Reich legislature alone can alter the constitution but continues with the argument that the judiciary itself permitted the president to ignore Article 5 (differentiating between competencies of the republic and competencies of the federation states 'Länder').[9] That means that the formal norms of the state of exception are part of the legal order in liberal constitutions. If nothing inhibits the sovereign's powers, no checks and balances, he can suspend the legal order in its entirety.[10] The problem that Schmitt sees, is that the sovereign is the one to decide upon the state of normality and exception.[11] Someone who decides on exception and which laws apply is sovereign to the extent that he can even decide that in this time no law applies to the sovereign. Only because it is the sovereign who decides upon the definitions and how both states are organized the initial decision is not based on norms but on politics.[12] Schmitt identifies here the problem that law does not only apply to the empirical but that the empirical is defined by the law – what is normalcy and what is emergency depends on the legal definition of normalcy and/or emergency. One can argue further along this logic and conclude that since the emergency can never be concretely defined by law in order to cover all possibilities, in the end it is up to politics to brand any situation as emergency. As a consequence, Schmitt goes further and states that the *Fuehrer* protects the law from gravest abuse, when he makes law and becomes the highest judge in times of emergencies. According to Schmitt, if someone lets a judge decide upon the lawfulness of the *Fuehrer's* acts in times of emergencies installs a counter-*Fuehrer* and opposes therefore the state and its law and makes the constitution at tool for treason.[13] In essence, the power to make material emergency norms given to the political leader by formal emergency laws are beyond the legal order as, according to Schmitt the leader of the state must be allowed to do everything to protect the law. For Schmitt, in the end all depends on politics that define normalcy and exception at the first place.

Kelsen states that, although in a case of national state of emergency executive and administrative organs are subject to fewer statutory constraints, they are still bound by law as their emergency powers stem directly from the constitution.[14] The Kelsenian perspective would therefore see formal and material emergency norms as *lex specialis* to the normal state of affairs, a *lex generalis*. Therefore, both are part of the legal order, and that means from a Kelsenian viewpoint that the constitutional arrangements that define the political order of a state in times of normalcy are also valid in times of emergency. From a Kelsenian perspective the norms of a state of exception are still guided by the principles of democracy and rule of law, because they are the only political norms that guaranty justice and the *identity thesis* (the state and the legal order as the same object).[15] As the legal order evolves and gradually prohibits self-help, until self-help is prohibited at least in its principle, the state becomes the only responsible entity to

9 Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer and John P. McCormick (Duke University Press, 2004) 74 (Part II)

10 Carl Schmitt, *Political Theology,* 5

11 Ibid.

12 Ibid. 13

13 Carl Schmitt "Der Führer schützt das Recht", *Deutsche Juristen Zeitung* 39 no. 15 (1st August, 1934) 947–948

14 Hans Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law* (Oxford University Press, USA, 1997), 289–320

15 The *identity thesis* states that all state actions have to be attributable to law otherwise the state acts outside of its function. Ibid. 99–106

ensure collective security. Within the state, collective security means relative peace (the absence of physical violence concerning individuals).[16] The emergency is a case of (internal or external) threat to the collective peace within the state and therefore to the legal order as such. The state of emergency is hence following a special case of state function only applicable in times of emergency that aims to preserve collective security. The identity thesis' logic is clear: if the state is a legal order, it needs to remain a legal order under all circumstances, also in times of emergency. Therefore, the state still has to operate under the condition of principles guiding the state and that make it a legal order (particularly the rule of law).

Some theoretical elaborations on this discussion fail to see that Schmitt states the lawyers' standard answer to all questions: "it depends on…".[17] It depends on whether the constitution is a liberal one; and, in more detail, it depends on which regulations and which kind of regulations a constitutional arrangement of a state allows. If the constitution allows

(1) the executive organ to decide upon the existence of an emergency without parliamentary control,
(2) if it allows the executive to enact material laws without temporal limitation for the time of an emergency or a fixed time,
(3) and/or if it allows the executive to change the formal laws regarding emergency powers,

then one can speak of a Schmittian legal state of exception (from the rule of law).[18] The more of these conditional questions can be answered with *NO*, the more the legal system resembles a Kelsenian ideal of a legal state of emergency (without exception from the rule of law). Taking these questions into account, the concept of states of emergency holds more content in liberal democracies determined to ensure its citizens rights and freedoms than in other political forms of states.

This viewpoint of Kelsen has important advantages. It is analogous to the jurisprudence of the International Court of Justice. It sees international humanitarian law (one could call it "law in times of armed emergencies") as *lex specialis* to the always applicable international human rights law – the *lex generalis*.[19] This is important because the existence of the principle of the rule of law, the democratic principle and the separation of powers doctrine on the international level and the institutionalization of these ideas within international and regional organizations lead more and more states to an institutional isomorphism regarding these ideas.[20] That means that the conditions as negatively stated above (the *it depends on* conditions) are more and more a fact for

16 Hans Kelsen, *Reine Rechtslehre*: 38–39

17 David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order," *Cardozo L. Rev.* 27 (2005), 2005; John Ferejohn and Pasquale Pasquino, "The law of the exception: A typology of emergency powers," *International Journal of Constitutional Law* 2, no. 2 (2004), 210–239

18 Carl Schmitt, *Political Theology,* 7

19 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (ICJ Reports 1996): para. 26; International Court of Justice, Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, General List No. 131 (9 July ,2004): paras. 102–106

20 Liberal democracy as an idea can be seen as in the latest stage of the life-cycle of norms, "norm internalization". This leads to an increased similarity of actors who share the same surrounding. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (Autumn 1998), 887–917; Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American sociological review* 48, no. 2 (1983), 147–160

the international community as a whole, which renders the Schmittian perspective as solely applicable to states that cannot be defined as *de facto* liberal democracies but rather as "authoritarian democracies"[21].

In addition to this finding it can be concluded that the state of exception makes only sense, if powers shift between legislative, executive and jurisdiction, which is not necessary in an authoritarian system, as this system is due to its nature as efficient in making speedy decisions as can be. Therefore, emergency powers can only exist in *de facto* liberal democracies because an authoritarian regime is either in a constant state of exception or does not know this conception. Putting it differently, if a state of exception results in a restructuring of the separation of powers and an authoritarian regime does not know such a separation *per definitionem*, then either the authoritarian regime is in a constant state of exception (which is of course a *contradictio in termini* since an exception is subject to the temporal limitation) or the concept is the less applicable the close a state comes to be an authoritarian states. If that is the case, then all states of emergency are more or less closer to the ideal conception of Kelsen.

This essay therefore continues under the assumption that in an ideal liberal democracy laws of states of exception are not exception from the law. The supremacy of law prevails. If there is formal law governing the material laws in times of crises neither of them constitute a state of extra-legality but a state within the legal order, a *lex specialis* for times of crisis. Hence, laws concerning states of emergency do not derogate the principle of democracy as such but only temporarily change the structure demanded by very same principle. That means that states of emergency must not change the political system as a whole but can only temporarily alter formal laws (lex generalis) demanded by the political system. Otherwise a constitution would read: "In times of emergency the state is no longer a democracy. The government assumes all powers until further notice". Because the democratic principle continues its influence, emergency laws need to be checked and balanced. In order to increase efficiency and speed of the normal political structure of the state, while at the same time preserving democracy and rule of law, it happens often that the process of political decision-making is restructured in a chronological way (see section 4).

To answer the title of this section "emergency powers *extra lege*?": The Schmittian construction of a state of exception as a space beyond the legal order exists but it only exists in "authoritarian democracies", i.e. authoritarian regimes that call themselves or that are on paper still democracies. Liberal constitutions (as idealized by Kelsen) do not allow the state of exception to derogate the rule of law and the democratic principles and the authoritarian regime does not need to derogate the rule of law because it is judge, legislation and executive at the same time. Consequently, Schmitt is wrong when saying "it depends on", because it does not depend on the political system. Only the *de facto* liberal constitution knows a real legal state of exception and it must not allow it to derogate the principle of democracy and the rule of law.

3. Governing Principles to states of Emergency

Having established that states of emergency only exist in *de facto* liberal democracies and are therefore bound to the rule of law, the next analytical step will be to come from the democratic principle to the principle of the rule of law and to the doctrine of separation of powers. This section therefore does not focus on the differences between

21 Hans Kelsen, "Foundations of Democracy," *Ethics* 66, no. 1 (October 1955), 31–32

different legal traditions and their understanding of the rule of law and the principle of democracy. I will use the internationally agreed legal minimum standards for defining the principles in the sense of a greatest common denominator. After inquiring how to derive the rule of law from the democratic principle, the term "rule of law" has to be elaborated as point of divergence between different legal traditions. This process is necessary in order to allow general conclusions that are not only of relevancy to a specific legal tradition but for liberal states in general.

3.1 Principle of Democracy

The principle of democracy has been subject to a long tradition of scholarly writing. It is not this article's purpose to repeat this. It deems more important to look briefly at what the principle of democracy enshrines and how it manifested in international law. The term "democracy" translates "government by the people", which essentially means that the governed participate in the government.[22] Essential to the principle of democracy is nowadays that anyone governed has the same influence on the government. This absolute equality is naturally restricted in practice. Children, those without reason, and foreigners are commonly not represented for various logical reasons. Who in the end belongs to the *polis* varies. However, the members of the *polis* have the same influence. That means that voters are free in their choice and their votes weight the same. The principles of freedom and equality of the members of the *polis* lie as foundations to justice at the heart of the concept of democracy. This is so far the political system that best represents both principles.[23]

Taking as a minimum requirement the standards of political participation as granted by the International Covenant on Civil and Political Rights (ICCPR), the core norm to political participation Article 25 ICCPR states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country.

With reference to the democratic principle the primary duty of the state is holding elections and ensuring that every citizen may participate and make use of his or her right to equal and free suffrage held by secret ballot. The obligation to guarantee "the free expression of the will of the electors" prohibits the state from manipulating the elections in any way, and demands that the state accepts the result of the elections. Therefore, the Committee on Civil and Political rights interprets the duties of states as follows:

> "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion

22 Ibid. 2
23 Hans Kelsen, *Was ist Gerechtigkeit?* (Reclam, 2000), 49–52

> or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant."[24]

The waiver of the right to vote is not possible as it is impossible to declare oneself as unequal in a political community established on the basis of equality. The right to participate in public affairs, voting rights and the right of equal access to public services contained in Article 25 ICCPR grants the active right (to vote) and passive right (to be elected) of participation. The right to elect must always be accompanied by the right to stand for elections. The opportunity to stand for elective office is the only way to ensure that the persons entitled to vote have a free choice of candidates. Of course, the right to stand for elections and its normative realization in national law has to be subject to the non-discrimination provisions.[25]

The principle of democracy, although the formal laws that establish the principle in the constitutional reality are derogable for the times of crisis, does not disappear, because it is as a principle above the *lex generalis*. It continues to exist. If a state, whose political identity is claimed to be democratic, does not do all in his power to reestablish democratic normality (as soon as possible but at latest at the end of a crisis), then it ceases to be a *de facto* democracy, moves away from resembling the ideal liberal democracy, and moves closer to become an "authoritarian democracy"[26]. Therefore, although the formal laws that realize a political system might be partially or even fully derogated, the identity thesis could be formulated that way: *a state's identity depends on its behaviour, any act of a democracy should be based on the democratic principle.* I will establish below that this is possible also in times of crises, even if the nature of emergencies require different mechanisms than in times of normalcy. In the areas where the executive acquires emergency powers in the form of legislative power the continuation of the democratic principle will help to explain how control mechanisms should be designed (and in fact usually are designed).

3.2 The Rule of Law and the Separation of Powers

The Universal Declaration of Human Rights states, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"[27]. The rule of law in its international legal understanding means that all authorities, persons and other entities within the state and the state itself are subject to and act only on the basis of law. This can also be called the *supremacy of law*. The supremacy of law is based on a simple logic: any rule demands that it is being followed otherwise it would be no rule but a suggestion; every rule expresses a will (in the case of law a political will); thus, if a law exists, its nature of being formalized political will demands that it is being followed. The rule of law is therefore a principle on its own and is not necessarily related to the political system.

Civil rights connect the supremacy of law with the argument of legal certainty. If there is no certainty of what legal consequences any act can yield, the system is an arbitrary one. In an arbitrary system there is no need for a state, as it is a democratic state's foremost

24 CCPR General Comment No. 25 (1996), para. 20
25 Ibid, paras. 15–17
26 On the term "authoritarian democracy" introduced by Hans Kelsen see chapter 4.
27 Universal Declaration of Human Rights (1948), Preambular Paragraph 3

duty to preserve order and security. Thus, a democratic state looses its inner justification if it allows arbitrariness. For example, Article 20 (3) of the German *Grundgesetz*[28] refers to legal certainty directly, while legal certainty is indirectly enshrined in the first section of the 14th Amendment to the Constitutions of the United States of America.[29] Whether the rule of law is directly or indirectly enshrined or even if it results from the mere fact of existence of law, there is a big difference between authoritarian regimes and liberal states. Although both expect that their laws should be followed (which one might call the 'rule of law'), the difference is quite substantial. It lies in the legitimacy of the political will expressed in the law and the capability of an authoritarian regime to change the law any time it wishes. The political will is the element which so closely intertwines the democracy and the rule of law. It is the will of the majority that gives the law legitimacy in a liberal democracy and the coercion by material force that gives power to law in an authoritarian regime. One can therefore speak of the rule of law (as will of the majority) and the rule of the gun. Furthermore, the rule of law in the sense of the Universal Declaration means that all people are equal before the law – *equality before the law*. These ideas behind the formulation of the Universal Declaration were intended to protect people from a state's arbitrary interference into their lives. Most authoritarian regimes fail to fulfil both criteria of the rule of law (supremacy of and equality before the law) but always at least the first (supremacy of the law).

Equality before the law is anchored in Article 26 ICCPR which also formalises the inclusion of equal protection by the law in this principle. Generally, Article 26 is referred to in conjunction with Articles 2 (1) and 3 in the context of non-discrimination. Equality before the law in the analysis of the *travaux préparatoires* and also in a grammatical and systematic interpretation concedes not only a prohibition of discrimination (as enshrined in Article 2 ICCPR) between individuals but also a much broader right to equality.[30] This right to equality prohibits any arbitrary application of law and arbitrary decision of courts independently from the grounds listed in Article 2 para. 1. This difference between equality and non-discrimination was emphasized throughout the history of the development of the ICCPR, even though the difference became more and more blurred with time. This norm therefore entails a positive duty for the state not only to avoid any arbitrary law but also to prohibit the arbitrary application of law and to enact laws which prohibit discrimination.[31]

In international law the concept of the rule of law has become a buzzword for development, peacekeeping, good governance etc. In the preparatory document following the request of the General Assembly in Resolution 61/39[32] the Secretary General, Kofi Annan, presented the views of all Governments, which followed his invitation to give a

28 Article 20 (3) *Grundgesetz*: "Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden."

29 14th Amendment to the Constitutions of the United States of America, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

30 Some scholars no longer make any distinction between non-discrimination and equality before the law. This does not do justice to the idea of the rule of law anchored in the aspect of equality. See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary* (New York: Oxford University Press, 2000), 518–571

31 Manfred Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll – CCPR Kommentar*, (Kehl am Rhein, Strassburg, Arlington: Engel, 1989), 495–502

32 Resolution adopted by the General Assembly, *The rule of law at the national and international levels*, A/Res/61/39

comment on the subject matter "The rule of law at the national and international levels". Although the submissions were made by Governments of different legal traditions, they all had in common at least the principles mentioned above, and many statements also emphasized the principle of the *separation of powers* as elementary to the rule of law.[33]

The idea of the separation of power as a constitutional arrangement dates back to the beginning of the enlightenment and the French Revolution. Immanuel Kant defined the republicanism as the political principle of the separation of executive powers from legislative.[34] Considering that the first republic in history, the Roman Republic, did not know this doctrine yet and that constitutional monarchies such as the United Kingdom and the Netherlands know the separation of powers, this principle is rather less connected to the regime type (any regime can call itself whatever it wants) than constitutes an expression of the rule of law in form of checks and balances.[35]

Central features of states of emergency are that (a) the state expands its power vis-à-vis the rights of its citizen and (b) that legislative power is shifted to the executive power.[36] It is, on the other hand, a central feature of authoritarian systems that the executive is at the same time the legislative organ.[37] As concluded above, authoritarian states do, therefore, not know the legal construction of a state of emergency.

4. Emergency Laws and Principles

Having concluded that both the rule of law and the democratic principle are still working in times of crisis and the doctrine of the separation of powers is most often important for states of emergency, one can now look into the detailed consequence of these ideas for the legal structures of emergency legislation.

The essence of the state of emergency is the pressure of necessity under the condition of urgency. That means effective state action for a concrete problem is urgently necessary. The acting branch of a state, the executive, is forced by a threat to the survival of state and/or citizens to act faster (urgency) and/or more efficiently (concreteness) than legally permitted in times of normalcy. In order to solve this problem one has to look at regulations that commonly prohibit fast and efficient state action. It has been mentioned that an authoritarian regime is most efficient in making speedy decisions. This has to do with the fact that (1) it can enact ad hoc legislation for concrete problems for the execution (as executive and legislation are the same), (2) this process is fast in nature as no majority consensus has to be found (or at least only within a smaller group belonging to the political elite), and (3) the administration does not need to be controlled by the representation of the people since checks and balances are not relevant

33 Report of the Secretary-General, *The rule of law at the national and international levels: comments and information received from Governments*, A/62/121

34 Immanuel Kant, *Zum ewigen Frienden und andere Schriften* (Frankfurt am Main: Fischer Taschenbuch Verlag, 2008), 160 *nota* 1
The first definive article also states that the republican constitution necessitates the rule of law and the equality of people as subjects of law.

35 One has to mention that not all states adhere to this doctrine equally strong. Particularly in New Zeeland and Canada, due to its historical relation to Great Brittan and the representation of the Queen by the Governor-General, the separation in executive, legislature, is not as strong as in other legal traditions.

36 Oren Gross and Fionnuala Aoláin, *Law in times of crisis,* 8

37 In other words, political decision-making is in the hands of one (autocracy) or a few (oligarchy) with executive powers and not of a majority (democracy).

for a system that does not know the *principle of legal certainty*. These three elements constitute an extreme advantage in terms of efficiency (speed of decision making) and freedom of the government to act (effectiveness). For a democratic system to be equally effective and efficient this means that it has three possible options to deal with a crisis:

a) giving legislative power to the executive;
b) giving more administrative power to the executive (vis-à-vis the rights of the citizen);
c) reducing the democratic control (checks and balances) over the executive.

4.1 The Effect of Necessity, Concreteness and Urgency on Formal and Material Laws

To be able to respond flexibly to the particular case, the formal emergency law should not too much interfere with the material emergency law. This means that formal emergency law should define the general character of an emergency as given by its nature. It lies in the nature of the executive as the acting state agent that it knows best the problems and restrictions of its own power when facing the necessity of safeguarding the state and its people. It makes therefore sense that it is an executive body that decides upon the necessity (including the conditions of urgency and concreteness) to declare a state of emergency. This is, however, no absolute requirement; it can also be a small committee of any other power that is able to act quickly enough in urgent situations to declare the state of emergency. The separation of powers and also the principle of democracy are not precise enough to be very strict in this regard. However, the declaration of such a state of emergency affects the state structure mostly concerning the separation of powers by transferring legislative power to the executive and reduces the expression of the rule of law by affecting the checks and balances. It is therefore a requirement of the democratic principle that at least *ad post* (after such a declaration) one of the powers who did not declare the emergency can control the necessity of the declaration.

In terms of effectiveness and efficiency considerations, formal emergency law should therefore not be drafted in a too casuistic or deterministic way. However, it must also consider the limitations imposed by the principles on the exercise of emergency powers. In order to gain greatest efficiency while adhering to the principles a simple solution might be considered: in case the formal emergency laws shift legislative powers to the executive, parliamentary decision over the executive's legislative acts can still happen *a posteriori*. This increases the reaction capacity and ensures that at the same time checks and balances remain intact. In this sense, the parliamentary review-process on material emergency laws might be the best way to fulfill the democratic principle. One might however run into the legal problem that once there is a democratic decision over laws that were installed by the executive, they might remain laws for all times due to their democratic legitimacy. Another, less democratic but maybe more practical, option is a temporal limitation of material emergency laws (as described below) or a combination of both.

The condition of concreteness in combination with the limitation of objective and the rule of law prohibit, that the executive establishes by emergency acts laws for eventualities that might happen in future but are not causing an emergency yet and not in predictable near future. This is because the lack of concreteness always means a lack of urgency. And if urgency is missing then the democratic principle demands that the regular legislation establishes laws.

The principle of democracy and the condition of concreteness in combination with the limitation of objective have also the effect that the executive must not establish or change the formal laws of emergency. The *ultra vires* principle restricts the executive's

action to the concrete case. Power can only be given by the one who posses power. In accordance with the principle of democracy only the parliament possesses legislative power. Henceforth, the parliament is the only one that can transfer its power to the executive. In addition, the influence of material emergency law on formal emergency law should be, due to lack of its democratic legitimacy and because of concerns of legal certainty, prohibited.

4.2 Entry into Force, Continuation and Termination of States of Emergency

As already clarified, the transfer of powers from legislation to executive has to be limited to the duration of the emergency and the elimination of the threat to state and citizens. It is necessary to keep up this distinction between times of normalcy and times of emergency as it is relevant for separating the emergency from situations of a permanent change, such as climate change, which, because it replaces an old normality with a new one, would make a constitutional amendment necessary. One can imagine the case that an emergency situation becomes the normal situation. This constitutes a severe problem to the legal scholarship as suddenly temporary emergency law has to act as transitional law into the new normalcy. Because the democratic principle does not disappear during times of emergency, but allows its own restriction due to self-preservation, it is crucial that formal emergency laws do not replace the parliament by the executive but that it allows parallel legislative operation of both entities. Only this can ensure that a transition to a changed normality is possible.

Due to the temporal limitation of emergencies, the democratic principle demands that either the existence and continuation of the emergency is under regular review of and confirmation by the legislature or the judiciary (relative temporal restriction) or that the emergency powers and material emergency law themselves are temporally restricted to a certain period (absolute temporal restriction).

4.3 Powers in Times of Emergencies (Territorial and Objective Limitations)

The principle of the rule of law demands that a shift of legislative power can only be based on the normative authorization of material emergency laws and the extent of this shift depends on the condition of necessity and proportionality. It must be therefore as small as possible. Constitutional arrangements would violate the principle of the rule of law and the democratic principle, if they allow a transfer of more power than required by the emergency situation. These principles are also violated, if constitutional arrangements abandon all expressions of these principles, even if only temporarily. That means that democracies must remain *de facto* liberal democracies and cannot allow themselves to become temporarily an authoritarian regime. The constitutional arrangement should particularly prohibit that the legislature is relieved of its function during the state of emergency. The rule of law requires the executive branch to let formal laws of emergency untouched *de iure* and *de facto*; otherwise the consequences might be the of the Weimar Republic case. To balance between democratic principle and effectiveness and efficiency is a difficult task which becomes apparent when looking into concrete case studies.

The extent of emergency powers is restricted to the concrete case. This, as we have said above, also forbids any change of formal emergency laws by means of emergency powers. The limitation of objective demands in addition that any material

emergency law or emergency power has to be directly related to relief or mitigation of the emergency at hand. Solving indirect structural problems by imposing permanent solutions of measures with long term effect (by for example registering all citizens' fingerprints or genetic codes or by imposing full-body x-rays on airports) that aim to increase future security or preparedness is due to the democratic principle and the certainty of law criteria solely the task of the parliament. To enforce such a regulation, formal emergency law has to take care of democratic or judiciary control of material emergency law and emergency powers.

The democratic principle continues, and therefore, as we have said, must the parliament continue its normal function as far as possible. Because there are emergencies that take longer and that might become normalcy, it is of advantage that the transfer of power from legislation to executive is not a transfer in its literal meaning. Transfer would mean that the parliament would have no power to decide on the concrete case of emergency. If the emergency is of a long-term variant and maybe more emergencies add to the status quo, the legislative would lose more and more competencies. It would then be incapable of adequately responding to the new "normalities". The principles of the separation of power and the democratic principle would suggest that the parliament can dispossess the executive of its emergency powers at any time it wishes. These principles also suggest that laws enacted by the parliament can overwrite material laws of emergency at any time.

Conclusion

Times of emergency demand the state to act as effective (in the best way) and as efficient (fast) as possible in order to safeguard its own and its citizens' survival. Because effectiveness and efficiency can be quite limited by regulations ensuring the democratic principle, the separation of powers and the rule of law, one can usually find the legal construct of the state of emergency in constitutional arrangements. In summary, the nature of an emergency gives already rules to the legal state of emergency. The legal state of emergency is the structural solution to a procedural state of insufficient response capacity of a state triggered by an event or multiple events.

The nature of emergencies is defined by space and time which lead to:

- a temporal limitation of emergency powers,
- a spatial and territorial limitation of emergency powers, and
- a limitation of objectives of emergency powers.

The event that triggers a state of emergency must result in the necessity to restructure state functions by fulfilling:

- the condition of necessity,
- the condition of concreteness, and
- the condition of urgency.

In the following, the principle of democracy and the principle of separation of powers should be mentioned. The degree of lawfulness of state actions in times of emergency depends on whether states of emergency are within or outside the legal order and if they are within, on how much these actions are in accordance with the principles governing the state.

Let me recapitulate the arguments concerning the rule of law brought forward in this article:

1) Emergency powers are inherent to the conception of states of emergency.
2) Emergency powers, i.e. particularly special powers of the executive in times of emergencies, do only make sense, if they are different than in times of normalcy.
3) *De facto* authoritarian regimes do always have these special powers and therefore do not need to declare a state of emergency (or exception) in order to be more efficient; thus rules on states of emergency are the more manifest the more a state resembles a *de facto* liberal democracies.
4) As a *de facto* democracy remains a democracy also during crisis – the principle of democracy has to be adhered to as good as possible under the condition of the situation also in times of crisis. *De facto* liberal democracies are bound to the principle of democracy and the doctrine of separation of power (if applicable). In times of crisis the nature of emergencies allows alterations of the state structures only to the extent as necessary to return to a state of normalcy after the crisis.
5) Due to the international norms governing democracy and the rule of law as well as international human rights law specifically applicable to states of emergency, *de facto* liberal democracies are always bound to the rule of law.

A rule without law is logically not thinkable in liberal democracies as it is their duty to always perform in accordance with the law also in situations that might exceed the capacity and reactivity of normal state function. This is different in autocracies whose political structure is of a kind that, first, allows it to function in both times in a most efficient way, and, second, is not bound by the rule of law as it fails to fulfil at least one important element of the rule of law, namely legal certainty. For democracies it is necessary to have *lex specialis* for times of emergency so that the state can perform its primary role – to safeguard its citizen and its own functioning. One can say in other words, the primary duty of the state is to function in both times of normalcy and times of crisis for the purpose of safeguarding its citizen.

The other strand of argumentation was that, if the principles of the rule of law and democracy apply, then this would mean that, considering the nature of emergencies, the formal and material emergency laws have to full certain points regarding:

– the effect of necessity, concreteness and urgency on formal and material laws
– entry into force, continuation and termination of states of emergency
– powers in times of emergencies (territorial and objective limitations)

The less states adhere to the above mentioned points, the less they are in line with the principle of the rule of law and the principle of democracy. This does not mean that the state is no democracy but the less these points apply to a state's constitutional arrangement the less it can be considered a democratic state in Kelsen's sense.

Indeed, it is difficult to attribute regime types to anything as their definitions and particularly their defining elements such as the content of the rule of law are far from being unequivocally accepted. One can, however, identify some patterns that derive from the nature of emergencies as such and the hard core of the rule of law and the principle of democracy. These patterns of emergency norms provide enough space for liberal democracies to deal with crises when they occur. At the same time they prevent, if applied correctly, that states of emergency are misused by the executive power to circumvent democratic decision making or gain powers that are not provided by the constitution.

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