Jakub Jinek | Lukáš Kollert (eds.)

Emergency Powers

Rule of Law and the State of Exception

Nomos

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Preface

The problem of emergency powers has become topical during recent decades. The series of economic, political and security crises we have been experiencing since the beginning of the new millennium no longer allows us to believe that the Western liberal democratic constitutional order is the only locus where political power and law operate. The reactions of sovereign states to crises have led the state of normality to be increasingly replaced by some form of exceptional state or infused by it. The kind of normality presupposed by the democratic liberal state has been put in question by new phenomena emerging in the sphere of empirical facts, e.g. international terrorism or, more recently, the situation of pandemic or other cross-border emergencies. A considerable number of authors argue that the boundary between normality and abnormality which is traditionally presupposed by the state of exception has gradually become blurred and unclear. This dramatically changing reality has clearly shown that the end of history, foreseen by liberal theorists some 30 years ago, is nowhere to be seen on the horizon.

However, despite the fact that emergency powers have been intensively studied by legal and political theorists in the most recent period, there still remains some deep theoretical confusion, controversy and obscurity that, as a matter of fact, seem to float to the surface whenever theorists begin to vigorously explore the issue in question in reaction to political and other crises, or in response to proposals to anchor the state of exception in positive law (see e.g. rather extensive debates in Germany related to the adoption of the *Notstandsverfassung*, the raging of the *Rote Armee Fraktion* or quite recently the *Luftsicherheitsgesetz*).

To give at least a few examples, the very concept of the state of exception continues to be used equivocally in the scholarly debate and is often confused e.g. with crisis as a factual situation that gives reason for its declaration. While some authors see the state of exception in the strong sense (i.e. the suprapositive state of exception) as an immanent and necessary part of modern legal orders, others consider it a merely factual exercise of power. While some of the latter hold the view that public officials ought to act in the case of severe crises even if there is no explicit legal basis for the actions deemed necessary, others reject this, claiming that such practices endanger the democratic legal order and erode it. Given the alleged tendency of the state of exception to become a permanent feature of govern-

ing practices in today liberal democracies, some authors even ask the question of whether – given the nature of the risks that liberal democracies face – the state of exception in fact does not pose one of the main dangers to their existence. The primary aim of the proposed volume is to contribute to conceptual clarification in this area, which is attracting increasing interest of the scientific community and beyond. It also aims to provide an outline of possible answers to some of the questions above. Such an endeavor can also be seen as a desideratum with respect to current political issues.

The focus of the monograph will be on the relationship between the state, rule of law and the state of exception. Individual contributions deal with topics such as the compatibility of the state of exception with the rule of law, the relationship between exception, emergency powers and normality, the typology of emergency powers and states of exception, the risks and merits of various forms of regulating extraordinary governance or of its absence, and the impact of the current security and economic situation on our understanding of the state of exception as well as the rule of law.

In the opening chapter, Josef Isensee claims that the normal situation presupposed by the legal order is the basis for "normal" norms and that exceptional situations form a basis for exceptional provisions. The author points out that for exceptional provisions to be logically possible, a stringent valid legal order is necessary. Analyzing the existing legal regulation of the German Basic Law, Isensee argues that it does not take the possibility of truly exceptional situations seriously enough and that the existing emergency regulation does not make it possible to handle all potential existential crises within the bounds of law. Rather than suggesting the adoption of a subsidiary general clause, Isensee argues that *praeter legem* actions deemed necessary for resolution of severe crises can be made legitimate based on the protective duties of the state laid down in the constitution.

The author of the following chapter, Otto Depenheuer, considers the need for the legal system to be able to flexibly respond to existential challenges that threaten the political community such as terrorism. He first deals with the distinction between normal and exceptional state of affairs and argues that the situation which Western states actually face under terrorist attacks is that of "case of emergency within the normal state of affairs". He further discusses various options for the state to act under such conditions and concludes that the best way out of the relevant dilemmas is to legally differentiate various emergency regimes according to terror alert levels.

Concentrating on the very notion of the state of exception, Vojtěch Belling describes a number of different existing approaches to the state of

exception as well as its various typologies. Further, he outlines the dilemmas faced by these approaches and risks which are associated with them. Following their evaluation, the author argues that the dead ends and quandaries connected with crisis resolution in a *Rechtsstaat* can best be resolved by adopting a subsidiary general clause in the part of the norm regulating legal consequences of a state of exception. Additionally, Belling discusses the theory of the state of exception in Carl Schmitt's writings and criticizes some of the recent conceptions that, in his view, hypocritically reject the state of exception as a legal phenomenon.

Lukáš Kollert in his chapter also defends the view that the state of emergency should be anchored in positive law. He outlines possible scenarios that can be followed by public officials vis-à-vis the crisis and evaluates their advantages and disadvantages. Further, he argues that from the point of view of the long-term existence of the rule of law, the *ex ante* regulation of emergency powers represents the most suitable approach. Finally, he proposes a two-level system to regulate emergency powers. At the same time, however, Kollert shows that even proper regulation of emergency powers cannot rule out the dilemma between breaching positive law and sacrificing vital values protected by the legal order. In this context, Kollert focuses on the concept of a suprapositive state of exception and its justification.

In his chapter, Jan Kysela focuses in general on the issue of exceptionality in law. After dealing *inter alia* with the distinction between usualness and exceptionality, the author outlines in an essential part of his chapter three different models of the limitation of law. The first one involves parallel orders of governance, in the second one, law itself acknowledges that certain issues are beyond its reach, and the third one revolves around the concept of the state of exception. Kysela concludes his reflections on the issue with the insight that the legal order and the state of exception do not necessarily have to be complete opposites, as they serve a common purpose.

The volume closes with the chapter by Eckart Klein, who in its first part presents a general overview of the treatment of the state of exception under the constitutions of Imperial Germany, the Weimar Republic and the German Basic Law, thus covering a period of time from 1871 up to the present. Particular focus is placed on the legal debates concerning the respective provisions. In the second part of the chapter Klein presents different states of exception as determined by German Basic Law and particularly discusses to what extent the armed forces may be called in, which fundamental rights are affected and what political and judicial control mechanisms exist. The chapter concludes with a general assessment of the issue.

Our editorial policy was to establish throughout the volume a reasonable degree of uniformity in dealing with terminology, abbreviations, references, transliterations, and typography. The volume contains a glossary which can facilitate the understanding of the core concepts. We gratefully acknowledge that the volume is published with the support of the Czech Grant Agency. We would also like to thank Dalton Stansbury and Martin Pokorný who have assisted us in preparing the manuscript.

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On the Validity of Law with Respect to the Exceptional Case

Josef Isensee

I. Norm, normalcy, and the exceptional case

"In orderly times, do keep the rules – yet when all goes upside down and under, act according to the circumstances." This line from a 16–17th-century Chinese novel[1] recalls to us the uncomfortable truth that legal rules may break down over the irregularities of reality. This shows the Achilles' heel of the rule of law as subordinated to unreservedly general universal laws:[2] it may find itself in situations beyond the control of general rules of law, and then it faces a dilemma. Either it has to transgress the legal rules – or else risk disastrous consequences for the community and, indeed, for its own survival *qua* rule of law.

Every general law encounters the limits of its possibilities whenever the normalcy at which it aims is lacking. "The validity of a norm presupposes the general state of affairs for which it is calculated; and when a state of exception is completely incalculable, it is also impossible to assess it normatively."[3] Thus, Hermann Heller; and before him Carl Schmitt: "Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This factual normality is not a mere 'external presupposition' that a jurist can ignore; rather, it belongs to the norm's immanent validity. There exists no norm that is applicable to chaos."[4]

Rather than a norm, normalcy is the real substrate of a norm in the form in which the lawgiver has conceived it, and therefore, a previously existing segment of reality corresponding with the program of the norm. Normalcy is a precondition for a general law to be applied without fric-

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1 *Die Rache des jungen Meh oder das Wunder der zweiten Pflaumenblüte*, p. 13.

2 The fundamental reference is G. Kirchhof, *Die Allgemeinheit des Gesetzes*, pp. 37 ff.; id., "Allgemeinheit des Verfassungsgesetzes – verfaßte Internationalität und Integrationskraft der Verfassung".

3 H. Heller, *Staatslehre*, p. 255.

4 C. Schmitt, *Political Theology*, p. 13 (translation modified).

tion.[5] The conceptual counter to the normal case, which corresponds with the lawgiver's notion of normalcy, is the exceptional case. While the law claims its validity also in the exceptional case, the enforcement of the law founders upon unwieldy facts, so that the proclaimed validity fails to attain practical efficacy.[6] In the particular real situation constituting an exceptional case, the law is inapplicable *even though* according to its abstract and general wording it ought to be applied.

The lawgiver has not specifically defined the exceptional case; rather, it arises unforeseen and cannot be dismissed. It turns out that the legal consequence, as foreseen by the law, is inadequate. Still, that is no reason to give up on the law: the legal order may provide an emergency regime, and even when it does not, or when the emergency regime fails to do its thing, this does not necessarily hail the advent of a legal vacuum, directed by the maxim that *necessity knows no law*. Even though a particular legal clause may lose its grip, the idea of law as such is not in retreat. Rather, it must assert itself and maintain itself even under irregular circumstances.

II. Derogations within the law and the political exceptional case

While almost every rule is subject to exceptions, not every exception is the exceptional case. The rules set down by law are commonly encircled by derogations and exemptions defining the precise extent of the law by amplifying, moderating or modifying the regular legal consequences. The law adapts itself to the factual particularities of life, so that the enforcement of the law encounters no difficulties. Obviously, though, an excessive number of exemptions and derogations may harm the clarity of the law and impair its consequentiality, generality, equality, and systemic fairness, thus producing pathological outgrowths within the body of the law.

Beside the *technical* legal exemption, we have to take account of the *ethical* directive to legally exempt. This directive applies whenever a law which is fair and general in itself proves to be unfair in its application to a particular atypical case, since, for the particular individual, a rigid, literal application would turn out to be absurd or unreasonable, thus turning reason into absurdity and a well-meaning act into a scourge. The conflict between

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5 On the expectation of normalcy cf. Ch. Enders, "Normalitätserwartung der Verfassung".

6 On the distinction between validity and efficacy cf. H. Kelsen, *Reine Rechtslehre*, pp. 37 ff., 99 ff., 377 ff.

the generality of the law and the fairness to be attained in a particular case was resolved as early as Aristotle with his concept of *epieikeia*.[7] For the kinds of liminal cases listed above, positive law foresees dispensations, clauses of hardship[8] and teleological reduction.[9] Here, we find modifications of the validity and the content of the norm which are foreseen by the legal order. The conflict breaks into the open, however, if the efficacy of the norm is disrupted by the occurrence of a situation condemned by the legal order.

The political exceptional case, distinct from exception at the level of legal technique and legal ethics, can occur both as a single event and also as a long-term state of exception. One may also use the term "state of emergency", or actually – in contrast to the emergency regulations contained in civil and criminal law[10] – the term "State emergency", manifested (as the case may be) in various normatively defined as well as undefined or even undefinable phenomena. The political exceptional case breaks the rules of state law normalcy, hurts the functional capacity of the organization of the state and affects the existential setup of the community, especially its civic peace, by intensifying inner oppositions. The political exceptional case puts in peril not only the validity claimed by the written constitution but also that claimed by all written and unwritten norms which make up the fundamental legal order of the community – its material constitution. While not every single economic and social crisis *is* a political crisis, each, in fact, *may turn into* a political crisis. A breakdown of the banking system, mass unemployment, supply shortages as well as natural disasters may become politically explosive.

Whenever that is so, there appears a tendency for the general law to be supplanted by a measure: a clearly aimed provision related exclusively to the particular case and bound to the existential situation.[11] A measure re-

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7 Aristotle, *The Nicomachean Ethics*, Book V, Ch. 14.

8 On all these issues cf. R. Mußgnug, *Der Dispens von gesetzlichen Vorschriften*; J. Isensee, "Das Billigkeitskorrektiv des Steuerrechts"; P. Kirchhof, "Gesetz und Billigkeit im Abgabenrecht"; I. Pernice, *Billigkeit und Härteklauseln im öffentlichen Recht*; H. Schneider, *Gesetzgebung*, pp. 30 f.; S. Müller-Franken, *Maßvolles Verwalten*, pp. 465 ff.

9 On teleological reduction cf. K. Larenz – K.-W. Canaris, *Methodenlehre der Rechtswissenschaft*, pp. 210 ff.

10 §§ 228, 904 BGB, §§ 34, 35 StGB.

11 On measure as a type of norm cf. C. Schmitt, "Legalität und Legitimität", pp. 331 ff.; E. Forsthoff, "Über Maßnahme-Gesetz"; K. Huber, *Maßnahmegesetz und Rechtsgesetz*. However, the law of measures is not, *a priori*, contrary to the constitu-

places a rule by a circumstantial regime, as described by the Chinese saying cited at the beginning.

III. Stringency of legal rule as a condition for making the exceptional case possible

The distinction between normalcy and the exceptional case assumes that the law whose applicability is in question in a liminal situation purports to have general, strict and durable validity. Furthermore, it presupposes that the people who execute it are devoted to the law and do not manipulate it at pleasure; in other words, that they are bound by the idea of the rule of law, and that the law does not atrophy into a mere political instrument.

A contrasting image is provided by the (still extant) socialist system, which sees the law as an instrument of the party leadership for executing its political goals, one that ought to be utilized according to the maxim of socialist partisanship,[12] so that the law accommodates itself to every need of the leadership, fails to attain any normative subsistence, fails to condense into a legal order, and therefore – since the entire legal order consists of virtual exceptions – fails to single anything out as an exceptional case. As the bureaucratic routine and political wilderness expand, the socialist state must simulate the exceptional state of class struggle and maintain battlefront mentality, since the rule of law – based on regularity and predictability – has a tendency to dissimulate the exceptional case and ostracize alarmism, so as to protect a feeling of normalcy amongst the citizenry and legitimize the regular binding force of the law.

The limitation of the rule of law fixated on normalcy is boring for those observers who keep up the expectation that politics ought to provide them with events and excitement. For the political thinker Carl Schmitt, the exception is "more interesting" than the normal case. "The normal case

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tion: *BVerfGE* 25, 371 (396), 36 383 (400), 95, 1 (15 ff.); F. Ossenbühl, "Gesetz und Recht – Die Rechtsquellen", § 100 MN 11, 32. On the contents and extension of the ban on laws directed at singular cases, as promulgated in Art. 19 (1) *BL*, cf. G. Kirchhof, *Die Allgemeinheit des Gesetzes*, pp. 207 ff.

12 On socialist partiality cf. E. Bloch, "Parteilichkeit in Wissenschaft und Welt"; H. Benjamin, "Die dialektische Einheit von Gesetzlichkeit und Parteilichkeit durchsetzen", p. 368; K. A. Mollmann, *Vom Aberglauben der juristischen Weltanschauung*. On the socialist understanding of the law cf. G. Brunner, "Das Staatsrecht der Deutschen Demokratischen Republik", § 11 MN 21 ff., 28 ff.; H.-H. Trute, "Organisation und Personal der DDR", § 215 MN 11; J. Isensee, "Rechtsstaat – Vorgabe und Aufgabe der Einung Deutschlands", § 202 MN 73 f., 75 ff.

proves nothing; the exception proves everything; it does not merely confirm the rule – the rule actually draws its life from the exception. In the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition."[13] The same pleasure in the exceptional case permeates fiction-writing, as it values the border-case more than normalcy, likes existence on the brink better than life in smug security, finds pathology to be a more sophisticated subject than chubby wholesome sanity, and prefers unhappy marriages that are unhappy each in its own way to the happy ones that are all the same.

Yet let us go back to the rule of law and its need for normalcy. The exceptional case can occur only if the law manifests a modicum of solidity and rigidity in its claim of validity. As long as the rule is flexible, plastic and infinitely adaptable, there is no state of exception. That puts to one side all the norms which are not meant seriously, all "symbolic law", as well as the law of wishful thinking, and thus the substantial part of fundamental social rights (regarding work, shelter, health, happiness, etc.) – and all international "soft law". It puts to one side all the provisions of EU law which concern economic discipline and avoidance of excessive deficits[14] – regulations disrespected by the affected Member States of the monetary union (including Germany) from the very beginning – as well as the "No Bailout" clause.[15] The general question needs to be asked whether those norms of EU law which are merely teleological and do not aim at a fixed legal order but rather at integration – thus presenting a disturbing analogy with the socialist concept of law – are at all capable of delineating the exceptional case.[16]

The necessary stringency of the claim of validity is well captured by the contemporary concept of *resilience*.[17] Resilience denotes the capacity of the law to impose its claim of validity against real resistance and affirm itself in unwieldy reality – doing so either by inflexible, immovable, unbudging insistence, or else by giving in to external pressure as much as is unavoidable in order to endure, yet by immediately snapping back to full validity whenever and insomuch as the external pressure subsides.

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13 C. Schmitt, *Political Theology*, p. 15 (translation modified).

14 Art. 126 TFEU.

15 Art. 125 TFEU.

16 During the presentation of his plan regarding the future development of the European Union, President of the European Commission Juncker stated drily that modifications of treaties are mere "means to a goal" (*Frankfurter Allgemeine Zeitung*, September 14, 2017, No. 214, p. 2).

17 On this cf. K. von Lewinski (ed.), *Resilienz des Rechts*.

IV. Under the condition of what is possible

Politics as the "art of the possible" takes into account the non-manipulable givens of reality – what Macchiavelli calls the *necessità*. The rule of law forces politics to respect law as a non-disposable given, too, as it subordinates politics to the commands of the law and obligates the organs of the state to treat the constitution and the laws as iron necessity. Yet even a constitution itself fails to rule over the entire political reality, since its power does not reach any further than the power of the state does.

This much was demonstrated with exceptional clarity when, in 1954, the newly born Federal Republic of Germany negotiated with France over the status of the Saar, with a result that failed to accomplish the goal of the constitution – to reintegrate the severed parts of Germany. The Federal Constitutional Court pronounced the resulting treaty acceptable and rested content with the politically achievable, as it at least approached the fully constitutional state of affairs. The Court rejected the purported maxim that, if the best (and from the viewpoint of constitutional readers detached from reality: the only good) is unattainable, it is not allowed to proceed from the bad towards the better. The shortcoming, caused by international relations as they stood, was simply accepted, since the treaty was "closer to the Basic Law" than the previous state of affairs.[18] Adopting the conditioning of what is possible transcends the crass alternative of "everything or nothing" by relativizing the binding force of the constitution and substituting it with the greatest practicable approximation to the constitution, yet with the proviso that indispensable constitutional principles must not be violated.

The achievement of the "small" reunification – the one with the Saar region – was then maintained in the 1990 "great" reunification with the GDR. The constitution took into account the difficulty of a rigorous constitutional procedure and, for a limited transitional period, explicitly allowed deviations – although, obviously, only conditional and cautious ones. It did *not* provide the legislator with free privilege to violate the constitution. Rather, the Basic Law maintained its claim of validity precisely by virtue of having its text explicitly modified and paraphrased, limited with regard to its object and limited with regard to time. The core constitutional principles, fixed and unrevisable, were explicitly guaranteed. However, there was a disturbingly close approach to the taboo-zone in the

18 *BVerfGE* 4, 157 (169 f.). Cf. P. Lerche, "Das Bundesverfassungsgericht und die Vorstellung der 'Annäherung' an den verfassungsgewollten Zustand", pp. 721 ff.