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Note: This is mainly a thought piece on the nature of necessity and emergency. For more information on any of the footnotes (sadly, they are not up to snuff even at this late date) or concepts referenced please contact me at jacquelinehunsicker@gmail.com. It is also worth saying that if you are aware of a German constitutional scholar looking for a coauthor on this style of piece, let me know. Happy reading!

The Emergency Powers of the Judiciary, or Necessity and German Constitutionalism

We live in a world that Carl Schmitt might have characterized as a constant state of exception. When under siege from non-state actors who are seldom caught, traditional nation-states and newer confederations of those states are often at a loss about what to do, except that they know they must not allow the terrorists to win, to paraphrase the former President of the United States of America, George W. Bush. Winning, in this case, would be for those enemies to triumph over countries with ways akin to our own. However, what can oftentimes be overlooked in periods of crisis is that in order to win, sometimes the leader, the general, the executive—whomever—is willing to sell his nation's soul for the sake of that winning, that is to say, change the constitution of its people. By constitution I mean not only any formal document, but the way in which constitutional orders allow the citizens that live under them to live their lives relatively freely with guarantees of the rule of law, various rights, and other common aspects of modern liberal constitutional democracies.

Some might ask: why would a leader undermine his constitution, much less his people? In the best cases, we will assume he does it unconsciously, thinking that he is a savior not a destroyer. In the worst cases, we will assume ambitions already formed to topple the reigning regime, and condemn him for maltreating his peoples' trust. But one would imagine, particularly in a world increasingly made up of democratic regimes, that leaders fall between those categories—those somewhat excusable but dangerously unwitting fools who make sacrifices without imagining any of their consequences on one hand and conspiratorial and criminal frauds on the other. This middle group would consist of rather well intentioned albeit often somewhat inept leaders who believe that the crisis of “their” time is a crisis far worse than those that preceded it and thus warrants their stepping out of their bindings—the constitutional order—in the name of saving it, but who do ultimately hope to save that order for the future. Even unpopular leaders may one day imagine monuments and tributes to their names, once the dust of history has cleared so that future generations can see the debt they owe to the past (see George W. Bush’s comparison of himself to Truman). Nevertheless, it will be my aim to demonstrate that the executive is unlikely to be the best safeguard of constitutional orders with regards to rights. The executive is too prone to see himself as above the constitutional order that instated him, partially because, for better and for worse, the executive is often called to act quickly in the face of danger.

The actions of legislative bodies in times of crisis often serve to help the executive in tearing down constitutional norms. First, there is overwhelming tendency in the face of crisis to, as American political scientists call it, “rally around the flag” and create a united front between the executive and legislature. Second, as one of the key

pieces of the legislature's mandate is to act as proxy for the citizens it represents, acting on the fear of the citizenry—often in concert with the executive—can be interpreted as part of their job description. Legislators are, to be sure, further removed from the immediacy of crises, but this deprives most legislators of developing the skills for proactive thought and promotes retroactive thought—meaning, they think better once the crisis has been dealt with preliminarily, and thus their hands are tied in ways that make them less than ideal for preserving the constitutional order in the long run (cite Tulis).

Most examples of judicial action—or, rather, inaction—in the immediate aftermath of crises (see Lincoln and *ex parte* cases, *Korematsu*) do not inspire confidence that courts could be at all effective in arresting the sorts of constitutional changes brought on by crises. Courts are widely perceived as ineffective even as symbols (Rosenberg), much less as powerful enough institutions to combat executive and/or legislative overreaching, being prone to be taken over by special interests themselves (Hirschl). What's more, many would argue that judicial action that claims to preserve the constitution against elected representatives of the people could be far worse than judicial inaction (Bickel, Horowitz, Manfredi).

Yet there is an arena in which action by constitutional courts is largely recognized as legitimate: the protection of rights. Although constitutions are far more than the rights that they protect in the narrow sense, in a much broader sense, constitutions are meant solely to protect rights. The rule of law is the right of man under the social contract (Locke). Freedom from tyranny—tyranny that is often exercised when institutions like the separation of powers and stability of law are threatened—is a right (American founders, Lon Fuller). Rights of this sort, often referred to as “first-generation” rights,

are unquestioned by modern liberal democratic orders. More and more, “second” and “third” generation rights—those including the rights to human dignity, freedom from oppression on a much wider scope, education, health care, and human fulfillment—are being enforced by courts, particularly in advanced democracies outside of the United States. If protection of these rights is seen as the purview of constitutional courts even by people who do not elect the members of those courts, then it seems possible—and perhaps even reasonable—to imagine that said courts could indeed protect these rights in times of crisis.

Passing this responsibility to courts is not ideal. Ideally, all branches of government would have a Lincolnian understanding of protecting the constitution and all branches would be involved. Unfortunately, with courts being allowed to increase their powers of adjudication in many different arenas also comes the idea that executives and legislatures can act and then simply wait for the true authority on constitutions to step in and correct any problems. Undoubtedly this cripples not just the care executives and legislatures take in upholding the constitutions that supposedly rule over them, but also the image these bodies show to the people. This, surely, is not the only reason for overly litigious societies like America, for it is obvious that much of that is people wanting what they want when they want it and abusing their legal rights to get ahead, but I would imagine that having the court seen as the most likely protector of individual rights and the constitution itself does propel more individuals in crisis towards the court rather than their local representative.

These are serious problems, but in examining the interplay between different state actors, it does appear that constitutional courts may still have the best ability to safeguard

the constitution—if only because most people think that it is the court’s responsibility to tell the people what the constitution means. Even if the idea of a court having such a heavy responsibility in that area is a myth, it is still a powerful one. Even though courts are not seen as impartial as they were a century ago, even those who feel they have been slighted by judicial ideology have abandoned neither the legal system nor the constitution that established it.

In reading Schmitt, we find a surprisingly compelling, yet terribly frightening, account of what a state’s response to emergencies should be. But what, as the Austrian mathematician, Kurt Gödel asked¹, prevents our order from being reconstituted by a new decision by an ambitious sovereign-esque executive? Who prevents the kind of human rights catastrophes seen not merely in Guantanamo Bay, but in the Nazi concentration camps Giorgi Agamben emphasizes in his *Homo Sacer*?

This is of particular importance given the consensus in political theory and history from the Greeks to present that Schmitt is correct in stating “Like every other order, the legal order rests on a decision and not on a norm” (9). We are well aware that Machiavelli’s Romulus and Brutus made decisions to create the Roman kingship and

¹ Kurt Gödel famously was on the brink of attaining U.S. citizenship when he discovered that the Constitution could not prevent its own degeneration into dictatorship. It was largely the influence of Einstein and Morgenstern that kept him in line during his citizenship tests. See Morgenstern’s memorandum to this fact at: http://1372721354610204262-a-jeffreykegler-com-sites.googlegroups.com/a/jeffreykegler.com/morgenstern-document/Home/files/Morgenstern_onGoedelcitizenship.pdf?attredirects=0&auth=ANoY7cp-XyOzuqLWrtZGqkKH8QWa5x6KwF_-UYec2JOo783bbH4_kfVTGm2mgPgdTfv7z2tl_MjsAPyr9tO_M0IzfxbkEVcr0r5g6Zf8KXUMoI2MzbnvjbHe09SyS_gMrWz1vjudKsmphykzF12BI27pD_F321Xow38-F7F9f8g18DEp5QZ2V37bI51mj-ZvA0ZUHlJJHoYIEA3LhIlkxtNs-9w0awLRk3c80bOrzwAZc1JO3SN3p_0G9O4LLI3LTpZ6M_wzvks3 (Accessed 6 April 2009)

republic respectively, just as we are aware that the rebelling colonists in the American colonies, whose position is well represented by Thomas Jefferson's *Declaration of Independence*, were guided by a decision, not a norm. Perhaps more perturbing is that the founders in Philadelphia in the summer of 1787 were also acting as decisionists, largely led by James Madison, to abandon the norms established in the Articles of Confederation.

Despite the decisionist elements of American constitutionalism, however, it seems fair to say that we are still governed by fairly strong norms and that decisions are not univocal from one sovereign, coming rather from the President and various executive agencies, Congress, and the Supreme Court, as well as various state and local organs.

What I have written above is more than a mere introduction to the importance of Schmitt and Agamben, but also to the key question here: is there an institution in government that can be deployed to separate power so that a sovereign executive cannot effectively become Schmittian, thus preventing the catastrophes Agamben devotes his work to explaining? Perhaps high constitutional courts might be best placed to curtail this problem of the executive, provided that the court is endowed with enough historical and practical power to rouse the consciousness of the people to prevent them from being bamboozled by Schmittian executives. It is not in America that I find such a court, because the Supreme Court usually denounces executive overreaching too long after the crime has been committed to be effective, but rather in Germany.

German history, which includes the Weimar era battle between Schmittian existential constitutionalism and Hans Kelsen's legal positivist model, the rise of Hitler (and Schmitt's support of Hitler as sovereign), the horrors of the concentration camps,

and finally the creation of a sort of Kantian Basic Law, provides a potential alternative to the more open American court system. As a result, I believe it is important to consider whether provisions like Article 2 of the Basic Law, which ensures the fundamental right to human dignity to all Germans, might be able to arrest the biopolitical human rights collapse that Agamben projects will happen in modern democratic orders. This is not to say that Germany is perfect or totally inclusive (their treatment of the Turkish people within their borders is evidence enough of that), but that their constitutional order and the power of their Constitutional Court might be able to stop terrible excesses of the German Chancellor.

A recent German Constitutional Court case that shows this possibility is what I will refer to as the German Aviation Case (Judgment 15 February 2006—1BvR 357/05).² This case calls into question the constitutionality of several provisions of the Aviation Security Act, whose §14.3 allows

direct use of armed force against the aircraft is permissible only if the occurrence of an especially grave accident cannot be prevented even by such measures. This, however, only applies where it must be assumed under the circumstances that the aircraft is intended to be used as a weapon against human lives, and where the direct use of armed force is the only means to avert this danger (Grounds A:14).

This provision allows the Chancellor or the Federal Minister of Defense to authorize shooting down airplanes thought to be weapons against human lives, and allows them to sacrifice the human lives on board to do so. The Court rules

33. 1. The constitutional complain is admissible. The complainants' fundamental rights are directly violated by the challenged regulation. Because they frequently use planes for private and professional reasons, the possibility that they could be affected by a measure pursuant to §14.3 of the Aviation Security act is not merely a theoretical one.

² This case can be found in English at http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html

34. 2. The constitutional complaint is also well-founded. The Aviation Security Act infringes the complainants' fundamental rights to human dignity and to life pursuant to Article 1.1 and Article 2.2 sentence 1 of Basic Law. *The Act makes them mere objects of state action. The value and preservation of their lives are left to the discretion of the Federal Minister of Defense according to quantitative aspects and to the life span presumably remaining to them 'under the circumstances. In the case of an emergency, they are intended to be sacrificed and to intentionally be killed if the Minister presumes, on the basis of the information available to him or her, that their lives will only last a short time and that, in comparison with the losses which are imminent otherwise, they therefore are no longer of any value at all or are, at any rate, of reduced value* (emphasis mine, citations included in text).

Sections 35 and 36 reiterate the same concerns—namely, that the prioritization of some lives over other lives is thoroughly unacceptable and legally incompatible with human dignity. As I see it, this ruling is a repudiation of Agamben's claim that all democratic states have reduced their citizens to living as *homo sacer* (14). Some might say that the decision of the Court is the same as the decision of an executive, and that this result, though far more palatable than decisions made by Schmittian executives, is nothing more than a new mold for the sovereign. But I believe this is not the case. If my preliminary analysis of the German system is correct, then the court does have actual power. If so, neither Chancellor and Ministers, nor Parliament, nor Court can be the sovereign: they divide power amongst themselves, some winning some struggles, others not. Decisionism is therefore impossible with the existence of checking institutions imbued with actual power.

In the end, though I am well aware that it may be the case that neither American nor German courts are well suited to combat the problems inherent to liberal constitutionalism announced by Carl Schmitt, it also appears that we cannot just ignore his incisive analysis and hope for the best. This is especially true if we consider arguments like Michael Paulsen's, where the executive is seen as even more powerful

than current politicians would admit. As Paulsen argues: “The Constitution itself embraces an overriding principle of construction for the document’s specific provisions that may even, in cases of extraordinary necessity, trump specific constitutional requirements” (Gross and Aolian, 50). Furthermore, “in that respect, necessity is not only part of the constitutional order. It is ‘the first and ordinary source of law’” (Gross and Aolian, 50). If Paulsen is correct, then the German lawmakers were right to give the executive such extreme power.

The question then becomes one of prioritization of rights and survival, which is the basic balance in the German Aviation case. Should a country protect itself from terrorists (assuming, of course, that the method the Bundestag invented would actually work, which is in question), or protect fundamental human rights? Furthermore, is there a balancing test that could be applied that would improve our chances of being able to achieve both ends? Paulsen proposes such a test, saying that the executive power should have the equivalent of the Court’s balancing tests when necessity compels the executive to go outside of the law. As he states, however, “Unfortunately, however, what the courts hold sufficient to constitution such a ‘compelling interest’ often falls well short of what one might think to be true *necessity*, in the sense of an urgent need to protect the nation or its people from devastating events” (Paulsen, 1286). This means in Paulsen’s schematic that the Court’s protecting basic human rights, such as in the German Aviation Case, has analogous tests with the executive.

The question we are left with from Paulsen’s analysis, as well as the decision from the Bundestag, is what is necessity? How can we know a situation reaches that threshold, and who should be the constitutional actor to remedy the situation? I have

argued here that in the case of rights, the constitutional courts should have jurisdiction,
but only protection of rights does not a legal system make.