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EMERGENCY SITUATIONS AND CONCEPTIONS OF LAW*

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Summary

Based on the insights of legal theorists, the author of the current article constructs three conceptions of law that influence the consideration of emergency situations. In this sense, realistic, legalistic and mixed conceptions can be distinguished. None of them is satisfactory because they do not include an explanation of some of the existing forms of extraordinary regimes, nor do they consider any specific way of legal reasoning on emergency situations in a specific type of order. The author proposes the elimination of these deficiencies through a clearer classification of emergency regimes and orders. Searching for solutions for the improvement of three conceptions in this way leads to a more comprehensive theory of emergency situations that has advantages over any separate conception. This theory also includes the fourth position for emergency situations characteristic of constitutionalised legal orders.

Introduction

This article considers the theoretical conceptions of law through which emergency situations can be observed. Following the reflections on law by Carl Schmitt, Hans Kelsen and Lon Fuller, three conceptions of law are offered, reflecting on the understanding of emergency situations. The thesis of this article is that all three conceptions have shortcomings which prevent them from serving as an appropriate theoretical framework for practical problems. The theoretical tools employed for examining the thesis are conceptual analysis, ideal types and analysis of legal reasoning. The structure of the research is, as follows. The second section contains the outline of three conceptions of law in relation to emergency

* The author dedicates the current study to the memory of his father.

situations. Subsequently, in the third section, their shortcomings are presented. How these shortcomings can be overcome is then explained in the fourth section, and the advantages of the proposed comprehensive theory are pointed out. In the final, concluding section, the research results are summarised.

1. Three conceptions concerning emergency situations

A famous theoretical debate on emergency situations between Carl Schmitt[1] and Hans Kelsen[2] can be analysed with a focus on opposing opinions concerning the question of who should be the guardian of the constitution during an emergency situation[3], but it can also involve the background positions on law that reflect this disagreement.[4] These two aspects are related, because, if the question about the guardian of the constitution is reformulated to inquire whether decisions during an emergency situation can be evaluated by the adjudication, and if the possibility of subjecting problems to the adjudication is accepted as a necessary element of law, then a discussion can be opened on the question of whether emergency situations can be subjected to law. The Schmitt–Kelsen debate then becomes a debate about different understandings of law reflecting the considerations of emergency situations, which can be summarised, as follows. Schmitt believes that the "genuine political decision" cannot be decomposed into legal norms,[5] and that emergency situations are precisely the place where the political nature of law is demonstrated. Kelsen removes the "genuine political" from legal thinking in such a way that he reduces law to legal norms, and subjects the behaviour in emergency situations to the legal norms that govern them. According to George Schwab's interpretation of the Kelsen-Schmitt debate, Schmitt opposed Kelsen, "who, in endeavouring to construct a legal system that was scientifically airtight, banished the exception."[6]

[1] Schmitt C. The Guardian of the Constitution (Ch. I., 1–3, II.1(a), II.2(d)4, III, III.3). Translation of: Der Huter der Verfassung (1931). In: Vinx L. The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law. Cambridge: Cambridge University Press, 2015, pp. 79–174. Schmitt C. Closing Statement Before the Staatsgerichtshof in Leipzig. Translation of Schlussrede vor dem Staatsgerichtshof in Leipzig (1932). In: Vinx L. 2015, pp. 222–228.

[2] Kelsen H. The Nature and Development of Constitutional Adjudication. Translation of: Wesen und Entwicklung der Staatsgerichtsbarkeit (1929). In: Vinx L. 2015, pp. 22–78. Kelsen H. Who Ought to be the Guardian of the Constitution? Translation of: Wer soll der Huter der Verfassung sein? (1931). In: Vinx L. 2015, pp. 174–221. Kelsen H. The Judgment of the Staatsgerichtshof of 25 October 1932. Translation of: Das Urteil des Staatsgerichtshofs vom 25. oktober 1932 (1932). In: Vinx L. 2015, pp. 228–253.

[3] See: Gornisiewicz A. Dispute over the Guardian of the Constitution. Hans Kelsen, Carl Schmitt and the Weimar Case. Politeja, Vol. 3, No. 72, 2021, pp. 193–214.

[4] An example of analysis of the background settings of the authors can be found at Dyzenhaus D. Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order? Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2005–2039.

[5] Strong T. B. Foreword. In: Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, p. xiv.

[6] Schwab G. Introduction. In: Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, p. xlii.

The third legal theorist of interest within this article is Lon Fuller. Although his considerations do not directly relate to emergency situations, his reflection on the limits of adjudication is important because, following the assumption made about the relationship between law and adjudication, it is possible to reformulate it as a reflection on the limits of law.

Based on the insights of these three authors, a description of three conceptions of law is proposed, that reflect considerations on emergency situations, which the author names realistic, legalistic and mixed conceptions. They are constructed as ideal types that are useful for understanding different approaches to a particular legal institute.

According to the realistic view, situations can arise when a legal authority has the "right power" to make decisions outside the law. Schmitt believed that the legal norm cannot regulate in extreme cases or in absolute states of exceptional situations.[7] In the context of Schmitt's theory, "a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures".[8] A legal norm that would try to guide crisis management has no legal consequences for those who manage crises.[9] A legal authority in an emergency situation is not limited by norms in achieving its goal because such limitations are not natural. Consequently, even if some legal norms did exist that would set limits on the legal authority, they have no legal effect in an emergency situation. This is why the legal order must be consistent with the nature of things and formulate a norm by which the legal order in an emergency situation is excluded and law itself gives way to politics.

A legalistic view of emergency situations does not recognise the "right power" of legal authorities to act outside the legal order. Everything that legal authorities do, they do through the legal order.[10] In the context of the debate, Schwab found that "Schmitt attempted to challenge those jurists who equated the state with the legal order – who considered the state to be a "system of ascriptions to a last point of ascription and to a last basic norm"." According to Kelsen, the state is identical to the legal order. David Dyzenhaus named this thesis – 'the thesis that the state is totally constituted by law'[11] – the Kelsen's Identity Thesis. Since Kelsen understood that the state is identical to the legal order and that legal order is a set of norms[12], he thus completely dismantled the concept of a sovereign who would decide outside of law in an emergency situation. Since, according to Kelsen,

[7] Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, pp. 5 and 13.

[8] Schwab's comment in Schmitt C. 2005, p. 5, note 1.

[9] See: Schmitt C. 2005, p. 7.

[10] Schwab G. 2005, p. xli.

[11] Dyzenhaus D. 2006, p. 2010.

[12] Kelsen H. General Theory of State and Law. Cambridge: Harvard University Press, 1949, p. 182.

all situations can be interpreted through law,[13] this means that even exceptional situations can be decided based on posited legal norms.

Kelsen's understanding of the state and law does not mean that legal authorities in some jurisdictions cannot be free to make their decisions as they wish. Consistent application of the starting points of the legalistic view means that the legal order can be organised in such a way that legal authorities are allowed everything that is not prohibited to them. This approach can be called the legalistic approach in a weaker sense. Nevertheless, the legalistic view of modern states incorporates an additional setting by which legal authorities are prohibited from anything that is not expressly permitted to them. Nevertheless, even according to this variant of the legalistic approach in a stronger sense, the legal order can authorise a legal authority to do whatever it deems necessary in an emergency situation without legal restrictions to achieve a goal. It follows that both versions consider that the legal order can regulate everything, including the actions of legal authorities, in emergency situations. If a legal authority can decide without legal restrictions, it is because the legal order gives it the freedom to act in this way: according to the stronger variant of the legalistic order, this freedom must be prescribed, and according to the weaker variant, this freedom exists when no legal limitation of the actions of legal authorities is prescribed.

A mixed view of emergency situations rejects both extremes of previous conceptions: politics above law and law above politics. With the realistic and legalistic conception, it is about understanding the nature of law as a phenomenon. According to the first, law that is understood as a decision or institution cannot limit the political,[14] and according to the second, law that is understood as a set of norms can limit the political. The mixed view is not focused on the nature of law as such but on the nature of situations that determine whether something can be legally addressed. That is, natural boundaries exist between what can and cannot be regulated by law. Lon Fuller argued that adjudication has natural limits, which we can understand as the limits of law. According to him, courts judging in polycentric situations of specific proliferation of interests is not natural.[15] An example of a polycentric situation is when a doctor has to "prescribe a cure for a trouble of the lungs while also considering the heart, the kidneys and the digestion as well as the income and the family conditions of the patient."[16] The proliferation situation cannot be resolved in a way that presents arguments about the violation of an interest in accordance with the set standard. Adjudication is limited to situations for which presenting these arguments about the violation of

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[13] Kelsen H. Peace Through Law. New Jersey: The Lawbook Exchange, 2008, p. 27. According to Kelsen, everything is permitted that is not prohibited.

[14] David Dyzenhaus founds that Schmitt's "highly political conception of law" supports the idea that "legitimate will always assert itself over the legal". Dyzenhaus D. Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar. Oxford: Oxford University Press, 1997, p. 2.

[15] Fuller L. L. The Forms and Limits of Adjudication. Harvard Law Review, 1978, Vol. 92, No. 2, p. 394.

[16] Polanyi M. The Logic of Liberty, Abingdon: Routledge, 1951, p. 176.

rights and obligations is possible based on some standard.[17] To apply this thinking to emergency situations, it could be said that the law should be limited to relations in which the standards of rights and obligations in these situations can be naturally posited, whereas management decisions that solve the distribution of interests of a polycentric character would remain a matter of political decisions beyond the scope of law.

To sum up, according to the realistic view, emergency situations remain a legally empty space that cannot necessarily be regulated by law and legally supervised. By contrast, the legalistic view indicates that emergency situations can be regulated by law and are always subject to adjudicative supervision in such a way that legal restrictions must be respected, and according to a stronger variant, the freedom of action of legal authorities must be expressly allowed. Conversely, the mixed position suggests that some issues of emergency situations can be regulated and some issues cannot be regulated, and that adjudicative supervision is of limited scope.

2. Theoretical shortcomings of realistic, legalistic and mixed conceptions

Although each of the three above-mentioned conceptions reveals something about emergency situations, none of them is satisfactory because they suffer from theoretical shortcomings. Two shortcomings are to be pointed out here. The first is the inability of at least some of them to explain some examples of extraordinary regimes that exist in modern states. The second is an oversight of the possibility of legal reasoning in constitutionalised legal orders, which can be applied to everything – including emergency situations.

The first drawback stems from the unclear conceptual apparatus used by the conceptions. All three conceptions use the abstract concept of an emergency situation without referring to the legal regimes governing different types of emergency situations. Talking about an emergency situation, it is generally accepted that the respective situation is not the regular state of affairs. Seeing that it is not a regular state of affairs, what makes it exceptional and what are the consequences of this non-regular situation? One abstract explanation is that it is a kind of threat that requires "actions by the state not permissible when normal conditions exist"[18] and that these actions can be seen as some kind of extra-legal type. A paradigmatic example of this type of situation, which is often shared when thinking about emergency situations, is the situation considered by the constitution as a threat to the survival of the state and results in suspension of human rights in a non-defined way, followed by strengthening of executive power. However, this understanding of the emergency situation does not cover all possible cases.

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[17] See Fuller's explanation in Fuller L. L. 1978, p. 369.

[18] Greene A. Emergency Powers in a Time of Pandemic. Bristol: Bristol University Press, 2021, p. 30.

Specifically, modern states have already established legislative extraordinary regimes for various situations that do not threaten the survival of the order but that do threaten the regular functioning of the order and certain values that the order protects. The examples are legislative extraordinary regimes for situations of natural disasters, such as floods and fires, for situations of mass influx of people across state borders or for situations that threaten health.[19] These regimes regulate the said emergency situations in such a way that they prescribe the rules for the activation and termination of the legal regime and the rules for the consequences when the regime is activated. Among these consequences are the rights and obligations of persons subjected to these regimes. The fact of legislative regulation of emergency situations does not mean that this process is necessarily valuable.[20] However, this fact should be considered by the conceptions on emergency situations.

Thus, the first shortcoming of all conceptions is that they do not deal with the classification of emergency situations with regard to the existence of legislative emergency regimes. Additionally, the possibility of the existence of such regimes shakes the realistic conception more strongly. The realistic conception does not cover these legislative emergency regimes. According to Schmitt, as interpreted by Tracy B. Strong, "no pre-existing set of rules can be laid down to make explicit whether this situation "is" in actual reality an exception".[21] And in emergency situation, it is not possible to prescribe which measures should be taken. An emergency situation, according to a realistic conception, refers only to the constitutionally prescribed rule of establishing an emergency regime that endangers the state and the rule on the consequences of activating such a regime that enables the suspension of rights and the strengthening of the executive power for effective management.

On the other hand, legalistic and mixed conceptions are confirmed by the examples of legislative emergency situations that manifest the possibility of legally regulating all or at least some aspects of emergency situations. In addition, advocates of mixed conception can argue with concrete examples that some elements of these regimes are still in practice considered political. For example, the rules for activating at least some legal regimes in practice seem to be a matter of political decision. The response of the proponents of the legalistic conception on such issues can be to accept such a limit but at the same time not to give up their fundamental premise that everything can be regulated by law if the legislator so desires. It is the responses of these two conceptions to the *prima facie* "political questions" of legal regimes that point to the second theoretical shortcoming.

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[19] See Christian M. Gunther on regulating COVID-19 crisis through existing legal framework. Gunther C. M. Legal vs Extra-Legal Responses to Public Health Emergencies. European Journal of Health Law, 2022, Vol. 29, p. 142.

[20] See: Fatovic C. Emergencies and the Rule of Law. Oxford Research Encyclopaedias, Politics, 2019.

[21] Strong T. B. 2005, p. xiv.

The second shortcoming stems from the lack of respect for different types of legal reasoning in different legal orders. None of the three conceptions recognises the possibility of the existence of constitutionalised orders. Legal reasoning in this type of order includes the position that constitutional norms can be applicable to any aspect of social life, regardless of the specific statutory content.[22]

The realistic conception again suffers most from establishing the possibility of the existence of constitutionalised legal reasoning. This conception is based on the suspension of the constitution or the limited application of constitutional rules. Conversely, legalistic and mixed conceptions do not have a problem with the application of constitutional norms in emergency situations. However, they are more focused on rules while ignoring or weakening the application of constitutional principles to emergency situations. For example, the decision on the activation or non-activation of the extraordinary regime can be regulated by the rule on the establishment of the regime in such a way as to determine the legal authority empowered to establish such a regime, but without precisely determining the conditions for activation that would allow a regular legal assessment of the justification of activation or omission to activate. The EU, with its Member States, established this type of an activation norm for a temporary protection extraordinary regime.[23] This state of positive law could convince advocates of a legalistic or mixed conception that, in that case, one cannot legally reason about the decision or failure to activate. The former could argue that the law does not regulate this decision in a way that is legally controlled even though it could, while the latter would argue that it should not have been regulated in such a way because it is a political issue. However, in constitutionalised orders, these decisions can be evaluated by legal reasoning on the basis of constitutional principles, such as the principle of the rule of law or the principle of equality, and by applying the doctrine of statutory reasonableness and the doctrine of balancing.[24] Similar to this idea on constitutionalised reasoning,[25] as opposed to purely legalistic reasoning, is the thinking of Dyzenhaus when he claims that Kelsen's identity thesis does not include the concept of a substantive rule of law that contains constitutional principles.[26]

The mixed conception is not interested in the expansion of law into the realm of politics, because it accepts the natural division of political and legal. By contrast, the proponents of a legalistic approach do not oppose this expansion, but they

[22] See: Guastini R. La sintassi del diritto [The Syntax of Law]. Seconda edizione. Torino: Giappichelli, 2014.

[23] See reconstruction of this norm in: Kresic M. A Refugee Crisis at the Doorstep and a Neglected Solution. Three Misconceptions about the Temporary Protection Directive. Croatian Academy of Legal Sciences Yearbook, 2021. Vol. XII, No. 1, pp. 153–157.

[24] Kresic M. 2021, p. 157.

[25] For the structure of attitudes in constitutionalized legal reasoning see: Kresic M. Process, Consequences and Means of (de)constitutionalization: a Reconstruction of Guastini's Concept of Constitutionalization. Diritto & Questioni Pubbliche, 2019, Vol. XIX, No. 2, pp. 107–132.

[26] Dyzenhaus D. 2006, pp. 2010 and 2018.

believe that the relationship between law and politics depends on set legal rules. They can easily accept that due to existing legal texts, constitutional norms and constitutionalising doctrines are not consistently applicable to emergency regimes, especially with regard to the general provisions on constitutional emergency regimes. Following this line of thinking, an interesting point is that Dyzenhaus believes that "Kelsen's legal positivism offered no legal resource which could be used to resist a fascist seizure of power in Germany".[27] The consistent application of legal reasoning in constitutionalised orders does not allow legislation to evade the constitution; therefore, the doctrines necessary for judging decisions always remain available during judicial review. Likewise, the legalistic conception, which is not complemented by views on the constitutionalised order, remains within the framework of thinking about constitutional norms as constitutional limitations and fails to think about these norms as constitutional guidance for the legislator.

3. Theoretical advancements of conceptions and comprehensive theory of emergency situations

The aforementioned dissatisfaction with the existing theoretical framework for the explanation of emergency situations requires a more precise clarification of concepts and an explanation of the influence of the constitutionalised order on emergency situations. The proposal for improving all three conceptions is, as follows: to make a classification of legal regimes and types of orders, and to consider the potential of constitutionalised legal reasoning in emergency situations.

The concept of an emergency situation is not sufficiently clear. To better understand the various normative arrangements, a more convenient approach is to first define extraordinary regimes in contrast to regular regimes and then, among extraordinary regimes, make a distinction between the constitutional institute of a state of emergency and the legislative institutes of emergency situations in a narrow sense.

The concept of legal order should recognise the difference between certain types of order, especially constitutionalised and non-constitutionalised types. Extraordinary regimes in constitutionalised orders are subject to constitutional norms on the fundamental values of the order. Legal reasoning based on these values and specific doctrines on reasonable statutes and balancing should always be used to assess the legality of decision-making during crises caused by emergency situations.

The realistic conception can retain its place in the debate if it is limited to the constitutional institution of the state of emergency in orders that are not constitutionalised. Legalist and mixed conceptions can retain their places in the debate in relation to all kinds of extraordinary regimes in non-constitutionalised orders. All three conceptions should recognise the possibility

[27] Dyzenhaus D. 1997, p. 5.

of a specific influence of law on emergency situations in constitutionalised orders. In this way, the creation of a more comprehensive theory of emergency situations is possible, in which each of the three elaborated approaches has its place, and the fourth one is added.

The first advantage of this comprehensive theory is that it points to the limited place of each of the three conceptions presented in the debate on emergency situations. Another advantage is that the comprehensive theory better reflects the situation in modern states in which legislative emergency regimes already exist and constitutionalising trends mark at least some orders. The third advantage is that this theory indicates the possibility of a fourth approach that is possible in constitutionalised legal orders. The approach of constitutional reasoning enables a *de lege lata* analysis that differs from analyses based on the three presented conceptions. Namely, the realistic conception rejects the influence of law on politics, while the mixed one partially accepts it. The legalistic conception accepts that political questions can be regulated by law. However, without adopting constitutionalising positions, it does not apply constitutional principles and specific doctrines to all extraordinary regimes. It does not do so when formulated legal norms seemingly give priority to politics over law. In contrast to all three conceptions, the approach of constitutional reasoning permeates politics with law and interprets every situation through law. In addition, constitutionalised legal reasoning enables a better *de lege ferenda* analysis, because starting from constitutional values and specific doctrines, it can better point out the possible shortcomings of existing regimes in future emergency situations. The peculiarity of this type of *de lege ferenda* analysis is that constitutionalised legal reasoning looks at constitutional norms not only as limitations but also as guidance for the legislator.

Finally, the fourth advantage of the comprehensive theory is that it indicates how different conceptions of law reflect on the understanding of emergency situations. The existence of this type of connection is true for the debate of legal theorists and it is probably also true for the debates of legal practitioners and citizens, although they might be unaware of this connection. For this reason, awareness of this connection enables a better approach to solving practical problems. It makes our descriptions of reality better. It also focuses legal practitioners and citizens on a search for deeper roots of their prescriptive statements on emergency situations. These statements are conditioned by attitudes towards emergency situations, and these attitudes are conditioned by beliefs we have about emergency situations. These attitudes and beliefs are presented in the political arena as part of commitments to certain values. Part of making "any package of commitments viable is the explanation and justification of each as forming part of a coherent whole".[28] No coherent whole can exist without some conception of law.

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[28] Dyzenhaus D. 1997, p. 5.

Conclusions

In the previous sections, the author of the article first demonstrated the possibility of understanding the emergency situation through three conceptions of law, constructed by using some insights from legal theorists. The author then pointed out the shortcomings of these conceptions and suggested how their position in the debate on emergency situations can be improved. Realistic, legalistic and mixed conceptions suffer from the lack of consideration of some already existing emergency regimes and the possibility of the existence of constitutionalised orders. The discussion on emergency situations should start with the classification of emergency regimes and legal orders and should recognise the possibility of constitutionalised legal reasoning. In this way, the creation of a more comprehensive theory of emergency situations is possible in which each of the three elaborated approaches has its place and the fourth one can be added. The comprehensive theory of the emergency situation has many theoretical and practical advantages: it indicates the place of each conception in the consideration of reality, it better corresponds to reality, it introduces a new conception which can be useful for cognition of reality and it brings awareness to the connection between the conception of law and the understanding of specific legal institutes.

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