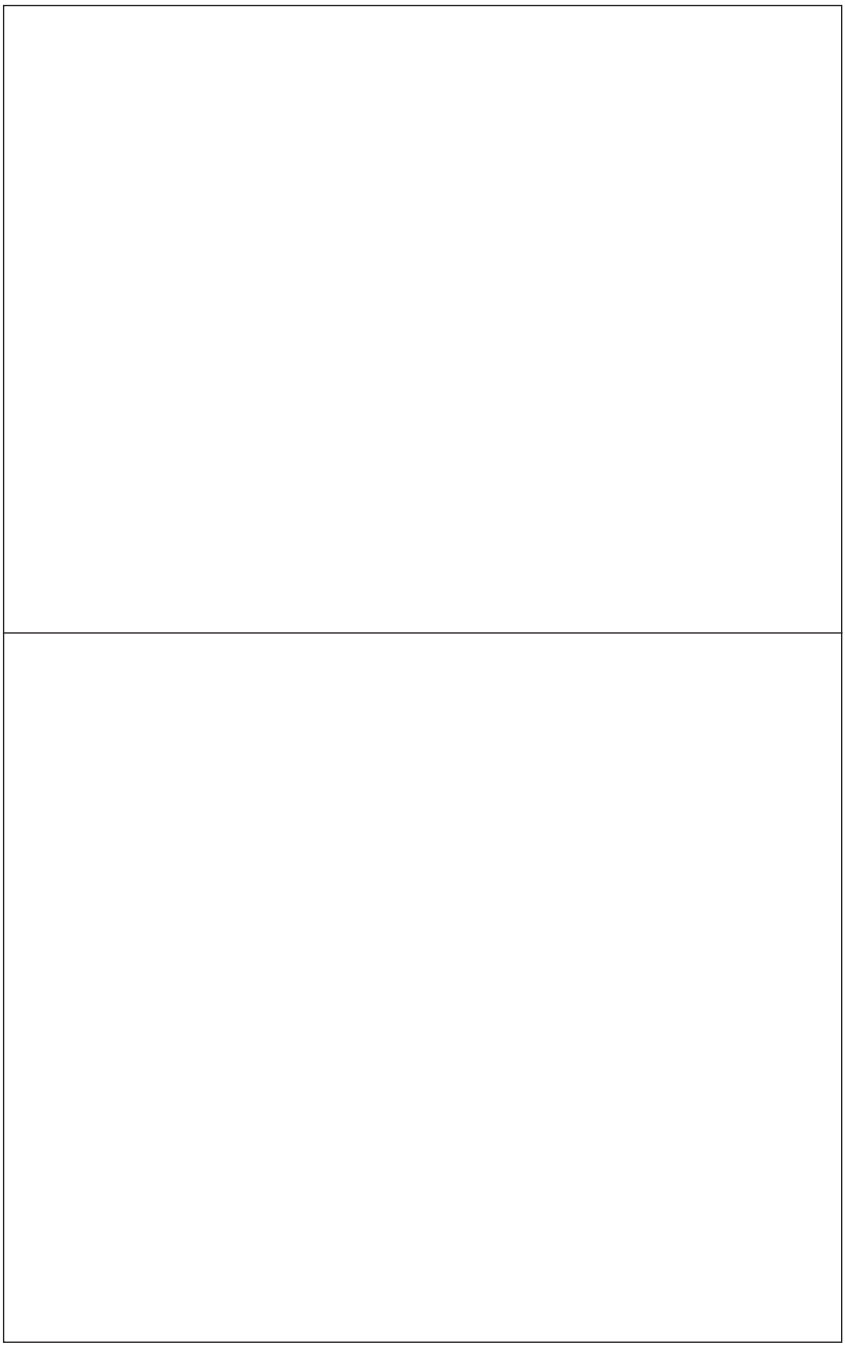
Jakub Jinek | Lukáš Kollert (eds.)

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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