

## BOOK REVIEW

### Banishing the Rhetoric of the Exception

**Nomi Claire Lazar** 2009. *States of Emergency in Liberal Democracies*  
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#### Anna Kronlund

The debates surrounding emergency powers have recently become an increasingly popular topic in the field of political theory and constitutional law. At present, it is typical to refer especially to Carl Schmitt's writings of *Ausnahmezustand* in the Weimar Republic context. Nomi Claire Lazar in her recent book, *States of Emergency in Liberal Democracies*, intends, however, to reject the norm /exception dichotomy that seems to dominate both historical and contemporary discussions of emergency powers and instead to emphasize the continuity between normal and exceptional times in order to make the use of emergency powers more accountable and safer.

Nomi Claire Lazar's book is one example of how the traditional topic of emergency powers in constitutional law and political theory has lately attracted new interpretations and viewpoints. A recent article by Patricia Mindus<sup>1</sup> also tackles this question with a fresh point of view by analyzing the effort to link emergencies and constitutional norms. Mindus emphasizes in her article both a detailed systematic analysis and an empirical investigation with special reference to debates in Sweden. It is worth remembering that empirical study is needed if we do not want to settle for a less explicit and abstract level

## BOOK REVIEW

of discussions of emergency powers. Legal scholars usually tackle the notion of emergency powers but generally tend to ignore looking at discussions surrounding emergency powers, for example, in the parliaments because they are not considered interesting as such. This is, however, something to disagree with because parliamentary debates can provide constituted empirical data that is needed in order to understand how emergency powers can be best managed and dealt with.

Lazar's book uses two main themes in order to show that there can be continuity between the exceptional and normal times. The first example to illustrate this idea is to show that John Locke's general approach to emergency powers makes possible "a flexible liberal response to emergencies" that emphasizes continuity in both accountability and principles. (67) For Lazar, Locke's approach to emergency powers seems to provide a way for by-passing the norm /exception dichotomy by emphasizing "continuity of principle and the instrumentality and partial continuity of institutions." (73-74) Lazar's other point is to show that most researchers have misunderstood the dictatorship institution in Ancient Rome. Against the backdrop of the dictatorship tradition Lazar emphasizes that "no sovereign can act without regard to informal power and informal constraint." (133) According to Lazar, the Roman example illustrates that a dictator's powers were limited both formally and informally. Lazar mentions that "through the acquisition of informal powers, several dictators succeeded in legislating and even altering the constitution." The example of dictatorship in Ancient Rome proves for Lazar that there can be continuity between normal and exceptional times and we should think "beyond the rule of law rhetoric" when considering the capability of emergency powers in liberal democratic context. (121-122) Lazar especially argues that there should be strong continuities between emergency and everyday relationships between justice and order. These continuities, mentioned in the book, should be descriptive, moral and institutional in order to make political leaders accountable for the same standards to which they are usually held in executing their duties. (4-5, 50)

The idea of emergency powers in general is not rejected in the book but Lazar insists that emergency powers must be "minimally offensive to liberal principles" and "maximally effective [...] while promoting safety and the primary values the rule of law is intended to promote." (134) To escape the norm /exception dichotomy, Lazar

argues, that liberal democracy can remain liberal democratic even while the powers are concentrated and rights derogated. Therefore, the main intention in the book is to blur the distinction between the exception and norm. This means, according to Lazar, that both emergency and normal situations should be influenced by corresponding mechanisms of power and although these mechanisms may shift or change, they do not evaporate in times of crisis.<sup>2</sup>

Lazar emphasizes both informal and extra-institutional means of restricting and limiting arbitrary exercise of power. These informal restraints of power that Lazar mentions could be for instance honor and conscience, electoral success, the likelihood of detection, and availability of funds. (131–134) Further, formal norms, some specific to the emergency and others continuous, can be combined to produce accountability. In relation to this Lazar mentions elections, courts, tribunal oversights and so forth. (146–147) In emergencies, formal norms can surround emergency provisions. For Lazar this means that certain criteria for declarations of emergency circumstances and of each power invoked should be set out in advance and that in the end the use of emergency powers will be judged. (156) Concentrating mainly on the principle of the rule of law, we tend to ignore the framework of ordinary politics that regulate the exercise of powers in times of crisis as well.

Lazar also implies that we should not only concentrate on the institutional side of emergency powers: the office and the office holder are not the same thing. Even though the law regulates the capabilities and responsibilities of an institution during normal and exceptional times, the power of the office and the office-holder does not necessarily coincide. (130) Therefore the essential question to consider is how the charisma and other personal powers influence the successful use of emergency powers? It is not enough to evaluate institutions in their sociopolitical context; Lazar indicates we should recognize that individual political skills and charisma can substitute “even the most genius constitutional thinking.” (131) Following Locke’s idea, the prestige would be one useful example of informal restriction for the extensive use of emergency powers. On the other hand there are several examples of how personal characterizations can be used against the idea of responsible and appropriate use of emergency powers. In their recent article on constitutional dictatorship, Balkin & Levinson<sup>3</sup> argue that the U.S. president has a very strong element of the

## BOOK REVIEW

plebiscitary figure. For Balkin & Levinson<sup>4</sup> “tendencies that Weber identified toward an increasingly plebiscitarian democracy with a powerful executive and a weakened legislature” well illustrates aspects of the contemporary constitutional system in the United States. The plebiscitary presidency in the United States seems to refer particularly to situations, in which the president claims through election, to act and speak on the behalf of the whole nation.<sup>5</sup>

For Lazar, while no set of emergency powers can escape the many difficulties posed by different exceptional situations;

good institutions should set up formal, public criteria for the sound use of emergency powers and should at a minimum invoke an automatic mechanisms for their enforcement (155).

According to Lazar, such criteria would be both procedural and normative. These normative principles might involve, for example, the critical evaluation of the “necessity principle” or the “urgency and scale principle.” (155) Lazar observes that we know very little about the empirical side of emergencies: about what kinds of political circumstances work best with different emergency institutions and the kinds of existing institutional structures available for the use of emergency powers. (157) The book encourages us to actively discuss and evaluate emergencies and the use of emergency powers on both an *ex ante* and an *ex post facto* basis. After “9/11” there were a lot of discussions in the United States surrounding emergency powers but no one, to my knowledge, has seriously suggested that emergency power should be included to the U.S. Constitution or that the National Emergencies Act of 1976 should be revised or even applied as it was originally supposed to. It seems also implausible that, in the context of the United States, emergencies would be defined beforehand within the statutory or constitutional framework. This would be considered against the president’s generally approved authority to act flexibly in times of crisis. Lazar’s idea of constraints of emergency powers assumes that there would be a body/institution to examine and evaluate the use of emergency powers before and after an emergency has occurred. The Supreme Court evaluates the use of emergency powers in the United States regularly as well as the voters at the end of the electoral mandate. But in the 1970s the then Secretary of State William P. Rogers already presented the idea of establishing a

joint congressional committee, which would act as consultative body with the executive in emergency situations, could be suitable for this kind of purposes.<sup>6</sup>

Another essential question that the author also recognizes in the book is how to prepare for exceptional situations without shifting powers from the legislative to the executive? There are of course many examples of using emergency powers that take into account the role of the legislature in times of crisis like the state of siege institution in France or the German Basic Law. However, the problem has always been how to secure the role of the deliberative institution, when dealing with an emergency situation that expects quick and decisive actions. For instance in the United States, where the separation of powers system and the checks and balances are expected to preserve the constitutional order, Congress is often referred to as the main barrier for the prevention of the executive power from becoming an absolute power in times of crisis, not to forget the judiciary. The Constitution remains silent on the issue and makes no reference for the suspension of any of its principles during times of crisis, other than the *habeas corpus* rule. When emergency powers have not been pre-defined beforehand, it is customary that Congress grants emergency powers to the president. Another option is that the president builds his own jurisdiction to meet the challenge of the emergency by issuing executive orders or regulations mainly based on his "inherent" powers implied in the second article of the Constitution. One of the most important authorities for the U.S. president is the authority to define the political reality.<sup>7</sup> For instance, the National Emergencies Act of 1976 states that the president declares the national emergency. Therefore, it is problematic or even impossible for Congress to dispute the president's interpretation of the political situation and this means that the Congress basically will authorize the president with new powers to meet the challenge.

Further, the idea of the plebiscitary presidency together with the situation when the same party controls both the majority of the Congress and White House makes presenting the opposite view almost impossible. For instance, immediately after "9/11", there was a lack of dissensus both in the Congress and among the public. Congress could always rely on its oversight authorities, but it seems that when a national emergency declaration has been made, the Congress (and the Court) often faces difficulties resisting the executive branch initia-

## BOOK REVIEW

tives. The biggest flaw in the National Emergencies Act (1976) legislation is that it authorizes the president alone to declare the national emergency. Another, inconvenience concerning the legislation is to give to the Congress the burden to end existing national emergencies.<sup>8</sup> This would be very difficult to enforce in practice especially when the president's party has the majority in the Congress. Due to the Supreme Court decision in *Ins. v. Chadha* (1983), only joint resolutions that are exposed to veto, can nowadays be used to terminate declarations of national emergency made by the president. Lazar, does not provide a direct answer to the question of how to secure the role of the deliberative institutions in times of crisis, but mentions that

after the fact, when political leaders submit to judgment, there will be plenty of time for deliberation on questions of guilt and responsibility (107).

Following Lazar's idea, it seems that constitutions in general should be defined so well that they minimize crises in a way that does not cause any further problems. Therefore, the legislators have a moral obligation to know what kinds of emergency powers can be optimized both safety and efficiency. (107-108)

Lazar's main point is to demonstrate that an emergency is not necessarily a state of exception and that we should not necessarily consider exceptionalism "as the framework through which we understand emergency powers." (136) It is true that we should be aware of (mis)conceptualizing things and situations. Lazar correctly observes that because of different kinds of normative constraints, which can be applied in times of crisis, "any moment of exception" is thus primarily "a normative choice and not an existential fact." (154) The necessity rhetoric is a very important tool and can be easily misused. It is often said that the state of exception remains between law and politics. Lazar, however, emphasizes that an "emergency" remains in the crossroad of law, morals, and politics. (161) Therefore, the use of emergency powers is not encircled only with legal controls but social and political controls as well.

Lazar's book offers a relatively provocative argument to a very traditional topic in constitutional law and political theory. More questions about the book can be, however, raised like how to evaluate the notion of public good and further public interests for being successful

constraints for the use of emergency powers; how to avoid the assumption that emergency powers seems to expect a specific political context where they are evaluated; and how mechanisms of control and supervision against the misuse of power – such as judicial review and parliamentary oversight can avoid the dilemma of partisanship and “rally round the flag” phenomenon? It seems that more empirical research, rather than normative, is needed to solve the basic problems related to emergency powers: what happens when the national emergency declaration has been made and why?

## BOOK REVIEW

### NOTES

1. Mindus, Patricia. 2010. Sorting Out Modern Constitutional Provisions on Emergency. A Taxonomic Framework. *Redescriptions* 14, 2010, 107-132.
2. In a similar vein Kim Lane Scheppele argues that emergencies should be normalized into the constitutional systems and that already when planning the constitutions, the founders should confirm that the normal governmental organizations have the authorities to meet the challenge of emergencies available all the time in order to make sure that there never exist a need to suspend the basic principles of the constitution. Cf. Scheppele, Kim Lane. 2010. Exceptions That Prove the Rule. Embedding Emergency Government in Everyday Constitutional Life, in Jeffrey K. Tulis & Stephen Macedo (ed.), *The Limits of Constitutional Democracy*, New Jersey: Princeton UP, 124-154.
3. Balkin, Jack M. & Levinson, Sanford. 2010. Constitutional Dictatorship: Its Dangers and Its Design. *Minnesota Law Review*. 94, 1790-1865.
4. *Ibid.*, 1853.
5. For a discussion of the idea of the plebiscitary presidency in the United States, see e.g. Lowi, Theodore J. 1985. Presidential Power: Restoring The Balance. *Political Science Quarterly*. Vol. 100 (No. 2, Summer 1985), 185-213.
6. Department of State Publications 8591; General Foreign Policy Series 255. Current Foreign Policy: Congress, the President, and the War Powers 1971, 8.
7. See for instance Balkin & Levinson 2010, 1844, 1857.
8. According to the National Emergencies Act of 1976 (*Public Law* 94-412/50 U.S.C. 1601-1651), any national emergency shall terminate after one-year period except if not further continued by the president. Emergency declarations can be terminated earlier by the congress through joint resolution or by the president.