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German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse

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A. Introduction

A foreign jurist, on looking into the German literature on constitutional law, will soon and suddenly be struck by a peculiarity of this scholarship: the unusually strong emphasis on a marginal area of constitutional law, namely, the state of emergency.[1] The inquiry is, of course, well-known in other countries, but the passion for, and the theoretical effort expended on, this marginal area is unique to Germany.

However, this disinterest on the part of other constitutional lawyers, and the recent decline in interest on Germany's part, could yet change, turning the marginal area into a highly current issue. Combating terrorism raises questions for which the German patterns of argumentation, fine-tuned in the academic debate on the law of state of emergency, may provide a useful framework for discussion. The questions arising in the context of the struggle against terrorism test the limits of positive regulations in extreme situations, leading ultimately to the same underlying dilemma as the law on state of emergency, though with different terminology. In this sense, the constellation of legal issues involved in combating terrorism could be considered as the law on state of emergency "incognito." However, the various argumentative patterns for law on state of emergency have not yet been directly transferred into the very timely legal discourse on counterterrorism (and no such attempt is made here), but such a transfer of argumentation suggests itself. As such, the topic has a "potential currency," even if traditional issues of state of emergency themselves no longer count among the most current issues.

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This article discusses the previous insights and conclusions of the German literature and Germany's positive constitutional law, thereby hopefully identifying a few dangerous and inconsistent dead-ends in the legal argumentation on state of emergency. This, in turn, might also serve as a starting point for further discussion in other countries.

B. Typical Examples Illustrating the Fundamental Dilemma of Law on State of Emergency

Certain situations can so *threaten* the constitutional(ity of the) state that the binding constitutional provisions cannot, or at least, not with the necessary speed,[2] handle state of emergencies sufficiently.[3] The possibility of such situations, thus, requires the adoption of regulations (laws on state of emergency), which permit circumvention of such binding provisions (effectivity), but which also safeguard against abuse of such circumvention.[4] The fundamental dilemma of law on state of emergency asks where the balance is to be struck between these two needs.[5] The actual objective of state of emergency law should be to secure the route back to the "normal" constitutional state.[6] A basic, but often ignored, preliminary to this dilemma is the question of how to deal with the element of *threat*. First, the objects of protection should be clearly determined. Not each and every provision of the constitution need be protected by the possibility of state of emergency; rather, only fundamental principles and self-protective mechanisms require state of emergency. Second, it should be clear that the prospective actualization of the threat must reach a certain level of probability. The danger of an unexpected war or a catastrophic terrorist attack is always greater than zero;[7] however, this does not mean every nation should be in a perpetual state of emergency.

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[2] *See* CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT 266 (2000) (discussing the time factor, that is, urgency).

[3] This must be kept separate from an actual disruption of the constitution (*Verfassungsstörung*), which describes a situation where the upheaval stems from the state's *internal* sphere (for instance, the parliamentary legislature's self-dissolution in the last years of the Weimar Republic). *See* Johannes Heckel, *Diktatur, Notverordnungsrecht, Staatsnotstand*, 22 ARCHIV DES ÖFFENTLICHEN RECHTS 257, 310 (1932). This article analyzes only the state of emergency, excluding the constellation of constitutional disruption.

[4] *See* FRIEDRICH KOJA, ALLGEMEINE STAATSLEHRE 397 (1993).

[5] *See* Paul Kirchhof, *Die Zulässigkeit des Einsatzes staatlicher Gewalt in Ausnahmesituationen*, *in* DIE ZULÄSSIGKEIT DES EINSATZES STAATLICHER GEWALT IN AUSNAHMESITUATIONEN 84 (1976).

[6] Konrad Hesse, *Staatsnotstand und Staatsnotrecht*, *in* 5 STAATSLEXIKON DER GÖRRES-GESELLSCHAFT 202 (7th ed. 1989); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 303 (20th ed. 1999).

[7] "History is full of wars which everyone knew would never break out" (Hungarian proverb).

In order to dissect the dilemma's constellation more precisely, the following analysis compares three formal constitutional regimes for state of emergency, looking to their respective circumventions and safeguards against abuse: the Hungarian Constitution (HC), the Federal Republic of Germany's *Grundgesetz* (GG – Basic Law or Constitution), and the Constitution of the Weimar Republic (WRC). The inclusion of the latter is unavoidable because the historical experience[8] underlies both the German state of emergency rules currently in force and most scholarly opinions. Furthermore, the current state of law, as a conscious counterpoint to the Weimar Republic, cannot be comprehensibly explained without such reference. Hungary, in contrast, is included because its approach adopts a similar strategy to Germany's (i.e. similarly detailed and similarly structured regulations on state of emergency), but also for its use, to some degree, of other regulatory tactics. A wholly divergent solution, as a comparative case, like England or France, seems unlikely to be particularly instructive, because the comparison would inescapably yield a commonplace conclusion that they are fundamentally different, due to the basic differences of such regulation. The selection here, hopefully, sheds new light on the individual provisions of the *Grundgesetz*, using similar, but still distinct, approaches.

The aim of the comparison is not completeness, but a depiction of the fundamental dilemma. Always considering the two mentioned poles, effectiveness and danger of abuse, this article will analyze typical examples.[9]

I. Inception, Termination, and Stages of State of Emergency

1. Inception

Because a state of emergency triggers a *dangerous* legal mechanism that is very susceptible to abuse, it is appropriate not only to *precisely* determine its elements,[10]

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[8] The emergency powers were invoked extremely often during the Weimar Republic, a fact that was both cause by and was a contributing factor to the instable nature of the Republic. In 1932 these emergency powers were used to dispense the autonomy of Prussia (a *Land* then led by Social Democrats as opposed to the right-wing nationalist central government), an important step towards the failure of the democratic Weimar Republic and resulting finally in the national-socialist takeover. The *Reichstag* was being dissolved at that time so it could not deal with the problem, and the vague and imprecise emergency provisions of the WRC did not allow (or did not force) the *Staatsgerichtshof* (Constitutional Court) either to restore the power of the democratically elected Social Democratic Prussian cabinet. *See* HENNING GRUND, "PREUßENSCHLAG" UND STAATSGERICHTSHOF IM JAHRE 1932 (1976).

[9] *See* KLAUS STERN, 2 DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 1303 (1980).

[10] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-A (1) [state of defense or external emergency] ("Any determination that the federal territory is under attack by armed force or imminently

but also to formalize its inception.[11] That is, the preconditions should be linked to a *definite* procedure for proclamation of state of emergency. Among the three examples, only the Weimar Republic's Constitution completely forgoes such a procedure for the sake of efficacy.[12] The following, therefore, only considers Hungarian and contemporary German law on state of emergency regarding this point. The *Grundgesetz* foresees a formal proclamation for an *external* but not for an *internal* emergency.[13] This stricter and, for external emergencies, peculiarly uncharacteristic handling of internal threats, referring to "the existence or free democratic basic order of the Federation or of a Land,"[14] can be explained by the grim experiences of the Weimar Republic and well-justified fear of the evil ghosts

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threatened with such an attack (state of defense) shall be made by the *Bundestag* with the consent of the *Bundesrat*. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the *Bundestag*."). *See also id.* at art. 91 (1) [internal emergency] ("In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, a Land may call upon police forces of other *Länder*, or upon personnel and facilities of other administrative authorities and of the Federal Border Police."); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19 (3) (h) & (i) ("Within [its] sphere of authority, the Parliament shall … (h) declare a state of national crisis and establish the National Defense Council, in the case of war, or imminent danger of armed attack by a foreign power (danger of war); (i) declare a state of emergency, in the case of armed actions aimed at overturning constitutional order or at the acquisition of exclusive control of public power, in the case of acts of violence committed by force of arms or by armed groups which gravely endanger lives and property on a mass scale, and in the event of natural or industrial disaster; …"); DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimarer Reichsverfassung] [WRC – Weimar Republic Constitution] article 48 ("(1) If a *Land* does not fulfill the obligations laid upon it by the *Reich* constitution or the *Reich* laws, the *Reich* President may use armed force to cause it to oblige. (2) In case public safety is seriously threatened or disturbed, the *Reich* President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114 [freedom of person], 115 [privacy], 117 [secrecy of post and phone], 118 [freedom of expression], 123 [freedom of assembly], 124 [freedom of association] and 154 [right of succession], partially or entirely. (3) The *Reich* President has to inform *Reichstag* immediately about all measures undertaken which are based on paragraphs 1 and 2 of this article. The measures have to be suspended immediately if *Reichstag* demands so. (4) If danger is imminent, the *Land* government may, for their specific territory, implement steps as described in paragraph 2. (5) These steps have to be suspended if so demanded by the Reich *President* or the *Reichstag*. Further details are provided by Reich law.").

[11] An accurate determination of the preconditions, in general, causes no small amount of difficulty, since it necessitates the prediction of situations that are by definition abnormal and therefore unpredictable and problematic to reduce to precise preconditions. *See* STERN, *supra* note 9, at 1326.

[12] *See* DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimarer Reichsverfassung] [WRC – Weimar Republic Constitution] art. 48 (2). *See* GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHES VOM 11. AUGUST 1919, at Art. 48, margin note 7 (14th ed. 1933) (discussing the deformalizing of law for exceptional circumstances).

[13] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 91.

[14] *See id.* at art. 91 (1).

of that history. The proclamation of state of emergency, if such a thing exists, generally takes place in the representative body of the people, specifically by a qualified majority. [15]

The requirement of such a proclamation, however, can be problematic in terms of *efficacy* due to the formality and the resultant loss of time. Thus, the proclamation can also, in case of urgency, be made by *other institutions*. In Hungary this other institution is the President,[16] and in Germany the Joint Committee of the two parliamentary chambers, the *Bundestag* and *Bundesrat*.[17]

Occasionally, even this simple procedure can be too time-consuming, so that the respective constitutions foresee, in order to manage an emergency *effectively,* the possibility of immediate measures *without any formal proclamation* of state of emergency. This dangerous option, however, is used only in case of an unexpected military attack.[18]

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[15] *See id*. at art. 115-A (1); *id.* at art. 80-A (1) ("If this Basic Law or a federal law respecting defense, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defense has been declared, shall be permissible only after the *Bundestag* has determined that a state of tension exists or has specifically approved such application. The determination of a state of tension and specific approval in the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12-A [need for compulsory military and alternative service] shall require a two-thirds majority of the votes cast."). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19 (3) (g), (h) & (i) ("Within [its] sphere of authority, the Parliament shall …(g) decide on the declaration of a state of war and on the conclusion of peace; …"); in conjunction with, *id*. at art. 19 (4) ("A majority of two-thirds of the votes of the Members of Parliament shall be required for the decisions specified in points g), h) and i) of Paragraph 3.").

[16] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/A (1) ("Should the Parliament be obstructed in reaching such decisions, the President of the Republic shall have the right to declare a state of war, a state of national crisis and establish the National Defense Council, or to declare a state of emergency.").

[17] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-A (2) ("If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the *Bundestag* or the *Bundestag* cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.").

[18] *See id.* at art. 115-A (4) ("If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit."). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/E (1) ("In the event that the territory of Hungary is subject to an unexpected attack by foreign armed units, immediate action shall, in accordance with the defense plan approved by the Government and the President of the Republic, be taken - with forces that are commensurate to the gravity of the attack and equipped for such a role - prior to the declaration of a state of emergency or a state of martial law in order to repel such attack, defend the territorial integrity

2. Termination

The termination of state of emergency is obviously regulated out of concern that the responsible institutions might "forget" to declare the emergency over and thereby retain their extraordinary powers. In this sense, the third sentence of article 115-L (2) GG foresees a termination of the state of defense "without delay," as soon as the conditions for its inception no longer exist.[19] Article 19/A HC contains a similar, although weaker provision.[20] With the formal termination of the state of emergency, all emergency restrictions on fundamental rights are automatically cancelled.[21]

As the Constitution of the Weimar Republic did not contemplate a formal inception, it, of course, also contained no provisions as to its termination.

3. Stages

Varying stages or types of states of emergency are provided under the principle of proportionality.[22] Thereby, the concentration of powers is limited to the level and manner that is absolutely necessary. This seems to be a useful means to find a balance between efficacy (the bigger the danger, the bigger the emergency powers) and fear of abuse (the smaller the danger, the smaller the emergency powers).

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of the country with the active air and air defense forces of the Hungarian and allied armed forces, ensure constitutional order and the security of lives and property, protect public order and safety.").

[19] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-L (2) ("The *Bundestag*, with the consent of the *Bundesrat*, may at any time, by a decision to be promulgated by the Federal President, declare a state of defense terminated. The *Bundesrat* may demand that the *Bundestag* reach a decision on this question. A state of defense shall be declared terminated without delay if the conditions for determining it no longer exist.").

[20] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/A (4) ("At its first meeting following the end of the obstruction, the Parliament shall review the justification of the declaration of a state of war, state of national crisis or state of emergency, and shall rule on the legality of the measures taken. A majority of two-thirds of the votes of the Members of Parliament is required for this decision.").

[21] *See* INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 460 (1983).

[22] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] arts. 80-A, 91 & 115-A; A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19 (3) (h) & (i). *See also* WOLFGANG DALEKI, ARTIKEL 80-A DES GRUNDGESETZES UND DIE MAßNAHMEN ZUR ERHÖHUNG DER VERTEIDIGUNGSBEREITSCHAFT (1985) (analyzing in detail the German legal situation in this respect).

II. Organizational Regulation

The *effective* handling of an emergency requires the centralization of powers, which, in turn, might be carried out through the establishment of *new institutions*. Article 19/B(2) HC foresees a Defense Council, comprising the President (who is simultaneously the president of the Defense Council), the President of Parliament, the floor leaders of the political parties represented in Parliament, the Prime Minister, and the Ministers. The army's Chief of Staff has a right of consultation.[23] Neither the German *Grundgesetz* nor the Weimar Republic's Constitution provides for such an institution for state of emergency.[24]

But both the *Grundgesetz* and the Hungarian Constitution contain guarantees of institutional continuity, i.e. provisions prohibiting the dissolution, or termination, of term of office, as to certain institutions. These guarantees retain institutional checks and balances to counteract the dangers inherent in centralization of powers. Such checks may include the parliamentary bodies[25] as well as the constitutional courts.[26] The *Grundgesetz* also contains guarantees of institutional continuity in

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[23] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/C (2) ("The National Defense Council is chaired by the President of the Republic, and is composed of the following members: the Speaker of Parliament, the floor leaders of the political parties represented in Parliament, the Prime Minister, the Ministers, and the Chief of Staff of the Hungarian Armed Forces with the right of consultation.").

[24] Although the Joint Committee (article 115-E of the Basic Law) has practical functions only in a state of defense, it exists during the normal conditions as well.

[25] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-H (1) & (3) ("(1) Any legislative terms of the *Bundestag* or of *Land* parliaments due to expire during a state of defense shall end six months after the termination of the state of defense. … (3) The *Bundestag* shall not be dissolved while a state of defense exists."); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 28/A (1) & (2) ("(1) During a state of national crisis or a state of emergency the Parliament may neither declare its dissolution nor be dissolved. (2) Should a term of Parliament expire during a state of national crisis or a state of emergency, its mandate shall be extended until the cessation of the state of national crisis or state of emergency.").

[26] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-G ("Neither the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its judges may be impaired. The law governing the Federal Constitutional Court may be amended by a law enacted by the Joint Committee only insofar as the Federal Constitutional Court agrees is necessary to ensure that it can continue to perform its functions. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to this end. Determinations by the Federal Constitutional Court pursuant to the second and third sentences of this Article shall be made by a majority of the judges present."); *id.* at art. 115-H (1) ("…The term of office of a member of the Federal Constitutional Court due to expire during a state of defense shall end six months after the termination of the state of defense."); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/B (6) ("The operation of the Constitutional Court may not be restricted during a state of national crisis.").

external emergencies in the interests of efficacy. To protect the capability to act, the Federal President's term of office can be extended,[27] and the threshold for a vote of no confidence against the Federal Chancellor is raised.[28]

III. Regulation of Powers

Law on state of emergency rearranges, primarily in the interests of *efficacy,* the normal constitutional division of powers. Generally, this means *centralization*.

In the first instance, this occurs through a transfer of powers from one institution to another. Such a transfer is superfluous, of course, if the acting institution already has *carte blanche*.[29] But if this is not the case, as in Hungary and the Federal Republic of Germany, then questions of powers must be more specifically regulated. The *Grundgesetz*, in cases of external emergency, strengthens the federal government's legislative powers as against those of the *Länder*,[30] and those powers are then exercised by the Joint Committee.[31] The executive autonomy of the *Länder*

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[27] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-H (1) ("… A term of office of the Federal President due to expire during a state of defense, and the exercise of his functions by the President of the *Bundesrat* in case of the premature vacancy of his office, shall end nine months after the termination of the state of defense. …").

[28] *See id*. at art. 115-H (2) ("Should it be necessary for the Joint Committee to elect a new Federal Chancellor, it shall do so by the votes of a majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee may express its lack of confidence in the Federal Chancellor only by electing a successor by a two-thirds majority of its members.").

[29] DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimarer Reichsverfassung] [WRC – Weimar Republic Constitution] art. 48 (2) (empowering the President of the Reich to take "necessary" measures); *id*. at art. 48 (3) (similar as to the governments of the constituent *Länder*). *See* DANIEL ESKLONY, DAS RECHT DES INNEREN NOTSTANDS. VERFASSUNGSGESCHICHTLICHE ENTWICKLUNG UNTER BESONDERER BERÜCKSICHTIGUNG DER TATBESTANDLICHEN VORAUSSETZUNGEN VON NOTSTANDSMAßNAHMEN UND IHRER PARLAMENTARISCHER KONTROLLE 88 (2000). For this reason, some spoke of the "dictatorial power of the President of the Reich." *See, e.g.*, Richard Grau, *Die Diktaturgewalt des Reichspräsidenten*, *in* 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 274 (Gerhard Anschütz & Richard Thoma eds., 1932) (with further references).

[30] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-C (1) & (3) ("(1) The Federation shall have the right to legislate concurrently for a state of defense even with respect to matters within the legislative powers of the *Länder*. Such laws shall require the consent of the *Bundesrat*. … (3) To the extent necessary to repel an existing or imminently threatened attack, a federal law for a state of defense may, with the consent of the *Bundesrat*, regulate the administration and finances of the Federation and the *Länder* without regard to Titles VIII [Implementation of Federal Legislation, Federal Administration], VIIIa [Joint Responsibities] and X [Finance] of this Basic Law, provided that the viability of the *Länder*, municipalities, and associations of municipalities, especially with respect to financial matters, is assured.").

is practically suspended by subjugating the *Länder* to the federal government's control.[32] Fitting seamlessly into this line of centralized authority, in the state of defense, article 115-B GG transfers the power of command over the armed forces from the Federal Minister of Defense to the Federal Chancellor.[33] And article 87-A (3) & (4) GG permits an expansion of the armed forces' capacities in state of emergency, allowing the armed forces also to exercise authority in the domestic sphere (for example, in protection of civilian property).[34] The single *decentralizing* provision in Germany's federal redistribution of powers for state of emergency pertains to the case where the federal level is incapable of taking the necessary measures. Then the *Länder* are empowered to use the Federal Border Police.[35]

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[31] *See id.* at art. 115-E (1) ("If, during a state of defense, the Joint Committee by a two-thirds majority of the votes cast, which shall include at least a majority of its members, determines that insurmountable obstacles prevent the timely convening of the *Bundestag* or that the *Bundestag* cannot muster a quorum, the Joint Committee shall occupy the position of both the *Bundestag* and the *Bundesrat* and shall exercise their powers as a single body.").

[32] *See id*. at art. 91 (2) ("If the *Land* where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that *Land* and the police forces of other *Länder* under its own orders and deploy units of the Federal Border Police. Any such order shall be rescinded once the danger is removed, or at any time on the demand of the *Bundesrat*. If the danger extends beyond the territory of a single *Land*, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the Land governments; the first and second sentences of this paragraph shall not be affected by this provision."); *id.* at art. 115-F (1) and (2) ("(1) During a state of defense the Federal Government, to the extent circumstances require, may: 1. employ the Federal Border Police throughout the federal territory; 2. issue instructions not only to federal administrative authorities but also to Land governments and, if it deems the matter urgent, to *Land* authorities, and may delegate this power to members of *Land* governments designated by it. (2) The *Bundestag*, the *Bundesrat*, and the Joint Committee shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article."). *See* PETER EICHHORN, BESONDERE FORMEN DER ZUSAMMENARBEIT VON BUND UND LÄNDERN IM KATASTROPHENFALL UND ZUR AUFRECHTERHALTUNG DER INNEREN SICHERHEIT 54 (1998).

[33] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-B ("Upon the promulgation of a state of defense the power of command over the Armed Forces shall pass to the Federal Chancellor.").

[34] *See id.* at art. 87-A (3) and (4) ("During a state of defense or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defense mission. Moreover, during a state of defense or a state of tension, the Armed Forces may also be authorized to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities. (4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organized armed insurgents. Any such employment of the Armed Forces shall be discontinued if the *Bundestag* or the *Bundesrat* so demands.").

[35] *See id*. at art. 115-I (1) ("If the competent federal bodies are incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in particular areas of the federal territory, the *Land* governments or the authorities or representatives they

The Hungarian Constitution *centralizes* the powers of the President, of the executive branch, and partially of the parliament all in the above-mentioned Defense Council.[36] It only exercises the parliamentary powers over the military,[37] in addition to those parliamentary powers explicitly transferred by parliament.[38] The state of emergency centralization in Hungary is, thus, significantly stronger than in Germany because it is centralized in a single institution. And this institution primarily comprises members of the executive branch. The motivation for this perhaps excessive concentration, and therewith the motivation for making effectiveness absolute, would not be easily reconciled with the level of concentration stemming from the German regulatory philosophy, that is, from a predominant fear of abuse.

IV. Law Making

The respective legislative procedures, in certain cases, are expedited in the interests of speedy action. For such purposes, article 115-D GG opens the way for an accelerated procedure for urgent bills of law during a state of defense.[39] One finds

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designate shall be authorized, within their respective spheres of competence, to take the measures provided for in paragraph (1) of Article 115-F."). *See* HANS-JOACHIM RUNGWEBER, KOMPETENZVERSCHIEBUNGEN IM BEREICH DER EXEKUTIVE IM RAHMEN DER NOTSTANDSVERFASSUNG 44 (1979) (dissertation, University of Bochum) (on file at the Max Planck Institute for International Law, Heidelberg).

[36] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/B (3) ("The National Defense Council shall exercise (a) the powers transferred to it by the Parliament; (b) the powers of the President of the Republic; (c) the powers of the Government.").

[37] *See id*. at art. 19/B (1)(a) & (b).

[38] *See id*. at 19/B (1)(a) ("During a state of martial law, the National Defense Council shall decide (a) on the use of the armed forces abroad and within the country, the participation of the armed forces in peacekeeping missions, humanitarian operations in foreign theaters, and the stationing of armed forces in a foreign country, (b) on the deployment of foreign armed forces in Hungary or in other countries from the territory of Hungary, and on the stationing of foreign armed forces in Hungary, …").

[39] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-D ("(1) During a state of defense the federal legislative process shall be governed by the provisions of paragraphs (2) and (3) of this Article without regard to the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82 [details of legislative procedure with rather generous deadlines]. (2) Federal Government bills that the Government designates as urgent shall be forwarded to the *Bundesrat* at the same time as they are submitted to the *Bundestag*. The *Bundestag* and the *Bundesrat* shall debate such bills in joint session without delay. Insofar as the consent of the *Bundesrat* is necessary for any such bill to become law, a majority of its votes shall be required. Details shall be regulated by rules of procedure adopted by the *Bundestag* and requiring the consent of the *Bundesrat*…").

no counterpart provision in the constitutions of Hungary and the Weimar Republic, since legislative powers in a state of emergency are already centralized in a single institution, namely, the Defense Council (Hungary) or the President of the Reich (WRC), respectively, where the decision-making process is not cumbersome.

Law on state of emergency also touches on issues of the hierarchy of norms. In such a state, the normal hierarchy of norms can be abrogated owing to the "abnormal" situation.[40] However, the constitution's supremacy remains intact.[41] Furthermore, these exceptional regulations are either limited in duration, or their extension requires parliamentary approval.[42] The Weimar Republic Constitution did not contemplate any such limitations on emergency measures.[43]

V. Restriction of Fundamental Rights

A precarious line of inquiry is that of the restriction of fundamental rights. In state of emergency some level of restriction is unavoidable, but certain fundamental rights maintain full validity as a result of the *fear of abuse* of the emergency powers. This can take place by way of an exhaustive listing of the non-restricted

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[40] *See id*. at art. 115-K (1) ("Laws enacted in accordance with Articles 115c, 115e, and 115g [emergency laws], as well as statutory instruments issued on the basis of such laws, shall suspend the operation of incompatible law so long as they are in effect. This provision shall not apply to earlier law enacted pursuant to Articles 115c, 115e or 115g."). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/B (4) ("The National Defense Council may pass decrees, which may suspend the application of certain laws or which may deviate from the provisions of certain laws. Furthermore, it may take other extraordinary measures, but may not, however, suspend the application of the Constitution.").

[41] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-E (2) ("This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted by the Joint Committee. …"). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/B (4).

[42] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-K (2) & (3) ("(2) Laws adopted by the Joint Committee, as well as statutory instruments issued on the basis of such laws, shall cease to have effect no later than six months after the termination of a state of defense. (3) Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106, and 107 [provisions on joint responsibilities of the Federation and the *Länder*, and on fiscal powers] shall apply no longer than the end of the second fiscal year following the termination of a state of defense. After such termination they may, with the consent of the *Bundesrat*, be amended by a federal law so as to revert to the provisions of Titles VIIIa and X [titles on joint responsibilities of the Federation and the *Länder*, and on fiscal powers]."). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] arts. 19/B (5) & 19/C (4).

[43] *See* Carl Schmitt, *Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung*, *in* 1 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 63 (1924); Erwin Jacobi, *Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung*, *in* 1 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 117 ff. (1924).

fundamental rights.[44] Alternatively, the fundamental rights subject to restriction can be listed.[45] The current German provisions allow the restriction of human rights basically only in external emergencies.[46] In the *Grundgesetz*, specific regulation of emergency restrictions sometimes accompanies individual fundamental rights allowing restrictions also in an internal emergency.[47] Although, such scattered regulation hardly contributes to transparency.[48]

VI. Review

A paramount area of regulation comprises monitoring and review. Although this area can complicate efficacy, it is indispensable to the maintenance of the constitutional rule of law.

Even the highly lapidary Constitution of the Weimar Republic included such precautionary safeguards. First, the President of the Reich had a duty to inform the

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[44] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 8 (4) ("During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54-56. [life and human dignity, right to freedom and personal security, capability to have rights], Paragraphs (2)-(4) of Article 57. [presumption of innocence, fair trial, nullum crimen], Article 60. [freedom of conscience and religion], Articles 66-69. [equality of men and women, children's rights, national minority rights, prohibition to expel Hungarian citizens] and Article 70/E [social security].").

[45] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-C (2) ("To the extent required by circumstances during a state of defense, a federal law for a state of defense may: 1. make temporary provisions respecting compensation in the event of expropriation that deviate from the requirements of the second sentence of paragraph (3) of Article 14; 2. establish a time limit for deprivations of freedom different from that specified in the third sentence of paragraph (2) [Only a judge may rule upon the permissibility or continuation of any deprivation of freedom.] and the first sentence of paragraph (3) of Article 104 [Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections.], but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies."). *See also* DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimarer Reichsverfassung] [WRC – Weimar Republic Constitution] art. 48 (2).

[46] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 115-C (2).

[47] *See, e.g.*, *id*. at art. 11 (2) ("[Freedom of movement] may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.").

[48] R. Herzog, *Artikel 115c*, *in* DAS GRUNDGESETZ ¶ 27 (Maunz et al. eds., 1969).

Reichstag of the measures taken "without delay."[49] Second, the President had a duty to obey by withdrawing such measures on the demand of the *Reichstag*.[50] The current German and Hungarian constitutions have similar provisions.[51] Also, the necessity of reviewability, in part, motivated the above-mentioned guarantees of institutional continuity.

VII. Implications

It follows from the above, then, that individual rules for state of emergency belong either in the category of the principle of efficacy or in the category of fear of abuse. This dichotomy also explains the differences in regulatory detail. That is, one can generally say that emergency regulation is more detailed where the fear of abuse is (or was) greater.[52] The highly detailed German regulation currently in force has its roots in the lamentable experiences of the Weimar Republic, and the Hungarian provisions of 1989 find their roots in concerns drawing on the Polish example.[53] This, though, does not mean that law on state of emergency in modern constitutional states is always detailed. France is a case in point: article 16 of the French Constitution and article 48 WRC have similarly lapidary formulations and

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[49] *See* DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimarer Reichsverfassung] [WRC – Weimar Republic Constitution] art. 48 (2).

[50] *See id*. at art. 48(2).

[51] *See* GRUNDGESETZ [GG] [Basic Law or Constitution] art. 87-A (4) ("… Any … employment of the Armed Forces shall be discontinued if the *Bundestag* or the *Bundesrat* so demands"); *id*. at art. 91 (2) ("Any … order [placing the police of a *Land* and the police forces of other *Länder* under federal leading] shall be rescinded … any time on the demand of the *Bundesrat*."); *id*. at art. 115-F (2) ("The *Bundestag*, the *Bundesrat*, and the Joint Committee shall be informed without delay of the measures taken in [state of defense]."); *id*. at art. 115-L (1) ("The *Bundestag*, with the consent of the *Bundesrat*, may at any time repeal laws enacted by the Joint Committee. The *Bundesrat* may demand that the *Bundestag* reach a decision on this question. Any measures taken by the Joint Committee or by the Federal Government to avert a danger shall be rescinded if the *Bundestag* and the *Bundesrat* so decide."). *See also* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [HC - Constitution of the Republic of Hungary] art. 19/C (3) ("The President of the Republic shall immediately inform the Speaker of Parliament of any emergency measures that have been introduced. The Parliament or, should the Parliament be obstructed, the Parliamentary Defense Committee shall remain in session during a state of emergency. The Parliament, or the Parliamentary Defense Committee, shall have the right to suspend emergency measures introduced by the President of the Republic.").

[52] *See* FRIEDRICH KOJA, DER STAATSNOTSTAND ALS RECHTSBEGRIFF 15 (1979) (noting that it is logical that, wherever the traditions of democracy and the rule of law are not strong, precise regulation is especially important).

[53] In December 1981, General Jaruzelski declared martial law in Poland so as to quash the democratic oppositional movement. *See* INTERNATIONAL COMMISSION OF JURISTS, *supra* note 21, at 86.

similar regulatory techniques.[54] A given legal order's decision regarding the detail necessary to achieve efficacy always results from this balancing of legal interests in light of historical experiences and the ability to learn from those experiences.[55] Here, as elsewhere in balancing legal interests between efficacy and constitutional normativity, the principle of proportionality facilitates the finding of an appropriate solution. This must be in terms of not only the level of detail, but also the specific means of empowerment.[56] That is, the greater the disruption the greater means and the fewer obstructions there should be.[57]

This balancing of legal interests, however, can only be carried out, if constitutional normativity is truly a substantive legal interest. Where state power is already unlimited, additional empowerment is superfluous, thus, the concept of state of emergency only makes sense in a *constitutional* state.[58] This is why many dictatorships do not bother to adopt such regulation. [59]

The opposite extreme is to dispense wholly with emergency empowerments for fear of abuse. The constitutional charter of Serbia and Montenegro offers an example of this (irrational) solution: the federal level provides for no state of emergency.[60] In this case, the smaller constituent's (Montenegro) fear of abuse,

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[54] *See* 1958 CONST. art. 16 ("(1) Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council. (2) He shall inform the Nation of these measures in a message. (3) The measures must stem from the desire to provide the constitutional public authorities, in the shortest possible time, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures. Parliament shall convene as of right. (4) The National Assembly shall not be dissolved during the exercise of the emergency powers.").

[55] *See* STERN, *supra* note 9, at 1290.

[56] *See* KOJA, *supra* note 52, at 65. *See also* Robert Alexy, *Zur Struktur der Rechtsprinzipien*, *in* REGELN, PRINZIPIEN UND ELEMENTE IM SYSTEM DES RECHTS 35 (Bernd Schilcher, *et al*. eds., 2000) (discussing in general the connection between proportionality and balancing).

[57] *See* Hesse, *Staatsnotstand*, *supra* note 6, at 202.

[58] *See* KOJA, *supra* note 52, at 65.

[59] Accordingly, the original version of the Hungarian Constitution (1949), for example, did not contain the institution of state of emergency. A Stalinist constitution did not necessarily require a state of emergency: the state was in any case in a permanent, informal state of emergency. *See* STERN, *supra* note 9, at 1297 (discussing pre-constitutional times in a similar vein).

[60] András Jakab, *Die Verfassungscharta von "Serbien und Montenegro"*, 63 HEIDELBERG J. INT'L L. 811 (2003).

which was the fear of centralization by way of emergency measures, completely defeated the principle of efficacy.

C. Paradigms of State of Emergency

Two categories comprise the theoretical constructs of state of emergency: (1) state-centered theories and (2) constitution-centered theories.[61]

I. State-Centered Theories

Supporters of state-centered theories presume that the state has a pre-legal right, or non-positive right of natural law, to act in self-preservation.[62] In contrast to the classical version, a moderated version sees this power as subject(able) to positive law.

1. Classical State-Centrism

Tracing back to pre-constitutional times, the best-known contemporary proponent of classical state-centrism in state of emergency is Klaus Stern, according to whom the state always has an unwritten, supra-positive right of necessity that the positive law cannot limit.[63] Similar approaches are advanced by Herbert Krüger, Hans Nawiasky, Carl Schmitt, Paul Kirchhof and Ulrich Scheuner.[64]

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[61] The advantage of a non-German author in this sensitive, theoretical area is that he or she can make stronger, more pointed assertions without offending, since he or she, as outsider, obviously does not mean to take part in an argument internal to Germany. In this sense, the attempt will be made to depict the theoretical situation with honesty and in contradistinction.

[62] Friedrich Koja would trace these concepts back to the Hegelian idea of the state as preeminent institution. *See* KOJA, *supra* note 52, at 12. Koja is partially correct, although one must also bear in mind that these ideas predate even Hegel. *See* ERNST RUDOLF HUBER, 1 DEUTSCHE VERFASSUNGSGESCHICHTE 654 (1960).

[63] *See* STERN, *supra* note 9, at 1337.

[64] *See* CARL SCHMITT, DIE DIKTATUR: VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF, at IX (1921). *See* STERN, *supra* note 9, at 1337 (rejecting Schmitt in formulation, but not in essence). *See also* Meinhard Schröder, *Staatsrecht an den Grenzen des Rechtsstaates*, 103 ARCHIV DES ÖFFENTLICHEN RECHTS 121, 134 (1978); Georg Flor, *Staatsnotstand und rechtliche Bindung*, 73 DEUTSCHES VERWALTUNGSBLATT 149 (1958); Kirchhof, *supra* note 5, at 98, 100; Ulrich Scheuner, *Der Verfassungsschutz im Bonner Grundgesetz*, *in* UM RECHT UND GERECHTIGKEIT: FESTGABE FÜR ERICH KAUFMANN 318 (1950); HANS NAWIASKY, 2 ALLGEMEINE STAATSLEHRE, pt. 2, at 108 (1955); ELSBETH SIEGERS, STAATSNOTRECHT: GESCHICHTE, INHALT UND BEGRÜNDUNG 125 (1974); HANS-ERNST FOLZ, STAATSNOTSTAND UND NOTSTANDSRECHT 187 (1962); HANNS KURZ, VOLKSSOUVERÄNITÄT UND VOLKSREPRÄSENTATION 317 (1965); RUDOLF ZIHLMANN, LEGITIMITÄT UND LEGALITÄT DES NOTRECHTS 72 (1950).

The argumentation of these jurists is that *normativity presumes normality* of circumstances.[65] This implies "that norms only apply in normal situations and that the presumption of situational normality is a positive-law precondition of their applicability."[66] Thus, norms cannot bind the state in exceptional situations in which the state, by necessity, has an overriding right of self-preservation. And a norm cannot dispense with this necessary right of the state due to the very abnormality of exceptional situations.[67]

It is apparent that this line of reasoning has its basis in natural law, which provides for the state's pre-positive right to existence[68] (*jus eminens*[69]). This right is not merely parallel to the constitution, but even exists contrary to the constitution,[70] since the constitution cannot apply, by definition, in an abnormal emergency situation. Some assert this openly,[71] others are more reserved.[72] In this sense,

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[65] *See* HERBERT KRÜGER, ALLGEMEINE STAATSLEHRE 31 (2d ed. 1966); CARL SCHMITT, POLITISCHE THEOLOGIE 19 (2d ed. 1934). This is also recognized by the moderated state-centered theories, discussed *infra*. *See* Ernst-Wolfgang Böckenförde, *Der verdrängte Ausnahmezustand*, 31 NEUE JURISTISCHE WOCHENSCHRIFT 1881, 1884 (1978) (stating that, when the presumed normality falls away, the reference point for a norm's normativity falls with it); HERMANN HELLER, STAATSLEHRE 255 (1934).

[66] Carl Schmitt, *Legalität und Legitimität*, *in* VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924–1954, at 321 (1958) (author's translation).

[67] The state is viewed as a pre-legal institution, whose power is originally unlimited, and only tamed by the law. Even moderate state-centered theorists display this Schmittian viewpoint. *See, e.g*, Böckenförde, *supra* note 65, at 1885; Kirchhof, *supra* note 5, at 117.

[68] *See* CARL FRIEDRICH WILHELM VON GERBER, GRUNDZÜGE DES DEUTSCHEN STAATSRECHTS 42 margin note 2 (3d ed. 1880) ("The recognition of emergency powers contains the idea of the state's right of existence beyond its usual constitutional life, a right that appears in abnormal emergency circumstances") (author's translation); ERICH KAUFMANN, ZUR PROBLEMATIK DES VOLKSWILLENS 14 (1931) ("For the extreme case, an ultimate right of necessity exists, alongside standardized and formalized exceptional rights, in the unwritten, natural-law content of every body of constitutional law") (author's translation). *See also* RUDOLF VON JHERING, DER ZWECK IM RECHT 330 (8th ed. 1923) ("As the individual human being, so too the state has a right of necessity when its existence is threatened") (author's translation). Or from antiquity, *see* CICERO, DE LEGIBUS III, at 3 ("Salus rei publicae suprema lex esto").

[69] *See* Schröder, *supra* note 64, at 132 (detailing the history of the term *jus eminens* and citing further references).

[70] *See* KRÜGER, *supra* note 65, at 31 ("Emergency law, by its very concept, implies recourse to natural law as against positive law") (my translation). *See also* STERN, *supra* note 9, at 1336 (reasoning identically).

[71] *See, e.g.*, GEORG MEYER & GERHARD ANSCHÜTZ, LEHRBUCH DES DEUTSCHEN STAATSRECHTS 906 (7th ed. 1919) ("Only one thing is sure: the constitution does not intend, cannot intend … for the life of the state to stand still…. Here, constitutional law ceases, and the inquiry … is no longer a legal inquiry") (my translation). *See also* SCHMITT, *supra* note 65, at 11 (describing the supremacy of this right to existence over positive law: "Sovereign is whoever decides in the exceptional state"). Schmitt claims that positive

Herbert Krüger speaks openly, stating that it is impossible to institutionalize this emergency competence.[73] Stern formulates it more tactfully, although, ultimately with the same result. While not openly asserting the pointlessness of any and all emergency regulation, he nonetheless develops a system of restraints on emergency powers, a system separate from the given constitution.[74] These restraints are: (1) the protection of essential constitutional interests; (2) that emergency powers should only be triggered as *ultima ratio*; (3) a balancing of conflicting legal interests; (4) a prohibition on excessiveness; and (5) the intention to return to the normal situation. At first glance, Stern seemingly argues himself back into the positive constitutional law protection of essential constitutional interests as restraint on the exercise of pre-positive emergency powers. But appearances here are deceiving. In and of itself, this restraint is not further clarified. Furthermore, such widely interpretable "essential constitutional interests" cannot replace detailed regulation, which constitutes the true heart of the current German emergency law. Thus, positive constitutional law is not rehabilitated; instead, only its primary principles are made over into points of reference.

According to Stern, positive law cannot displace the state's natural law right to existence.[75] But instead, he offers a system of non-positive restraints on the exercise of this right.[76] However, exactly what purpose positive law on state of emergency still serves remains unclear.

Klaus Stern's reasoning, therefore, demands compliance with this positive law only insofar as it is consistent with the state's right of existence. Thus, positive law's normativity must be recognized *only within* the limits of this right of existence. This is generally the case with positive law ("statutes"), which is only to be recognized within the limits of natural law ("the law").[77] The right of existence, although possibly contradictory to the positive law, always continues to be directly

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law cannot bind this sovereign decision-making and this state of emergency. *See* SCHMITT, *supra* note 64, at IX.

[72] HANS NAWIASKY, 2 ALLGEMEINE STAATSLEHRE, pt. 2, at 108 (1955)

[73] *See* KRÜGER, *supra* note 65, at 31.

[74] The restraints are meant to show that unwritten emergency law does not imply an "open general empowerment." *See* STERN, *supra* note 9, at 1337. For a similar opinion *see* Böckenförde, *supra* note 65, at 1883.

[75] *See* STERN, *supra* note 9, at 1337.

[76] *Id.*

[77] *Id.* at 1334, 1337.

exercisable according to Stern.[78] Thus, in this conceptualization, the normativity of constitutional regulation of state of emergency depends always on pre-legal rules governing emergencies. As a result, the constitutional law on state of emergency devolves into a *nonjusticiable, intra-administrative plan of action* or mere guidelines, and natural law ascends to become the actual law on state of emergency. This is because violations, usually by the executive, of the positive constitutional law on state of emergency always have a "good legal excuse," namely, their having occurred on the basis of unwritten pre-positive emergency powers. This disallows any effective legal review.

2. Moderate Theories

In contrast to the above-discussed classically state-centered theories, the moderate theories presume that *positive* constitutional law *can* override the state's pre-positive right to existence.[79] This overriding occurs in the form of detailed regulation.

First, Ernst-Wolfgang Böckenförde, a well-known proponent of this approach, sees an "open general empowerment" for every state institution in unwritten emergency law, limited only by proportionality, but *not* limited according to bearer, extent, or scope. Such an open, general empowerment, he continues, would breach the structural basis of a constitution grounded in the rule of law.[80] This general empowerment can be displaced only by a sufficiently detailed constitutional regulation. Böckenförde, however, considers current German regulation of state of emergency to be *insufficiently detailed* to replace those emergency powers superior to constitutional law.[81] His conclusions, therefore, strikingly resemble those of classical state-centrism, notwithstanding his criticism of how state-centrism lays the theoretical foundation of the state. According to him, supra-positive emergency law is presently in force in Germany, precisely for the reason that detailed emergency regulation should be adopted in order to displace it.

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[78] *Id.* at 1337.

[79] *See* THEODOR MAUNZ & REINHOLD ZIPPELIUS, DEUTSCHES STAATSRECHT 415 (30th ed. 1998) (referring only to the theoretical situation where regulation is lacking); KARL DOEHRING, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 270 (3d ed. 1984); KARL DOEHRING, ALLGEMEINE STAATSLEHRE 202 (2d ed. 2000); MARKUS TROTTER, DER AUSNAHMEZUSTAND IM HISTORISCHEN UND EUROPÄISCHEN RECHTSVERGLEICH 99 (1997) (dissertation, University of Heidelberg) (on file at the Max Planck Institute for International Law, Heidelberg); Günter Dürig, *Artikel 87a*, *in* DAS GRUNDGESETZ ¶ 128, margin note 5 (Maunz, *et al.* eds., 1971).

[80] *See* Böckenförde, *supra* note 65, at 1883.

[81] For his *de lege ferenda* constitutional regulatory text, *see* Ernst-Wolfgang Böckenförde, *Ausnahmerecht und demokratischer Rechtsstaat*, *in* DIE FREIHEIT DES ANDEREN: FESTSCHRIFT FÜR MARTIN HIRSCH 259, 264 (Hans-Jochen Vogel ed., 1981).

Second, in contrast, others follow the will of the constitution-making body.[82] In consequence, the emergency regulations introduced in Germany in 1968 rule out the exercise of supra-constitutional powers, which otherwise would exist in the background.[83]

II. Constitution-Centered Theories

Constitution-centered theories dispute the existence of pre-legal state powers. The positive (fixed) constitution always serves as a starting point for argumentation.

1. The Classical Version

The classical or radical version of this viewpoint limits the state's emergency powers to those explicitly named in constitutional law.[84]

More strongly than state-centered theories, constitution-centrism underscores the danger of abuse stemming from unwritten emergency empowerments.[85] Adolf

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[82] *See supra* note 79.

[83] Thus, the objective of emergency legislation in 1968 was precisely to make recourse to unwritten constitutional principles unnecessary by way of explicit regulation. *See* Schriftlicher Bericht des Rechtsauschusses, BTDrucks 5/2873 (quoting STERN, *supra* note 9, at 1329).

[84] *See* Richard Thoma, *Der Vorbehalt der Legislative und das Prinzip der Gesetzmäßigkeit von Verwaltung und Rechtsprechung*, *in* HANDBUCH, *supra* note 29, at 221, 232 ("In a structured, republican constitutional state, there can be no state's right of necessity beyond what is constitutionally foreseen") (author's translation); Andreas Hamann, *Zur Frage des Ausnahme- oder Staatsnotrechts*, 73 DEUTSCHES VERWALTUNGSBLATT 405 (1958); REINER SPEIDEL, DER BEGRIFF DER STAATSNOTSTANDSLAGEN UND DIE MÖGLICHKEITEN IHRER ABWEHR IN DER BUNDESREPUBLIK DEUTSCHLAND 94 (1964); Alfred Voigt, *Ungeschriebenes Verfassungsrecht*, 10 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 44 (1952); Adolf Arndt, *Der Rechtsstaat und sein polizeilicher Verfassungsschutz*, 14 NEUE JURISTISCHE WOCHENSCHRIFT 900 (1961); HANS M. PARCHE, DER EINSATZ VON STREITKRÄFTEN IM INNEREN NOTSTAND: ZUGLEICH EIN BEITRAG ZUR LEHRE VOM RECHTSSTAATLICHEN HANDELN DER EXEKUTIVE UND SEINER KONTROLLE 3, 179 (1974) (dissertation, University of Münster) (on file at the Max Planck Institute for International Law, Heidleberg); CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT 267 (2000); HEINRICH OBERREUTER, NOTSTAND UND DEMOKRATIE 89 ff., esp. 113, 120 f. (1978); WERNER KÄGI, DIE VERFASSUNG ALS RECHTLICHE GRUNDORDNUNG DES STAATES 118 (1945); MICHAEL KRENZLER, AN DEN GRENZEN DER NOTSTANDSVERFASSUNG. AUSNAHMEZUSTAND UND STAATSNOTRECHT IM VERFASSUNGSSYSTEM DES GRUNDGESETZES 74 (1974); FRANK-BODO VON WEHRS, ZUR ANWENDBARKEIT DES NOTSTANDSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 116 (1971) (dissertation, University of Mainz) (on file at the Max Planck Institute for International Law, Heidelberg). Surprisingly, the approach taken by Konrad Hesse is similar to the Kelsenian approach. *See* KONRAD HESSE, DIE NORMATIVE KRAFT DER VERFASSUNG 24 (1959); HESSE, *supra* note 6, at 300. According to Hesse, one cannot call upon supra-positive emergency law, but one should keep in mind that state institutions will indeed do so, where regulation on state of emergency is lacking.

Arndt formulates the standpoint eloquently and intelligibly: "All speculation about a 'supra-constitutional state of emergency,' permitting measures not justified by the documentary constitution, is nothing but a deplorable glossing-over of unconstitutionality, of constitutional treason."[86]

Such an approach, therefore, views state of emergency not as an extra-constitutional situation, but simply as constitutional *lex specialis*.[87]

And it rejects the argument for a constitutional law subject to the state's superior right to existence.[88] Kelsen explains: "Behind the naïve assurance that the state must 'live,' there usually lurks the reckless desire that it lives exactly as those who avail themselves of the justification of an 'emergency right' consider it appropriate for it to live."[89]

However, this does not imply that this group would punish *every* violation of the positive provisions of emergency law, even where the violation, for instance, occurred in the interests of reestablishing the constitutional order. Subsequently, the competent institution, the parliament for example, could approve an order of indemnity for such a violation. The violation as such, though in opposition to the position of state-centered theories, could not be denied.[90] In this conceptualization, a moral duty to violate the law, in the interests of preserving the constitutional

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[85] Aside from this, the natural-law viewpoint as such is criticized as unscholarly in the Kelsenian tradition. *See, e.g.*, KOJA, *supra* note 4, at 398; KOJA, *supra* note 52, at 10.

[86] ADOLF ARNDT, *Demokratie: Wertsystem des Rechts*, *in* NOTSTANDSGESETZ – ABER WIE? 13 (1962) (author's translation). *See also* JOSEPH BARTHÉLEMY & PAUL DUEZ, TRAITÉ DE DROIT CONSTITUTIONNEL 242 (1933) (stating that supra-positive emergency law is no legal principle but only "une théorie politique que le gouvernement pourra invoquer devant le parlement pour expliquer son illégalité et la rendre politiquement excusable"); GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 359 (3d ed. 1929) (stating that the category of state's emergency rights was developed and applied in order to gloss over blatant violations of the legal order, which is just a reformulation of the saying: power prevails law); ADOLF MERKL, ALLGEMEINES VERWALTUNGSRECHT 166 (1927) (stating that supra-positive emergency law is the last refuge of those who advocate freedom of the executive from the law, to some degree).

[87] KOJA, *supra* note 4, at 399. *See also* KOJA, *supra* note 52, at 14 ("State emergency, understood thus, becomes—and this is important—a constitutional state, and not a state of constitutionlessness") (author's translation).

[88] *See* Adolf Arndt, *Der Rechtsstaat und sein polizeilicher Verfassungsschutz*, 14 NEUE JURISTISCHE WOCHENSCHRIFT 899 (1961) ("A constitutional state has no other *raison* than its constitution.") (author's translation); Konrad Hesse, *Ausnahmezustand und Grundgesetz*, 8 DIE ÖFFENTLICHE VERWALTUNG 741 (1955).

[89] HANS KELSEN, ALLGEMEINE STAATSLEHRE 157 (1925) (author's translation).

[90] *See* KOJA, *supra* note 52, at 17.

state, may exist; however, one must strictly distinguish between such a duty and the legal analysis of the case.

2. The Open Version

Eckart Klein advances a more open version of the constitution-centered theory. Specifically, while all the state's emergency powers must indeed derive from the positive constitution, these powers can also include *implied powers*, since the constitution inherently contains a general obligation to sustain it.[91] The fundamental flaw in this viewpoint is its contradiction, based only on the positive constitution, of the well-known intent of the constitution-making body, whose will in 1968 was namely the exclusion of any unwritten emergency powers.[92]

III. The Fundamental Dilemma Behind the Paradigms

The differences between the aforementioned paradigms can be explained by the same fundamental dilemma of efficacy versus fear of abuse, which was discussed in the first part of the paper. Before addressing the dilemma, however, it is helpful to consider a tabular overview of the positions so they can be referenced more easily while examining the motivations behind the paradigms.

One can arrange the various viewpoints as follows. The first organizing criterion is the theoretical basis, that is, the recognition of pre-positive emergency powers. Constitution-centered theories deny this basis, whereas state-centered theories affirm it. The other organizing criterion is more practical, namely, whether the respective commentator allows for emergency powers not explicit in the *Grundgesetz* in Germany's constitutional order. According to this, a differentiation can be made between theories bound and not bound by the constitutional text.[93]

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[91] Eckart Klein, *Der innere Notstand*, *in* 7 HANDBUCH DES STAATSRECHTS 412 (1992). This is similar to the doctrine of implied powers. *See* Karl Doehring, *Das Staatsnotrecht in den Vereinigten Staaten von Amerika*, *in* DAS STAATSNOTRECHT IN BELGIEN, FRANKREICH, GROßBRITANNIEN, ITALIEN, DEN NIEDERLANDEN, DER SCHWEIZ UND DEN VEREINIGTEN STAATEN VON AMERIKA 212 (1955).

[92] *See supra* note 83.

[93] Those who do not concretely address the current legal situation of the Federal Republic of Germany are in parentheses. Those who do, in italics.

Do pre-positive emergency powers exist? (theoretical basis) / Can only those emergency powers, which are explicit in the *Grundgesetz*, be exercised? (practical side)	Yes (state-centered)	No (constitution-centered)
Yes (textually bound)	*Maunz*, *Zippelius*, *Doehring*, *Dürig*, *Trotter*	*Hesse*, *Möllers*, *Wehrs*, *Krenzler*, *Oberreuter*, *Parche* (Kägi, Arndt, Duez, Barthélemy, Hamann, Voigt, Speidel, G. Jellinek, Koja, Kelsen, Merkl)
No (not textually bound)	*Böckenförde*, *Stern*, *Schröder*, *Kirchhof*, *Siegers* (Schmitt, Krüger, Flor, Jhering, Zihlmann, Meyer, Anschütz, Gerber, Kaufmann, Scheuner, Kurz, Nawiasky, Folz)	*E. Klein*

As we have seen, state-centered theories and those which disregard the constitutional text (lower left part of the table) focus on efficacy, while constitution-centered theories and those which embrace the constitutional text (upper right part of the table) focus on fear of abuse. Those who combine the two legal doctrines (e.g. constitution-centered but disregarding the constitutional text, e.g. E. Klein), try to find a compromise between efficacy and fear of abuse. These compromises are, however, dead-ends. If a person like Klein refers to the constitution, but does not seem to be bound by its text, then the legal constraints on emergency powers in the text of the constitution cannot fulfill their functions, and the compromise seems destined to be squandered for the sake of efficacy. The other compromise (upper left, e.g. Zippelius), stating that supra-constitutional powers still exist as a background but cannot be exercised because of positive law, is simply useless in current German constitutional law because it could be applied only if the relevant articles of the GG were abolished. This is highly hypothetical or rather very unlikely, which does not make this theory harmful, rather, simply useless in today's German constitutional law. And finally, the traditional and radical "state-centered and textually not bound" approach does not recognize any compromises;

it simply opens the gates to abuse and practically denies the legal-normative nature of relevant constitutional provisions.

The right solution seems to be a constitution-centered, textually bound approach, with a moral complement.[94] It addresses the dangers of the risk of abuse without raising problems of efficacy. That is also why it most closely resembles the approach of the present author.

IV. A Cynically Modest Proposal by Way of Hart

In closing, one other unusually cynical attempt to resolve the issue should be mentioned. It is cynical in the sense that it practically dispenses with legal argumentation, thereby greatly relativizing the preceding analysis. However, it does make clear that the assumption of the analytical model used above depends strongly on legal culture, and consequently is inaccessible *via* the usual discourse of legal academia. The legal theory of H.L.A. Hart inspires the following line of reasoning.[95]

Hart conditions the role of natural law on the respective legal order. In some jurisdictions, lawyers consider natural law as part of the legal order (e.g. USA), but not in others. And there is no better test than this rule of recognition among jurists. The same holds true with respect to whether to be bound to the legal text. If a legal order's jurists commonly argue a given issue with textual reference, then that must be the law. By the same token, natural law is part of the law if jurists regularly invoke the rules of natural law.[96] Put bluntly, the law is simply the majority opinion among jurists.[97]

This approach can help us, however, only if there is a clear majority opinion (*herrschende Meinung*). But, as we can see from the above table, there is no clear majority opinion among jurists regarding the German law on state of emergency. So Hart cannot help us here. Such an approach gives us a solution only in countries where lawyers and legal scholars overwhelmingly agree on a legal issue. This is the case in Hungary where practically no criticism has been raised against the

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[94] *See supra*, at 1. The Classical Version.

[95] H.L.A. HART, THE CONCEPT OF LAW 100, 109 (2d ed. 1994).

[96] *Id.* at 204.

[97] This conceptualization, however, does not mean that a given majority opinion is unassailable. That is, if the implicit, previously unknown ramifications of majority opinion A contradict majority opinion B, then one may legally challenge a majority opinion (namely, whichever majority opinion is the more important, according to majority opinion C).

"textually bound constitutional-centrist" approach of state of emergency.[98] In Hungary, this approach has never been deeply argued or challenged by different approaches. It was and is simply presupposed as unquestionable, that is, it is part of Hungarian legal culture.[99]

D. Insights

The fundamental dilemma of the law on state of emergency is striking an appropriate balance between efficacy in managing the threat to the state or constitution and the protection of the constitutional state from the abuse of emergency powers. This dilemma explains the varying regulations and the differences in the amount of detail. The greater the fear of abuse, as a rule, based on historical experience, the more detailed the law on emergency will be. Also the constitutional provisions can be subsumed under one of these two motivations—except for the principle of proportionality, which tries to find a balance between efficacy (the bigger the danger, the bigger the emergency powers) and fear of abuse (the smaller the danger, the smaller the emergency powers).

The actual objective of the law on state of emergency should be to secure a return to the "normal" constitutional status. Thus, the concept of state of emergency in a constitutional state only makes sense where the exercise of state power is subject to constitutional restraints.

Two categories comprise the theoretical constructs of state of emergency: state-centered theories and constitution-centered theories. State-centered theories recognize the state's pre-positive right to existence, while the constitution-centered theories dispute such a right. This question is distinct from whether or not a given author's argumentation is textually bound, that is, whether or not it recognizes emergency powers beyond those explicitly stated in a given constitution. State-centered theories that also disregard the text of the constitution are motivated by the wish for efficacy, while constitution-centered theories that respect the text of the

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[98] *See, e.g.*, ZSOLT BALOGH ET AL., AZ ALKOTMÁNY MAGYARÁZATA [CONSTITUTIONAL COMMENTARY] 309 (2003) (supporting the observation implicitly); A. Újfalvi, *"Szükség törvényt bont" avagy a rendkívüli jogrend szabályozása a Negyedik Köztársaságban* ["*Necessity Knows No Law," or Regulation of the Emergency Legal Order in the Fourth (Hungarian) Republic*], 40 MAGYAR KÖZIGAZGATÁS 614 (1990); ANDRÁS JAKAB, A JOGSZABÁLYTAN FŐBB KÉRDÉSEIRŐL [CENTRAL QUESTIONS FOR A THEORY OF NORMATIVE LEGAL ACTS] 152 (2003).

[99] On the textually bound nature of Hungarian legal reasoning in general, *see* A. Jakab & M. Hollán, *Die rechtsdogmatische Hinterlassenschaft des Sozialismus im heutigen Recht: Das Beispiel Ungarn* [*The Legal Conceptual Legacy of the Socialism today: The Example of Hungary*], 46 JAHRBUCH FÜR OSTRECHT 11 (2005).

constitution are motivated by fear of abuse. Combined theories aim for a compromise.

There is no general answer to the question which of the authors is correct. Instead, the question should be answered in two sub-queries. First, whose arguments are stronger? Here, the textually-bound, constitution-centered theories seem to have the upper hand. And, second, which approach has a clear majority among lawyers? The answer to this latter question always depends on the majority opinion of legal scholars and lawyers in a given jurisdiction. This approach, however, cannot give us guidance as to German law on state of emergency given its highly contested nature. This is opposed to Hungary where practically no doubt has been raised against the "textually bound, constitutional-centrist" approach of state of emergency.