ПИРОН Πυρρων АКАДЕМИЧНО ЕЛЕКТРОННО СПИСАНИЕ ЗА КУЛТУРА И ИЗКУСТВА

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The State of Emergency and the Law

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Sovereign power is the kind of power that decides on the state of emergency.

Carl Schmitt

This definition of Schmidt includes several points, which I will comment on in my exposition because of the close connection with our topic and its emblematic significance for his political theory.

A key point in Schmitt's conception of the nature of sovereign power is its anomic nature, i.e. it has a pre-normative existence. This raises with great urgency the question as to what extent the law can have a regulatory role whenever the powers that be introduce a state of emergency, i.e. a state outside the normality of the current legal order. However, the state of emergency is regulated in the Bulgarian Constitution as an institute of constitutional law.

In his *Political Theology* Schmitt argues that sovereign power does not need law to create law. The so-called constituent power in the constitutional theory, which constitutes a certain statehood with its institutions and legal order, materialises itself in the constitution and creates a certain legal order, despite its spontaneity and almost eruptive power, manifested in crucial historical periods with their inherent political radicalism. In a normal situation, constituent power is in a latent state, one from which it can emerge when the ultimate condition of extreme necessity arises to preserve statehood through the state of emergency.

In the context of the difference between the extraordinariness caused by the political will to create a state with a new legal order and the need to protect a jeopardised public order, Schmitt qualifies dictatorships as governance in a state of emergency split into revolutionary (commissar) dictatorship – theoretically expounded by Lenin and Sorel, representing the rationalist and irrationalist, voluntarist trend in the theory of revolutionary dictatorship – and consular /safeguarding/ dictatorship expounded by the reactionary conservatives of the Restoration, Joseph de Maistre and Donoso Cortés. However, not only the first but also by the second type of dictatorial rule brings forth an order other than the one that previously existed.

In a normal situation, the sovereign power maintains a certain public order through the norms of the law it has created. At the same time, in an extreme state, it sustains order through the monopoly it has over the decision to impose a state of emergency, or through the so-called decisionism, a state in which the law is suspended. In this regard, according to Schmitt, the

notion of sovereignty is legal instead of sociological, as it characterises power in relation to law not only as law-making but also as law-suspending. In this context, Karl Schmitt criticises the immanent theory of sovereignty that connects it to society as resulting from it. He also slams Hans Kelsen's positivist legal theory, which presents the state as a centralised legal order that overcomes the dualism of state and law. According to him, these views ignore the real problem of the sovereignty of power, which manifests itself in its monopoly on the decision to impose a state of emergency as a secularised version of political theology, similar to it also in terms of placing its genesis in the divine, transcendent source of the monarch's sovereignty in pre-modernism.

The state of emergency is called for by anarchy and chaos in society, jeopardising the security of the state and triggered by external or internal hazards, e.g. social or natural disasters. In such an extreme situation, public order cannot be protected against societal anomie by means of the acting law, but only by the introduction of the state of emergency in which the law is suspended and anomic, parallel actions of the state come to the fore, affected mostly by the power structures of its executive, i.e. the army, the police and the security agencies. The government has the power, efficiency, energy and determination to drive forward the measures that necessitated the state of emergency.

Which of the state's power tools applied will gain priority in resolving the crisis depends on the nature of the threat. If it is a civil war and a martial law is enforced, more comprehensive and intensive violence is in order, to be applied mostly by the army and militarized law enforcers, rather than by the ordinary police, although the latter can also assist in individual actions.

This is not the case with asymmetric threats such as terrorism, which cannot be easily identified. Their perpetrators are anonymous and conspiratorial, and they accommodate the normalcy of society, especially if the latter is of a liberal kind. Therefore, the police, the security services and the intelligence agencies will play a primary role in dealing with such threats, with the assistance of specialised, anti-terrorist forces.

Indeed, the nature of the measures and the executive bodies that implement them will be different in an emergency consequent to a pandemic that threatens public health. Our country recently emerged from it, with some of the anti-epidemic measures being still in place. I will discuss these measures in further detail a bit later.

The nature of the threat determines which basic constitutional rights of citizens are affected and to what extent. The question of the regulatory role of the law and the adherence to constitutional prescriptions for actions of the government within some legality can only be discussed if the rights are restricted rather than fully suspended.

The failed attempt by the West German Bundestag in the 1970s to pass legislation regulating government behaviour in a state of emergency amid the terrorist threat triggered by the extreme left-wing Baader-Meinhof terrorist group is quite telling. As already pointed out, in complete suspension of rights, the government's actions are para-legal. The role of law can be subsequently discussed during the normalisation following the lifting of the emergency state. This will be the time to assess these actions of the government and its officials during the suspension of a legal order. And this is when an amnesty can be applied for illegal actions in order to have them legitimised as necessary to ward off a possible collapse of statehood. However, in a normal situation, they would be treated as criminal. This is a way to motivate and provide resolution to the authorities during a state of emergency as they will be guarded against any liability for their actions during the subsequent normalisation.

The use of force by the state could also be discussed in this context. Using force should be considered legitimate when it is designed to make sure the law is applied or safeguarded, as the probability to use force motivates law-abiding among the subjects of legal provisions. Applying force outside the law constitutes illegitimate political violence, i.e. an illegitimate manifestation of state terrorism. Dictatorial regimes may legalise violence by passing extraordinary regulations applied by extraordinary courts that give it the form of a political jurisdiction. An example of this is the so-called People's Court in Bulgaria during the communist takeover after 1944, which wasn't even legally established through the National Assembly, but by government fiat by virtue of the legislative powers delegated to the executive by Parliament. Such forceful acts cannot be tolerated, and they must be condemned and sanctioned if and when the opportunity for that arises.

The state of emergency occupies an intermediate position between the two extreme forms of using force by the state, because in it the coercive measures, although applied during suspension of the law, aim to protect the foundations of statehood. In other words, this is an extreme form of the state's self-defence against anarchy and chaos in society due to the lack of conditions for peaceful and legal political activity carried out by holding free elections. The threat can not only come from a societal but also a natural source. Either way, after the threat has ceased, the political and legal normalcy in society that preceded it must be restored, and

the question of legitimising the actions taken in a state of emergency to overcome the crisis of statehood may be raised.

It is worth noting here that anomie and anarchy in society do not provoke the defensive reaction of the state to impose a state of emergency in all cases, despite the risk of statehood failure. Examples of this are the developments in some post-communist countries in the early period of transition during the 1990s. In some of them, e.g. Bulgaria, the crisis did not evolve into dictatorship and suspension of the existing legal order despite the dysfunction of state institutions, while in others, like Russia, under similar conditions, the situation initially resulted in a creeping and subsequently in an open authoritarianism bordering on a state of emergency. The latest development in this direction is quite telling. Apart from the current constitutional model of unbalanced powers of the Russian presidential institution, concentrating power in the president at the expense of other authorities, the restriction of two consecutive presidential terms is dropped by annulling the already consumed ones, which, given the fact that the outcome of the election is predetermined, could turn the current president into a lifelong dictator. It is no coincidence that Karl Schmitt's ideas of authoritarian conservatism and sovereign power are popular among Russia's political elite and have found a way into its ideology of "sovereign democracy", which is what Russian democracy is supposed to be. In its essence, it is anti-liberal and anti-European, closely interlaced with the idea of the Russian world's uniqueness as a Eurasian and Orthodox civilisation juxtaposing through its values the liberal, "decadent" Western world. For Russia, the West and the European Union make up the image of the enemy, although the latter hardly poses a threat for not even having its own armed forces while being the main market for Russian gas supplies. But the very fact of its existence constitutes a rejection of the legitimacy of Putin's regime and the soundness of its Eurasian ideology.

The state of chaos and anarchy inherent in early post-communism in both Bulgaria and Russia resulted from the action of the same forces that determined the processes under way in the two countries. Instead of being a spontaneous trend, the weakening of the state was a conscious strategy of the post-communist elites designed to discredit the fragile democracy, to ensure the predatory and unhindered draining of public resources (which under the total domination of state property under the old regime were concentrated in the state) and warrant impunity for all these actions.

Similar processes took place in the two post-communist countries during that period underpinned by the change of ownership and the emergence of an oligarchy that accumulated

wealth in a non-market way by dint of the so-called "political" capitalism. In a situation of that kind, both the objective conditions and, above all, the subjective factor for overcoming the state crisis by applying emergency measures were absent as the "strong people" in business and politics were interested in the degradation of state institutions.

In Russia, in a context of a centuries-old tradition of tyrannical rule and political culture of an authoritarian-patriarchal type inherited from serfdom and combined with aggressive nationalism laced with imperial syndrome and ideas of Russian exclusivity, the transition period wound up with Putin's autocratic regime. The latter qualifies as a security-type dictatorship designed to consolidate the oligarchy's overt domination as a kleptocracy and ward off a revolution of the "colour" type, which took place in some other post-Soviet countries, a further redistribution of the former state property after it had been transformed into oligarchic and the deepening of pluralistic tendencies. The Russian president has established a system of prebendalism rooted in the loyalty of the oligarchs who support him and the punishment and removal of those who are disloyal by either sending them to prison or expelling them from the country.

Despite the analogies between the post-communist social processes underway in the two countries, Bulgaria saw a different kind of evolution. With all the shortcomings and window-dressing of Bulgarian democracy after 1989 and the country's ambiguous positioning between Europe and Russia, the political regime exhibits the core democratic features, albeit more on a nominal rather than on a genuinely constitutional level. For that reason, unlike in Russia, the local oligarchy is not overtly present in political life but pulls the strings from behind the scenes as parallel, surreptitious powers that be. What contributed to this type of development were the parliamentary – rather than presidential – form of government established by the constitution; the political culture of the population, which, despite its predominantly rustic and patriarchal nature, differs positively from the Russian by being more democratic and egalitarian; and, above all, the country's orientation to the West in terms of geopolitics and values propelling it to full EU membership.

We come to the important question of whether membership in this liberal-democratic community is a guarantee against the anomie, arbitrariness and the transformation of an emergency state into a permanent dictatorship. Karl Schmitt connects sovereign power with decisionism and, conversely, not having a monopoly on the state of emergency with the lack of sovereignty. Schmitt illustrates the latter with the situation of the German provinces in the pre-war Reich, which was a unifying federal state. While the provinces did not have

sovereignty because they could not decide on a state of emergency, the federal government was sovereign for having a monopoly on that decision. However, regardless of its supranational institutions and the partial transfer of national sovereignty to these institutions through the accession treaties based on the Treaty establishing the Union (Article 85, paragraph 1, item 9 and para 2 of the Bulgarian Constitution), the latter is not a federal state wielding supreme power over its member-states. The member-states' sovereignty is voluntarily shared within the Union, but this does not result in a super-state that binds them together as a unified political entity. The EU's exclusive competence is mainly related to the single economic space, having historically emerged as a "common market", originally of the six founding countries, and now including 27 members. Based on this exclusive competence, its supranational institutions create Community law which either has direct application in the member-states through regulations which take precedence over national law or, in the form of directives, must be transposed into the domestic legal systems. The disputes related to Community law are resolved by the Court of Justice in Luxembourg.

Parallel with the exclusive competence of the Union, member-states retain their own competence or share competence with the Union's institutions. This shared competence, which includes issues of internal order, security and justice, is based on the principle of subsidiarity. What it adds up to is decentralised dealing with issues by individual countries outside the exclusive community competence, with the Union being able to intervene through its supranational institutions only when a solution is not efficient enough in order to provide additional capacity for its implementation. Moreover, as an expression of their sovereignty, the application of the principle of subsidiarity is monitored by the national parliaments across member-states.

Indeed, the strengthening of authoritarian tendencies in two Central European post-communist countries – Poland and especially Hungary under Orban – which contradicts EU's principles and values should not remain without an adequate community response. Unfortunately, a consistent and effective response at EU level has yet to be seen. This is the result of the Union's serious problems, which over the last decade have become a challenge to its future. Euroscepticism and national populism, culminating in Brexit, have been underpinned by a lack of will and the tools of a more integrated and federalised Europe, which would have been able to stand its ground against centrifugal, nationalist and authoritarian tendencies in some member-states. So far, Europe has been relying on consensus-building and soft power while trying to resolve its internal contradictions.

Overcoming the issues with Poland and, above all, with Hungary in the future will be a litmus test of EU's resilience not only in institutional and geopolitical terms but also in terms of values. The Union's stability should be able to translate in a capability for the restoration of jeopardised democratic standards in a single member state rather than see other members exiting or remaining inside at the cost of tolerance for its standard-bending practices.

A state of emergency changes the functioning of state power and restricts the basic civic and political, first-generation rights. However, they are genuinely expressed in countries with a liberal-democratic regime, with the rule of law and a system of checks and balances, rather than in authoritarian and totalitarian states. For the latter, the state of emergency is a permanent societal condition due to the high degree of centralisation of power and its disregard for mooring its actions onto legal grounds. Dictatorships do not only occasionally violate but treat nihilistically the personal and political rights of their citizens from the ground up. Instead of being provoked by a jeopardised statehood, authoritarian regimes forcefully create a state of emergency as it is a part of their immanent nature. Given this, the "image of the enemy" is vital for their ability to justify the emergency measures they choose to impose.

As a product of socio-political engineering, the social order of totalitarianism is established exclusively by violence, free from any legal restriction and by carrying out mostly anomic actions by the power structures of the executive power. Examples in our country are the forced collectivisation of private farmers or the infamous "revival process" (that changed the names of people from the Turkish minority - translator's note), which were executed as sheer coercive political acts, without taking the effort to even give them a pseudo-legal form outside the decrees of the communist party leadership. These actions of the authorities primarily target the "different", those who belong to another race or ethnicity and are treated as inferior or dangerous to a nation's ethnic or racial purity /under National Socialism/ or those who, according to the so-called "class approach", a form of politically coloured "racism" (under communism), belong to politically unreliable groups, are branded "enemies of the people" and are therefore subject to segregation and genocide.

Despite the ideological differences between the two types of regimes, they resorted to a policy of state terrorism characterised by arbitrariness disregarding the judiciary or the court system and carried out by highly politicised administrative structures, especially by the state security bodies. Two particularly striking examples of this arbitrariness are the forced labour camp system and the deportation and coercive resettling of large population groups.

Apart from that, pseudo-legal forms of state violence were applied, such as the ban on the free movement of people outside the country and the criminalisation of illegal border crossings, the ban on choosing a place of residence, the criminalisation of the freedom of speech and political association, which are not in unison with the officially recognised organisations and their ideology.

These acts of totalitarian regimes received their moral and legal condemnation. Yet while denazification was more radical due to Nazi Germany's military defeat in a war where the West and Russia were allies, the same hardly goes for decommunisation, which resulted from the implosion of the communist regime and the West' prevailing in the Cold War. The process of decommunisation was inconsistent and superficial or almost non-existent in countries like Bulgaria. The old regime cadres were not subject to "lustration", and many successfully adapted to the post-communist setting, despite several noisy trials of those responsible for the camp system and the "revival process", which ended with almost no results.

Emergency measures in countries with a liberal-democratic regime are mainly related to the fight against Islamic terrorism. The most prominent example is the Patriot Act passed by the US Congress after the 9/11 attacks in New York and Washington. Designed to be in effect provisionally, it was prolonged several times until it was repealed in 2015. It provided for measures like secret searches of homes without the knowledge of their owners; secret surveillance and eavesdropping on electronic communications; detention of terrorist suspects for an indefinite period in special places of isolation without charges or evidence of a crime and with limited access to legal protection; applying torture; treating of detainees as "unlawful combatants" instead of prisoners of war protected by the Geneva Convention, and conducting trials by extraordinary military tribunals instead of general courts, and thus offering a limited right to defence and establishing the truth. The latter was declared unconstitutional by the US Supreme Court before the law was repealed. Thus even those accused of terrorism were being given the opportunity for a fair trial in a general court rather than in an extraordinary tribunal.

All these emergency provisions, so controversial from a humanitarian perspective, can be explained by prevailing public attitudes in the aftermath of the terrorist attacks. Apart from reaping heavy civilian casualties, they were interpreted as an attack on the United States by the Islamic fundamentalists of al-Qaeda. This enemy poses an asymmetric threat for its anonymity, mimicry to local conditions and conspiratorial mode of action. The difficulties in identifying the perpetrators translated into measures replete with legal uncertainty as to how

the state should counteract this threat – and therefore contradicted the principle of the rule of law. It was based on the idea that preventive detentions serve the interest of national security and deter serious terrorist crimes by providing valuable information about the run-up to such acts and their perpetrators.

Although introduced by a particular nation-state, emergency measures motivated by terrorism may not only affect a particular place. During the Patriot Act enforcement, citizens in the United States were subject to penal laws (substantive and procedural) by regular courts from the time before the adoption of the emergency law. All the previously existing guarantees to suspects and defendants were applied during investigations and court proceedings, including those related to privacy and the establishment of truth by an independent and impartial court. Conversely, those suspected of terrorism, whether inside or outside the country (an example of the latter being the illegal CIA prisons for such individuals outside the United States), fell under the emergency law, which allowed extrajudicial pre-trial detention, unrestricted in length and without charge. This flew in the face of the separation of powers principle. Instead of being based on a court decision, it was carried out through orders of the security services (the police and the intelligence agencies). In other words, the power structures of the executive crowded out the judiciary, the bodies of which would have been competent in a normal situation.

Although targeting the legitimate goal of countering and preventing the terrorist threat against the country, the US anti-terrorism legislation (no longer in force), provided for disproportionate human rights restrictions. The extraordinary measures legitimised the unequal treatment of terrorist suspects in establishing guilt compared to other criminal suspects to whom the American criminal law would apply. These measures also implied serious encroachments on privacy, freedom and secrecy of communication carried out without judicial sanction, only at the discretion of the security services.

The state of emergency in the Bulgarian Constitution is referred to in four constitutional texts in a broadly descriptive and blanket manner, i.e. as "another thing" in comparison with some explicitly described cases of emergency. These are the provisions of Art. 64, para 2, art. 84, item 12 and Art. 100, para 5 of the constitution, granting exclusive powers to the National Assembly to declare martial law or another state of emergency based on a proposal by the Council of Ministers or by the president. The latter can initiate such a proposal if and when the Parliament is not sitting, but the latter ought to be immediately convened to rule on the proposed presidential decision. In the case when the state of

emergency has occurred after the National Assembly mandate has expired, this requires an extension of its powers until such circumstances have been overcome. These constitutional provisions not only qualify the introduction of an emergency state as the exclusive competence of the National Assembly but also provide that parliamentary activity should be resumed in order to deal with the emergency if the Parliament is not sitting or its mandate has expired.

Keeping in place a legislative branch is needed to not only adopt the necessary policies, but also to control the government, whose role is growing in an emergency, and the way it implements the measures restricting citizens' constitutional rights. Article 57, paragraph 3 of the constitution, again after mentioning a declaration of war, martial law or another state of emergency, stipulates that a law may temporarily restrict the exercise of certain citizens' rights, except for the rights provided for in Articles 28, 29, 31, para 1, 2 and 3, Art. 32, para 1 and Art. 37. In other words, there is no provision of complete suspending of rights, but of legally introduced restrictions only on explicitly specified constitutional rights within a certain period of emergency.

We must critically state that a future constitutional reform is well-advised to drop the "state of emergency" from the constitutional jargon. Semantically, it directs not only to the restriction but also to the suspension of citizens' rights. It also implies para-legal, anomic state actions justified by an assumed disintegration of public order. The latter is hard to legally define and regulate, even less by an uncertain term like "another state of emergency". This contradicts the constitutional idea of controlled restriction of rights called for by the need to apply emergency measures in a situation of jeopardised statehood while maintaining the regulatory function of the law and the principles of *Rechtsstaat* and the separation of powers.

In this context, the provision of Article 35, paragraph 1 of the constitution provides more appropriate content. Although it refers to the restriction of precisely defined rights – the right to choose one's residence and the right to free movement on the territory of the country and outside it – without resorting to "state of emergency" as a term, it argues that this can only be done by law and for the purpose of achieving a legitimate goal, i.e. the protection of national security, public health and the rights and freedoms of other citizens. This provision defines the state of emergency in particular terms outside the cases of war and martial law, covering other exceptions to normalcy related to national security, public health and human rights-related threats.

This legal area became a hot issue after the introduction of a state of emergency with a Decision of the National Assembly of 13 March 2020 and, based on this decision, of the Law on Measures and Actions during the State of Emergency called for by the epidemic hazards resulting from the spread of coronavirus. After the two months of the emergency state expired, and it was repealed, the Health Act was amended to no longer demand a state of emergency due to imminent danger to life and health of citizens from epidemic disease. Instead, in its Art. 63, para 1, the law now recommends what it calls an emergency epidemic situation. Regardless of the altered name for the state of emergency, the stipulated measures against the epidemic threat, with their restrictions of rights, as well as the bodies authorised by law to declare and manage this situation, make the following provisions of Art. 63, from paragraph 2 through paragraph 7, disputable from a constitutional perspective. This was the reason why the president referred them to the Constitutional Court. Although Article 63, paragraph 2, of the Health Act stipulates that the emergency epidemic situation could only last within a limited time, the power to define this period is delegated to the Council of Ministers, which decides on a proposal of the health minister based on an epidemic risk assessment carried out by the chief sanitary inspector. If an epidemic situation is in place, the health minister may introduce nationwide temporary anti-epidemic measures proposed by the chief sanitary inspector, while the directors of regional health inspectorates can impose such measures regionally, as long as they are agreed with the CSI. These measures may restrict the movement of people within the country; they can also suspend the operation of public and service facilities, i.e. they can restrict the right to work. Thus, the introduction of an emergency epidemic situation, its length and rights restrictive measures are not passed by the law of the National Assembly but are instead delegated to the executive, i.e. the Council of Ministers and its bodies. By dint of such delegation, the government and its agencies could, outside the control of Parliament, permanently restrict constitutional rights by fiat – which is constitutionally unacceptable.

In summary, the main conclusion is that the state of emergency, understood as the suspension of the law due to a threat to statehood, is a para-legal state, which is therefore outside legal regulation. The point of political liberalism is to "curb" the anomie of sovereign power by affirming the principles of the Rechtsstaat and the separation of powers. If a threat to statehood is present, the imposed restrictions on constitutional rights should remain within legality, motivated solely by the legitimate aim of providing protection against a particular threat and in compliance with the principle of proportionality, i.e. with the minimum possible

application of the state coercion necessary to achieve this goal. As they have the potential to transform a liberal-democratic type of governance into a dictatorial regime, these restrictions must be temporary rather than permanent. Once the threat has been overcome or warded off, the normality of the public order established by the constitution must be restored.