

Comparative Emergency Laws

Professor Dr. Ebrahim Afsah

v. 2.2

Tuesdays, 9:00–11:00, Seminar Room 43, Juridicum

Description

Do exceptional times require exceptional measures? And if so, how can we limit the inevitable damage to the ordinary legal and political system? These old constitutional questions are often conflated with the recent phenomenon of global terrorism, but they pertain to a much broader set of threats to the integrity of state and society, from natural disasters, war, economic collapse to, more controversially, migration and related issues.

This course offers a broad historical and geographic overview of the concept of emergency laws from the Roman republic to contemporary times, and from liberal democracies to autocracies. Perhaps counter-intuitively, explicitly and pre-emptively formulated emergency laws are not the prerogative of (Western) liberal constitutional democracies, but can be found and are taken seriously by decision-makers in very different types of states. Balancing rights, procedural safeguards and freedom with security in order to better respond to existential threats turns out to be a fairly universal functional challenge of any effective state.

This course will examine different theories of emergency powers, using various international case studies of exceptional crises. We will examine how different responses to exceptional security threats have challenged liberal concepts of democracy and the rule of law and, in some cases, international human rights law. This underlying balancing is contrasted with the similar but distinct calculation occurring in non-liberal entities.

In order to better understand how the State can or should respond to international terrorism and other security threats, this course will examine the major theoretical paradigms of emergency powers: the “extra-legal” model, the “legislative” model, the “neo-Roman” model, the “rule-of-law” model, and the “authoritarian” model. In turn, these models will be considered in connection with specific historical events, in order to assess their effectiveness and drawbacks in simultaneously responding to emergencies and protecting the constitutional status quo, that is upholding the rule of law and/or liberal democratic values.

To this end, the course will focus on theoretical readings about emergency powers, together with statutes, court judgments, and historical accounts of extraordinary events. Case studies will include the United States, Germany, Japan, France, China, Iran, East Timor, Thailand, Malaysia, South Korea, Taiwan, Sweden, Argentina, and others in passing.

At the conclusion of the course, students should have acquired the ability to:

- Identify and analyse complex and concrete legal problems surrounding different states of emergency, in their historical contexts;
- Present the wider policy and legal arguments behind the different theoretical models of emergency powers;
- Put the current controversies about responses to terrorism into historical, national, and international perspective, in order to test the relevance of different emergency powers theories;
- Analyse the impact of different emergency powers upon the concept of liberal democracy and the rule of law, consider their links to illiberal or authoritarian regimes, and understand their relationships to the nature of the state itself;
- Argue carefully and logically for and against specific legal positions in factual context, present the theoretical foundations for those arguments, and make reasoned choices in terms of public policy;
- Formulate and communicate ideas and legal issues;
- Utilize international and foreign legal materials, and historical accounts, in a coherent, competent, and professional way.

Course materials can be downloaded here: <https://tinyurl.com/Lehre-Afsah>

Prerequisites

Knowledge of constitutional and international law, and a sufficient command of English.

Exam

The grade for this course consists of one written, two-day take-home, open-book book exam of maximum 2000 words excluding footnotes (70%) and class participation (30%).

Students will have to answer two questions out of six, thus accommodating to some degree personal preferences. The exam is aimed to motivate a renewed engagement with the course material and to cement the retention of the above stated Learning Outcomes, which will guide grading. Special emphasis will be given to the mastery of comparative approaches.

Curriculum

1st Session, 8th October: General Introduction to the Field

- What are emergency powers?
- When do they become necessary?
- Is greater executive flexibility ever functionally warranted?
- What is the scope for rhetorical abuse (threat exaggeration)?
- Is there a connection between O.J. Simpson, Osama Bin Laden and Anders Breivik?

Mandatory Material:

David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), Chapter 1, pp. 17-34.

Victor Vridar Ramraj, "No Doctrine more Pernicious? Emergencies and the Limits of Legality," in: *Emergencies and the Limits of Legality*, ed. by Victor Vridar Ramraj (Cambridge: Cambridge University Press, 2008) pp. 3-30.

Oren Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), Introduction, pp. 1-14

Peripheral Material:

SKIM only: The whole point of these readings is to show the cumbersome and expensive nature of (criminal) procedure when no external limits are placed on it. The executive would rationally seek to avoid some of these strictures in extraordinary times when time and decisiveness are of essence.

Christopher B. Mueller, "O.J. Simpson and the Criminal Justice System on Trial," *University of Colorado Law Review*, Vol. 67(4), No. 4 (1996) pp. 727-46. Read very superficially, focus on p. 741 lower half, p. 743 lower half, p. 745 whole page

Paul F. Campos, "The Color of Money: O.J. Simpson and the Criminal Justice System - Perceptions and Decisionmaking," *University of Colorado Law Review*, Vol. 67(4), No. 4 (1996) pp. 921-30. Not a long piece, read cursorily but focus on pp. 924-28

Ronald J. Allen, "Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets, The O.J. Simpson and the Criminal Justice System - Reform," *University of Colorado Law Review*, Vol. 67(4), No. 4 (1996) pp. 989-1026. This is a winding, but interesting piece, however, it raises only a few points relevant to this course. Focus on pp. 989-91, 1000-8 [here especially 1004-5], and 1021-24.

15th October: cancelled

2nd Session, 22nd October: Typology of Emergency Laws

- What is the institutional logic of the separation of powers?
- What do social contract theories tell us about the nature of constitutionalism?
- What models of accommodation are mentioned in the readings?
- What are their respective strengths and weaknesses?
- How are different models dependent on different legal and other cultures?

Mandatory Material:

Gross and Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice.*, Chapter 1, Models of Accommodation, pp. 34-85

Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency.*, Chapter 1, pp. 54-65, ignore pp. 35-54.

Review readings from first class.

Voluntary Material:

John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law*, Vol. 2(2), No. 2 (2004) pp. 210-39.

Jon Elster, "Comments on the Paper by Ferejohn and Pasquino," *International Journal of Constitutional Law*, Vol. 2(2), No. 2 (2004) pp. 240-43.

3rd Session, 29th October: Emergency Powers in France

- What are the defining characteristics of the presidency in the 5th Republic?
- What are the historical reasons?
- What additional powers can be invoked by the executive? What is the role of the other branches of government?
- What concerns were raised by the 1961 invocation of presidential emergency powers?
- How were the provisions changed before and during the current state of emergency? Does this reflect a changing security environment?

Mandatory Material:

John Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992).

Martin Harrison, "The French Experience of Exceptional Powers: 1961," *Journal of Politics*, Vol. 25(1), No. 1 (1963) pp. 139-58.

Jeremy Shapiro and Bénédicte Suzan, "The French Experience of Counterterrorism," *Survival*, Vol. 45(1), No. 1 (2003) pp. 74-98.

Venice Commission, *Opinion No. 838/2016 on the Draft Constitutional Law on "Protection of the Nation" of France*, adopted by the Venice Commission at its 106th Plenary Session, CDL-AD(2016)006, (2016).

Voluntary Material:

- Alistair Cole, "Heading the Republic," *Contemporary French and Francophone Studies*, Vol. 12(2), No. 2 (2008) pp. 183-91.
- Idris Fassassi, "France: The Wrong Path? The Limits of Constitutional Reform in Response to Terrorist Attacks," *ConstitutionNet*, Paris, IDEA, 19 February 2016, available at: <http://www.constitutionnet.org/news/france-wrong-path-limits-constitutional-reform-response-terrorist-attacks>.
- Martin A. Rogoff, "Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond," *Jus Politicum*, Vol. 6 (2011) pp. 1-58.
- Fionnuala Ní Aoláin and Oren Gross, "Connecting Past and Present: Assessing French Emergency Powers in Historical Perspective," *Just Security Blog*, Washington D.C., 23 November 2015, available at: <https://www.justsecurity.org/27810/connecting-present-assessing-french-emergency-powers/>.

4th Session, 5th November: Militant Democracy and Notstand in Germany

- What has been the experience with Article 48 in the Weimar Constitution?
- How did the drafters of the post-war *Grundgesetz* address the topic and why?
- What caused the change in approach prior to 1968? How was it legally implemented?
- What is the difference between the French provision to its German counterpart in 1919 and 1968?
- Which is more sophisticated? Which more effective? Which safer?

Mandatory Material:

- Russell Miller, "How to Kill an Idea: An American's Observations on the NPD Party-Ban Proceedings," *Verfassungsblog*, 13 January 2017, available at: <http://verfassungsblog.de/how-to-kill-an-idea-an-americans-observations-on-the-npd-party-ban-proceedings/>.
- Russell Miller *et al.*, "40/68 – Germany's 1968 and the Law," *German Law Journal*, Vol. 10(3), No. 3 (2009) pp. 223-60.
- András Jacab, "German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse," *German Law Journal*, Vol. 7(5), No. 5 (2005) pp. 453-78.

Voluntary Material:

- Jan-Werner Müller, "Militant Democracy," in: *The Oxford Handbook of Comparative Constitutional Law*, ed. by Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012) pp. 1253-66.
- Karl Loewenstein, "Militant Democracy and Fundamental Rights, I," *American Political Science Review*, Vol. 31(3), No. 3 (1937) pp. 417-32.
- Idem*, "Militant Democracy and Fundamental Rights, II," *American Political Science Review*, Vol. 31(4), No. 4 (1937) pp. 638-58.
- Christoph Gusy, "Ermächtigungsgesetzgebung in Deutschland zwischen Monarchie und Republik," *Beiträge zur Rechtsgeschichte*, Vol. 2/2018 (2018) pp. 396-408.
- John Mueller, "Terrorism and the Dynamics of Threat Exaggeration" (Paper presented at the "Annual Meeting of the American Political Science Association, Washington, DC, September 1-4, 2005", Ohio State University, Columbus, Ohio, 2005), available at:

<http://www.diplomatie.gouv.fr/fr/IMG/pdf/mueller2.pdf>, accessed on: 11 January 2007.

5th Session, 12th November: Militant Democracy and Notstand in Austria

- What is the core insight behind the idea of a ‘militant democracy’?
- Is Austria a militant democracy?
- What is the core of ‘constitutional patriotism’?
- Is there a link between militant democracy, constitutional patriotism and migration?
- Can prohibition ever further freedom?

Mandatory Material:

Ulrich Wagrاندl, “Militant Democracy in Austria,” *University of Vienna Law Review*, Vol. 2 (2018) pp. 95-128.

Ewald Wiederin, “Das Notverordnungsrecht des Bundespräsidenten,” *Beiträge zur Rechtsgeschichte*, Vol. 2/2018 (2018) pp. 385-95. (if you read German)

Müller, “Militant Democracy.”

Voluntary Material:

Ulrich Wagrاندl, “Transnational Militant Democracy,” *Global Constitutionalism*, Vol. 7:2 (2018) pp. 143-72.

Thomas Olechowski, “Normsetzung im Notstand. Zur Einführung,” *Beiträge zur Rechtsgeschichte*, Vol. 2/2018 (2018) pp. 229-35. (in German, giving an overview over the conference proceedings on the history of the Austrian emergency constitution.)

Stephan G. Hinghofer-Szalkay, “Richterliche Rechtsnormvernichtung im Notstand. Verfassungsgerichtsbarkeit und Notverordnung,” *Beiträge zur Rechtsgeschichte*, Vol. 2/2018 (2018) pp. 357-70. (in German, compare to Dyzenhaus.)

Kamila Staudigl-Ciechowicz, “Das Kriegswirtschaftliche Ermächtigungsgesetz 1917. Von seiner Entstehung 1917 bis zu seiner Aufhebung 1946,” *Beiträge zur Rechtsgeschichte*, Vol. 2/2018 (2018) pp. 274-93. (in German, compare to the economic provisions in the American New Deal.)

Ulrich Wagrاندl, *Wehrhafte Demokratie in Österreich*, ed. by Paul Oberhammer, Vol. 274, Juristische Schriftenreihe (Wien: Verlag Österreich, 2019).

6th Session, 19th November: The New Deal in America

- What caused the crisis at the origin of the New Deal?
- Were the measures proposed effective? Were they lawful?
- Which branches of the government came into conflict?
- How was the constitutional crisis averted?
- Can you see parallels to contemporary events?

Mandatory Material:

Michael R. Belknap, “New Deal and the Emergency Powers Doctrine Historical Observation,” *Texas Law Review*, Vol. 62:1 (1983) pp. 67-109.

Roger I. Roots, "Government by Permanent Emergency: The Forgotten History of the New Deal Constitution," *Suffolk University Law Review*, Vol. 33 (2000) pp. 259-95.

Voluntary Material:

Philip A. Wallach, "Laying out a broad TARP," in: *To the Edge* (Washington DC: Brookings Institution Press, 2015) pp. 79-118. (focus on 79-92 and 100-106)

Bernadette Meyler, "Electronic Emergency and the Rule of Law," *DePaul Law Review*, Vol. 56 (2006/2007) pp. 539-67.

7th Session, Friday, 22nd November: Economic Emergencies: General

Hörsaal Rechtswissenschaften Schenkenstraße 8-10, 4th floor , 10:00-12:00

- Are political (violent), natural and economic emergencies qualitatively different?
- Should extraordinary responses be judged by different standards?
- How do economic emergency measures affect the constitutional order?
- How accurate is the analogy to war?
- Should (economic) crises be accepted as legitimate defence for the non-performance of (international) legal obligations?

Mandatory Material:

Oren Gross and F. Ní Aoláin, "Models of Accommodation," in: *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) pp. 17-85. (review from Week 1, focus on pp. 74-78)

William E. Scheuerman, "The Economic State of Emergency," *Cardozo Law Review*, Vol. 21(5-6), No. 5-6 (2000) pp. 1869-94.

Voluntary Material:

Christina Binder and August Reinisch, "Economic Emergency Powers: A Comparative Law Perspective," in: *International Investment Law and Comparative Public Law*, ed. by Stephan W. Schill (Oxford: Oxford University Press, 2010).

Meyler, "Electronic Emergency and the Rule of Law."

8th Session, 26th November: Economic Emergencies II: Euro Crisis

- What caused the European monetary and fiscal crisis?
- Which policy measures were taken? Were they effective? Were they lawful?
- Did these measures lead to permanent economic or legal changes?
- If the only justifiable purpose of emergency measures is the ultimate return to the normality of the constitutional order, how are irreversible shifts in wealth (profits are privatised while losses are socialised) and/or institutional power (from the legislative to the executive or unelected bodies) evaluated?
- What is the potential impact on the democratic order if the deepening economic crisis leads to unelected, so-called technocratic governments as the only solution for severely indebted countries? Compare with Li's critique of ineffectual Western governance unduly privileging procedure (elections) over outcome (growth and responsible public finances)?

Mandatory Material:

Claire Kilpatrick, "On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts," *Oxford Journal of Legal Studies*, Vol. 35:2 (2015) pp. 325-53.

Peter Spiegel, "Inside Europe's Plan Z: How the Euro Was Saved," *Financial Times*, (15 May 2014).

Björg Thorarensen, "The Impact of the Financial Crisis on Icelandic Constitutional Law: Legislative Reforms, Judicial Review and Revision of the Constitution," in: *Constitution in Global Crisis*, ed. by Xenophon Contiades (2013) pp. 263-83.

Voluntary Material:

Matthias Ruffert, "The European Debt Crisis and European Union Law," *Common Market Law Review*, Vol. 48 (2011) pp. 1777-806.

Jonathan White, "Emergency Europe," *Political Studies*, Vol. 63:2 (2015) pp. 300-18.

Pablo Martín Rodríguez, "A Missing Peace of European Emergency Law: Legal Certainty and Individual's Expectations in the EU Response to the Crisis," *European Constitutional Law Review*, Vol. 12:2 (2015) pp. 265-93.

9th Session, 3rd December: Administrative Guidance in Japan

- Does the genesis of the Japanese constitution affect its popular legitimacy? What are the two main positions in contemporary Japan?
- Is the Japanese Constitution a 'Business as Usual' constitution? Why does Fenwick think it is not?
- What is extra-legal administrative guidance? How have the Japanese courts treated it?
- What factors motivate calls for constitutional reform? Are they predominantly functional or normative?
- What is the relationship between expected damage, likelihood of occurrence and cost of preventive action in public and elite responses to extraordinary threats?

Mandatory Material:

Mark Fenwick, "Emergency Powers and the Limits of Constitutionalism in Japan," in: *Emergency Powers in Asia. Exploring the Limits of Legality*, ed. by Victor Vridar Ramraj and Arun K. Thiruvengadam (Cambridge: Cambridge University Press, 2010) pp. 314-41.

Voluntary Material:

Hitoshi Nasu, "Article 9 of the Japanese Constitution Revisited in the Light of International Law," *Zeitung für japanisches Recht / Journal of Japanese Law*, Vol. 18 (2004) pp. 50-66.

Ram Prakash Anand, "Family of 'Civilised' States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation," *Journal of the History of International Law*, Vol. 5 (2003) pp. 1-75.

Wolfgang Streeck and Kozo Yamamura (eds.), *The Origins of Nonliberal Capitalism: Germany and Japan in Comparison*, Cornell Studies in Political Economy (Ithaca: Cornell University Press, 2001).

10th Session, 10th December: Socialist Rule of Law in China

- What are the concrete functional challenges faced by China prior to the creation of extraordinary laws?
- What is the role of law played in its systems?
- How does law function as enabling government power? How does law function to constrain government power?
- What is the role of legitimacy of law and how is it affected by the emergency measures?
- What is the role of the legitimacy of the state and how is it affected by its ability to deliver outcomes?
- Note the absence of tension between liberal norms and security needs.

Mandatory Material:

Jacques deLisle, "States of Exception in an Exceptional State: Emergency Powers Law in China," in: *Emergency Powers in Asia. Exploring the Limits of Legality*, ed. by Victor Vridar Ramraj and Arun K. Thiruvengadam (Cambridge: Cambridge University Press, 2010) pp. 342-92.

Daniel A. Bell, "Real Meaning of the Rot at the Top of China," *Financial Times*, (London, 23 April 2012).

Eric X. Li, "Why China's Political Model Is Superior," *New York Times*, (18 February 2012).

Voluntary Material:

Gilles Andréani, Lanxin Xiang, and Bruno Tertrais, "China's Rise: Contingency, Constraints and Concerns," *Survival*, Vol. 54(1), No. 1 (2012) pp. 205-24.

Thomas Fingar, "China's Rise: Contingency, Constraints and Concerns," *Survival*, Vol. 54(1), No. 1 (2012) pp. 195-204.

11th Session, 17th December: Emergency Law in Developing Countries

- What is the relationship between basic administrative coherence and the rule of law?
- What are the challenges faced by developing nations in establishing the rule of law?
- What are the differences in the use of emergency law in East Timor, Thailand, Malaysia and South Korea?
- Which factors explain why some polities have found it easier to return to normal constitutional affairs than others?
- What is the difference between Afghanistan and South Korea?

Mandatory Material:

Victor Vridar Ramraj, "The Emergency Power Paradox," in: *Emergency Powers in Asia. Exploring the Limits of Legality*, ed. by Victor Vridar Ramraj and Arun K. Thiruvengadam (Cambridge: Cambridge University Press, 2010) pp. 21-55.

C. I. Eugene Kim, "Emergency, Development and Human Rights: South Korea," *Asian Survey*, Vol. 18:4 (1978) pp. 363-78.

Voluntary Material:

Barnett R. Rubin, "(Re)Building Afghanistan: The Folly of Stateless Democracy," *Current History* (April 2004) pp. 165-70.

Mark Tushnet, "Some Skepticism about Normative Constitutional Advice," *William & Mary Law Review*, Vol. 49(4), No. 4 (2008) pp. 1473-96.

Idem, "The Constitutional Politics of Emergency Powers: Some Conceptual Issues," in: *Emergencies and the Limits of Legality*, ed. by Victor Vridar Ramraj (Cambridge: Cambridge University Press, 2008) pp. 145-55.

12th Session, 7th January: Turkey: Coups and Counter-Coups

- What is characteristic about the 2016 failed coup compared to those that preceded it?
- Which legal developments *prior* to the coup affected the role of the military?
- Which elements did the planners of the coup fail to observe?
- What has been the response by the Erdogan government?
- Can you see parallels to European countries in the past?

Mandatory Material:

Ahmet Insel, "Turkey, between the Coup d'État and the Referendum," *Politique étrangère*, Vol. 2017/2 (2017) pp. 105-16.

Edward N. Luttwak, *Coup d'État. A Practical Handbook*, Revised Edition (Cambridge, Mass.: Harvard University Press, 2016 [1968]), pp. 116–69. Chapter 4 "The Planning of the Coup d'État"

"Turkey: The Attempted Coup and Its Troubling Aftermath," *IISS Strategic Comments*, Vol. 22(19), No. 19 (July 2016).

Emma Champion, "Turkey Approves Constitutional Amendment," *IISS Blog* (17 April 2017).

"Turkey's New Presidential System," *IISS Strategic Comments*, Vol. 24(23), No. 23 (August 2018).

Voluntary Material:

Edward N. Luttwak, "The Middle of Nowhere," *Prospect* (26 May 2007).

Ömer Taşpınar, "The End of the Turkish Model," *Survival*, Vol. 56(2), No. 2 (2014) pp. 49-64.

13th Session, 14th January: Migration and Emergency

- What is the ultimate cause of the migration crisis?
- Is it likely to abate, is it structural and chronic or exceptional?
- Which constitutional principles have clashed?
- Could exceptional legal measures have avoided the legal/political damage?
- What are the long-term repercussions of the events of 2015?

Mandatory Material:

Justin Borg-Barthet and Carole Lyons, "The European Migration Crisis," *Edinburgh Law Review*, Vol. 20 (2016) pp. 230-35.

Kriszta Kovács, "The State of Exception: A Springtime for Schmittian Thoughts?," *Diritto & Questioni Pubbliche*, Vol. XVII:2 (2017) pp. 163-82.

Ana López-Sala and Dirk Godenau, “Controlling Irregular Immigration at the European Union’s Southern Maritime Border: An Emerging System Driven by „Migration Emergencies“,” *Journal of Mediterranean Knowledge*, Vol. 2:1 (2017) pp. 17-35.

Voluntary Material:

Ernst-Wolfgang Böckenförde, “Der säkularisierte Staat: Sein Charakter, seine Rechtfertigung und seine Probleme im 21. Jahrhundert,” (München: Carl Friedrich von Siemens Stiftung, 2007) pp. 11-42.

Ralf Michaels, “Gehört der Islam zu Deutschland? Beyond Böckenförde,” *Verfassungsblog*, 22 März 2018, available at: <https://verfassungsblog.de/gehoert-der-islam-zu-deutschland-beyond-boeckenfoerde/>, accessed on: 27 May 2018.

14th Session, 21st January: Revision Session

- Bring your own questions!

Mandatory Material:

Review previous readings.