State of exception (*Ausnahmezustand*)

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3/4/5 June, 2016 (seminar), 9 am – 6 pm  
11 June, 2016 (workshop, optional), 10 am – 6 pm

Juristische Fakultät: Schwerpunkte 1, 2 und 5

Are states of exception still exceptional? One could doubt it, if we look at current debates and developments: existential governmental crises and states of exception have become buzz words. But what’s behind these buzz words? This seminar aims at exploring the topic “state of exception” by looking at it through different lenses: historical, legal, comparative, and policy lenses will form a bigger, interdisciplinary picture. The legal perspective will comprise both a doctrinal and a socio-legal perspective, and the comparative perspective will link back to the historical one: it will be both synchronical and diachronical, i.e. comparative over time. A co-operation between the HU Law Faculty (Prof. Dr. Anna-Bettina Kaiser), the HU Department of History (Prof. Dr. Gabriele Metzler), and the Department of Politics at Princeton University (Prof. Dr. Jan-Werner Müller) makes possible this interdisciplinary approach towards the state of exception as a multi-layered phenomenon.

The seminar addresses questions such as the origin of the state of exception as a legal instrument, its development in 19th century France and Prussia, and its grave abuse in Weimar Germany, where emergency decrees finally lead to a permanent state of exception during the Nazi period. With a specific normative focus, the seminar will analyse the respective requirements of the U.S. and current French and German constitutions (*Notstandsverfassung*) for dealing with states of exception. How do the aforementioned constitutions cope with modern threats such as terrorism? What role do courts play? And how do rules emanating from the conception of militant democracy (*Wehrhafte Demokratie*) interact with the instrument “state of exception”? Termed as a policy question: Is the conception – and in Germany the rules – of militant democracy an illiberal antagonism? Or is it an indispensable tool in future challenges for constitutional democracies?

The seminar wants to examine these and further questions. Seminar participants will – if possible – form interdisciplinary and international teams of two to jointly work on a presentation. The seminar will be supplemented by an optional workshop which will take place on 11 June 2016 at Humboldt University.

**Tentative syllabus:**

**I. Introduction and History I: The State of Emergency during the Roman Republic – still a source of inspiration?**

*Giorgio Agamben*, State of Exception, 2005
II. History II: The 19th century – the State of Siege (*Belagerungszustand*)

1. The *état de siège* in 19th century France  

2. The reception of the *état de siège* in the so-called Paulskirchenverfassung and in Prussia  

3. The failure of the state of siege as a legal instrument in World War I (France and Germany)  

III. History III: The 20th century – Constitutional Dictatorship

1. Weimar Republic  
   a) *Carl Schmitt* – thinker of the state of exception  
   *Carl Schmitt*, Political Theology. Four Chapters on the Concept of Sovereignty, 2006 (1922)  
   
   b) Constitutional Dictatorship during the Weimar Republic  

2. The Third Reich – permanent state of exception or dual state (Ernst Fraenkel)?  
*Ernst Fraenkel*, The Dual State: A Contribution to the Theory of Dictatorship, 2015 (1941)

IV. Recent Developments: Some Basic Normative Questions

1. Current debates on the state of exception (Agamben, Kahn)  
*Giorgio Agamben*, State of Exception, 2005  
*Paul Kahn*, Political Theology, Columbia UP, 2012

2. Liberty and Security (Waldron, Dyzenhaus)  

V. Legalist and Extralegalist Approaches in Contemporary Western Democracies

1. The German Militant Democracy and *Notstandsverfassung* – regulating the old-fashioned state of siege?  
Jan-Werner Müller, Militant Democracy, in: Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012
Ernst-Wolfgang Böckenförde, Der verdrängte Ausnahmezustand, Neue Juristische Wochenschrift (NJW) 1978, p. 1881-1890

2. The State of Exception in the French Constitution – in need of reform?

3. The US “War on Terror”

VI. Thinking about Specific Exceptional Measures

1. Loss of Political Rights and Deprivation of Citizenship (Macklin)
   Audrey Macklin, “Citizenship Revocation and the Privilege to Have Rights” (2015) 37 Queen’s L J

2. “Enhanced Interrogation” (Waldron)

3. Arming the People Themselves?

Bibliography:
Giorgio Agamben, State of Exception, 2005
Ernst-Wolfgang Böckenförde, Der verdrängte Ausnahmezustand, Neue Juristische Wochenschrift (NJW) 1978, p. 1881-1890
Günter Frankenber, Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception, 2015
Paul Kahn, Political Theology, Columbia UP, 2012
Audrey Macklin, “Citizenship Revocation and the Privilege to Have Rights” (2015) 37 Queen’s LJ

Jan-Werner Müller, Militant Democracy, in: Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012


Carl Schmitt, Political Theology. Four Chapters on the Concept of Sovereignty, 2006 (1922)


Prüfung: Vorausgehende Studienarbeit, anschließende Studienarbeit, Seminararbeit

Besprechungstermin: 21. April, 17 (!!) Uhr c.t., Raum UL9, 210

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