# Erosion of the Rule of Law

## The State of Emergency as a Strategic Narrative in Representative Democracies

Matthias Lemke

## Contents

## Abstract

Representative democracies, in which – in accordance with the normative ideal of democratic theory – the government has the duty to give the sovereign reasons for what it does, use the state of emergency to sustainably avert danger in crisis situations – for instance, by restricting basic rights. Since the state of emergency restricts fundamental *habeas corpus* rights, the plausibilisation strategies required for this must be sound enough to be accepted by the people. Taking Stephen E. Toulmin's thoughts on argumentation theory as a basis, this essay identifies three elements of plausibilising narratives that can be observed throughout the history of representative democracy regardless of the type of political system in which it is practiced – the exterior situation, the explicit distinction between friend and foe and the dictate of efficiency. Together, they can be seen as elements of what Toulmin calls a warrant for states of emergency, i.e. as elements of a strategic narrative designed to lend plausibility to the suspension of fundamental basic rights and liberties in a representative democracy.

## About the Author

Dr. phil. Matthias Lemke was born in 1978. Since 2012, he has held the position of academic coordinator for the German Federal Ministry of Education and Research project entitled "Post-democracy and Neoliberalism" at the Department of Political Science at the Helmut Schmidt University, Hamburg. Focal topics of research are political theory and the history of political thought since the Early Modern Age, particularly post-democracy and neoliberalism, economisation, the state of emergency and democratic socialism. Publications: *Wandel durch Demokratie. Liberaler Sozialismus und die Ermöglichung des Politischen*, Wiesbaden 2012; *Die gerechte Stadt. Politische Gestaltbarkeit verdichteter Räume*, Stuttgart 2012 (eds.); *Ausnahmezustände als Dispositiv demokratischen Regierens. Eine historische Querschnittsanalyse am Beispiel der USA*, published in: *Zeitschrift für Politikwissenschaft* 3/2012.

Email: matthias.lemke@hsu-hh.de

## 1. The State of Emergency and the Constitutional State - A Problem Relationship

There has been a remarkable expansion of executive powers in the recent history of western democracies. Legislative practice after 11 September 2001, primarily in the USA (cf. Lemke 2012: 322-326), but also in other western democracies, is not the only evidence of the increasing use of states of emergency[1]. Expansions of executive powers in an unusually short period of time compared to the previous decades were also observed in France in the wake of the suburban unrest in 2005/2006 (cf. Lemke 2010: 94-99; 2013)[2] and in Spain in response to a wildcat strike by air traffic controllers in December 2010 (cf. Lemke 2011: 382-390). If the main aim of these states of emergency is to impose a temporary or permanent suspension of habeas corpus rights, western democracy can be diagnosed as suffering from a significant crisis in which the promise of the comprehensive rule of law associated with it is eroded – or at least put up for negotiation arbitrarily and willingly in a given situation.
This indicates the core of the problem, the relationship between democracies and the state of emergency. How far may a democracy go to protect itself – against whatever danger may arise? Part of this issue is the problem of weighing up different interests, which points to the dilemma of a republic – even a democratic republic – being unable to find salvation in injustice on account of its conception of itself as a constitutional state – even if its existence is at stake. Machiavelli was less demure, writing in his *Discorsi* (1531):

"And therefore I will say, in conclusion, that those republics which in time of danger cannot resort to a dictatorship, or some similar authority, will generally be ruined when grave occasions occur." (Machiavelli 1990: 185).

Machiavelli is not alone in his assessment that the state of emergency modelled on the *Roman dictatorship* can be of great assistance. Also authors of considerable importance for modern representative democracy such as those writing for the *Federalist Papers*, in particular Alexander Hamilton, regarded the concentration of executive power as an effective means for dealing with crisis situations:

"The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights."

To put it more bluntly, this means:

"To be more safe, they [i.e. the people, M.L.] at length become willing to run the risk of being less free." (Hamilton, as quoted by Adams/Adams 1994: 40).

On the other hand, how much is it worth for people to live in a republic like that which buys security with freedom and because of a pressing danger – whether real or imaginary is immaterial – takes refuge in an emergency regime?

As the length of time over which the problem has already been discussed suggests, it is hardly possible to find a hard-and-fast solution for this problem of self-preservation and the means required for each situation. Instead, another and far more interesting question regarding the relationship between the state of emergency and democracies ought to be posed in order to see the reasoning mechanisms that take effect in connection with the self-

[1] Cf. the reactions to the terrorist attacks in Madrid on 11 March 2004 and in London on 7 July 2005. For the definition of a state of emergency, cf. Rossiter (1948), Agamben (2004) and Frankenberg (2010).
[2] Analogous to this is the unrest in London and other English cities in August 2011; cf. Altenried (2011).

preservation of a representative democracy. How can the civil liberties of citizens be curtailed at all in a representative democracy, particularly considering that the government has the duty to give them reasons for the decisions it makes? And what must happen for hard-fought rights to be voluntarily renounced?
Three steps are necessary to answer this question. The first step involves showing the extent to which a state of emergency can be regarded as a narrative that can be operationalised politically and generate acceptance among the people. By taking up the theme set out by Stephen E. Toulmin, it is possible to show that crisis intervention activities must draw on – recurring – narratives to be accepted as plausible measures by the sovereign. The second step involves illustrating the narrative of the state of emergency and its elements in historical and empirical terms. With a view to different crisis situations in constitutional states in which representative democracy is practiced, it is possible to distinguish between three elements or narrative threads that – in varying combinations or by themselves – are capable of making the suspension of specific norms plausible to the public. The description of these elements leads to a final reflection on the extent to which the present increase in narratives, for which there is empirical evidence, can also be regarded, so to speak, as being indicative of the declining stability of the normative core of representative democracy – the rule of law.

## 2. The Strategic Narrative in Representative Democracies

According to the normative assumption in Habermas's discourse theory, collectively binding decisions are made in representative democracies by means of the link between their institutions and the sovereign that is established by the medium of language. The purpose of this link is to arouse debate on the need for a specific policy output. The executive has the duty to give reasons to the people, i.e. to the political public[3], for all the decisions that ultimately facilitate policy outputs.
Using Stephen E. Toulmin's thoughts on argumentation theory (1975; 2003), the aim is to show that a specific plausibility horizon is drawn on for every reason given. This horizon is not part of the argument in a narrower sense, but enables the argument – the specific form of turning data into conclusions – to work. This plausibility horizon, which Toulmin calls a warrant, is important for evaluating an argument, and for doing so before a specific, material policy output is achieved. Making an analytical distinction between a formal argument and its plausibility horizon allows strategic narratives – narratives in representative democracies that are aimed at getting a decision brought about – to be put into discourse contexts that extend far beyond everyday debates on one topic. Specific political decisions, i.e. the material consequences of such plausibility horizons, mark the end of a (political) argument and subsequently become elements of strategic narratives themselves, since politics is a process that never ends. In the medium to long term, the material policy outputs themselves become elements of a warrant, a phenomenon which Michel Foucault describes in his amorphous concept of the *dispositive* as a "thoroughly heterogeneous ensemble" (Foucault 2003: 394; cf. Agamben 2008) of material and immaterial elements of the discourse.
Toulmin says that – starting with the formal deduction of the elements of the plausibility horizon – an argument is quite fundamentally any statement that is accepted in terms of its contents and that has a claim to being valid due to it being articulated and heeded by others:

[3] The statement that reasons must be given for political decisions made in a representative democracy links democratic decision-making processes with - successful - arguments. This normative view must be considered against the contrasting realistic view that the number of reasons given to the political public, to whom information is conveyed using language, is decreasing - particularly in the post-democratic era - and that legitimacy for political decisions is being generated by other means. In this essay, the terms plausibilisation or plausibilising narrative is used to denote this way of generating legitimacy, which does not primarily involve the use of arguments. In political practice, the distinction between argumentation and plausibilisation can be assumed to become blurred.

"A valid argument or a well-reasoned or reliably supported claim is one that will stand up to criticism and can be supported by a reasoning that complies with the standards that have to be met for it to be accepted (Toulmin 1975: 15)."

Hence, arguments articulate contents with a claim to validity and aim in their own finality to defend this validity or have the contents accepted as valid by others. In structural terms, the "practical business of argumentation" (ibid: 87) consists of three elements:

"Arguments are made up of three claims: ‘minor premise, major premise; therefore: conclusion’" (ibid.).

To explain how conclusions – claims that are accepted as valid and thus intersubjectively plausible – come about, Toulmin makes a distinction in which the reasoning process prior to the *conclusion (C)* is divided into an explicit and an implicit element. What the two elements have in common is that they contain information that is relevant to the conclusion insofar as they express specific facts required for a conclusion to be drawn and determine the way in which the reasoning is done on the basis of these facts. When forming the starting point of an argument, Toulmin refers to original facts as *data (D)* and to the information also used to legitimise the specific practice of reasoning as *warrants (W)*:

One of the reasons for making a distinction between data and warrants is that explicit reference is made to data, whereas implicit reference is made to warrants. It can also be noted that warrants are general and determine the correctness of all arguments of the type concerned. [...] The warrants to which we commit ourselves are implicit in the particular steps from data to conclusions that we are prepared to take and permit (ibid: 91).

The logic of the links between data, warrants and conclusions and their respective functions in the reasoning process can be illustrated by means of a specific example, as presented here in Table 1:

Table 1: Analysis Format for Arguments (General)

| **Element** | **Link** | **Content** |
|---|---|---|
| Data (D) | - | "Harry was born in Bermuda." |
| Warrant (W) | because | "A man born in Bermuda is legally a British citizen." |
| Conclusion (C) | therefore | "Harry is a British citizen." |

© Matthias Lemke in 2013 taking up topic in ibid: 91; cf. like Toulmin (2003: 92).

Table 2 illustrates that this format can also be applied to strategic narratives in the context of the public plausibilisation of the suspension of norms, but with the difference that the warrant comprises various elements (in this case three):

Table 2: Analysis Format for Arguments (State of Emergency)

| **Element** | **Link** | **Content** |
|---|---|---|
| Data (D) | - | There is a (severe) crisis. |
| Warrant (W) | because | Exterior situation and/or distinction between friend and foe and/or dictate of efficiency |
| Conclusion (C) | therefore | The suspension of norms / declaration of a state of emergency is unavoidable. |

© Matthias Lemke in 2013.

What does not change in the reasoning for the necessity of a state of emergency is, on the one hand, the crisis diagnosis and, on the other, the declaration of a state of emergency

itself. There is variance in the domain that Toulmin identified as the implicit part of the reasoning if it serves to subtly and informally legitimise the decision: in the warrants. Warrants work like “glasses” (Toulmin 1981: 121) which – to use a metaphor originating from the theory of science – render realities visible in a specific manner without themselves featuring beyond their function. This makes two things clear: The *strategic narrative* of a state of emergency is to be found in the *warrants* that outline the plausibility horizon of a specific political decision. This – conversely – allows different types of states of emergency to be identified from individual elements of the strategic narrative in accordance with the different ways in which their *warrants* can be composed.
Hence it follows that the analysis of states of emergency and the reasoning for them in representative democracies requires searches to be conducted for the contents of the established *warrants*. The respective *warrants* must be used to identify how precisely the particular link established for each state of emergency between the *data* (existence of a specific crisis) and the *conclusion* (suspension of norms in a state of emergency) was legitimised.

## 3. Narrative Elements Plausibilising a State of Emergency

The following remarks are intended to show what content has been used by the executive to legitimise a certain link between the *data* and the *conclusion* vis-à-vis the political public when states of emergency have been declared in representative democracies. Certain elements constantly recur in the *warrants* used to legitimise the suspension of norms.

### 3.1 Exterior Situation

The creation of an exterior situation is the narrative that can be traced back the furthest in the reconstruction of recurring elements of warrants in the reasoning given for states of emergency. The plausible reasoning for the need for expanding executive powers is based on the construction and identification of a collective player outside a state’s own constitutional order. He is portrayed as being hostile or harmful to the political existence of a state’s own collective subject. To fend off the actions of this player, it is necessary to expand executive powers. The exterior situation thus creates a defensive situation that legitimises and lends plausibility to the claim that exceptional practices are forced to be applied from the outside. This is important because it makes the actual suspension of norms appear to be something that nobody wanted, but is forced upon them. This lends it additional legitimacy because there are fewer grounds for suspecting that the executive is accumulating power for selfish reasons. Two scenarios can be used *pars pro toto* here to illustrate this specific warrant: the constellation of the players in the American Civil War as was brought to bear in the case *Ex parte Milligan* (1866) and that of the Algerian War of Independence (1954-62).
The specific warrant of an *exterior situation* for *Ex parte Milligan* (cf. Lemke 2012: 310-317) can be reconstructed on the basis of the appropriate judgment issued by the US Supreme Court. The lawsuit decided in favour of Lambdin P. Milligan is a milestone in the debate on crisis-induced emergency situations in representative democracies since it established the limits that can be imposed on civil rights by the suspension of norms – doing so for the first time in favour of the plaintiff.

When stating the grounds for the judgment, Justice David Davis said, "The importance of the main question presented by this record cannot be overstated for it involves the very framework of the government and the fundamental principles of American liberty" (US Supreme Court 1866: 109).

*Ex parte Milligan* thus becomes a political case, since it imposes limits on what the executive can do by placing norms under judicial control. By using the *external situation* concept, the executive had been able to significantly expand its powers compared with those it had in a "state of normality". This measure was aimed at maximising the efficiency of counter-insurrection efforts and – judging from the need for republican self-preservation expressed in

the *Federalist Papers* – was logical from the executive's point of view. The measure was rendered plausible by a warrant that transported an *external situation*. This is made exemplarily clear in an order Lincoln issued to the armed forces.

"You are engaged in repressing an insurrection against the laws of the United States. If at any point [... ] you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally or through the officer in command at the point where resistance occurs are authorised to suspend that writ." (Lincoln 1861).

Lincoln's practice of implementing crisis-induced suspensions of norms, which was aimed at increasing efficiency in the repression of *insurrections* by the US Army for the good of "public safety" and achieving the sustained self-preservation of the legal framework established by the United States, was thus essentially based on an *external situation* that was created by the use of such terms as *insurrection* and *against the law*. The actual suspension of *habeas corpus* as an expression of the expansion of the executive's powers derives from a *rebellion* being diagnosed that is interpreted by the *Federal Government* in the historical context as an illegal attempt on the part of a group of states to bring about secession. This causes a manifest conflict to arise over the interpretation of the central government's powers on the one hand and the constituent states' sovereign power of ultimate decision on the other. Although it is applied within the United States, the reasoning for a state of emergency thus takes on a quasi international quality that renders it possible to make a distinction in the sovereign between citizens and non-citizens and hence, with judgmental intent, between (law-abiding) friends and (lawless) foes.
While exceptional government action is derived from and legitimised by a distinction being made in the imputed position on the law in the *Ex parte Milligan* case, the concept of making a distinction between interior and exterior works slightly differently in the Algerian War of Independence(for details, cf. Lemke in particular). One case in which it is successful is the decolonisation conflict in which the French colony of Algeria seeks to gain its independence from France, and another is the *internal* conflict itself that erupted over the debate on Algeria's future status. On examination, the specific arguments Charles de Gaulle used in the early days of the Fifth Republic to plausibilise the declaration of a state of emergency reveal that he repeatedly claims that the supporters of the President and his policies are on the one side – the *right* side – and his opponents, that is to say, those in favour of Algeria's continued annexation to France, are on the other side – the *wrong* side. The repetition of this narrative for years, the more or less latent warlike unrest and the internal instability of France, with the country divided over the issue of Algeria, created a political atmosphere which led to a state of emergency actually being declared under Article 16 of the constitution of the Gaullist Fifth Republic on 22 April 1961 during the so-called *Generals' Putsch*. Although Algerians were French nationals *from the legal point of view*, they were ostracised and also ascribed the connotation of being foes. The proximity of the strategic narrative regarding the creation of an *external situation* to that of the explicit friend-foe distinction thus becomes apparent. This suggests that although these two reasoning mechanisms can be considered separately from an analytic angle, *the friend-foe distinction* in practice seems to be a latent structure in the creation of an external situation.

### 3.2 Explicit friend-foe distinction

In most cases, the creation of an *external situation* is not a neutral distinction, but rather an assessment. Such assessments – which first featured in the *Korematsu v. United States* case – are made in the context of an *explicit friend-foe distinction*, which marks a further warrant. Distinctions in which specific motives or attributes – for example, of a racist or incriminating nature – are stated with the aim of arousing derogatory emotions towards the outside or towards others are explicit assessments and thus different in quality. The *explicit friend-foe distinction* differs from the aforementioned warrant and its logic in that reference is made not only to the non-identity of the others, but also to their *alterity* – in a pejorative

sense – in order to lend plausibility to the need for emergency measures. Under such a fear-based policy, "others" are precisely not chance adversaries, but the existential foes upon which Carl Schmitt based his concept of politics. Such *explicit friend-foe distinctions*, as pejorative references to alterity, can be found in reasoning for states of emergency in various forms and intensities. While the defamation of an entire occupational group out of envy is still a comparatively mild form of distinction – no matter how unfortunate it may be, this classification is on no account meant to be cynical, but is necessary for analysis purposes –, other distinctions are connected with xenophobic or even overtly fascist motives.
The *debate on unequal wealth, income distribution and opportunities* that was initiated by the executive in connection with the Spanish air traffic controllers' strike in December 2010 and meant to incriminate the air traffic controllers is an example of a comparatively mild form of distinction. In the case of the striking air traffic controllers, it was only through the partial suspension of the constitutional fabric due to the declaration of a *state of alert* that it was possible to override the basic right of "workers and employers to adopt collective labour dispute measures conflict" (Section 37(2) of the Spanish Constitution)[4], which is normally explicitly guaranteed by the constitution. The declaration of a state of alert in response to illegal industrial action by the air traffic controllers seemed necessary because there was clearly no guarantee that the functioning of "essential public services" could be ensured. The precise definition of "essential pubic services", the functioning of which must also be ensured in the event of industrial action, is contained in Royal Decree 1673/2010 of 4 December 2010 (cf. Ministerio de la Presidencia 2010). The Royal Decree states that:

> "Section 19 of the Spanish Constitution grants all Spaniards the right to freely choose their place of residence, and to freely move about within the national territory. This right is also granted to all other persons as a result of the international treaties and agreements to which Spain is a party." (ibid: 101222).

The root of the crisis is the determination of "exceptional circumstances" (ibid.) in the form of the violation of the basic right to freedom of movement. According to the Royal Decree, neither Spaniards nor aliens in Spanish territory were able to exercise this basic right because of the strike. Since the basic rights guaranteed by the constitution are features of Spanish democracy, however, the declaration of a state of alert seems to be an appropriate response to the air traffic controllers' strike. On the other hand, the strike is highly criminalised, since it was not the industrial action that was taken into account in the assessment of the situation, but solely the violation of the basic right to the freedom of movement by the air traffic controllers. In this instance, the argument in which the state of alert was embedded was based on the generation of envy and accusations of criminal conduct. In addition to the postulate of the greater number having a privilege – all Spaniards as bearers of basic rights versus striking air traffic controllers –, the situation must be set in a specific framework that consequently permits an internal distinction to be made among the sovereign. This internal distinction, which makes an internal *explicit friend-foe distinction* possible and, by implication, exceptional action against this internal foe on the part of the executive necessary, is based on the metaphor of hostage-taking. Hence, the air traffic controllers' strike is no longer described in media coverage as industrial action – albeit illegal. Instead, air traffic controllers are described as a numerically small and extremely well-paid elite that is taking an entire country, whose citizens want to exercise their basic right to mobility, hostage in pursuit of its own ends. According to the media, behaviour that is errant and causes economic damage is unacceptable and the perpetrators must be brought "to reason" (Wieland 2010: 2). The group of air traffic controllers becomes the collective target for the measures that can be implemented in a state of alert.

---

[4] The section in full reads as follows: "The right of workers and employers to adopt collective labour dispute measures is hereby recognised. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services."

"The declaration of the state of alert affects the entire territory, all airport control towers, the network and control centres [...] [and] all air traffic controllers (Ministerio de la Presidencia 2010: 101222).

The framing of the situation as the taking of hostages permits not only the actual reasons of the air traffic controllers for their actions to be passed over, but also – alleged – responsibilities to be clearly assigned. The sentence "We will let justice take its course" (Cáceres 2013: 7) is not a neutral statement made by the Spanish Minister of Transport, Jose Blanco, but an open threat that manifests itself in the declaration of the state of alert. A decision that the Spanish government no longer actively takes, that it did not want to take or even bring about, but that – to stick to the semantics of the argument – it is forced to take by the "hostage takers". Supplementary to the internal *explicit friend-foe distinction*, the executive claims to be in a purely reactive position and does not suspend the norms in the stream of events, but is forced to do so. The claim that the government with the prime minister at its head did not hesitate [...] when it was a matter of protecting the public (Blanco Lopez 2013) is a defensive-minded internal description of this government action that is interpreted to be purely reactive. In addition to the assignment of responsibility that is achieved by the construction of the foe image of the *air traffic controller = hostage taker*, the identification of the air traffic controllers as foes permits an internal distinction to be made among the sovereign, the Spanish people. The result is that the group of air traffic controllers becomes an object of projection which fulfils two functions in this "war" (ibid.): It allows the concrete personal legitimisation of expansions of executive powers by the government and the precise targeting of measures. The intentional construction of a minority as a *pejorative alterity* serves to generate approval for the executive among the remaining majority of the sovereign because the executive is seen to be acting in the "interes general" (ibid.).
The USA's reaction to Japan's attack on *Pearl Harbour* has a significantly more complicated plausibility horizon. The *Korematsu v. United States* case[5] (cf. US Supreme Court 1944) goes back to a practice based on "racial prejudice, war hysteria, and a failure of political leadership" (United States Statutes at Large 1988: 2) that manifests itself in the curtailment of civil liberties for Japanese Americans. They only represent a very small group, in relation to the total population, but their members were henceforth considered *enemy aliens* (cf. Lemke 2010; 2012 for further details) and approved for what was considered a minor restriction of their civil liberties for the very reason that they were outnumbered by the rest of the population. In this case, the pertinent *greater number argument* involves a purely quantitative weighing up of interests, which itself is based on a profound uncertainty regarding the immediate future. The assumption of a risk that is sufficiently probable and cannot be adequately narrowed down in terms of how it might spread reduces inalienable civil liberties to a calculable object which, if the conditions are favourable, can also be written off:

"Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country." (US Supreme Court 1944: 219).

As far as the *Korematsu v. United States* case is concerned, this means that Korematsu is stripped of his real civil rights because the predicted risk is also classified as real. This way of providing reasoning for the state of emergency therefore confounds the levels of actual and predicted reality, with the result that predicted reality becomes the decisive criterion for the suspension of norms. The effort to protect the population makes the idea of threat prevention appear more attractive, despite the fact that it comes with a massive loss of basic rights. In terms of motivation, the fear of future events leads to plausibility being lent to the

[5] For information on the problem of preserving the civil liberties of the Japanese Americans, see Rossiter (1948: 280 et seq.); for information on the case history, see Takezawa (1995); for the strict scrutiny used to weigh up the government's interests against civil liberties, see Winkler (2006).

state of emergency. In his statement of dissent, Justice Murphy refers to this fear as *racism*. As regards the reasons for his *dissent*, he explains:

"This exclusion of all persons of Japanese ancestry [...] from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." (US Supreme Court 1944: 233).

Justice Murphy points out that there is the danger of a degenerative perpetuation of a state of emergency when the reasons for constructing a *pejorative alterity* threaten to cease being entirely objective. A situation like this exists when it is based on attributions assigned to groups of people that do not provide reasoning for an alleged state of affairs that can be plausibilised intersubjectively (cf. US Supreme Court 1944: 240 et seq.). The prerequisites for this state of affairs are met in the *Korematsu v. United States* case because reference is made to the Japanese ancestry of the suspects, which is considered sufficient for an *exclusion*, irrespective of whether any member of this collectively addressed group has actually committed an offence or not:

"It is the case of convicting a Citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." (US Supreme Court 1944: 226).

Justice Murphy also states that executive expansion should not be progressively exhausted by the executive by means of prejudice and scapegoating, but instead hedged in. For it is clear that the declaration of a state of emergency not only means an expansion of executive powers. It also means the beginning of a process of segregation in a formerly homogenous society, particularly if an *actual external situation* cannot be indicated. As with the suburban riots in France, it is clear that once *pejorative alterity* emerges from the latency stage, it is capable of undermining governance in representative democracies. For the institutions established by the sovereign in this case turn against the sovereign itself.

The warrant is further intensified in view of the legislative practice and case law in the United States following 9/11. In the context of the Supreme Court's decision in the *Boumediene v. Bush* case, an *external situation* intensified by *pejorative alterity* is rendered permanent in the so-called *War on Terror* and is no longer restricted to a specific period, let alone supported by a specific reasoning. The US government has passed a number of laws for the permanent future task of combating terrorism (of which the *USA PATRIOT Act* is the best-known and probably the most controversial) and issued *Executive* and *Military Orders*, including that of 13 November 2011, which established the figure of the *unlawful enemy combatant*.[6] The permanent restriction of *habeas corpus* intended to be achieved by the establishment of this figure represents a significant expansion of the executive's powers to the disadvantage of individual persons and is a development that has repeatedly been the subject of proceedings before the US Supreme Court. In its effort to extend its room for manoeuvre, the Bush administration created a whole group of cases[7] that can be interpreted as relevant legal evaluations of *pejorative alterity*. Two aspects become clear if we consider the judgment delivered in 2008 in the *Boumediene v. Bush* case, which is among this group: On the one hand, it is possible to see the effort made by the executive to expand its powers by temporarily suspending *habeas corpus* completely, while on the other it is possible to see the contrary effort made by the judiciary to protect fundamental rights unconditionally. It is

[6] Cf. Bush (2001); cf. also *Military Commissions Act of 2006* (10 U.S.C. 948a) on the definition of the *unlawful enemy combatant*.

[7] Cases of particular relevance in this context are *Rasul v. Bush, Hamdi v. Rumsfeld, Hamdan v. Rumsfeld* as well as *Boumediene v. Bush*, cf. in this context the essay by Niday (2008) - focusing on *Hamdi v. Rumsfeld* and the implicit argumentative preparation for the softening of constitutional provisions.

the judiciary that is preventing the expansion of the executive and thereby standing up against the creeping erosion of democratic principles. When consideration is given to the central argument put forward by the government, it becomes clear against the background of the latently omnipresent enemy narrative that the figure of the *unlawful enemy combatant* serves to create a category of persons that can be subjected to efficient prosecution because they are categorically located outside the law.

"The Government contends that non-citizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus." (US Supreme Court 2008: 8).

This radical and both fundamental and structural questioning of the granting of rights by a representative democracy constitutes, as it were, not only the core of the *explicit friend-foe distinction*, but also an absolute intensification of it as a warrant. By claiming the absolute right to define who should benefit from the protective rights granted by the constitution and the *Bill of Rights* in a specific situation, the executive implicitly reveals the pressure it sees itself under to take action in such an heated up crisis situation.

### 3.3 Dictate of Efficiency

This pressure to take action brings into view a third element involved in providing plausibility through narration. The necessity to take the right action quickly and comprehensively in an emergency situation leads to a version of warrants that can be referred to as the *dictate of efficiency*. Due to it being hedged in by constitutional legal provisions, the normal state is described as being cumbersome and having a retarding effect when it comes to resolving a crisis. The normality of a binding character – a core element of the belief in legal legitimacy – is allegedly relinquished in favour of enabling the executive, which has been largely relieved of constitutional restrictions, to solve problems better and faster. This plausibility horizon of the state of emergency is also not immune to the so-called hegemonic economisation that has frequently been diagnosed in recent times (cf. Schaal/Lemke). Crisis intervention in a state of emergency, formerly a reserve of the executive, can thus sometimes – and perhaps increasingly – be experienced as a marketable service. Economisation in connection with the reasoning for states of emergency always implies two things: the discussion of the most efficient way of using resources and the players involved in the resolution of the crisis, who will not automatically be the state, but may also be private contractors offering crisis intervention services. The disaster management following *Hurricane Katrina* set a type of precedent for this stricter version of the dictate of economised efficiency and the accompanying shift in focus as regards the provision of plausibility through narration, the emphasis now being more on *looking at a state of emergency from a market perspective*.
The case brings together two players. One is the private security firm *XE Services* based in North Carolina, which was called *Blackwater Worldwide* until 2009.[8] It came to international prominence through its work as a so-called *private contractor* for various US departments, authorities and companies during the *Second Iraq War* (*Operation Iraqi Freedom*), during which mercenaries working for the company, which was considered to be the world's largest private provider of security and military services, attracted attention by using excessive force on several occasions. A lesser known fact is that the company, operating under the name of *Blackwater USA*, has also been involved in various civil defence and disaster control operations on the home front in America in connection with *Hurricane Katrina* in and around New Orleans. This far-reaching intervention by a private security firm in a disaster area marks a shift in focus towards the economisation of a state of emergency. Crisis situations were previously been dealt with mainly by state institutions, but this restriction was lifted in

[8] The name *Blackwater* is used in the essay because the company operated under this name during the operation in New Orleans in 2005 that is examined in this analysis. The company has again changed its name and is now called *Academi*.

2005. Private security companies have moved into the space between the citizens and the state. This constellation is controversial because the foundation of the legitimacy of state intervention in a state of emergency is fragile anyway and is now coming under additional strain due to the entrance onto the scene of a private-sector company that has no democratic legitimacy to be there: "FEMA[9]" – the other, the *public authority,* "is broken, because FEMA was supposed to be the link between people and government in time of natural disasters" (Pelosi 2006). Nancy Pelosi, the former Speaker of the House of Representatives, was dead-on with her description of this constellation in February 2006, after organisational and communicative shortcomings on the part of the public authorities during and after the disaster had become known. If *Katrina* reveals the continued inability of the pertinent authorities to provide adequate crisis intervention services, two crises concur in one point: on the one hand, the occurrence of a natural disaster and beyond that a manifest failure of the state in its effort to prevent and respond to it. In view of this double failure of the state in preparing and conducting the crisis intervention activities and the extreme urgency of the situation, the summoning of additional forces in the form of so-called *contractors*, i.e. particularly non-governmental ones, only seems consistent, because they can be provided quickly and usually also at low cost (compared to uniformed personnel) and because years of experience have been acquired in how to integrate private-sector companies in sensitive task areas. However, the routine integration of private-sector resources can be seen as a direct expression of a weak state if the situation is considered from the angle of democratic theory. It turns out to be a political problem that owes its virulence to the fact that not only the state's legitimacy becomes fragile in a state of emergency anyway, but also because the state's fundamental guarantee that it will deal with crisis situations responsibly and transparently has become precarious.

"[D]emocratic government is responsible government - which means accountable government - and the essential problem in 'contracting out' is that responsibility and accountability are greatly diminished." (Singer 2005: 126).

The provisions of the *Posse Commitatus Acts*, which are relevant when military force – or hired military force – is used within the state, are undermined by *private contractors* due to the fact that the *practice of looking at crisis intervention from a market perspective* means that intervention competence within the state can no longer be hedged in by law, but only by supply and demand. Accordingly, as the private-sector security service providers themselves are able to influence supply and demand, they are also able to influence their own significance, e.g. by specifically offering infrastructure and resources that government authorities can hardly refuse to use on account of shortage and urgency. Privatising the state of emergency on the basis of an "unusual source to protect people and property" (Witte 2005), which the state is virtually forced to do as a result of its own failure in the field of disaster provision, therefore turns out to be a multiple crisis for state power, as the state is apparently unable to concentrate its own power, i.e. to organise itself, and to deal specifically with the crisis scenario in an urgent situation. A state that cannot do enough to prevent crises and is increasingly forced to merely respond to them appears to come under excess strain when a crisis actually arises, and this excessive strain compels it to bring in private-sector resources. The reactive state therefore seems to be a prisoner in several respects. It is a prisoner of the market as well as a prisoner of its own making.
In view of this apparent self-blockade of the state, there seems to be a need for a new player in the struggle for more security to ensure efficient disaster relief. In retrospect *Blackwater's* appearance in the disaster area in and around New Orleans[10] is described under two different aspects. On the one hand, there is emphasis on the fact that *Blackwater* provided resources quickly, immediately, "just 36 hours after the levies broke" (Temple-Raston 2007),

[9] Federal Emergency Management Agency.
[10] Besides *Blackwater*, the other companies that offered their services in this context were *DynCorps, American Security Group, Wackenhut, Kroll* (all USA) and *Instinctive Shooting International* (Israel). Cf. Scahill (2008: 256).

which suggests some kind of improvisation or self-authorisation, but definitely a legal loophole in view of the shortage of time; on the other, the fact that *Blackwater* was able to go into action and be able to provide some 600 employees within an extremely short period of time is attributed to contracts with the DHS that already existed or were updated or concluded during the operation, while the DHS itself, a government authority, was evidently not sufficiently capable of organising the operation effectively. There seems to be little congruence between these two assessments, and this insufficient plausibility between the two lines of information suggests that there was that deficiency in transparency which Scahill warns as being legally questionable in his analysis of *Blackwater's* security services in view of the disaster management in New Orleans. From the viewpoint of the players directly involved, however, such a deficiency in accountability is not necessarily a disadvantage in emergency situations. On the contrary, it is likely to create attractive room for manoeuvre for state and non-state players for the precise reason that there is greater difficulty in specifically assigning responsibility and establishing sufficient transparency. The need for security and the possibilities for meeting it thus seem to generate a target attainment conflict – a maximum in terms of the rule of law (because even states of emergency are not entirely disconnected from the rule of law) and a maximum in terms of security seem to be incompatible.

What can be deduced from the Katrina case are the arguments a state in need of protection during a disaster has when it can only accomplish its core tasks by purchasing additional security measures. The monopoly of a state which relied on state players to deal with military and civilian disasters and crises crumbles. From the legal point of view, this erosion of the state's monopoly on security is questionable because in view of the *narrative of the feeble state,* players who are only subject to significantly less state control and accountability are used in situations where state legitimacy is already fragile. While in traditional crisis intervention, reliance is placed on the military and police and therefore a minimum in terms of player juridification can even be guaranteed during a crisis, mercenaries are only under obligation to their employer, not to the sovereign that dispatches them. The acceptance *Blackwater* nevertheless meets with as a private-sector company in the field of crisis intervention coincides with the powerlessness of state institutions. Over time, this creeping erosion of the quality of the players in crisis situations guaranteed by the state and its institutions will lead to public-sector service providers being substituted by private-sector ones.

Even though *Blackwater's* intervention in the activities conducted in the wake of *Hurricane Katrina* in the New Orleans area was limited in comparison to the services rendered by the government, it is nevertheless of considerable symbolic importance. One level at which this is the case is the logic used as reasoning for the state of emergency, which after *Katrina* is a discourse that can be plausibilised using commercial warrants. This has significantly expanded the spectrum of acceptable reasonings beyond the political framework. The other level affected is that of the democratic legitimacy of and responsibility for executive expansions, which for the first time is superimposed by efficiency and cost considerations. One dimension of the criticism of *contracting out* in democratic theory becomes apparent when it is seen in the context of the innovation of American democracy as formulated by James Madison in the *Federalist Papers*:

> "[...] The advantage America has over the old method of preparing and adopt a thorough draft constitution [...]" consisted precisely in "bringing about a new beginning by the intervention of an advisory assembly of citizens and not by a mystical constitutional source." (Madison, as cited by Adams/Adams 1994: 217, 216).

As neoliberal ideology has now become hegemonic, the references to the market can be described as a new *strategic narrative* that even goes beyond the *dictate of efficiency* and could also be summarised by the term *economisation of the state of emergency*.

## 4. Erosion of the Rule of Law

Then, however, there is the fundamental question that – also in the context of Madison – is linked with the problem of setting limits for the suspension of norms outlined in the introduction: "How could it come about that a people that had been so concerned about its freedom [...] now abandoned its precautionary measures up to [this] point [...]?" (ibid.: 216). If an attempt is made to proceed from this question and evaluate strategic narratives used to plausibilise states of emergency, the impression that is created is that the combination of the three elements of warrants presented provides an effective set of instruments for suppressing the normal functioning of a representative democracy. Over a prolonged period of time and in various political systems – presidential, semi-presidential and parliamentarian –, the executive has repeatedly succeeded in enforcing the suspension of norms by using a functionally identical set of such narrative elements. When consideration is also taken of the finding that states of emergency are becoming comparatively more frequent following the attacks in New York and Washington than they were in other eras, the impression that the state of emergency could increasingly become the actual *normality of representative democratic governance* is hardening.
This impression that, in material terms, more executive powers are being bought at the expense of the citizens' rights of *habeas corpus* is highly problematic because the warrants associated with the decision to declare a state of emergency can today be communicated more intensively than ever. Due to the hardening of the above-mentioned narrative elements and in view of the advances in technology, what seemed essential to save the republic during an emergency has become a threat to the constitutional state based on representative democracy: the rule of law, it has been found, is eroding more and more.
The answer that could be given to Madison is that freedom has disappeared because a strategic narrative and its elements that have been in use for a long time have finally aligned with the technical conditions that are conducive to their dissemination. – The lack of freedom and not the rescue of democracy, it seems, is the true point of alignment.

## 5. Bibliography


Adams, Angela / Adams, Willy Paul (Hrsg.), 1994: Die Federalist-Artikel. Politische Theorie und Verfassungskommentar der amerikanischen Gründerväter. Mit dem englischen und deutschen Text der Verfassung der USA, Paderborn et al.

Agamben, Giorgio, 2008: Was ist ein Dispositiv? Aus dem Italienischen von Andreas Hiepko, Zürich/Berlin.

Agamben, Giorgio, 2004: Ausnahmezustand. Homo Sacer II. 1, Frankfurt a. M.

Altenried, Moritz, 2011: Aufstände, Rassismus und die Krise des Kapitalismus. England im Ausnahmezustand, Münster.

Blanco, Kathleen B., 2005: Brief an George W. Bush vom 28.8.2005.

Blanco Lopez, Jose, 2010: Defender el interés general, blog entry.

Bourdieu, Pierre, 1979: La Distinction. Critique sociale du Jugement, Paris.

Bush, George W., 2001: Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Washington D. C. [ 13 Nov 2001 ].

Cáceres, Javier, 2010: Luftverkehr in Spanien normalisiert sich wieder, in: Süddeutsche Zeitung, 6 Dec 2010, 7.

de Gaulle, Charles, 1961: Message au lendemain du putsch des généraux, 23 Avril 1961, in: La Fondation Charles de Gaulle/L'Institut National Audiovisuel, http://www.ina.fr/fresqu es/de-gaulle/fiche-media/Gaulle00071/discours-du-23-avril-1961.html [10 Mar 2013].

Foucault, Michel, 2003: Schriften in vier Bänden. Dits et Berits. Band III: 1976-1979. Herausgegeben von Daniel Defert und Frangois Ewald unter Mitarbeit von Jacques Lagrange. Aus dem

Französischen von Michael Bischoff, Hans-Dieter Gondek, Hermann Kocyba und Jürgen Schröder, Frankfurt a. M.

Frankenberg, Günther, 2010: Staatstechnik. Perspektiven auf Rechtsstaat und Ausnahmezustand, Frankfurt a. M.

Journal officiel de la République française, 2005: Assemblée Nationale. Session ordinaire de 2005-2006. 53$^{e}$ séance. Compte rendu intégral. 2$^{e}$ séance du mardi 8 novembre 2005, Paris (=Année 2005 - N$^{0}$86(2) A.N.).

Lawrence, Chris / Lavandera, Ed, 2005: Relief workers confront ‚urban warfare', in: CNN.com.

Lemke, Matthias, i.E.: Am Rande der Republik. Ausnahmezustände und Dekolonisierungskonflikte in der V. Französischen Republik, in: Rüdiger Voigt (Hrsg.), Ausnahmezustand. Carl Schmitts Lehre von der kommissarischen Diktatur, Baden-Baden.

Lemke, Matthias, 2012: Ausnahmezustände als Dispositiv demokratischen Regierens. Eine historische Querschnittsanalyse am Beispiel der USA, in: Zeitschrift für Politikwissenschaft, 22 (3), 307-331.

Lemke, Matthias, 2011: Das altemate law der Demokratie: Begründungspraktiken für Ausnahmezustände in den USA (1944) und Spanien (2010), in: Zeitschrift für Politik, 58 (4), 369-392.

Lemke, Matthias, 2010: Das alter ego der Souveränität. Zur Begründung von Normsuspendierungen im Ausnahmezustand, in: Salzborn, Samuel/Voigt, Rüdiger (Hg.), Souveränität. Theoretische und ideengeschichtliche Reflexionen, Stuttgart, 83-102 (=Staatsdiskurse, Bd. 10).

Lincoln, Abraham, 1861: Suspension of the Writ of Habeas Corpus Relating to the Events in Baltimore, Washington.

Machiavelli, Niccolò, 1990: Discorsi. Abhandlungen über die ersten zehn Bücher des Titus Livius, in: Ders., Politische Schriften. Herausgegeben von Herfried Münkler, Frankfurt a.M., 125-269.

Ministerio de la Presidencia, 2010: 18683 Real Decreto 1673/2010, de 4 de diciembre, por el que se declara el estado de alarma para la normalización del servio publico esencial del transporte aéreo, in: Boletin Official del Estado, No. 295, See. L, 101222-101223.

Niday, Jackson A., 2008: The War against Terror as War against the Constitution, in: Canadian Review of American Studies, 38 (1), 101-117.

Pelosi, Nancy, 2006: Katrina Response a Scandal of Incompetence and Cyronism, in: California Chronicle, 8 Feb 2006.

Rossiter, Clinton L., 1948: Constitutional Dictatorship. Crisis and Government in the Modern Democracies, Princeton.

Scahill, Jeremy, 2008: Blackwater. Der Aufstieg der mächtigsten Privatarmee der Welt, Munich.

Scahill, Jeremy, 2005: Blackwater down, in: The Nation, 21 Sep 2005.

Schaal, Gary S. / Lemke, Matthias, i.E.: Die Ökonomisierung des Politischen, in: Schaal, Gary S. / Lemke, Matthias / Ritzi, Claudia (Hg.), Die Ökonomisierung der Politik in Deutschland - eine vergleichende Politikfeldanalyse, Wiesbaden.

Singer, Peter W., 2005: Outsourcing War, in: Foreign Affairs, 2/2005.

Stephan, Robert B., 2006: Statement of Colonel Robert B. Stephan (USAF, retired), Assistant Secretary of Infrastructure Protection, U.S. Department of Homeland Security, in: United States Senate Committee on Homeland Security and Governmental Affairs, Minutes of the hearing on 10 Feb 2006.

Takezawa, Yasuko Iwai, 1995: Breaking the Silence. Redress and Japanese American Ethnicity, Ithaca / London.

Temple-Raston, Dina, 2007: Blackwater Eyes Domestic Contracts in U.S., in: National Public Radio, 28.9.2007.

Toulmin, Stephen E., 2003: The Uses of Argument. Updated Edition, Cambridge/New York.

Toulmin, Stephen E., 1981: Voraussicht und Verstehen. Ein Versuch über die Ziele der Wissenschaft, Frankfurt a.M.

Toulmin, Stephen E., 1975: Der Gebrauch von Argumenten. Aus dem Englischen übersetzt von Ulrich Berk, Kronberg/Ts.

United States Statutes at Large, 1988: The Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 app. U.S.C. §1989 (1988)), Title I, Section 101.

US-Supreme Court, 1944: Korematsu v. United States 323 U.S. 214 (1944).

Wieland, Leo, 2010: Ein Land als Geisel, in: Frankfurter Allgemeine Zeitung, 6 Dec 2010, No. 284, 2.

Winkler, Adam, 2006: Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, in: Vanderbilt Law Review,59, 793-871 (=UCLA School of Law Research Paper No. 06-14).

Witte, Griff, 2005: Private Security Contractors Head to Gulf, in: The Washington Post, 8 Sep 2005.