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**Materia Reipublicae: Democracy,
State of Exception, and the Dialectics
of Demos and Population**

State of Exception – An Overview

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6 In this paper I want to discuss the relation between individual human
7 rights and the state of exception. After pointing to the tension
8 between the two phenomena (1), I will, rather generally, outline their
9 conjunction in the democratic constitutional state and focus on the
10 relation of individual rights and state power (2). In the next step, I
11 want to show how not only the state of exception but also individual
12 rights function as a strategy of government and explain what I call the
13 difference between *demos* and *population* (3). I will then, referring to
14 the early modern period, focus on the legal ›management‹ of
15 individual freedom as a means of the evolving state (4), in order to
16 shed light on the present relation between a politics of rights and a
17 politics of exception (5). It is this relation in which I see a dialectic
18 between *demos* and *population* as indicated in the title.

19 **1.**

20 Apparently, human rights and the state of exception are conflicting
21 legal phenomena. They pursue different goals. Human rights, at least
22 in their classical form as liberty rights, aim at the protection of the
23 individual. The state of exception, however, aims at the preservation
24 of the political and juridical order of the state. The state of exception
25 is precisely the situation in which the mere difference between these
26 two aims turns into a conflict. For the state of exception not only
27 brings an extension of executive competences but also goes along

28 with the limitation and suspension of individual rights: Constitutional
29 individual rights are suspended, in order to preserve the state. In Carl
30 Schmitt's words: »if the existence of the constitution is threatened, it
31 must be protected by means of a temporal suspension of the
32 constitution.«¹ At this point, it becomes clear that individual rights and
33 the state of exception are not only different and conflicting regarding
34 their aim. They are different as well regarding their position within the
35 legal system of the constitutional state, of the *Rechtsstaat* or the *État*
36 *de Droit*: Individual rights, in their institutionalized shape of
37 constitutional rights, are considered as fundamental principles of the
38 constitutional state; they are positioned at the ground or in the center
39 of the legal order. The state of exception however, is positioned at
40 the edge of the legal order: In the often-quoted beginning of his book
41 *Political Theology*, Carl Schmitt speaks of the state of exception as a
42 »borderline case«.² Individual rights and the state of exception are, in
43 this perspective, opposing phenomena in two regards: Firstly,
44 regarding their aim, secondly regarding their position within the legal
45 order of the constitutional state.

46 2.

47 There is, however, as well a clear conjunction between individual
48 rights and the state of exception. This conjunction is the framework of
49 the state. As I mentioned, the state of exception is about the
50 preservation of the state and human rights, in their classical form as
51 liberty rights, are about the protection of the individuals. The fact that
52 human rights are meant to protect the individuals against the state,
53 does not mean that they are external to the state. In their form as
54 constitutional rights, human rights are guaranteed by the state itself.
55 For human rights to be effective, the protection by the state is crucial.
56 This was Hannah Arendt's point in her article »There is only one
57 single human right« (1949) as well as in her book about »The Origins

¹ Carl Schmitt, *Die Diktatur*, Berlin: Duncker & Humblot 2006, 133, transl. JH. Schmitt refers here to the general justification of the commissarial dictatorship.

² As a borderline case, the state of exception is appropriate to define »sovereignty« as a concept »pertaining to the outermost sphere« of the legal order: Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, transl. by George Schwab, Chicago: University of Chicago Press 2005, 5.

58 of Totalitarianism« (1951).³ Human rights are meant to limit the
59 power of the state, but conversely, the protection they provide relies
60 on state power itself. This leads to a familiar justification of the state
61 of exception: Rights have to be suspended in order to uphold the
62 state order which is solely able to guarantee the liberty they provide.

63 This is one way to explain why human rights are, in their form as
64 constitutional individual rights, not external to the state: Rights need
65 the force of the state to become reality. However, not only the state
66 serves the realization of individual rights but individual rights benefit
67 the state as well. For the constitutional state, individual rights seem
68 to be highly important, at least if and insofar it claims to be a
69 *democratic* constitutional state.⁴ This point was made by Jürgen
70 Habermas in his book *Between Facts and Norms*, which is, as the
71 German subtitle makes clear, about the democratic constitutional
72 state (orig. *demokratischer Rechtsstaat*). Democracy, as a sphere of
73 public autonomy, relies on private autonomy, i.e. on rights (and vice
74 versa).⁵ For democracy, understood as the rule of the *demos*, means
75 the identity of those who rule and those who are ruled. In a
76 constitutional state this means: The citizens can enact the laws
77 which, under the rule of law, are applied to them. The precondition of
78 this democratic sovereignty (public autonomy) is an institutionalized
79 legislation process which is based on human rights (private
80 autonomy).⁶ Consequently, individual rights are the precondition of
81 the democratic state in its legal form. This still fits well with what I

³ Arendt emphasized that human rights only have an impact when they are civil rights, i.e. the rights of citizens, guaranteed by the state they belong to. Different from the situation of 1949, the international human rights protection has developed substantially to this day: Statelessness does not mean any more to be expelled from the legal sphere. Cf. Hauke Brunkhorst, »Menschenrechte und Souveränität – ein Dilemma?«, in: Hauke Brunkhorst, Wolfgang R. Köhler and Matthias Lutz-Bachman (ed.), *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik*, Frankfurt am Main: Suhrkamp 1999, 157-175, here: 174.

⁴ According to Habermas it is impossible that a non-democratic constitutional state is legitimate. Cf. Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (original title: *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* 1992), transl. by William Rehg, Cambridge/Mass.: The MIT Press 1996.

⁵ Cf. *ibid.*, 84-104.

⁶ Cf. *ibid.*, 104: »The substance of human rights then [deciphered in discourse-theoretic terms, JH] resides in the formal conditions for the legal institutionalization of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character.«

82 have said before. The state benefits the individuals since it realizes
83 the order they themselves establish. The reason why the state needs
84 the rights then is the following: The legitimation of the public will of
85 the state lies in the private liberty of the individuals who constitute
86 »the people«. In this democratic-theoretic account (focused on
87 legitimation) the individuals figure as people in the sense of *demos*,
88 of the active political subject.

89 **3.**

90 There is, again, another aspect in which the state needs the rights of
91 the individuals: The individuals are not only important for the
92 *legitimation* but also for the *existence* of the state. In this perspective,
93 the individuals do not appear in the form of the *demos*, but of the
94 *population*. This was the point emphasized by Michel Foucault,
95 especially in his Lectures on »Security, Territory, Population«. I have
96 now reached the point which is in the focus of my interest here.
97 *Demos* and *population* are two different ways to consider the
98 individuals, appearing as a collective entity towards the state. How
99 can this difference be described? At first glance, it may seem that the
100 individuals as *demos*, as people in the political sense, are active
101 whereas the *population* is passive: The concept of *demos*
102 denominates an entity which governs, and the *population* an entity
103 which is governed. The remarks of Foucault are illuminating here
104 because they insist that we cannot think of the population as merely
105 passive. It is for this reason he speaks of the population not as the
106 object of the government, but as ›subject-object«.

107 The *demos*, too, is a subject-object. The individuals of the *demos*
108 (the citizens) are subjects insofar they have the possibility to
109 participate in the legislation process; and they are objects insofar the
110 laws are applied to them. The *population* according to Foucault,
111 however, is a ›subject-object« in a different way. Population is, for
112 Foucault, not a legal-political category, not a category of public law,

113 but a category of political economy.⁷ The population is conceived
114 (since the mid-18th century) as a phenomenon of the vivid nature:
115 not passive, not stable, not restful, but constantly endeavoring to
116 satisfy its desires and needs. Thus, the population appears as
117 dynamic, mobile, and active – and in this sense as a subject. But as
118 a subject which is predictable: The collective subject of the
119 population is seen as a natural process accessible to calculations
120 and open to influence. As such the population is an *object* of
121 government. The strategies of this government are based on a
122 specific knowledge which is, in the 18th century and famously by
123 Rousseau, called »political economy«. ⁸ Political economy is the
124 knowledge of the, as Foucault calls it, »naturalness« of the
125 population.⁹ In this context, the expression of »economic
126 government« in the meaning of good government becomes important
127 during the 18th century. What are the features of such an economic
128 government? What is, firstly, its object? It is not the territory which is
129 governed; governed are rather issues, i.e. men in connection with
130 ›things‹ like resources, means of subsistence and epidemics, but as
131 well with ›things‹ like »customs, habits, ways of acting and
132 thinking«. ¹⁰ If not the territory but issues are governed, such a
133 government requires a specific strategy. What is, secondly, this
134 strategy or method? Foucault speaks of a »general management that
135 is characteristic of government«. ¹¹ ›Management‹ here designates a
136 government which is *not* primarily juridical. It is not based on legal
137 norms, but consists in ›security mechanisms‹ which intervene *directly*
138 on the level of the factual reality:

139 »These mechanisms do not tend to a nullification of phenomena in
140 the form of the prohibition, ›you will not do this,‹ nor even, ›this will
141 not happen,‹ but in the form of a progressive self-cancellation of
142 phenomena by the phenomena themselves. In a way, they involve

⁷ Cf. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, ed. by Michel Senellart, transl. by Graham Burchell, New York: Palgrave Macmillan 2007, 74-79.

⁸ Cf. *ibid.*, 106: »The constitution of a knowledge (savoir) of government is absolutely inseparable from the constitution of a knowledge of all the processes revolving around population in the wider sense of what we now call ›the economy.«

⁹ Cf. *ibid.*, 70, 72, 74.

¹⁰ *Ibid.*, 96.

¹¹ *Ibid.*, 97 and the like 70, 73.

143 the delimitation of phenomena within acceptable limits, rather than
144 the imposition of a law that says no to them. So mechanisms of
145 security are not put to work on the sovereign-subjects axis or in the
146 form of the prohibition.«¹²

147 The government of the population relies on such non-legal
148 mechanisms. Not only since the 18th, but already since the 15th and
149 16th century, there is, according to Foucault, a shift from the state of
150 justice into the »administrative state«. ¹³ For Foucault it is clear, that
151 the population which is addressed by this government, »is not, then,
152 a collection of juridical subjects«. ¹⁴ Insofar the individual is a
153 component of the population, it does not figure as the ›subject of
154 right‹ but simply as ›man‹: »man is to population what the subject of
155 right was to the sovereign«. ¹⁵

156 I find Foucault's account of the emergence of the population very
157 convincing. There is, however, one important aspect or conclusion
158 which I am less convinced by. More precisely, I have doubts
159 concerning three related aspects: Firstly, Foucault assumes that the
160 economic individual stands in contrast to the subject of right;
161 secondly, he assumes that the population consists of economic
162 individuals and *not* of subjects of right. Thirdly, Foucault suggests,
163 that the emergence of the population necessarily ends juridical
164 sovereignty. Against Foucault, I want to argue, that there is, in
165 contrast, a strong relation between the law and the government of
166 the population. I want to show, how the population is present both in
167 the juridical figure of individual rights and in the state of exception.
168 What is the link between the state of exception and the population?
169 The state of exception is a means by which the state power acts
170 directly – not by medium of laws – upon the population. The juridical
171 measures which substitute the laws and the deprivation of rights are
172 two ways in which the state forms the population: The exceptional
173 measures restrict the democratic action and disempower the
174 individuals as *demos*, i.e. treat them only as *population*; by the

¹² Ibid., 66.

¹³ Cf. *ibid.*, 108f.

¹⁴ *Ibid.*, 74.

¹⁵ *Ibid.*, 79.

175 deprivation of individual rights the state of exception protects this
176 population – it excludes from it those individuals who could disrupt it.
177 On the other hand, it is precisely the provision of individual rights
178 which generates the population; in what follows, I want to discuss this
179 latter point first. Since only if it becomes clear how individual rights
180 facilitate building the population, it is comprehensible how the state of
181 exception protects this population by withdrawing individual rights.

182 4.

183 The fact that the phenomenon of the population evolves in the 17th
184 century is not only stated by Foucault. The historian and political
185 scientist Hans Maier writes in regard to the treatise of Georg
186 Obrecht, a Strasbourg councilman from the beginning of the 17th
187 century: »For the first time, the individual independent from its
188 estates-based relations, the abstract ›population‹ is discovered as
189 object of management [Verwaltung].«¹⁶ This management of the
190 population is not so much oriented toward an idea of the common
191 good, than it aims at the enhancement of the state's strength. The
192 population increasingly appears as the matter of the state – which is
193 reflected as well in Latin treatises of the same time. Christian
194 Liebenthal, a scholar from the German town Gießen, wrote in 1619:
195 »Distinguitur proinde civitas a republica ut materia a forma.«¹⁷
196 (»Thus, the *civitas* (people/population) is distinguished from the
197 *republica* (republic/state) like the matter from the form.« transl. JH.)
198 Important in this context is, firstly, how this matter is formed and,
199 secondly, how it serves the enhancement of the state's strength.
200 Maier remarks, as the above quote shows, that the abstract
201 population consists of individuals which are removed from their
202 embeddedness within estates-based relations. This liberation is

¹⁶ Hans Maier, *Die ältere deutsche Staats- und Verwaltungslehre*, 2., neubearb. und erg. Aufl., München: C.H. Beck 1980, 130, transl. JH. The treatise of Georg Obrecht is titled *Fünff Vnderschiedliche Secreta Politica*; it was privately printed in 1617 and publicly edited in 1644.

¹⁷ Christian Liebenthal, *Collegium politicum in quo de societatibus, magistratibus, juribus majestatis, et legibus fundamentalibus [...] tractatur*, Giessen 1619; quoted from Winfried Schulze, »Ständische Gesellschaft und Individualrechte«, in: Günter Birtsch (ed.), *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft*, Göttingen: Vandenhoeck & Ruprecht 1987, 161-179, here: 175.

203 achieved by the juridical figure of individual rights.¹⁸ As bearer of
204 rights, the individuals appear as equal; as equals, they are part of the
205 abstract population. In contrast to Foucault, the subjects of rights –
206 the *legal persons* (Latin: *personae*) and not ‘men’ – figure as equal
207 parts of the population. The population as the matter of the state is
208 formed by guaranteeing individual rights.

209 Individual rights are also important for the second question I
210 mentioned above: How does the population serve the enhancement
211 of the state’s strength? In the 16th and 17th century, the literature
212 about taxes and the theories about the justification of taxes provide
213 evidence that the financial situation of the prince and the wealth of
214 the state can be increased by supporting the population’s economic
215 activity. As early as around 1600, there was the idea in the agrarian
216 sector that there is a higher yield when a field is leased to a peasant
217 instead of being cultivated by soccage. The enhancement of the
218 state, thus, is achieved by economic liberty – and economic liberty is
219 provided by individual rights. It is in the discussions on tax theory that
220 the conception of irrefutable individual rights gains importance.¹⁹
221 From the perspective of the state, individual rights have a double
222 impact: a) by establishing legal equality, the population is made
223 countable and accessible to taxation; b) insofar as rights provide
224 economic freedom, they foster economic activity and help to increase
225 profits and thus tax income. Individual rights play a major role
226 regarding both the constitution and the use of the population. This,
227 again, fits very well with two other points Foucault makes: Foucault
228 emphasizes that the emerging population is not passive, but vivid
229 and active. And he stresses (if only regarding the 18th century) the
230 importance of freedom. Thus, state intervention has »the function of
231 ensuring the security of the natural phenomena of economic
232 processes or processes intrinsic to population«; failing »to respect
233 freedom is not only an abuse of rights with regard to the law, it is

¹⁸ Niklas Luhmann, »Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft«, in: Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft, Vol. 2*, Frankfurt am Main: Suhrkamp 1981, 45-104, 47.

¹⁹ Schulze, »Ständische Gesellschaft und Individualrechte«, 1987, S. 174f.

234 above all ignorance of how to govern properly.«²⁰ Individual liberty
235 rights enhance the (›naturak‹) productivity of the population: The
236 population is governed by being active and free. I think it is precisely
237 in this sense that the population appears as a ›subject-object‹.
238 Regarding this ›subject-object‹, however, Foucault does not address
239 how it is constituted by the juridical figure of individual rights.²¹ I think
240 he hence underestimates that the law, by including individual rights,
241 is not only a negative and prohibitive, but also an enabling, permitting
242 and in this sense productive power. The productive ›security
243 mechanisms‹ are not only, as Foucault suggests, outside the law, but
244 effective within the legal sphere itself.

245 Not the laws, but the orientation toward rights is characteristic for the
246 modern concept of law.²² As Leo Strauss has pointed out, this
247 primacy of rights goes along with the modern (Hobbesian) idea that
248 »the individual is in every respect older than the civil society«.²³ It is
249 this idea on which social contract theories since the beginning of the
250 early modern period are based. On the one hand, there is social
251 contract theory, and on the other – evolving in the same period – tax
252 theory. In this latter perspective, the individual rights admittedly
253 belong to the individuals, but their purpose or end is not the individual
254 but the population. The concern of government is, this is the strong
255 point made by Foucault, the ›security‹ of the population, i.e. the
256 securing of its ›naturak‹ productivity. The instrument to do this is
257 guaranteeing individual freedom. But what if individual freedom does
258 not serve the population? To govern the population means to
259 manage its freedom – this means: not only to provide freedom but, if

²⁰ Foucault, *Security, Territory, Population*, 2007, 353.

²¹ That Foucault considers fundamental rights not as juridical in the proper sense becomes clear at the end of his last lecture of the series: »There must be a moment when, breaking all the bonds of obedience, the population will really have the right, not in juridical terms, but in terms of essential and fundamental rights, to break any bonds of obedience it has with the state and, rising up against it, to say: My law, the law of my own requirements, the law of my very nature as population, the law of my basic needs, must replace the rules of obedience.« (ibid. 356)

²² Cf. Leo Strauss, *Naturrecht und Geschichte*, Frankfurt am Main: Suhrkamp 1977, 188-190; Niklas Luhmann, »Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft«, 1981; Jürgen Habermas, *Between Facts and Norms*, 1996; Christoph Menke, *Kritik der Rechte*, Berlin: Suhrkamp 2015.

²³ Strauss, *Naturrecht und Geschichte*, 190, transl. JH.

260 necessary, limit it. With regard to the 18th century, Foucault states:
261 »The integration of freedom, and the specific limits to this freedom
262 within the field of governmental practice has now become an
263 imperative.«²⁴ Whereas from a social contract theory perspective,
264 individual rights serve the individuals and their self-preservation
265 (Hobbes), from a tax theory perspective, the freedom of the individual
266 is only a means, and the end of individual rights is to secure the
267 prosperity of the population. From this perspective of governing the
268 population, it seems appropriate to limit rights when they fail to serve
269 the purpose, i.e. to ensure the security of the population. With the
270 issue of limiting and of suspending rights, I have reached again the
271 question of the state of exception which characteristically goes along
272 with the suspension of individual rights.

273 **5.**

274 It is neither historically nor systematically appropriate to without
275 further ado transfer the observations considering the early modern
276 government of population to regimes of state of exception in the
277 constitutional nation states of the 20th century and the present age.
278 But it can help to shed light on the question which is debated in the
279 context of states of exception and, more generally, of increasing
280 security measures: the question of security versus freedom. This
281 question is debated as a conflict between two rights of the individual:
282 the individual right to security and the individual right to freedom. To
283 ensure our individual security we have to give up some of our
284 individual freedom. I think that the history of government and
285 population related to the question of the state of exception can help
286 to adjust this picture. The security in question here is still the security
287 of the population (not a right of the individual), and the individual
288 freedom which is to be limited – or the rights which are to be
289 suspended – are only the rights of ‘some’: of those who endanger the
290 population and hence are outsiders who do not belong to »us« (as
291 the population).

²⁴ Foucault, *Security, Territory, Population*, 2007, 353.

292 Here I want to refer once again to Foucault: In the context of the 18th
293 century, those who do not belong to the population are called ›the
294 people‹, ›*le peuple*‹, ›*das Volk*‹: »The people comprise those who
295 conduct themselves in relation to the management of the population,
296 at the level of the population, as if they were not part of the
297 population as a collective subject-object«. ²⁵ The limitation and
298 deprivation of rights is always directed towards those who are not
299 considered to belong to the population. From the perspective of the
300 population then, individual rights and state of exception – the
301 *provision* of individual rights and their *suspension* – do not, or more
302 precisely: *not only*, appear as opposite strategies. For firstly, they
303 both appear as strategies of constituting or securing the population.
304 Secondly, and more general, they both appear as actions of the
305 state. The provision and the withdrawal of rights are, in the
306 perspective of the ‘population’, two kinds of state action: two ways of
307 acting which do not take the shape of general laws and still are
308 located or locate themselves in the juridical framework – namely at
309 the center and at the edge of the legal sphere. This also means: Both
310 kinds of action, providing and depriving rights, operate in the manner
311 of respecting the equality of all individuals as legal persons. When an
312 individual is deprived of rights, it is nevertheless addressed as equal,
313 i.e. as a legal subject. This legal equality covers that we are not all
314 equally affected by the deprivation of rights occurring in state of
315 exceptions. In fact specific groups with specific origin, color of skin,
316 religion etc. are affected more than others because they are
317 considered to endanger the security of the population (and thus not
318 to be equally part of it).

319 The dialectic between *demos* and *population* takes place in these
320 situations of exception: The state of exception is the situation in
321 which the individuals are only regarded as – either appropriate or
322 disruptive – parts of the population and lose their democratic quality
323 which is to be a constitutive part of the *demos*. The population
324 constituted by individual rights is the precondition of the deprivation

²⁵ Ibid., 43f.

325 of rights in the name and for the sake of the population. This dialectic
326 remains unseen if individual rights are only considered in terms of the
327 *demos* (only in a normative perspective as elaborated by Habermas).
328 In order to oppose the dialectic occurring in the state of exception, it
329 is necessary to detach individual rights from the idea of an exclusive
330 population and to bind them more decisively to an inclusive *demos* –
331 since the antidemocratic logic of continuity between rights and state
332 of exception is legitimized with reference to democracy, but rooted in
333 population policy.

334

335 **Literature**

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