Preface

One would expect to find neither angels nor paradise in secular societies; rather one would be prepared to encounter conflicts of all kinds. In pluralist societies dispute and dissent are ubiquitous. Rulers have a tendency to dislike conflict and dissent. Therefore, the rule of law is brought in, not to make the ‘powers that be’ like controversy, but to prevent them from arbitrarily intervening in disputes and stifling dissent as well as, incidentally, to keep the passions of civil society at bay. Thereby law-rule – in the guise of the rule of law, Rechtsstaat or état de droit – is widely credited with setting up a regime of distance.

In comparison with democracy, republic or human rights, law-rule musters significantly less enthusiasm. ‘Democracy’ echoes the desire for participation by promising a government by the people. ‘Republic’ stands for accountability and transparency and, arguably, government in the public interest and the light of the public. And human rights are generally regarded as the basis of government and are expected to prevent or redress human suffering. In comparison with these rather popular elements of government, law-rule lacks glamour, although it is set up to magically transform personal rule into an impersonal ‘government of laws’ and, as a theoretical component of self-government, to ensure that rulers rule in the form of law, observe rights and exercise restraint – not exactly a modest agenda.

Law-rule’s discrete charm becomes apparent, though, once one turns to political regimes that know no legal constraints and claim extraordinary powers by dint of emergency law under whatever pretext – curbing terrorism and organized crime, defending the stability of the regime against ‘extremist elements’, punishing traitors (preferably from foreign countries), averting dangers or, more generally, providing security.

This book is about security. More to the point: how it happened that torture turned out to be security’s companion and how the state of exception revealed itself as the twin brother of law-rule – not in distant, barbaric regions of the world but in our backyard, in consolidated democracies and rule-of-law countries, like the United States, England and Germany, where power is claimed and widely believed to be civilized; at least: constrained by law. Throughout the last decade state
practice – waging the ‘war on terror and organized crime’ – covered not only extensive surveillance and other secret measures but also torture, the cruel and degrading treatment of prisoners and detainees, illegal renditions, indefinite detention of suspects and more. These measures have undermined the general belief in the effectiveness of law-rule and, by the same token, the liberal imagination of a just world. Lawyers and legal scholars have been and still are deeply divided over whether or not to condemn Guantánamo, justify (rescue) torture in emergency situations, and how to deal with ‘enemies’ whoever they may be. They disagree, more generally, on whether and how to balance liberty and security and whether the loss of freedom is justified by its trade-offs for security.

It would be overly ambitious to choose ‘in defence of the rule of law’ as the motto for the following considerations, since the allusion to Foucault’s In Defence of Society would be all too obvious. Besides, such a motto would be inappropriate for a critique of the concept and practices of Staatstechnik, the original title of the book, translated here as ‘political technology’ to accentuate the exercise of power as a collective singular and ‘techniques of government’ to stress the various mechanisms and measures of governing. Furthermore, I want to show how, during the series of ‘wars on terror, organized crime’ and other targets, the state of exception has been normalized, the extraordinary has been reduced to a phenomenon of the everyday, and even the taboo of torture has been touched upon – also under cover of law-rule.

The analysis of political technology is confronted with a twofold challenge: on the one hand, it has to throw light on the ambivalences of law-rule, while, on the other hand, it has to defend democratic legality against fantasies of extraordinary threats and extraordinary practices of power. Because things could be different in the world of law, security regimes and counter-terrorism, it seems in order to begin with a critique.

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1 Cole et al., Secrecy, National Security and the Vindication of Constitutional Law.
2 From the burgeoning literature see only Cole and Dempsey, Terrorism and the Constitution; and the impressive, empirically informed normative critique submitted by Waldron, Torture, Terror, and Trade-Offs.
3 See e.g. Greenberg, The Torture Debate in America; Waldron, Torture, Terror, and Trade-Offs.
4 For a critique of balancing and justificatory trade-offs: Waldron, Torture, Terror and Trade-Offs, ch. 2. For an apology and the complementary thesis that the executive branch should make the trade-offs between liberty and security: Posner and Vermeule, Terror in the Balance.
The first chapter introduces the mindset of engineers and experts as well as the typical methods characterizing political technology. I introduce the proposition that political technology as security technique is developed in the legal regime of the prevention of danger. Guiding the subsequent argument, in this section I argue that the security state exceeds the constraints of law-rule and works to normalize emergency powers (Chapter 1). Then a tour d’horizon through the conceptual repository of modernity follows. Using the example of a number of influential pre-modern and modern notions of the state, this part of the book illustrates and conceptualizes the change and trajectory of political technology from Hobbes to Foucault and draws attention to the relationships between conception and images of power (Chapter 2).

Reconstructing the emergence and development of law-rule, the next section of the book aims to highlight the ambivalences entailed in the liberal paradigm of law-rule and its corresponding political technology. These ambivalences become apparent in the different pathways of the rule of law and Rechtsstaat as well as in constellations of law-rule and the state of exception. They also surface in a number of legal controversies over the contents and scope of the rule of law in England and the German Rechtsstaat (Chapter 3).

Thereupon, the liberal imagination and mantra of law-rule, which have always already been threatened by the unruly prerogative, is contrasted with fantasies of the extraordinary. These fantasies are based on the very political and legal-doctrinal thinking that – inspired by and following on from Carl Schmitt – currently indulges in apocalyptic scenarios meant to force open the gates to emergency legislation in the name of security (like the Prevention of Terrorism Acts in England and the Patriot Act in the United States). This chapter addresses Carl Schmitt’s and the latter-day Schmittians’ romance with the exception and traces its impact on Schmitt’s legal theory and on the recent jurisprudence of ‘rescue torture’, the ‘rescue downing’ of aircraft and an ‘enemy criminal law’ (Chapter 4).

How the state of exception is normalized, and how the instruments of emergency law and their corresponding juridical justifications infiltrate the doctrines of ‘normal’ law will be illustrated by examining two post-World War II crises of law-rule, the first focusing on the German Rechtsstaat, once it was challenged by ‘political extremism’ and attacked by a national terrorist group (Chapter 5). The second crisis was triggered by terrorist networks operating transnationally; it requires a more global

though hardly comprehensive) discussion (Chapter 6). These two phases of counter-terrorism and crises of law-rule are particularly instructive as they not only highlight the different strategies and mechanisms employed to integrate the state of exception into ordinary law-rule but also demonstrate that things had already changed, at least in some European countries, before 9/11.\(^6\) One of the basic changes appears to be the shift from the direct regulation of individual behaviour to the monitoring of social processes and the screening of communication by the police, security and intelligence agencies. The phenomena of crisis, however ‘modern’, like the ‘roving surveillance’ of the internet, bring to the fore that law-rule has always been uneasily connected with the prerogative of the ruler to cope with whatever emergency might occur or be perceived as such.

The concluding chapter focuses on the normalization of torture as a technique of governing (Chapter 7). The comparative remarks on torture practices and torture doctrines neither exhaust the matter nor will they end the normalizing juridical discourse. An end of political technology, informed by one or the other security agenda, is not in sight. Therefore I only offer some comparisons on the return of torture and today’s attempts to legally justify its practice. The focus will be on United States and German jurisprudence as well as the practitioners of state-organized and -executed brutality.

\(^6\) Jeremy Waldron argues ‘Things changed on September 9, 2001.’ (id., Torture, Terror and Trade-Offs (supra note 2), 1).