EDITORIAL

Wilders, Schmitt and the Abuse of Emergency Powers*

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Is it good news when legal theory comes to life? Not always – for instance when it concerns the notions of 'emergency' and the 'state of exception'.[1] The idea that a state can suspend the normal legal order in times of crisis to ensure its own survival carries a risk of abuse.[2] Beyond the historical lessons of Weimar, numerous contemporary examples illustrate how the invocation of emergency laws by political powers could lead to violations of the Rule of Law.[3]

A recent example emerges from the Netherlands, the birthplace of this journal. In September 2024, the newly formed radical right-wing government, including Geert Wilders' anti-immigration 'Freedom-party' (PVV), declared its intention to proclaim an 'asylum crisis' to trigger emergency powers.[4] The similarities to Orbán's playbook in Hungary are troubling; in 2015, the Hungarian government similarly declared a state of emergency over migration.[5]

Activating this emergency regime grants the Dutch Minister of Asylum and Migration the authority to limit family reunification rights and suspend asylum approvals indefinitely, all while, crucially, escaping parliamentary oversight. This is facilitated by articles 110 and 111 of the Aliens Act, which enable the government to enact rules that deviate from the Act in extraordinary circumstances through 'government decrees' instead of 'Acts of Parliament'. The use of government decrees bypasses parliamentary involvement, thus allowing rules to be enacted without oversight from either the Senate (*Eerste Kamer*) or the House of Representatives (*Tweede Kamer)*.[6]

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1 We must not conflate emergency with exception. See: Ellen Kennedy, 'Emergency and Exception,' *Political Theory* 39, no. 4 (2011): 535–50, https://doi.org/10.1177/0090591711406410.

2 David Dyzenhaus, 'States of Exception', in: *The Oxford Handbook of Comparative Constitutional Law*, ed. M. Rosenfeld & A. Sajò (Oxford University Press, 2015), 452.

3 Gábor Mészáros, 'How Misuse of Emergency Powers Dismantled the Rule of Law in Hungary', *Israel Law Review* 57, no. 2 (2024): 288-307, https://doi.org/10.1017/S0021223724000025.

4 They seek to accomplish this using the legal options provided by the Aliens Act (*Vreemdelingenwet*).

5 Mészáros, 'Misuse of Emergency Powers', 288-307.

6 Laurien Nijenhuis, 'De asielcrisis: wat zegt het kabinet nu eigenlijk?', *NJB*, September 23, 2024, https://www.njb.nl/blogs/de-asielcrisis-wat-zegt-het-kabinet-nu-eigenlijk; Lisanne Groen and Lieneke Singenberg, 'Activeren van staatsnoodrecht in het vreemdelingenrecht', *Verblijfblog*, 10 June 2024, https://verblijfblog.nl/activeren-van-staatsnoodrecht-in-het-vreemdelingenrecht/.

This last constitutional aspect is particularly significant given the government's lack of a majority in the Senate. To put it bluntly: the government is declaring a crisis to exploit the Dutch emergency regime for political gain – not because a genuine crisis necessitates it, but because it bypasses the challenges posed by its minority status in the Senate. This may be particularly problematic as the Senate is mandated to review legislation on its lawfulness, practicability and enforceability – things particularly at odds with the practical effects of a self-declared asylum crisis that would suspend various human right protections. Moreover, critical issues exist regarding the legitimacy of the emergency law. This hinges on its temporariness, reflecting 'its tendency to disappear again', as the French jurist René Cassin once stated.[7] This tendency appears to be missing in the Dutch proposal, as the government did not define when this so-called crisis will end.
The use of emergency powers to tackle political challenges reflects a broader trend of the 'trivialisation of emergency regimes' that has emerged since the 9/11 attacks in the United States.[8] This trend has also manifested itself in countries traditionally seen as strong liberal democracies.[9] While the pandemic contributed to this shift, it was not the cause.[10] France, for instance, has increasingly resorted to 'governing through emergency powers' since as early as 2015.[11]

Tom Eijsbouts and Leonard Besselink once stated that editorials should highlight events' potential for scholarship, and they were right.[12] The Dutch case provides fresh and concerning empirical material that enriches theoretical literature on the contemporary use of emergency powers. This scholarship underscores the rise of emergency regimes that, while formally adhering to the language of the Rule of Law and resting on legalities, effectively deviates from the Rule of Law by embodying the logic of exception. As such, this literature criticises the Schmittian perspective, which views emergency models as relying on the explicit suspension

7 Cassin, as cited in: Wouter J. Veraart, *Ontrechting en rechtsherstel in Nederland en Frankrijk in de jaren van bezetting en wederopbouw* (PhD diss., Erasmus Universiteit Rotterdam, 2005), 425.

8 Stéphanie Hennette Vauchez, 'Taming the Exception? Lessons from the Routinization of States of Emergency in France', *International Journal of Constitutional Law* 20, no. 5 (2022): 1795, https://doi.org/10.1093/icon/moad006; Oren Gross and Fionnuala Ní Aoláin, 'Law in Times of Crisis: Emergency Powers in Theory and Practice', *Netherlands Quarterly of Human Rights* 26, no. 2 (2006).

9 See for example Conor Gearty, 'No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy' in *Illusions of Terrorism and Counter-Terrorism*, ed. Richard English. (Oxford: Oxford University Press, 2015); In fact, Gearty argues that democracies emerged out of societies with unequal power structures, whose remains prevented the society from fully transforming into a liberal one. It is in these remains that the virus of counter-terrorism was able to nestle itself, resulting in the quelling of any opposition to the new society.

10 Tom Ginsburg and Mila Versteeg, 'The bound executive: Emergency powers during the pandemic', International Journal of Constitutional Law 19, no. 5 (2021): 1498-1535, https://doi.org/10.1093/icon/moab059.

11 For just a few examples of this literature: Vauchez, 'Taming the Exception?', 8; John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers', *International Journal of Constitutional Law* 2, no. 2 (2004), https://doi.org/10.1093/icon/2.2.210.

12 Tom Eijsbouts and Leonard Besselink, '"The Law of Laws" – Overcoming Pluralism,' *European Constitutional Law Review* 4, no. 3 (2008).

of the legal order,[13] as well as Agamben's concept of a 'permanent state of exception', in which the boundaries between the legal order's inside and outside are constantly at risk.[14] Both perspectives overlook the possibility of a hybrid model – one that internalises the exception within the legal order itself.[15]

The Dutch case serves as a compelling example of this hybrid approach, as demonstrated by how the new government frames its intended use of the emergency regime. Unlike the Schmittian model, the executive avoids any suggestion of suspending the legal order and instead claims the mantle of legality. 'It is possible. I follow the law', stressed the Minister of Asylum and Migration in parliament.[16] Wilders also emphasised that crisis legislation is already in place and can be used whenever necessary. 'You cannot claim that parliament has passed undemocratic legislation', he argued, reducing Rule-of-Law standards to procedural formalities. Perhaps sensing that legality alone might not suffice, Wilders even invoked historical examples, declaring: 'I am not a Sun King', in reference to *le Roi Soleil*, Louis XIV of France (1638–1715) and his famous statement, '*L'État, c'est moi*' ('I am the state').[17] This kind of rhetoric, as Dyzenhaus observes, leads to the mere appearance or even the pretense of legality. A compulsion of legality, following Dyzenhaus, that might result in the subversion of constitutionalism.[18]

This semantic camouflaging presents not only new challenges to legal theory and scholarship, but also to constitutional practice.[19] By portraying the abuse of emergency regimes as consistent with the Rule of Law, contemporary governments avoid openly adopting the traditional Schmittian model of a state of exception and abandoning the Rule of Law. As a result, these practices should be classified as examples of 'abusive constitutional practices'. This term refers to the appropriation of liberal democratic constitutional frameworks, concepts, and doctrines to further authoritarian agendas.[20] Needless to say, these practices deserve a watchful eye – it is not only academic *l'art pour l'art*. What is more, this practice effortlessly falls in a

13 For a historical analysis of Schmitt's theory: Marc de Wilde, 'The state of emergency in the Weimar Republic Legal disputes over Article 48 of the Weimar Constitution,' *Tijdschrift voor Rechtsgeschiedenis* 78, no. 1-2 (2010): 135-158, https://doi.org/10.1163/157181910X487341.

14 For the differences between Agamben and Schmitt: Jef Huysmans, 'The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society', *International Political Sociology* 2, no. 2 (2008): 165-183, https://doi.org/10.1111/j.1749-5687.2008.00042.x; Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005).

15 Stéphanie Hennette Vauchez, 'Taming the Exception? Lessons from the Routinization of States of Emergency in France,' *International Journal of Constitutional Law* 20, no. 5 (2022): 1796, https://10.1093/icon/moad006.

16 Johan van Heerde, 'Crisis als politieke strategie: de erosie van de democratische rechtsstaat,' *Trouw* September 20, 2024..

17 Coen van de Ven, 'Fabers Fata morgana,' *De Groene Amsterdammer*, September 20, 2024, https://www.groene.nl/artikel/fabers-fata-morgana.

18 David Dyzenhaus, *States of Exception*, 456.

19 Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar, 2014) 26.

20 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press, 2021) 3; Jan Petrov, 'How to Detect Abusive Constitutional Practices', *European Constitutional Law Review* 20, no. 2 (2024): 191-221, https://doi.org/10.1017/S1574019624000142.

broader practice in which everything that goes against the majority's wishes is dubbed 'undemocratic'.[21]

Is there any good news? Yes, there is. Dutch legal professionals appear to be aware of this abuse. For instance, Dutch government lawyers so far have refused to participate in the process of transforming the government's 'illegal actions' into legalities and have not adjusted the Rule of Law framework to make it compatible with the crisis framework. In recently released internal documents, they directly addressed the Interior Minister, stating: 'As Minister of the Interior and Kingdom Relations, you bear a special responsibility for safeguarding the Constitution and ensuring that the government operates in accordance with the principles of the Rule of Law'.

This strong statement about a minister's role within the constitutional order is rare in Dutch legal-administrative culture. The reasoning behind the choice of language of these government lawyers becomes evident in their response to the government's question about when an asylum crisis can be declared: 'It can be done when extraordinary circumstances make it necessary (Section 110 of the Aliens Act)', they responded. 'However, the documents submitted to us do not provide sufficient justification for why this is the case at present.' This, of course, poses a problem for the government: regarding the application of state emergency law, the civil servants further explained that its use requires very strong justification, as it effectively sidelines parliament, at least temporarily. 'In the absence of that justification', they emphasised, 'the application of state emergency law is not acceptable from a democratic and constitutional perspective'.[22]

We are fortunate to have such principled government lawyers who are actively defending the Rule of Law. As David Luban once pointed out: 'Sometimes quitting is the right thing to do; but when there is *Spielraum*, and a genuine prospect of mitigating evil, staying at the desk can be the righteous path. But only for those who actually resist.'[23] Not surprisingly, Wilders was far from pleased. 'What would voters think of me if I backed down at the first sign of critical bureaucratic advice?', he ranted, 'If I did that now, I wouldn't be worth anything.' In more measured terms, Prime Minister Schoof echoed Wilders's sentiment: 'Experts are important', he said, 'but the political will to get things done is just as crucial.'[24]

In this prioritising of voters and results over the Rule of Law, we may need to reconsider the triumph of the Rule-of-Law paradigm. It is to be hoped that Dutch

21 In the Dutch political landscape, an example can be found in *Forum voor Democratie*'s calls to get rid of the *dikastocratie* in which they claim that the judiciary's application of rules of international law deregulate democracy, see for example: https://fvd.nl/standpunten/aanpak-dikastocratie; for further reading see for example Kim Lane-Scheppele, 'Autocratic Legalism', *The University of Chicago Law Review* 85, no. 2 (2018): 557.

22 https://open.overheid.nl/documenten/a9a15289-09dd-442b-aec5-74bfa0c91b8c/file.

23 David Luban, 'Complicity and Lesser Evils: A Tale of Two Lawyers', *Georgetown Journal of Legal Ethics* 34, vol. 3 (2021): 613.

24 Van de Ven, 'Fabers Fata morgana'.

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government lawyers and the Council of State, which will eventually be asked to provide an opinion, will remain steadfast and resist accepting the Schmittean logic as expressed by Wilders and some members of the government.[25] When called upon to assess the legality of the proposed regime again, they must not conform to Schmitt's first claim about states of emergency – that it is up to the executive to decide when a state of emergency exists.[26] Legal scholars should not only remind them of this essential principle, but also actively support it. In this context, and echoing Iris van Domselaar's earlier editorial, law schools should prepare future lawyers to recognize the dark sides of legalism.[27]

25 David Dyzenhaus, 'Schmittean logic', *Philosophy & Social Criticism* 47, no. 2 (2021): 183-187.

26 Dyzenhaus, *States of Exception*, 456.

27 Iris van Domselaar, 'Where Were the Law Schools?', *Netherlands Journal of Legal Philosophy* 1, no. 50, (2021): 3, https://doi.org/10.5553/NJLP/.000000-12; Leora Bilsky and Natalie R. Davidson, 'Legal Ethics in Authoritarian Legality', *The Georgetown Journal of Legal Ethics* 34, no. 3 (2021): 665.