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例外的挑战：
卡尔·施米特的国家紧急权理论研究

The Challenge of the Exception:
A Study on Carl Schmitt's Theory of State Emergency Powers

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摘要

当今的世界正进入一个全球化背景下的风险社会，突发事件随时随地可能发生。在非常状态下，国家应该集中与扩张什么样的权力以既能迅速、有效地处置突发事件，又能防止或最小化权力滥用风险的同时，最大程度地确保公民权利与维护法治，这是一个挑战。不仅以提出“政治乃区分敌友”的论断而得享盛名与声名狼藉，同时也以解释魏玛宪法第 48 条的总统紧急权条款而广为人知和恶名昭著的 20 世纪德国著名的公法学家和政治思想家卡尔·施米特（Carl Schmitt, 1888—1985）在魏玛德国时期就宣称，自由民主政制无能应对例外状态。

“9·11”事件引发了人们对国家紧急权问题的激烈争论。在这场争论中，卡尔·施米特及其国家紧急权理论是论者们的一个绕不开的论题。无论是共和主义国家紧急权理论流派的学者还是自由主义国家紧急权理论流派的学者都言必及施米特及其国家紧急权理论，都声称其提出的理论模式既能够有效解决国家紧急权与公民权之间关系的困境，从而应对例外的挑战，也回应了施米特提出的挑战。然而，几乎参与论争的学者都被批评为要么接受施米特理论的前提假设，要么可能导致施米特理论的结论，从而染有施米特国家紧急权理论的色彩。据此，本文以为，要走出这一困境，回到施米特，重新检视、重构施米特的国家紧急权理论，可能是不失为一条较可行之路径。

基于施米特文本和他的“主权就是决断例外状态”的论断，本文构建了一个体现决断例外状态的主权在国内层面与国际层面内容的框架，将施米特国家紧急权理论置于这一框架之下进行梳理。本文的目的就在于，试图在通过重新检讨、梳理、重构施米特紧急权理论基础上，把握其紧急权理论基本观点与成就，揭示其理论的本质与问题所在，从而为回应施米特的挑战做些工作，同时为后“9·11”时代紧急权理论与实践的进一步发展提供一些可能的启示。

本文有两个基本的判断，一是施米特论述的例外状态是一种政治性例外状态，其紧急权理论是一种基于国家生存理性或自保原则的国家理由学说，是政治性的紧急权理论；二是后“9·11”时代的紧急权理论论争的例外状态则是一种基于恐怖主义袭击造成的非政治性的例外状态，这些紧急权理论因而是一种法律的紧急权理论。职是之故，后者回应施米特的挑战之路径是值得反思的。由此，本文主要有两项工作。

论述施米特国家紧急权理论的基本内容。第一章对施米特的生平、主要著作和施米特关于例外状态概念及其紧急权概念的演化做了一简单介绍。第二章则阐述施米特关于例外状态下国家紧急权力的主张：决断例外状态需要不受限制的主权权力；例外状态下只有赋予不受限制的紧急权给总统才能守护宪法，议会、司法机关都不能在例外状态下捍卫宪法；例外状态下要捍卫国家、宪法，需要授予像总统这样的特别立法者以甚至侵犯宪法的立法权力。第三章则探讨施米特关于例外状态下公民权利的主张：基于魏玛宪法第 48 条内容和他关于“宪法”与“宪法律”的区分，他主张为在危机时刻捍卫宪法与国家，魏玛总统可以中止甚至终止的公民权利范围不仅仅魏玛宪法规定的 7 种；出于为希特勒紧急权提供论证和回应施特劳斯的挑战之目的，施米特借研究霍布斯国家理论的提出如此论断：要使得国家强大到足以在例外状态下实施专政，就得控制甚至否定公民自然权利、社会组织的宪法、法律权利。第四章则阐述施米特关于例外状态下法治的主张：紧急状态下，议会制无能应对危机，自由主义规范论、实证法意义上的法治不适用于例外状态；例外状态下只是没有规范论、实证论意义上“法治”，但是有主权者、元首的决断意义上的“法治”，只有元首才能守护法律。第五章论述施米特在国际层面的国家紧急权理论：基于人是危险的、世界处于自然状态、政治不可避免等理论资源，他宣称战争是一种永远存在的现实可能性；战争没有合乎规范的意义，战争无法律，只有生存的意义；为捍卫国家存续，国家可实行总动员，采取游击战等方式抗击外敌。基于上述，文章指出，施米特国家紧急权理论犹如一把刺向自由主义的阿基里斯之踵——例外状态——的匕首，对自由主义提出的挑战：自由主义民主政制无能应对例外状态。

阐述 20 世纪尤其是“9·11”事件及之后共和主义理论、自由主义理论等主要理论流派的代表性学者对施米特的挑战所作出的努力与回应，在分析这些理论流派的理论主张的基础上，指出其回应最终却陷入困境，并且分析其困境之根源所在。在第六章的第一节和第二节分别论述共和主义与自由主义的国家紧急权理论。后“9·11”时代的共和主义紧急权理论主张通过启动事先在宪法里设置的紧急状态权力条款与紧急状态法律，发挥立法机构的有效监督，同时辅之司法机关的作用来约束与控制紧急权的运作，以达到既迅速有效处置危机又最大限度地捍卫法治与维护公民权利之目的。自由主义紧急权理论则主张，在紧急状态下，

如果公共官员相信对于保护国家与公共秩序是必要的话，他们可以超越法律规范甚至宪法秩序，通过采取法外行动与措施应对与处置危机，但事后需由“人民”（行政机关、议会、法院、普通公民、国际社会等）对紧急权的行使者作出决定（可能批准，由此嘉奖、赞扬；可能拒绝，由此处罚、谴责），以此试图主要通过事后的、民主的、社会的等对紧急行动检控的手段而可能导致法外行动的成本与不确定性的增加来使得公共官员谨慎行事，从而达到消除或尽可能地降低法外紧急权滥用之风险，保存法治与宪政之目的。可见，无论是共和主义紧急权理论，还是自由主义紧急权理论都将“9·11”事件之后的例外状态视为一种法律的例外状态，都主张通过法律来处置紧急状态问题。

但是，本文在第六章第三节接着指出，“9·11”事件之后的论者与施米特所讨论的紧急权概念的逻辑前提概念——例外状态概念是不同的。施米特笔下的例外状态是一种政治的例外状态，而“9·11”事件之后的论者所讨论的例外状态则是一种法律的例外状态。因而，前者回应施米特的挑战的方式须要重新思考。应对“9·11”语境下的例外状态不仅仅是一个法律的问题，而且也是一个政治、社会、文化等方面的问题。在结论部分，在概要总结本文的理论意义之后，本文将进一步指出，施米特在的国家紧急权理论不适合充当当今恐怖袭击造成的例外状态下的国家紧急权理论与实践的理论基础，但是，他的思想对于今天的紧急权理论与实践仍然具有启发意义，有助于发现紧急权理论研究与应对危机的实践中的诸多问题与不足。

关键词：卡尔·施米特；例外状态；国家紧急权；政治；国家理由

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Synopsis

The contemporary world has stepped into a globalized risk society in which the emergent events will occur anywhere at any time. In abnormal conditions what power should a state centralize and expand to handle emergent events with the result of furthest protecting citizen's rights and maintaining rule of law while preventing and minimizing the risk of abusing power? It is a challenge. The famous German specialist in public law and political thinker Carl Schmitt, who becomes both celebrated and notorious for his arguments of "the political grouping of friend and enemy" and explanation of Article 48 of the Weimar Constitution, asserts that the liberal democracies are incapable of handling state of exception.

The events of September 11 cause fierce debates on the question of state emergency powers. Carl Schmitt and his theory of state emergency powers are topics all the debaters cannot evade in the debates. Whenever both the scholars of the state emergency powers theory of Republicanism and the scholars of the state emergency powers theory of Liberalism discuss it, they mention Carl Schmitt and his theory of state emergency powers. They assert that their theories can solve the predicament of relationship between citizen's rights and state emergency power to handle the challenge of the exception and offer a response to Schmitt's challenge. But nearly all the involved scholars are criticized either for acceptance of the prerequisite hypothesis of Schmitt's theory or for leading to his conclusion. So the dissertation points out reexamining the basic understanding of Schmitt might be a feasible way to escape the predicament. On the basis of Schmitt's texts and arguments of "Sovereignty decides on the exception", the dissertation establishes a framework reflecting sovereignty's decision on the exception on both domestic level and international level and sets Schmitt's theory of state emergency powers in it. The purpose of the dissertation is to seize his basic arguments and achievements of emergency theory, to reveal the essence and problems of his theory, to make contribution to the response to the Schmitt's challenge and to offer some inspirations to the further development of emergency powers theory and practice in post-"9.11" times on the basis of

reexamining and reconstructing Schmitt's theory of state emergency powers.

The dissertation is of two basic arguments: the first one is that the exception elaborated by Schmitt is a kind of political state of exception and that his theory of emergency power is the doctrine of reason of state on the basis of reason of state existence and self-defending principle; the second is that the state of exception argued by the scholars of the theory of emergency powers in post-"9.11" times is non-political state of exception caused by the attack of terrorism. So these state emergency theories are the theory of legal state of exception. Due to this point, we should rethink the way they respond to Schmitt's challenge. Accordingly, the dissertation is doing two jobs no one in the academic field has done.

Firstly the dissertation elaborates the basic contents of Schmitt's theory of state emergency powers. The first chapter gives a brief introduction of Schmitt's life and main works together with the evolution of his concepts of state of exception and state emergency powers. The second chapter expounds Schmitt's claims on state emergency powers in the state of exception: it should allow the sovereignty unrestrictive powers to decide on the state of exception. In the state of exception the president must be empowered the unrestrictive emergency power to watch constitution. Both the parliament and ministry of justice cannot defend constitution in the state of exception. With the purpose of defending state and constitution in the state of exception, the president as special legislator must be authorized the powers of legislation which might infringe constitution. The third chapter probes into Schmitt's affirmations of citizen's rights in the state of exception. Based on Article 48 of the Weimar constitution and his division between "constitution" and "constitutional law", he affirms that in order to defend both state and constitution in crisis the range of citizen's rights which Weimar president can suspend and even terminate might be in excess of the 7 kinds stipulated in the Weimar Constitution. For the purpose of justifying Hitler's emergency powers and responding to Strauss' challenge, Schmitt brings forward the thesis by borrowing Hobbes' theory of state: citizen's natural rights and social organizations' rights of constitution and law must be controlled and even

denied in order that the state is powerful enough to carry despotism into execution in the state of exception. The fourth chapter sets forth Schmitt's propositions about rule of law in the state of exception: the parliament is incapable of handling crisis and normativism of liberalism along with rule of law in the sense of positivism cease to the exception; there is no rule of law in the sense of normativism and positivism but only "rule of law" in the sense of decisions of sovereign and monarch. The fifth chapter elaborates Schmitt's theory of state emergency powers on the international level: on the grounds of the theories that human-being is dangerous; that the world is in the natural state; that the politic is unavoidable, he claims that war is still today the most extreme possibility; it is of no meaning in compliance with criterion but of the meaning of existence; it has no law; the state can mobilize all its people to attack enemies by way of guerrilla fighting with a view to defending the state. Based on the above-mentioned thesis, the dissertation points out that Schmitt's theory of state emergency powers is like a dagger stabbing into Achillean heel of Liberalism—the state of exception.

Secondly, the dissertation sets forth the efforts and responses made by the representative scholars of the main schools of Republicanism and Liberalism in 20th century, especially after the events of September 11. On the basis of the analysis of the theoretical arguments of these schools, it points out that the scholars have got into a predicament and analyzes the reasons. The first and second parts of the sixth chapter elaborate the state emergency power theories of Republicanism and Liberalism respectively. The state emergency power theory of Republicanism affirms that the emergency articles in constitution and emergency laws stipulated in advance can be started up to restrict and control the operation of emergency power. At the same time the supervision of the legislative and the role of the judiciary can be brought into play for the purpose of handling the crisis swiftly and effectively as well as furthest defending the law and citizen's rights. While the emergency power theory of Liberalism asserts that when public officials are convinced that it is necessary for protecting the nation and the public in the state of exception, he can handle and cope

with the crisis by adopting extra-legal actions which may exceed the criterion of law or even the constitutional order. But after the crisis “the people”(government, parliament, court, citizen, international community) will decide how to ex-post respond to the actors exercising emergency power (if permitted, awarded and commended; if denied, punished and rebuked). The public officials can be forced to make decisions deliberately by way of ex-post, democratic and social supervision of emergent actions, which may lead to the increase of the cost and the uncertainty of extra-legal actions as a result of eliminating and at least decreasing the risk of abuse of extra-legal actions to achieve the goal of protecting rule of law and regime. From the above, either the emergency power theory of Republicanism or the emergency power theory of Liberalism regards the state of exception after the events of September 11 as a kind of exception of law and advocate handling the state of exception by force of law.

But the third part of the sixth chapter points out the prerequisite concepts of the concepts of the state of exception discussed by the arguers after the events of September 11 and the ones talked over by Schmitt are different. Schmitt’s state of exception is a political one, but the state of exception discussed by the arguers after the events of September 11 is a legal one. So we should rethink the way they respond to Schmitt’s emergency powers theory. Handling the state of exception in the context of “9.11” is not only a legal problem but also a political, social and cultural one. In conclusion, in wake of the summary of theoretical significance of the dissertation, it points out that it is not appropriate to treat Schmitt’s theory of state emergency powers as the theoretical foundation of the theory and practice of emergency powers in the state of exception caused by the terrorism. But his thesis is of significance to the nowadays theory and practice of emergency power and instrumental in finding the questions and shortcomings of the research of emergency powers theory and the practice of handling crisis.

Key words: Carl Schmitt; State of Exception; State Emergency Powers; the Political; Reason of State

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