

CANSU URAZ

EXTRA-LEGAL DECISION-MAKING

Bilkent University 2024

EXTRA-LEGAL DECISION-MAKING
DURING SUPREME EMERGENCIES

A Master's Thesis

by
CANSU URAZ

Department of
Philosophy
İhsan Doğramacı Bilkent University
Ankara
May 2024

To Aysu



EXTRA-LEGAL DECISION-MAKING DURING SUPREME EMERGENCIES

The Graduate School of Economics and Social Sciences
of
İhsan Doğramacı Bilkent University

by

CANSU URAZ

In Partial Fulfillment of the Requirements for the Degree of
MASTER OF ARTS IN PHILOSOPHY

THE DEPARTMENT OF
PHILOSOPHY
İHSAN DOĞRAMACI BİLKENT UNIVERSITY
ANKARA

May 2024

EXTRA-LEGAL DECISION-MAKING DURING SUPREME EMERGENCIES
By Cansu Uraz

I certify that I have read this thesis and have found that it is fully adequate, in scope and quality, as a thesis for the degree of Master of Philosophy.

Simon Wigley
Advisor

I certify that I have read this thesis and have found that it is fully adequate, in scope and quality, as a thesis for the degree of Master of Philosophy.

Lars Vinx
Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and quality, as a thesis for the degree of Master of Philosophy.

William G. Wringe
Examining Committee Member

Approval of the Graduate School of Economics and Social Sciences

Refet S. Gürkaynak
Director

ABSTRACT

EXTRALEGAL DECISION-MAKING DURING SUPREME EMERGENCIES

Uraz, Cansu

Master, Department of Philosophy

Advisor: Prof. Dr. Simon Wigley

May 2024

A supreme emergency refers to an imminent threat to the security, freedom, and well-being of a significant number of people, presenting a serious challenge to democratic processes. In such situations, the absence of specified legal guidelines may prompt a government to resort to extralegal measures to address the imminent danger. This raises the critical question of whether democracy can justify the use of extralegal measures by political authorities during life-threatening situations. To examine that question I consider the instrumental and intrinsic accounts of the normative basis of democracy. I conclude that neither approach offers an adequate justification for extralegal actions during emergencies. Instead, I argue that such actions are excused but not justified.

Key Words: Extralegal, Supreme Emergency, Democracy

ÖZET

ACİL DURUMLARDA DEVLETİN HUKUK DIŐI ÖNLEMLERİ

Uraz, Cansu

Yüksek Lisans, Filozofi Departmanı

Tez Danışmanı: Prof. Dr. Simon Wigley

Mayıs 2024

Gerçek bir acil durum önemli sayıda insanın güvenliğine, özgürlüğüne ve refahına yönelik bir yakın bir tehditi ifade eder. Ama gerçek acil durumlar demokratik süreçlere ciddi bir tehdit oluşturular çünkü kanun genellikle acil bir duruma yanıt olarak hangi önlemlerin alınması gerektiğini özellikle belirtmez. Bunun sonucunda, devlet, öngörülemeyen bir tehditle başa çıkmak için hukuk dışı yollara başvurur. Bu durum demokrasinin insan yaşamını tehdit eden bir durum karşısında siyasi otoritelerin hukuk dışı tedbirlerini gerekçelendirip gerekçelendiremeyeceği sorusunu akla getirir. Bu soruya yanıt ararken demokrasinin iki temel yaklaşımını kullanabiliriz: enstrümental ve intrinsik demokrasi. Ancak bunların hiçbirisi devletin hukuk dışı gücüne gerekli bir açıklama sunamayabilir. Bu nedenle, gerekçe bulmak yerine, gerçek acil durumlar karşısında devletin hukuk dışı önlemlerini mazur görmemiz daha mantıklı olabilir.

Anahtar Kelimeler: Hukuk dışı, Acil durum, Demokrasi

ACKNOWLEDGEMENTS

I am deeply grateful to my supervisor, Simon Wigley, whose unwavering guidance and support were instrumental in bringing this work to fruition. His mentorship carried me through all stages of my writing project, and I am truly indebted for his invaluable insights.

I also extend my sincere thanks to my committee members for their invaluable contributions and for making my defense an enjoyable and enriching experience.

Special appreciation goes to my family for their steadfast understanding and unwavering support throughout my research and writing journey. Their encouragement and love have been my pillars of strength, and I am profoundly grateful for their presence in my life.

TABLE CONTENTS

ABSTRACT-----	i
ÖZET-----	ii
ACKNOWLEDGEMENTS-----	iii
TABLE OF CONTENTS-----	iv
CHAPTER I: INTRODUCTION-----	1
CHAPTER II: SUPREME EMERGENCY-----	8
2.1 What is a Supreme Emergency? -----	8
2.2 Exception or not-----	9
2.3 Not Illegal but Extralegal-----	11
2.4 The Problem of Emergency -----	13
CHAPTER III: THE INSTRUMENTAL ACCOUNT OF DEMOCRACY-----	16
3.1 Epistemic Theory-----	17
3.2 Arneson's Instrumental Account -----	21
CHAPTER IV: THE INTRINSIC ACCOUNT OF DEMOCRACY-----	25
4.1 The Intrinsic Account of Democracy -----	25
4.2 Excusing rather than Justifying-----	29
CHAPTER V: CASE STUDIES-----	34
5.1 Roman Case-----	34
5.2 Gandhi's Emergency-----	38
5.3 Korematsu Casen -----	39
CHAPTER VI: CONCLUSION -----	43
REFERENCES -----	45

INTRODUCTION

Winston Churchill coined the term 'supreme emergency' to describe the Nazis' threat to the United Kingdom during World War II. He used the phrase as a rhetorical device to incite the British people to overcome their fears and, more importantly, to legitimize his decision to bomb German civilians. Decades later, Churchill's concept of supreme emergency served as inspiration for the analysis of war and the idea of emergency. A supreme emergency is an imminent danger threatening people's collective survival and deepest values (Walzer, 33). The concept of supreme emergency may need to be modified based on modern governments' crises. In this context, a supreme emergency occurs whenever immediate and grave danger threatens citizens' lives or violates public order, risking their safety.

Supreme emergencies pose serious challenges to the legal system and the democratic process. Democracies are more committed to protecting individuals' civil and political rights than other systems. Thus, current governments are grounded in democratic principles. Democracies authorize the government to rule the country while the government pledges to protect its citizens' civil and political rights during its administration. However, when the government faces an emergency, it finds itself in unforeseen circumstances and must make rushed decisions to address them. To save the lives of its citizens within a limited time frame, the government usually resorts to extralegal means that undermine people's civil and political rights, as well as democratic processes. Emergencies prevent a government from fulfilling its commitment to governing through the law and respecting people's rights, further challenging the authority of democracy. This tension arises between the government and the democratic system that grants authority to it. Given this, an important question arises: can extralegal

actions taken by the government during emergencies be justified democratically, or do they rely on non-democratic justifications? Is there an alternative way to address the question if they are unavoidably unjustified?

The following examples will help clarify the type of emergency and problem I intend to discuss throughout the paper. Suppose that the adverse effects of climate change, such as unprecedented weather, floods, or extreme storms, have destroyed crops and, consequently, people's incomes in the southern part of the country. This has undermined people's ability to feed themselves. Although famine is a known and preventable disaster, the law does not prescribe how the government should relieve the imminent threat of famine, as the country has not experienced famine in the last century. Faced with famine, the government must come up with a long-term solution. Nevertheless, it also needs to support a vulnerable population and provide nutritious food for those in need immediately. Failure to do so may result in malnutrition and disease affecting a significant portion of the population, leading to deaths. Therefore, the government forcibly collects surplus food from supermarkets, restaurants, and other sources to distribute it to those in need. This action involves forcing them to give up their property, regardless of their consent, whenever the executive demands surplus food. However, if the government does not breach property rights, it fails to prevent the deaths of people living in the famine region.

Another example is army conscription. For the sake of clarity, I will use a hypothetical example. Let's assume that ongoing tension between two nations has led country A to attack country B. Even though the two countries have competing perspectives and interests, country B has not anticipated country A will use its armed forces against it. The government faces an imminent and overwhelming threat with no time for deliberation. To defend the country, the executive body mobilizes its military forces. Due to the scope and intensity of hostilities, the government decides to conscript its citizens despite their reliance on the professional military,

even if it means acting without democratic authorization. By doing this, the executive body forces eligible men to join the army and denies their rights. However, if the government does not conscript men, it will lead to more tragic deaths of civilians and human rights violations by the country A.

Perhaps the best example that you might be familiar with is the case of a pandemic, given recent experiences. Suppose that a novel virus outbreak is identified in a city. Attempts to contain the virus fail, resulting in its spread to other areas of the country and worldwide in a short time. Considering that the virus causes a high death rate and severe social and economic disruption, the government must immediately respond to the health crisis. Nevertheless, the law does not prescribe how to deal with that particular virus, although it is probable that the law might offer general guidance about handling pandemics by looking at past examples. Given that scientists have not yet developed a vaccine, the government must use its authority extensively to impose mitigation measures during a public health emergency. As a result, lockdowns and travel restrictions are implemented to limit the spread of the virus; nonetheless, doing so violates citizens' rights to freedom of movement and assembly. Yet, if the government chooses to respect those rights, it increases the death rate. Supreme emergencies, as we have seen in the above examples, push the executive branch to act without authorization for the purpose of saving people's lives, even though it means violating democratic processes.

We can respond to the question with two main approaches. Namely, the instrumental and intrinsic accounts of the normative basis of democracy. These two approaches seek to answer why democratic government is accepted as a justified authority. Delving into its nature will help us determine if democracy is capable of tackling the challenges posed by emergencies. We will start with an instrumental account, which justifies democratic processes in light of the outcomes of collective action (Coleman, 219). For a democratic decision to be

legitimate, it must be produced by the right procedure. An essential feature of the procedure is its epistemic value, which is publicly recognized (Estlund, 8). There is no doubt that some citizens possess greater wisdom than the group, yet this does not necessarily make their decisions legitimate or authoritative (Estlund, 40). Instead, good results are achieved when individuals with limited knowledge come together under the right circumstances. However, a government's action during an emergency is not justified by the instrumental argument for the following reasons: it cannot follow the right procedure to ensure a deliberative environment in which every point of view is taken into consideration to arrive at an acceptable decision. Limited time and the pressure to make effective decisions have forced the government to act in an extralegal manner, undermining democratic processes.

It does not mean that we should ignore the instrumental account. It may present a problem if we alter our understanding of what "good results" mean. When reading Arneson, good results entail the protection of fundamental rights. To achieve good outcomes, we use democratic rights as a means to protect more fundamental rights, such as freedom of speech, privacy, and individual freedom (Arneson, 2003a: 95). Given the function of democratic rights, democratic procedures should be judged based on the moral value of their potential outcomes (97). In this case, they exist as long as they protect fundamental rights better than their alternatives. This implies that we may temporarily suspend democracy or disregard the existing body of law if democratic procedures fail to adequately safeguard these rights in a given situation (95). While this approach may provide justification for extralegal measures, it carries significant risks for two reasons. Firstly, it opens the door for government abuse of power through its interpretation of what counts as inadequate safekeeping of basic rights. Secondly, it implies that the rights of those that are infringed in order to facilitate the emergency response cease to exist because the government's actions are fully satisfied. Put differently, there is no rights infringement in that case.

On the flip side, the intrinsic account justifies democracy through its connection to values independent of an outcome (Coleman, 219). This value, among many others, is fundamental equality. Each person's interests should be given equal consideration in choosing laws and policies for society (Christiano, 2008: 12). There is no reason why one person's life should be valued more than another's. To demonstrate equal importance to each person, they are provided with equal resources to understand and pursue their interests. The equal distribution of these resources, such as voting power or eligibility for office, gives people an equal say in shaping the society they live in and the power to influence collective decision-making (95-96). Democratic political institutions allocate resources, treat individuals as equals, and provide a basis for them to discover their interests. However, this intrinsic justification does not suffice to justify the government's extralegal acts during emergencies because public officials cannot prioritize equality while attempting to save their citizens' lives. They cannot give every citizen an equal say or distribute equal resources to satisfy their interests in times of a supreme emergency. Instead, they tend to use wide discretion in handling the serious threat. Put differently, extralegal actions cannot be justified because they do not emerge from a procedure that authorizes government actions. Either the existing body of law does not authorize the necessary action or there is insufficient time to obtain the authorization of an elected assembly.

Up until now, we have concluded that neither the instrumental nor the intrinsic account of democracy justifies the government's extralegal use of power during emergencies. Instead, they have shown that actions taken extralegally undermine the legitimacy of democracy. Does this mean that we should prohibit any conduct beyond the democratic process? Is the prohibition of any law beyond the democratic process essential? The answer is no. Supporting that strictly deontological position puts the executive body in a difficult place. The government will know that if it undermines the democratic procedure, even in a supreme

emergency, it will face punishment. Since they are likely to protect their authority and power, they will stick with the democratic procedure and ignore the consequences. Conversely, it is plausible to excuse the government's conduct. Supreme emergencies are real threats that must be handled immediately. Excusing the government is to accept that it acted contrary to democratic authority. It acknowledges that what it did during emergencies was wrong and liable to compensation. Nevertheless, the government can be excused since it also has no choice but to save its citizens' lives. Excusing the government's actions can be explained with the help of an intrinsic account instead of an instrumental one. That is, extralegal actions threaten the fundamental equality captured by democratic procedures and are therefore unjustified. However, because they were necessary to respond to a supreme emergency, I contend that such actions are excused and therefore liable for compensation, but not punishment or impeachment.

In light of the problem we are addressing, this thesis aims to provide an answer to the question of whether democracy justifies the government's extralegal acts during emergencies. In what follows, I define the notion of emergency and discuss how law shapes executive actions during emergencies. The lack of a clear description entails acknowledging that the government can activate emergency powers granted by law as it sees fit. I then argue about the authority of democracy. Emergencies are undeniable events in democracies. Even though each emergency emerges with a specific character, it is an expectation that governments respond to emergencies without violating the essentials of democracy. Yet, they undeniably fail to come up with measures that are compatible with democratic necessities. Since democracy is a vague concept, we will delve into different arguments about democracy—intrinsic and instrumental—and evaluate its relation to emergencies. Lastly, I lay out why these two accounts cannot justify the government's extralegal use of power during a supreme emergency. Even if it is justified, it inevitably leads to various problems. Instead, I propose

excusing the government's extralegal use of power, which is more related to the intrinsic account of democracy.



CHAPTER 2

What is the Supreme Emergency?

The Nazis threatened the continuity of British society. The danger was imminent. As a result, Winston Churchill decided to bomb German cities, even if it meant deliberately killing innocent citizens. To justify his actions and persuade others, Churchill introduced a new phrase to explain the gravity of World War II: a supreme emergency. Having a clear understanding of this phrase enables us to identify real emergencies. Two main criteria might define a supreme emergency: the imminence of the danger and its nature (Walzer, 2006: 252). Real emergencies occur when our core values and shared survival are at risk (Walzer, 2004: 33). Our deepest values refer to the value of community governing human life (34). Restrictions or permissions granted by these values cannot be suspended because they shape our way of life. In light of this, we interpret fundamental rights in the context of our deepest values.

This definition of a supreme emergency undoubtedly serves as the starting point. However, the threats that modern governments face allow for a wider interpretation of the supreme emergency. Firstly, regarding the scope of immediate danger, it does not have to threaten an entire nation. Even if a substantial number of people living in a particular area are in sudden danger of losing their lives, a government must invoke emergency powers to protect its citizens. For instance, the adverse effects of climate change may destroy all crops and income in one state rather than the whole country. Yet, the government must regard it as an emergency because those residing there lose their ability to feed themselves, and their lives are severely disrupted. Secondly, regarding the nature of an emergency, it is not necessary to

directly threaten the lives of citizens. If the imminent threat disrupts a society's security, freedom, and well-being, the government must view it as an emergency and take necessary actions. The reason is that these types of threats gravely endanger its health, economy, or environment. In this sense, individuals are unable to meet their basic needs, including food, shelter, or clothing, as well as accessing essential services such as drinking water, sanitation, or healthcare. For instance, the destruction of all crops does not annihilate the whole country or kill all people there. Instead, it undermines a particular number of people's ability to feed themselves. Even if the government abandons them, the country continues to exist. However, the absence of an effective response to this crisis threatens the well-being and health of the people and might cause their deaths.

Exception or not?

We define an emergency as an imminent threat to the security, freedom, and well-being of a significant portion of the population. While this definition provides some insights into whether an emergency is exceptional, it does not fully answer the question. There are two main approaches to answering that question. On the one hand, an emergency is considered an exception because it occurs without initial warning (Gross & Aolain, 165). Hence, it requires concrete decisions not constrained or guided by prior rules (163). In peaceful times, the government applies general norms. The applicability of general legal norms presupposes normalcy. However, when circumstances are abnormal, applying general norms prevents a government from taking effective measures to resolve an emergency. It is impossible to apply general legal norms to a supreme emergency, so a government must be authorized to suspend the application of the law when faced with a crisis (Schmitt, 13). The government cannot predict the nature of future emergencies and determine how to deal with them in advance; thus, legalizing exceptional situations results in apparent failures (11). Correspondingly, the

best thing that the law can do is to determine who decides whether there is an emergency, as the government handles an emergency without the guidance of the law (7). In this case, the government needs to exercise greater discretion in how to cope with an emergency. Due to the unpredictable nature of emergencies, public officials may ignore the law and rely on their authority and interpretation of an event.

On the other hand, an emergency regime should adhere to the principles of liberal democracy. Without the constraint of the rule of law, an emergency regime can quickly degenerate into a police state (Ackerman, 1072-3). Since the state of emergency is a legally created black hole, it is subject to external constraints. After an attack by an aggressor state or group, for example, the government should seize power to act unilaterally only for the briefest period. Yet, the president should persuade the majority to renew the state of emergency within short intervals (1047), and the judiciary should implement a special emergency system of checks and balances to protect fundamental rights (1046). The purpose of imposing these measures is to uphold the principles of democracy and the rule of law (1072). However, the problem arises when an exception is not a legal black hole but a space beyond the law. This space is created when the law recedes (Schmitt, 12). The judiciary cannot improve the government's policies that balance security and liberty during an emergency due to poor information (Posner and Vermeule, 94). Consequently, the Constitution should be relaxed or suspended, and power should be concentrated in the government's hands (15-17).

Considering these two approaches, we can conclude that emergencies are situations in which the executive body is aware of the possibility of facing immediate danger while exercising its authority. Nonetheless, they are unforeseen since the government never knows where or what kind of danger it will encounter. For example, suppose a government has faced unprecedented governance challenges due to the spread of an unidentified virus. The lack of vaccines has forced the government to intervene in people's lives by implementing stay-at-

home orders, travel restrictions, and business closures. Under these circumstances, the occurrence of an emergency is not an exceptional situation. There is a sense of awareness in the administration regarding the possibility of encountering emergencies during its tenure in office. There might even be some kind of past guidelines about pandemics. Yet, it is an unforeseen event because of situational details surrounding an emergency. The government has to exercise power beyond what is permitted since they have never faced pandemics caused by this particular virus before. Even if there are previous guidelines, they must exercise some discretion at the end of the day.

Not Illegal but Extralegal

The unforeseen nature of emergencies raises a significant question: does the unpredictable nature of an emergency force the government to step outside of the law? There are two competing models for determining the role of law in times of emergency: the legality model and extra-legal measures. A distinction is unavoidable between the rule by law and the rule of law models when examining the legality model. In the former, the law is used as a tool to control people and is created and applied arbitrarily. In the latter, each citizen is equally subject to all laws, and people are governed by the law rather than anything else (Dyzenhaus, 2006: 6). The government maintains order in society through its commitment to abiding by the rule of law. There cannot be a rule by law if the principles of the rule of law are absent (7). Accordingly, legislation must be interpreted in a manner that enables the government to discharge its responsibility to act reasonably and fairly. In this way, the government upholds the equality of all individuals under the law (12-13). The rule of law also plays a role in responding to emergencies. Certain emergencies might require the legislative or executive body to take the lead role. Nonetheless, judges will always have the responsibility of

upholding the rule of law (Dyzenhaus, 2008: 2011) because, as a condition of democratic authority, the rule of law establishes the legitimacy of law and politics. It provides prior constraints or ex-ante limits on state power to enhance predictability and certainty. Thus, under no circumstances should the government govern outside the rule of law, even during emergencies. In a situation where the executive is given prerogative power, meaning discretionary power of the government without the consent of the legislative body to violate the law to do public good, through the constitution or statute, the judge must understand the delegation of power as constrained by the rule of law (2036)

According to our definition of a supreme emergency, the nature and scope of the threat incite the government to use extralegal power. Hence, the legality model cannot provide a convincing answer. Yet, the extra-legality measure model allows public officials to act extralegally if they believe circumstances require them to do so to combat grave dangers. As long as such actions are directed toward advancing the public interest and are publicly acknowledged, they will be regarded as appropriate (Gross & Ni Aolain, 111-112). In this sense, going outside the law does not mean ignoring the rule of law. Contrarily, it preserves long-term obedience to legal principles and rules by preventing the bending of the law to accommodate emergencies (112). After the government determines the necessity to deviate from the law, it acts extralegally without knowing its consequences (136). After all is said and done, authorities accept and justify the process they chose to handle the threat because necessity does not turn extralegal actions into legal ones. The public will have the final say on whether to approve or reject the authorities' extralegal acts in retrospect (140-141). Ex-post ratification by the public likely causes the government to become extremely cautious. It refers to the possibility that, following an action taken by the government, it might be impeached by elected representatives or lose the next election if a retrospective evaluation of its action during an emergency is undertaken. At the same time, the court provides a means for

evaluating the government's actions during an emergency. However, this poses a problem when there is no law guiding the government about how to manage that emergency. Yet, with the uncertain prospect of subsequent ratification, the government will tend to avoid taking unnecessary risks (147-148).

My intention is not to delve into the intricacies of ex-post ratification or determine who should decide whether to ratify the government's actions. Instead, I aim to argue that in exceptional circumstances, public officials may choose to act in a manner that goes beyond the legal framework, namely extralegally (Farrell, 184-5). To clarify, I want to emphasize the definition of the word 'extralegal'. In this case, I will adopt Gross's perspective on extra legality as going outside the law. Acting extralegally means that an action taken by the government is not regulated by law, as opposed to an act that is against the law. In this respect, public officials provide reasons that do not derive from legal authority. They may rely on moral insights, special expertise, or the ability to coordinate effectively as non-legally dependent reasons and treat them as sources of practical authority (Tanguay-Renaud, 186). Extra legality is designed to operate between the gaps in the current law. However, individuals who exercise extralegal power do not enjoy immunity from lawful sanction (Tushnet, 46). In the aftermath of a supreme emergency, it is expected that public officials will assume accountability for their actions.

The Problem of Emergency

The concept of a supreme emergency presents serious challenges to democratic systems. Democracies prioritize the protection of civil and political rights more than other systems, forming the foundation of modern governments. Democracy grants authority to the government on the condition that it governs through law and upholds citizens' rights. However, supreme emergencies are inherent in the system. Governments often face

unforeseeable circumstances, compelling them to make high-stakes decisions to safeguard citizens' lives. Under the pressure of limited time and overwhelming circumstances, governments may resort to extralegal powers, disregarding civil and political rights and democratic processes.

During supreme emergencies, coordination between the executive, legislative, and judicial branches may falter due to the unprecedented nature and scope of the crisis. The executive may act independently, sidelining the authority of other branches, or they may acquiesce to the government's decisions. This imbalance strains the relationship between the government and the democratic process, which vests authority in the government.

This imbalance prompts a critical question: Can democracy justify the government's deviation from democratic principles during times of crisis? To illustrate, consider the threat posed by Nazism during World War II. In facing this dire threat, traditional norms, such as the prohibition of indiscriminate bombing, were challenged. Winston Churchill and other British leaders made the controversial decision to bomb German cities as a means of combating Nazism. While this policy may have contributed to the Allied victory, it came at a significant human cost, with approximately 300,000 German civilians losing their lives and 780,000 sustaining injuries (Walzer, 2006: 255).

The rationale behind the bombing of German cities was to kill and terrorize a civilian population, aiming to attack German morale rather than its army (Walzer, 2004: 35). An emergency posed by Nazism put Britain in a vulnerable position. As a democratic country, they must remain committed to protecting people's fundamental rights. They knew that innocent people should never be intentionally attacked (35). However, as authorities of Britain, they were aware that acting without the authorization of democratic principles possibly saved many people's lives, which was their responsibility towards their citizens. Despite their commitment to democratic principles, Churchill decided that fighting back was

the only option to save people's lives. He disregarded the rights of German civilians and the democratic process in Great Britain. However, Churchill's decision cannot be empirically justified, as we cannot be certain that bombing German cities expedited the end of the war. Thus, I accept that Churchill's decision to bomb German civilians was morally questionable, but I intend to use it to gain a deeper understanding of a real emergency. Returning to the example, an emergency raises the question of whether democracy is capable of justifying the government's undermining of democratic principles during such a time of crisis. If they are unavoidably wrong, could there be any alternative solution? The answer to this question is fundamental to understanding to what extent democracy is sufficiently flexible to conform to unforeseen circumstances and to what extent democracy's stability is jeopardized during emergencies.

CHAPTER 3

Instrumental Account of Democracy

We have delved into the meaning of emergency thus far. Resolving the issue requires addressing the problem within the democracy. However, before focusing on democracy, it is essential to establish the concept of political authority.

Political authority encompasses two crucial components. Firstly, the government enacts laws and enforces them through coercion against citizens. Secondly, citizens are expected to obey their government (Huemer, 5). Implicit in political authority are five principles: (i) The authority of the government extends to all citizens. (ii) The authority of a country is limited to its citizens and residents within its borders. (iii) The government is authorized to enforce laws regardless of their content. (iv) The government is authorized to govern a broad range of human activities, such as employment contracts, medical procedures, and individual weapon possession. (v) The government holds the highest authority over human society (12-13).

In what follows I argue that democratic procedures provide the normative grounds for political authority. As democracy safeguards citizens' rights, it is expected that the government respects these rights even while exercising its authority. Nonetheless, the question of why democracy is accepted as legitimate remains unanswered. Given the ambiguity surrounding the term 'democracy,' it's imperative to evaluate the concept based on two predominant approaches: instrumental and intrinsic democracy. By delving into the nature of democracy, we can ascertain its capability to navigate the challenges posed by emergency

scenarios. Specifically, it allows us to determine whether instrumental or intrinsic accounts can justify the government's extralegal utilization of power during a supreme emergency.

Starting with instrumentalism, it justifies democratic processes based on the outcomes they yield. An instrumental account encompasses a range of perspectives on the justification of democracy. In this section, I'll explore some influential arguments regarding democracy. It's important to note that this thesis does not aim to rigidly categorize authors, as their arguments often blur the lines between intrinsic and instrumental accounts. Therefore, in assessing their positions, I'll consider the extent to which they align with an instrumentalist or intrinsic understanding of democracy.

Epistemic Theory

By definition, democracy refers to a system in which people collectively authorize laws and policies (Estlund, 38), while legitimacy relates to the government's rightfulness in issuing and enforcing its directives (42). In terms of democratic legitimacy, two perspectives emphasize the epistemic value, namely the tendency to make the right decisions (98). Firstly, political decisions are legitimate only if they adhere to appropriate procedure-independent standards (102). More specifically, their legitimacy is determined by their ability to produce correct results in each instance where it is applied. Yet, its correctness is evaluated by procedure-independent standards, which is the general will. Through properly conducted democratic processes, citizens exercise their will. The outcome of their exercise will be legitimate because they are correct and not for any procedural reason (103). However, it is impossible to justify each decision from all reasonable perspectives, so the argument falls apart (Christiano, 2009: 229). For instance, minorities should be bound by the majority's judgment due to the correctness of the outcome, although they oppose the majority's decision.

It forces minorities to match their judgment with the majority without persuading them (Estlund, 105).

Considering the difficulty of the first epistemic approach, we turn to the second, epistemic proceduralism. It seeks to justify democratic legitimacy and political institutions that exercise coercive power over citizens (Christiano, 228). Political decision-making aims at objectives such as the common good or justice (232). Since democracy can lead to good decisions, such as the enactment of just laws, it is deemed suitable for making politically authoritative and legitimate decisions (234). However, it is quite likely that some decisions will be incorrect or unjust, even under optimal conditions (Estlund, 98). So, what renders these decisions legitimate and authoritative? Legitimacy hinges on the right procedure used to make a decision (98). Viewed in this manner, even when outcomes are incorrect, they are considered legitimate because they are produced in the right manner (104). This decision-making procedure must be assessed for its epistemic value.

While some citizens may possess more wisdom than the collective, this does not necessarily confer authority upon them. Merely knowing what should be done better than others does not automatically entail the right to rule or compel others to obey one's orders. As citizens differ on who possesses special knowledge, it is unreasonable to deduce legitimacy or authority from "S would rule better" to "S is a legitimate or authoritative ruler" (Estlund, 40, 102). In reality, individuals cannot possess comprehensive knowledge. Most individuals have limited expertise across various domains (84). Therefore, when they convene to make decisions under suitable conditions, they are more likely to arrive at sound outcomes (108). The right conditions entail a procedure that is justifiable from all reasonable perspectives (98). The notion here is that the political process must enjoy broad acceptance and be founded on a shared conception of justice or correctness (112). If a procedure unduly favors certain individuals over others, some reasonable viewpoints will reject it (Christiano, 234). This

principle establishes a degree of equality through other considerations. The political procedure should facilitate open debate and persuasion among participants. It underscores that legitimate authority must be anchored in public reasoning.

Epistemic proceduralism elucidates the legitimacy of democratic decisions. Nevertheless, it does not fully explicate why individuals ought to obey democratic authority. Authority entails that if someone issues a directive, it is the responsibility of others to comply with it (Estlund, 118). Authority can be established irrespective of a universally accepted justification, as long as normative consent is present instead of actual consent (134). Normative consent implies that individuals should adhere to democratic authority because, if allowed to consent, they would feel morally obligated to do so. In other words, it is deemed improper for individuals to withhold consent from authority because it tends to make better decisions than its alternatives across a broad spectrum of issues (161). Even if individuals are inclined to withhold consent, they may not defy authority because the authority's knowledge and current circumstances enable it to take necessary actions, even when mistaken. In certain urgent situations, those who are commanded might be mistaken in refusing the government's authority, as they lack a detailed understanding of the emergent situation. Yet, the authority's experience and capability empower it to provide invaluable guidance in times of crisis (125). It would be unjustifiable to decline consent to this type of authority. Despite some questioning the value of democracy, it remains a legitimate method for decision-making (Christiano, 234).

In times of a supreme emergency, democracy may not demonstrate the same effectiveness as during normal circumstances. When a crisis emerges, the government faces a dilemma. On one hand, there may be no existing law that addresses the current crisis adequately. In such a scenario, due to the urgency of the situation and the limited time available, the government may find it impossible to ensure that decisions are made through the proper democratic procedures. The lack of a suitable procedure means there is no

opportunity for diverse perspectives to be considered, and dissenting voices may not be heard or persuaded. On the other hand, there may be existing laws that provide general guidance but are insufficient to address the specific situation at hand. In this case, the government may be forced to deviate from the law and make decisions hastily, resorting to extralegal powers.

Whether there is a lack of appropriate procedures or existing laws are inadequate, the government may resort to using extralegal powers to respond to the emergency. This entails taking actions beyond what is permitted by law, potentially disregarding the decisions reached through proper democratic processes. In both scenarios, the government faces a supreme emergency threatening the lives or public order of its citizens and chooses to use extralegal powers to save lives, knowing that it is either violating or ignoring established procedures. The inability to adhere to correct procedures undermines the justification provided by instrumental accounts of democracy for the government's extralegal use of power during a supreme emergency.

The following example illustrates the dilemma faced by individuals in a crisis, highlighting the tension between following established procedures and taking necessary actions to ensure survival. Imagine these five friends are exceptionally cautious and have prepared meticulously for a hiking trip, creating a safety guideline for every conceivable situation within legal bounds. Despite their thorough planning, they find themselves in a dire situation during the snowstorm, realizing that adhering strictly to their guidelines would lead to certain death. Faced with the choice between following the lawful guidelines and risking their lives, they decide to violate both the law and their own guidelines by breaking into a small house without the owner's consent. In this scenario, their decision to break the law and their own guidelines may be seen as necessary for survival, despite lacking the proper procedural justification (Feinberg, 102).

However, they may still face punishment for their extralegal actions. This situation prompts us to question whether prioritizing adherence to procedure over saving lives is reasonable. Indeed, it seems absurd to expect individuals to follow the correct procedure at the expense of their survival. Similarly, when a government confronts a supreme emergency, expecting it to adhere strictly to legal procedures may be impractical and even detrimental to saving lives. In such circumstances, the government may need to act swiftly and decisively, even if it means deviating from established legal norms. This underscores the necessity of prioritizing saving lives over procedural adherence during emergencies, as exemplified by the snowstorm scenario.

Arneson's Instrumental Account

Despite the shortcomings of epistemic proceduralism, it's important not to dismiss instrumental accounts entirely. Rather, we can redefine what constitutes "good results" within the framework of instrumentalism. Specifically, we can view democratic procedures as essential safeguards for fundamental rights such as freedom of speech, privacy, and individual liberty. While these fundamental rights may be subject to change over time, democratic rights—such as the right to vote or stand for office in free elections—are considered foundational. The justification for democratic procedures lies in their ability to protect these fundamental rights more effectively than any alternative set of rights (Arneson, 2003a: 95). Thus, the moral value of democratic procedures is contingent upon the outcomes they produce. If democratic procedures consistently yield superior results compared to alternative systems, they are deemed legitimate. In this view, democracy is not valued for its intrinsic properties but rather for its extrinsic ability to safeguard fundamental rights and produce favorable outcomes. Sometimes, other forms of governance, such as autocracy, may be more effective in certain contexts. In such cases, it may be justifiable to prioritize autocracy over

democracy based on the outcomes they are expected to generate. Ultimately, democracy is valued as a means to an end rather than an end in itself. Its positive moral outcomes determine its worth, making it a valuable tool for promoting justice and protecting individual rights (Arneson, 2003b: 123).

Indeed, the protection of fundamental rights serves as a central moral standard by which procedures and actions are evaluated (2003a: 101). The fulfillment of individuals' fundamental moral rights is essential for ensuring the best outcomes within the political process (2003b: 124). Providing people's fundamental rights are maximized, one has legitimate authority over other people's lives (126). This includes designing institutions, policies, and acts in a manner that maximizes citizens' fundamental rights (129). However, in times of emergency, there may arise conflicts between political and civil rights and the value of life itself. To address this dilemma, one potential solution is to expand the set of fundamental rights to include the value of life. By recognizing the inherent value of life as a fundamental right, individuals are empowered to take the actions necessary to preserve their lives and achieve greater good. For example, in the scenario where five friends trespass into a small house to avoid freezing to death, they may justify their actions by appealing to the fundamental right to life. By prioritizing the preservation of their lives through effective means, they are acting in accordance with their fundamental rights, ultimately leading to positive outcomes. From an instrumentalist perspective, such actions may be justified as they serve to protect fundamental rights and produce favorable results.

Introducing the value of life as a fundamental right in times of emergency poses a new dilemma for governments. When faced with such emergencies, governments must prioritize which fundamental right takes precedence within the set. Saving lives typically outweighs other rights due to its inherent importance. When authorities cannot ensure citizens' right to life within the framework of democracy, they may temporarily set democracy aside in pursuit

of positive outcomes. In this case, the government's extralegal acts are not problematic but justified. However, it is a risky move for several reasons.

First, preserving life is paramount and may justify temporarily setting aside other rights. Democratic authority hinges on its capability to uphold fundamental rights and yield desirable outcomes. If democracy falls short in fulfilling this role, individuals may turn to alternative systems that offer better protection for their rights and yield positive results. However, the derivative nature of authority in a democracy can grant abusive power to authorities. The government might fabricate a supreme emergency to safeguard its authority or interests. Consider a scenario where a group of friends, caught in a life-threatening situation, must rely on one member's clear-headedness to survive. In this scenario, democratic processes may be impractical, and the group may prioritize survival over democratic rights. While protecting fundamental rights generally leads to positive outcomes, it does not always necessitate adherence to democratic procedures. However, the member with a clear head realized that others had given her the power to manage the crisis. Consequently, she exaggerated their situation and enlisted her friends to do all the work without any complaints. In return, her friends found themselves unable to defend against her abuse.

Second, this approach effectively cancels the rights of those that are needed to facilitate the emergency response (e.g. the property rights of the merchants and farmers whose food products are forcibly taken to respond to famine). When individuals seek to defend their rights, authorities often silence them by asserting that their sole objective is to safeguard the citizens' right to life. As long as they achieve the protection of people's lives, ignoring other rights will not pose a serious problem. In the case of the small cabin, for example, the rights of the cabin owner cease to exist because the hikers acted justifiably in saving their lives. Thus, the cabin owner has no grounds for demanding compensation or even an apology. For this reason, though the instrumental account provides justification for the government's use of

extra-legal power, the concept of justification allows political authorities to deny their responsibilities to their citizens easily. In this regard, supporting the idea of justifying the extra-legal power, even when the government faces serious and unexpected threats, is not as reasonable as we might think.



CHAPTER 4

Intrinsic Account of Democracy

Democratic processes and political institutions do not necessarily have to be assessed solely in terms of their outcomes. Contrary to instrumental accounts, the intrinsic value account of democracy justifies its existence through the values inherent in the democratic process, independent of specific outcomes. While there are various values that might explain democratic procedures, I will primarily focus on equality, as the idea of treating all individuals equally becomes particularly important within a community during emergencies.

Due to the nature of emergencies, some values that might otherwise explain the relationship between democracy and government can be discounted from the outset. For instance, freedom, defined as the ability to be free from the control of others, often takes a back seat during emergencies when laws and policies are imposed against individuals' will. Instead of being free, individuals find themselves subject to the will of the executive body. Similarly, public justification, which legitimizes laws and policies by requiring citizens to debate among themselves as equals, may be challenged during emergencies when swift action is needed. Democracy is a framework that facilitates free discussions among equals and allows for the defense or criticism of institutions based on considerations that others have a reason to accept (Cohen, 102). Equality emerges as a more convincing value in justifying government actions during crises, as every citizen expects equal treatment from the government in such circumstances. To delve into how equality explains the legitimate

authority of the government's extralegal use of power during emergencies, we must examine how equality explains the legitimate authority of the government overall.

To begin, humans have equal moral status. This equality depends on the fact that each human possesses the same basic capacity to be an authority in the realm of values. The realm of value refers to a pluralistic world in which people appreciate different values. However, the worth of each person's dignity far exceeds any value in importance (Christiano, 2008: 17). The dignity of persons requires that each individual be accorded his or her due (14). It is the fundamental requirement of equality (30).

To demonstrate how democracy and liberal rights tie with equality, we need to clarify social justice and public equality (45). Social justice is concerned with the rules governing the activities of society when they strive for justice (53). Thus, people establish rules so that they can claim equal treatment from one another and demonstrate the importance of each individual and their interests (47). Yet, it is not enough for justice to be done (48). Rather, members of society should be able to recognize this equal treatment (53). In this sense, the principle of justice must be public. To act justly, people should be on the same page as others and coordinate with them on the same rules (54). Since people live in an environment where there is significant diversity among individuals in terms of well-being and disagreement on justice, citizens have a fundamental interest in ensuring they are treated as equals in society (56)

The democratic decision-making process serves as the mechanism through which equality is incorporated into collective decision-making (75-6). Democracy, as a means to express the equality of citizens in society, does not change the fact that people have conflicting aspirations for shaping the world. Their distinct interests make disagreements inevitable (80-1). To accept and respect disagreements, shared authority among people, with equal consideration of their interests, should be established. In a democratic society, everyone

has an equal opportunity to shape the world in their own way (95-6). In this regard, individuals are provided with equal resources to understand and pursue their interests (88). Equal resources entail equality in voting power, equality of opportunities to run for office, and equality of opportunity to participate in the negotiation process. These resources help people satisfy their interests, such as money, power, liberty, or opportunity. The equal distribution of these resources influences collective decision-making procedures, allowing people to have a voice in shaping the society in which they reside.

Political institutions bear the responsibility of distributing resources equitably, ensuring equal treatment for every individual, and establishing the foundation for determining one's interests. However, each person in society must recognize equal treatment by political institutions. Therefore, democratic authority is closely tied to the principle of equality (243). Disobeying a democratic assembly is akin to undermining the equal status of fellow citizens (243). For example, the egalitarian process guarantees that each person's opinion holds equal weight in legislative decisions. One of these laws mandates citizens to pay taxes. In this context, those who refuse to pay taxes assert superiority in deciding how social life should be shared, thereby violating the duty to treat others as equals. Only a publicly clear violation of equality undermines the public perception that a democratic assembly treats them equally. Agreeing with all decisions is not necessary to be treated equally (268). Thus, any undermining of basic liberal rights, discrimination against a part of the population, or failure to provide a decent economic minimum would be a public violation of equality (271).

Before addressing my main concern, let's delve into the meaning of the last sentence as it defines the limits of democracy. Considering the realities of diversity, disagreement, and fallibility, each person has a fundamental interest in living their life according to their standards. These interests are so fundamental that no government can impede them. Liberal and democratic rights ensure the advancement of these interests. Undermining these basic

liberal rights constitutes a clear public violation of the equality of advancing interests. Hence, it is not within the authority of the democratic assembly to suspend fundamental liberties and democratic rights. However, the authority of democracy is compromised when it fails to take steps to ensure that its members receive at least a minimum level of economic security (272). An economic minimum is essential for equality because people cannot exercise their rights and advance their interests without a basic minimum (273). Despite disagreements about income distribution, it is acknowledged that these interests cannot be advanced without some resources. A severe lack of basic human needs such as healthcare, education, or a decent childhood indicates obstacles to exercising liberal and basic rights (274).

As previously stated, democracy serves as a method for achieving public equality in collective decision-making and enabling individuals to advance their interests equally. Consequently, democracy is considered legitimate due to public equality. However, this justification does not suffice to justify the government's actions during emergencies because public officials cannot prioritize equality when attempting to save citizens' lives. They cannot give every citizen an equal say or distribute equal resources to satisfy their interests in times of supreme emergency. Instead, authorities must exercise wide discretion on behalf of every citizen to make effective and expedited decisions.

For instance, suppose five friends are stuck in a snowstorm and are on the verge of death. Among them, Poppy remains calm and capable of making effective decisions. In normal circumstances, each party has an equal opportunity to contribute to the decision-making process. However, the current crisis forces Poppy to take control. She trespasses onto another person's property without consent and assigns everyone specific duties. Thanks to her actions, they survive. Nevertheless, they cannot justify their actions with intrinsic accounts. Breaking into someone else's house without consent is wrong. The government's extralegal acts in a state of emergency are no different. The executive body assumes full control of

handling an emergency without allowing people an equal ability to pursue their interests. In the eyes of the government, survival becomes the sole interest that all people should pursue.

Excusing rather than Justifying

So far, we have established that neither the instrumental nor intrinsic account of democracy justifies the extralegal use of power during emergencies. Even if Arneson's argument offers some justification for extra legality, it carries serious risks. Justification, in legal terms, excludes the idea that the defendant's conduct is legally wrong. Rather, it grants permission, implying that the individual has not violated any legal restrictions. Consequently, a justified action is not deemed criminal but rather permissible (Binder, 333). Since justified actions align with legal permissions, the focus lies more on the agent's ex-ante beliefs rather than a retrospective analysis of the circumstances (Morse, 405-6).

Understanding the available defense of justification enables individuals to make responsible choices, exercise their rights, and align their behaviors with the law (Binder 336). However, as demonstrated, actions taken extralegally undermine the legitimacy of democracy because the government should be held accountable for violating democratic procedures, which take precedence over all else, regardless of circumstances. But does this imply that we should prohibit any conduct that deviates from the democratic process? Not necessarily. Adopting a strictly deontological position places the executive body in a precarious position. If the government perceives those undermining democratic procedures, even in a supreme emergency, will result in punishment, it may become reluctant to take necessary actions. Given their inclination to safeguard authority and power, government officials may adhere strictly to democratic procedures and disregard potential consequences.

Given that, it is plausible to excuse the government's conduct. In contrast to justifications, excuses reflect the actor's inability to make responsible decisions under given

circumstances. However, excuses do not absolve the defendant of criminal responsibility for their wrongdoing (Binder, 333). Excused agents may have committed a crime, but they are not liable for punishment (Berman, 4). The purpose of an excuse is to determine whether a person should not be punished for acting without permission (32-33). Non-punishment indicates that the offender is not criminally blameworthy. An excuse in this case would be a reflection of the agent, the circumstances, or both. Actors often find it challenging to avoid acting extralegally, and most individuals in similar circumstances would likely act in the same manner (Baron, 390). Hence, excusing an extralegal act is subject to ex-post evaluation. After the defendant commits a crime, it may be determined that they should not be punished (Ferzan, 242). In the case of supreme emergencies that require immediate action, excusing the government entails accepting that it acts contrary to democratic authority, violates someone's rights, and oversteps its authority. While its actions during emergencies may be deemed wrong, they do not necessarily entail criminal responsibility. This is because the current circumstances compel public officials to act extralegally, a course of action that others in similar situations would likely take to save civilian lives

Two key questions arise when the government is excused. Firstly, how does excusing the government relate to victims? Secondly, what happens to the authorities in the government? To address these questions, we can draw a useful analogy between criminal and civil liability. The concept of liability implies responsibility: an individual is liable only for that which they assume responsibility. Criminal liability refers to culpability or legal responsibility for committing crimes, culminating in conviction and punishment (Duff, 103). In contrast, civil liability arises as a consequence of committing a civil wrong, allowing individuals to seek redress from others for the wrongful actions committed against them (Smith, 158). However, responsibility does not necessarily entail liability. An individual may admit responsibility for an act but avoid liability by providing justifications or excuses. In

both cases, the individual acknowledges responsibility for their actions, but their responses absolve them of guilt, hindering the progression from accountability to criminal culpability, sentence, and conviction (Duff, 103).

In this sense, a government facing a supreme emergency and resorting to extralegal means to save its citizens will be held responsible civilly rather than criminally. Authorities will offer excuses for their actions, enabling them to avoid punishment or impeachment. Instead, this may lead to the government apologizing or compensating those who have suffered as a result of its extralegal actions. At this point, I would like to return to Poppy and her friends' situation one more time. When they became stuck in the heavy snowstorm, they discovered a cabin and trespassed on private property. Assume that two days later, the snowstorm ends, and they can contact emergency services. As everything ends and they are rescued, the question arises of what will happen to them and the owner of the cabin since they violated the owner's property rights. Will they be punished? It is undeniable that these five friends committed wrongdoing. Yet, they had no choice but to save their lives. Thus, they can offer an exculpatory explanation, removing them from criminal liability. However, it does not absolve them of responsibility for violating another individual's property rights. They acknowledge their wrongdoing and take responsibility by apologizing and perhaps paying damages. The same logic applies to the government's extralegal actions during an emergency. After everything is over, they offer excuses to avert criminal liability, but they must remedy their wrongs toward citizens.

Democracy aligns with excusing the government's extralegal acts during a supreme emergency. To understand why, we need to examine democracy on an intrinsic rather than an instrumental level. In the instrumental account, the government should produce good results. However, when using extralegal power, the government does not guarantee good outcomes beforehand within the framework of democracy. If democracy does not produce good results,

the government does not have to choose democracy over other systems. Even if the government does not choose it, there is nothing inherently wrong. This scenario is similar to Poppy and her friends breaking into a small cabin without the owner's consent and violating the law to achieve good results, which is to save their lives. One might argue that saving lives is equivalent to achieving a good result, and Poppy and her friends trespassed on private territory to obtain this result. Thus, even if it is not democratic, there is nothing inherently wrong since they achieve a good result. However, let us assume that the cabin collapses at night, resulting in the death of four people. In this scenario, the mission of saving lives has failed, and there are no positive results. Consequently, the failure cannot be excused. Hence, the concept of good results cannot be attributed to future uncertainty.

Contrarily, the intrinsic account captures value by highlighting that there is something unavoidably wrong. Agents typically act with a defined purpose, seeking to achieve specific goals through their actions. The decisions they make are based on reasons rather than the results they produce (Morse, 383). To put it bluntly, when individuals undertake action, they are unable to anticipate the future and cannot ascertain whether an intervention will hinder their success. Their actions can only ensure the possibility of an outcome, not the actual outcome. Hence, their performance will be evaluated in light of the state of affairs they were attempting to achieve through their actions (384).

In the face of a supreme emergency, the purpose of the government is not to act against the interests of its people but rather in their best interests. Interest refers to the component of a person's overall well-being. In this context, the government, as a political institution, works for the continuation of collective survival and restoration of public order to preserve its citizens' well-being. Its decisions are based on giving people equal ability to survive. However, to provide this ability, they may have to violate their equal political and civil rights. While the government excuses its extralegal use of power based on its purposes, it

must still acknowledge that its actions were wrong since they violated people's equal rights. When five friends stuck in a snowstorm break into a small cabin, they pursue the same interest: survival. They know what they are doing is wrong, but also, they have no choice. In this case, they do not stand against the current system. Instead, they temporarily stretch their boundaries to save their lives but at the same time, they accept that they are wrong and will compensate those whose rights they violated. Under these conditions, they can be excused.



CHAPTER 5

Case Studies

1. Roman Case

It is accurate to state that the Roman Republic can be considered a form of democracy, although there is no doubt that the Roman system did not closely resemble the democratic systems of today. This is because the Roman Republic had a specific procedure in place. The Assemblies, composed of male citizens, held the authority to elect officials, legislate laws, conduct trials, and declare war. Each assembly consisted of two components: the magistrate who convened it and those citizens who assembled in response to his summons (Lintott, 40). The people elected the magistrates to govern the Republic on their behalf. These magistrates exercised military, judicial, and religious powers and convened assemblies (76). Despite the magistrate's authority, the Senate controlled finances, administration in Italy, and foreign policies (76). Nevertheless, the Senate retained its role as the body that provided advice to magistrates (77). Undeniably, scholars have been discussing whether the Roman Republic truly represented the people, offering different interpretations of its political culture. However, the existence and function of the Assemblies might support the interpretation of Rome as a democracy.

We now return to our primary concern: the emergency in the Roman Republic. Romans found that sitting magistrates could not effectively handle emergencies, so they devised a backup system: the dictatorship. Its purpose was to eliminate the threat and restore

Rome to a state of normalcy. After restoring ordinary government, the dictator would resign. (Wilson, 334). The dictatorships of Sulla and Caesar differed from the traditional model, however. Unlike traditional dictatorships, they arranged their nominations through intermediaries (327). In 82 BC, before Sulla's dictatorship, the Marians had disrupted the political system with one-party elections, leaving the people divided and demoralized. An emergency magistrate was needed, and Sulla, as the victor of the war in 88, seemed to be the only choice to restore the Republic to normalcy (Wilson, 291). Consequently, he marched to Rome (292). Upon seizing the city by force, Sulla utilized a mediator to declare himself dictator without any time limit. This marked the first instance in which the Romans subjected themselves to an unlimited dictatorship (Straumann, 80). During his dictatorship, Sulla enacted laws and reconstituted the state (81). Once the crisis was resolved and order restored, Sulla resigned (Wilson, 300). However, his actions set a precedent for Caesar (Straumann, 83).

Unlike Sulla, Caesar's dictatorship was more administrative rather than being assigned a specific task. In the Roman Republic, the election of a consul was not merely a contest of political ideology but also a matter of virtue. When Caesar sought to become consul for a second time (Morstein-Marx, 317), Pompey and the Senate, by denying him the right to stand for election, not only attacked his dignity but also infringed upon the electoral rights of the Roman people (317). In response, the Senate took decisive action, declaring Caesar an enemy and passing a Final Decree (308). Fearing that his opponents would not support his candidacy or acknowledge any election victory, Caesar marched to Rome, asserting that his enemies were suppressing the liberty of the Roman people to vote for him (320), thus igniting the civil war (331). Following the Civil War, Caesar's first dictatorship was initiated to oversee elections and lasted for eleven days (Wilson, 309). Before proceeding, it's essential to note the various interpretations of Sulla and Caesar. As I am not a historian, I refrain from debating the

precise events of the past. Instead, my focus remains on the emergency within the Roman Republic. For the sake of discussion, let's assume that Sulla seized control of the city by force and persuaded the Senate to declare him dictator due to the revolutionaries undermining the Republican system, while also acknowledging that the Senate exceeded its constitutional authority by preventing Caesar from being reelected without valid justification, despite popular support.

According to our assumptions, in the given scenario, there was a perceived threat to the continuity of the existing system, resulting in the disruption of societal freedom and well-being. Consequently, Sulla fought against revolutionaries to restore the system, while Caesar pursued his right to be elected, ultimately leading to a civil war. Faced with a supreme emergency, both resorted to extralegal actions. Did democracy justify these actions at the time? Justification implies that Sulla and Caesar did not violate legal restrictions or commit any wrongdoing. However, neither an instrumental nor an intrinsic account grants them permission for their dictatorship.

From an instrumental perspective, despite having procedures for both normalcy and emergencies, the Roman Republic was unable to implement its current procedure for a supreme emergency. Instead, they determined that force was the best course of action, given the stagnation of the current system. Yet, while they provided continuity to the Republic, their actions were morally questionable as they exploited the gaps in the system. Let's complicate matters further and consider "good results" as the protection of people's fundamental rights, including their right to life. Nevertheless, this grants both men derivative authority. They should prioritize the use of democratic processes as an effective means of governance, as long as they ensure the protection of Roman citizens' fundamental rights. However, if alternative methods beyond democratic processes can yield positive outcomes, authorities might consider suspending adherence to democratic procedures. This uncertainty leaves the populace unsure

whether the authorities are leveraging the current crisis to prolong their dictatorships or to implement policies aligned with their personal interests. In instances where both sides exploit their temporary authority, their deviation from the existing system may not specifically pose apparent issues, especially if they eventually restore the system and safeguard individuals' liberties.

Regarding the latter perspective, democracy's legitimacy does not hinge on outcomes but rather derives from intrinsic values, particularly equality. However, this alone does not suffice to justify the extralegal actions of Sulla and Caesar. When faced with corruption in the system jeopardizing the Republic's continuity, they implemented solutions deemed appropriate under the circumstances. Yet, during their dictatorships, those with a say were not provided with resources, such as voting or candidacy rights, to articulate and pursue their interests. While equal resources enable individuals to have an equitable say in shaping society, Sulla and Caesar consolidated this power in their own hands, rendering themselves the sole arbiters of authority, while those with seats in the Senate or Assembly were deprived of their right to equal resources. Put differently, they wielded power not sanctioned by the elected Assembly or existing law, thereby compromising fundamental equality among the populace.

If these actions cannot be justified, is there an alternative approach? The answer lies in excusing public officials' extralegal acts during supreme emergencies, rather than seeking justification. The excuse acknowledges that Sulla and Caesar committed transgressions by choosing war to preserve the system's continuity, thereby harming the current democratic framework. However, while their actions were morally wrong, they were not punishable. Excusing these acts entails recognizing that public officials undermined democratic authority and violated rights, albeit without culpability. Although they escape punishment, their actions remain subject to compensation or apology.

2. Gandhi's Emergency

India achieved independence from Britain in 1947, transitioning into a constitutional republic and democracy. Despite this, the remnants of the old societal order persisted, prompting Indians to navigate the delicate balance between democracy and nation-building (Prakash, 41). Two decades later, Indira Gandhi ascended to power (73). Although her administration appeared to consolidate power through centralization, beneath the surface, uncertainty and conflict simmered (127). Her government interpreted democracy as a competition among parties and interests for state power (110). Despite winning elections, Gandhi felt threatened by cabinet members with independent bases and consequently removed them, depriving herself of valuable advice on both national and regional politics. Amidst widespread corruption in politics, economic policies exacerbated hardships for many. Government control over wheat and rice led to mandatory purchases at fixed prices, driving up costs (132). The rising prices sparked protests, initially led by students but soon joined by teachers, middle-class professionals, white-collar employees, and volunteers (88, 90). Gandhi faced a significant setback when an opposition candidate filed a case against her, leading to her conviction on two counts of corrupt election practices (136). Her election was invalidated, and she was barred from contesting future elections (137). Two weeks after her conviction, Gandhi declared a state of emergency, citing a serious threat to national security. Consequently, civil liberties such as free speech and assembly were suspended, the press was censored, judicial scrutiny of government actions was curtailed, and opposition leaders were arrested (9).

To start, it is crucial to determine whether there is a supreme emergency at hand. As the term suggests, a supreme emergency entails an imminent threat to collective survival or public order, potentially jeopardizing security, freedom, and peace. However, upon examining

the emergency in India, we find that following the Court's decision that she engaged in corrupt practices during the election and invalidated her elections, Gandhi cited internal disturbances as grounds to declare a state of emergency. Throughout this period, Gandhi did not clarify or provide evidence regarding the nature of the internal disturbance faced by the people at the time. On the contrary, immediately after declaring a state of emergency, she imprisoned the opposition that might question her decision to do so. This indicates that not every declaration of emergency pertains to a supreme emergency.

Gandhi's example clearly explains why accepting Arneson's argument of instrumentalism as a solution causes the problem. She fabricated the security threat and used extralegal power to protect people's lives. Although she detained individuals and suspended civil liberties, her extralegal actions could be justified because she claimed to have "successfully handled the supreme emergency" and saved lives. Even if someone wished to exercise their right to free speech to voice suspicions about this fabricated supreme emergency, they found themselves devoid of rights. As long as the government purportedly saved lives and achieved favorable outcomes, the suspension of other basic rights would not be perceived as objectionable.

3. Korematsu Case

Hostility towards Asians existed long before the outbreak of World War II, but it reached its peak during this global conflict. Following the surprise attack by the Japanese Navy Air Service on the American naval base at Pearl Harbor, President Roosevelt signed a declaration of war against Japan and Germany in December 1941. Subsequently, in 1942, he issued the infamous Executive Order 9066, authorizing the relocation of individuals deemed threats to national security to internment camps (Yamamoto, 23). Congress passed a law on

March 21, 1942, criminalizing violations of military orders, leading to the mass detention of 110,000 Japanese Americans in desolate internment camps inland. These individuals were imprisoned for years without charges or trials, resulting in the loss of their homes, businesses, and even family members (23). Despite the U.S. military's decimation of Japan's naval capacity and its determination that Japan was no longer capable of attacking them by 1942, Japanese Americans continued to be interned in relocation camps (25). This period was marked by baseless accusations of disloyalty and spying against Japanese Americans by their fellow citizens (31). However, historical analysis reveals that the internment was unjustified, as the military threat from Japan had significantly diminished by the time the relocation camps were established.

Three Japanese Americans, including Fred Korematsu, resisted military curfew, exclusion, and detention orders during World War II (25). Korematsu, arrested in California for violating military orders following an exclusion order, argued that these orders were unconstitutional as they singled out a racial group without genuine military necessity, thereby violating the equal protection of the law. Despite his challenge, he was convicted by the Supreme Court (Yamamoto & Ebesugawa, 264). In 1983, Korematsu reopened his case, alleging that the military and the War and Justice Department had concealed and destroyed evidence and deliberately misled the Supreme Court (266). The Court acknowledged in 1944 that it had failed to scrutinize the government's false assertions regarding military necessity (267). As a result, Congress authorized reparations payments to former internees in 1988, accompanied by a presidential apology from President Bush to each surviving internee (269). Pearl Harbor and World War II were indeed supreme emergencies, threatening the collective survival of Americans and compromising national security. However, the question arises: did democracy justify the government's actions? While the Roosevelt administration sought to ensure society's security, neither instrumental nor intrinsic considerations could justify its

handling of this existential threat. Legally speaking, the government's conduct was inexplicable.

From an instrumental perspective, placing Japanese Americans in internment camps did not adhere to any legal or democratic procedure. In the absence of proper procedure, the government ignored the perspectives of Japanese Americans and made unilateral decisions. Alternatively, if we consider that good results require protecting fundamental rights, including the right to life, this might justify the treatment of Japanese Americans by Roosevelt's government. Nonetheless, it allows the government to circumvent the democratic process and sets the stage for potential power abuse. From an intrinsic perspective, treating all Japanese Americans as enemies without solid evidence deprived them of their right to equal treatment and opportunities, undermining the principles of equality and fairness in American institutions. In conclusion, under no circumstances can we justify the Roosevelt government's actions toward Japanese Americans during World War II.

If, for the sake of argument, we assume that the internment was a necessary response to the supreme emergency, then we may contend that the government's actions were excusable but not justifiable. Excusing the government for placing Japanese Americans in internment camps acknowledges that it acted against democratic authority and violated their rights. While this constitutes wrongdoing, the government is not criminally responsible because it acted under duress, forced to take extralegal measures in response to the exigencies of the time. However, this does not absolve the government of its civil responsibility; it should be held accountable for the suffering caused by its decision, including compensation and apology.

Interestingly, the excuse argument aligns more with the intrinsic account rather than the instrumental account. Public officials' actions are guided by reasons, not outcomes, as they seek to achieve certain goals. In the case of Korematsu, the Roosevelt government perceived

the Japanese as a threat to national security following Pearl Harbor and aimed to protect its citizens' lives. However, the intended outcome did not align with reality, resulting in disaster rather than the desired outcome of safeguarding citizens. Despite the government's intentions, its failure to uphold the rights and equality of Japanese Americans indicates that something was fundamentally flawed. Thus, while intrinsic accounts should capture the value of equality, the Roosevelt administration's actions fell short in safeguarding these rights, necessitating an acknowledgment of wrongdoing.



CONCLUSION

The occurrence of a supreme emergency poses a significant challenge to the democratic process. While democracy typically allows governments to govern within the bounds of the law while protecting citizens' rights, authorities may encounter unforeseeable circumstances that necessitate high-stakes decisions to safeguard citizens' lives in a limited timeframe. In such scenarios, governments may resort to extralegal measures to protect their citizens and restore order, even at the expense of undermining democratic processes and civil rights.

In attempting to answer whether democracy justifies the government's use of extralegal force during a supreme emergency, two main approaches have been considered: the instrumental and intrinsic accounts of democracy. In the instrumental account, Arneson's argument might justify extralegal acts. However, considering it as a solution could be risky because it allows the government to abuse its power and undermine people's other rights. In the intrinsic account, there is no room for justification of extralegal acts. Consequently, I contend that it is more appropriate to excuse rather than justify the government's extralegal acts during a supreme emergency. An excuse acknowledges that the government committed wrongdoing while absolving it from criminal responsibility. It reflects the reality that public officials often cannot avoid acting extralegally in such circumstances.

Considering the approaches used, the excuse argument aligns more with the intrinsic account of democracy. In the instrumental account, the focus is on achieving the best results, and if democracy fails to produce these results, authorities may reasonably abandon democratic principles. However, in the intrinsic account, equality is the unavoidably

cornerstone of democracy. If the current system fails to protect people's equal rights, particularly the right to life, political authorities may need to intervene extralegally to uphold these rights. Thus, the excuse model is consistent with the intrinsic account of democracy.



REFERENCES

- Ackerman, Bruce. (2010). The Emergency Constitution. *The Yale Law Journal*, 113, 1029-1091.
- Arneson, Richard. (2003a). Democratic Rights at the National Level. In Thomas Christiano (Eds.), *Philosophy & Democracy: An Anthology*, (pp. 95-116). Oxford University Press.
- Arneson, Richard. (2003b). Debate: Defending the Purely Instrumental Account of democratic Legitimacy. *The Journal of Political Philosophy*, 11(1), 122-132.
- Baron, Marcia. (2005). Justification and Excuses. *Ohio State Journal of Criminal Law*, 2(387).
- Berman, N. Mitchell. (2003). Justification and Excuse, Law and Morality. *Duke Law Journal*, 53(1), 1-77.
- Binder, Guyora. (2016). *Oxford Introductions to US Law: Criminal Law*. Oxford University Press.
- Christiano, Thomas. (2008). *The Constitutions of Equality: Democratic Authority and Its Limits*. Oxford: Oxford University Press.
- Christiano, Thomas. (2009). Debate: Estlund on Democratic Authority. *The Journal of Political Philosophy*, 17 (2), 228-240.
- Cohen, Joshua. (1996). Five Procedures and Substance in Deliberative Democracy. In Seyla Benhabib (Eds.), *Democracy and Difference: Contesting the Boundaries of the Political*, (pp. 95-119). Princeton: Princeton University Press.
- Coleman, Jules. (2003). Rationality and Justification of Democracy. In Thomas Christiano (Eds.), *Philosophy & Democracy: An Anthology*, (pp. 216-238). Oxford University Press.
- Duff, R A. (2008). Responsibility and Liability in Criminal Law. In Matthew H. Kramer & others (Eds.). *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, (pp. 101-120). Oxford University of Press.
- Dyzenhaus, David. (2008). Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order? *Cardozo Law Review*, 27, 2005-2040.
- Dyzenhaus, David. (2006). *The Constitutions of Law: Legality in a Time of Emergency*. Cambridge University Press.
- Estlund, M. David. (2008). *Democratic Authority: A Philosophical Framework*. Preston University Press.

- Farrell, Michelle. (2013). *The Prohibition of Torture in Exceptional Circumstances*. Cambridge University Press.
- Feinberg, Joel. (1978). Voluntary Euthanasia and Inalienable Right to Life. *Philosophy and Public Affairs*, 7(2), 93-123.
- Ferzan, K. Kimberly. (2011). Justification and Excuse. In Dohn Deigh & David Dolinko (Eds.). *The Oxford Handbook of Philosophy of Criminal Law*. Oxford University Press.
- Gross, Oren. & Ní Aoláin. (2006). *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge University Press.
- Huemer, Michael. (2013). *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey*. Palgrave Macmillan.
- Lintott, Andrew. (2009). *The Constitution of the Roman Republic*. Oxford University Press.
- Morse, J. Stephen. (2004). Reasons, Results, and Criminal Responsibility. *Illinois Law Review*, 2004 (2).
- Morstein-Marx, Robert. (2021). *Julius Caesar and the Roman People*. Cambridge University Press.
- Nozick, Robert. (2001). *Anarchy, State, and Utopia*. Blackwell.
- Posner, Eric. A. & Vermeule, Adrian. (2007). *Terror in the Balance: Security, Liberty, and The Courts*. Oxford University Press.
- Prakash, Gyan. (2019). *Emergency Chronicles Indira Gandhi and Democracy's Turning Point*. Princeton University Press.
- Schmitt, Carl. (2005). *Political Theology Four Chapters on the Concept of Sovereignty*. George Schwab (Trans.), The University of Chicago Press.
- Smith, A. Stephen. (2020). The Significance of Civil Wrong? In Paul B. Miller & John Oberdiek (Eds.). *Civil Wrongs and Justice in Private Laws*. (pp. 157-183). Oxford University Press.
- Straumann, Benjamin. (2016). *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic of the Age of Revolution*. Oxford University Press.
- Tanguay-Renaud, François. (2010). The Intelligibility of Extralegal State of Action: A General Lesson for Debates on Public Emergencies and Legality. *Legal Theory*, 16(3), 161-189.
- Tushnet, Mark. (2005). Emergencies and the Idea of Constitutionalism. In Mark Tushnet, Neal Devins & Mark A. Graber (Eds.). *The Constitution in Wartime: Beyond Alarmism and Complacency*. (pp. 39-54). USA: Duke University Press.
- Yamamoto, K. Eric and Ebesugawa, L. (2006). Report on Redress: The Japanese American Internment. In Pablo de Greiff (Eds.). *The Handbook of Reparations*. (pp. 257-283) Oxford University Press.
- Yamamoto, K. Eric. (2018). *In the Shadow of the Korematsu: Democratic Liberties and National Security*. Oxford University Press.
- Walzer, Michael. (2004). *Arguing About War*. Yale University Press.

Walzer, Michael. (2006). *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th ed.). Basic Books.

Wilson, Mark. (2021). *Dictator The Evolution of the Roman Dictatorship*. The University of Michigan Press.

