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Who is the sovereign during the corona crisis?

In democracies, the people is the sovereign. In these times, we need to be alert to slow de-parliamentarisation of governance

No one has given as pithy an answer to the question 'Who is the sovereign?' as the brilliant and controversial constitutional theorist Carl Schmitt: 'Sovereign is he who decides on the state of exception,' he wrote in 1922. Schmitt unmistakably takes after his 'teacher' Thomas Hobbes. In Hobbes' *Leviathan* from 1655, the overriding imperative is to prevent civil war, the battle of all against all. The retention of power, domestic peace and legitimisation all link up here. In Europe and the democratic world today, there is no threat of civil war, even as the French president makes use of martial rhetoric: '*Nous sommes en guerre!*' War has always strengthened the executive branch of the state and, in particular, granted special powers to the presidency *vis-à-vis* the governed.

In democracies, the people is the sovereign. It is only through legitimisation through elections that legislative sovereignty is transferred to parliament. The parliament, as the second-order sovereign, elects the executive. Through these two delegatory steps, democratic governments in parliamentary regimes can only lay claim to a derived form of sovereignty.

In terms of democratic theory, one could refer to the government as a third-order democratic actor. This holds for day-to-day politics as well as time-consuming decision-making processes. For war (Macron), pandemics (WHO), or 'the catastrophe' (Söder, prime minister of Bavaria), this apparently no longer holds. The hour of the executive has struck. The third-order democratic actor has taken over the helm of the state. The question is: is this constitutionally legal and democratically legitimate? Let`s look at the example of Germany.

Democratic legitimacy

The basic question, in particular, is whether the German federal and state governments can decide on such fundamental restrictions of basic rights such as freedom of assembly, of movement or freedom of profession and enterprise. In almost inconspicuous fashion, the third sentence in Article 2, Paragraph 2 of the Basic Law allows for such a restriction:

'*(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.*'

In the Covid-19 pandemic, this law is called the 'Law for the Prevention and Control of Infectious Diseases to Humans'. Normatively, the law is a trivial one compared to the basic rights that it restricts. The longer the restriction of basic rights goes on, the thinner the legal basis becomes: what then becomes necessary is a more substantive, preferably a constitutional norm or a speedy legitimisation via parliament. The first does not exist in the German *Basic Law,* the second one is problematic since it degrades parliament to a non-deliberative rubber stamp institution. The German government is acting on a rather thin legal base.

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This holds *a forteriori* for the question of democratic legitimacy. The emergency powers exercised at the federal and state levels can only be justified with reference to averting imminent catastrophe. It is, however, a behaviouralist misunderstanding to think that it is possible to legitimise the current measures simply through the support of the population as measured in opinion polls. With this logic, a whole range of authoritarian forms of government would be justified, from Putin to Orbán and Kaczyński or even the Nazi regime in 1936. A complete democratic justification calls for a twofold legitimisation: the majority support of the population (empirical legitimisation) and substantive legitimisation through the democratic constitution (normative legitimisation).

Science can not decide

Here, the principle of proportionality comes into play. Specifically, this means: the massive restriction of basic rights has to be *appropriate*,

necessary and *proportionate*. Is this the case? It is certainly not proportionate if one looks only at the number of infections and deaths in Germany. If this were the case, the restrictions of basic rights would have been necessary during the influenza outbreak in the winter of 2017-18 with over 25,000 deaths. The fundamental restrictions are proportionate only if one looks at them from the perspective of an imminent worst-case scenario with tens of thousands of deaths. This has not been ruled out by virologists and epidemiologists. Only this kind of expectation of looming catastrophe would make it possible to justify the current emergency measures.

Yet it is not science that can decide this question. Science cannot be seen as a fourth order sovereign, although all friends of expertocratic governance have a preference for. Science has epistemic, but not democratic legitimacy. Even 'epistemic evidence-based policymaking' requires the decision to be taken by democratically legitimized representatives and nobody else.

The executive alone cannot take on this role of decision-maker for an extended period. The longer the restriction of basic rights goes on, the more the second-order sovereign, the parliament, has to come back into the picture. If this does not happen, norm-based representative democracy is in danger of lurching into naked decisionism. Since the 1970s, democracies have only rarely disappeared via armed coups; instead, they have eroded and died slow deaths. Germany is not Hungary, Merkel not Orban. But German Democracy too, is by no means fully immune to slow de-parliamentarisation and de-liberalisation of its way of governance. Watchfulness is the citizen's first obligation.



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