Murdoch newspaper approves chief Nazi lawyer's legal defence of dictatorship

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In an extraordinary commentary in Rupert Murdoch's *Australian* newspaper on 18 January 2019, long-serving political commentator Henry Ergas wrote approvingly of the politico-legal conceptions of Carl Schmitt, the Nazi crown jurist who prepared legal doctrines justifying the destruction of the Weimar Constitution and the establishment of the Hitler dictatorship.

According to his online profile at the *Australian*, Ergas "is an economist who spent many years at the OECD in Paris" and has "taught at a number of universities, including Harvard's Kennedy School of Government, the University of Auckland and the École Nationale de la Statisque et de l'Administration Économique in Paris." Mr Ergas is currently an adjunct professor at Monash University.

In an article entitled "Are we headed towards high noon for democracy? Emergency powers may be the only way out of crises," Ergas referred to the political crisis in the US arising from the shutdown, and the Brexit crisis in the UK. He opined that, notwithstanding the potential dangers to liberal democracy of such a course, the adoption of emergency powers in the circumstances, being a "State of Exception" according to Schmitt's legal conceptions, offered Donald Trump and possibly Theresa May a way out. Moreover, given the "dire straits" politically, both in the US and the UK, Ergas suggested that "Schmitt's time may finally have arrived."

Given the openness of the appeal to Nazi legal doctrine in Murdoch's journal of record in Australia (Murdoch also owns the *Wall Street Journal*), it is worth extracting parts of Ergas' commentary in some detail. He writes:

> In 1923, as the Weimar Republic struggled with chaos, the German polymath Carl Schmitt wrote a short but enormously influential book, *The Crisis of Parliamentary Democracy*. Schmitt later destroyed his reputation through his collaboration with the Hitler regime. But if his work is increasingly cited, it is because its contemporary resonance is undeniable.
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> To say that, is not to suggest that today?s circumstances resemble those that drove Europe into the horrors of totalitarianism. Yet, with the US government plunged into a shutdown that only a presidential declaration of a state of emergency is likely to end, and Britain in a crisis that seems insoluble, Schmitt?s warnings cannot simply be dismissed.
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> The notion of "liberal democracy," he argued, was fundamentally ill-conceived. Liberalism and democracy had certainly been allies in the battle to rein in the power of monarchs. But that accomplished, the tensions between them had burst to the surface and would inevitably worsen as societies developed.
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> Liberal institutions—parliamentarianism, the rule of law, the separation of powers—existed to temper the democratic impulse, channelling it into an "endless conversation" that readily led to dead-ends. However, whenever they gathered explosive force, the pressures of democracy—the brute, often inchoate, expression of the popular will—were not so easily corralled.
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> As liberalism collided with the popular will, one had to overwhelm the other, hurtling the system towards "the state of exception"—that is, the suspension of business-as-usual. And, as Schmitt put it in another famous work, *Political Theology*, when the chips are down, "sovereign is he who decides on the exception."

In other words, the ultimate ruler in any political system is the actor who, once consensus has worn so thin as to make the system unworkable, can impose an outcome by invoking emergency powers.

With the conflict between liberalism and democracy growing ever starker, Schmitt argued, we would enter an age of states of emergency, eroding liberalism's foundations.

Ergas continues the commentary, with a discussion considering the risks to liberal democracy involved in the invoking of emergency measures in exceptional circumstances. He reflects that reliance on a "constitutional dictatorship" would not necessarily be fatal to the political system, and refers to the historical experience of the Greek city states being ruled in a "temporary absolute rulership" to overcome factional strife when the city was being torn apart. Ultimately, Ergas comes down in favour of the declaration of emergency, that is, the exercise of absolute executive power. He writes:

> Yet for all those limitations, it is clear that declaring an emergency offers Trump a way out. There is, however, a fundamental question as to whether Theresa May has any such options.
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> Despite isolated precedents, the answer is probably not. Rather, recent weeks have seen a permanent erosion in the British Prime Minister's power, not least through the loss of the control the government so painstakingly acquired, nearly two centuries ago, over parliament's order of business…
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> Schmitt thought May's predicament would become increasingly common. And the only outcome that could follow, he argued, was for the state of emergency to become the norm: one way or the other, the exception had to become the rule, permitting government to continue functioning. With liberal constitutionalism?s twin ancestral homes both in dire straits, Schmitt?s time may finally have arrived.

Carl Schmitt: Nazi crown jurist and the "State of Exception"

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The invocation by the Murdoch press of extraordinary circumstances, created by the crisis of bourgeois rule in the US and UK justifying a "constitutional dictatorship," follows identically the political and class dynamics of the 1930s and the legal-constitutional justifications that were advanced by Schmitt and other leading Nazi lawyers for the destruction of constitutional rule under the Weimar Republic, and the establishment of dictatorship, following the Reichstag fire of February 28, 1933.

On March 23, the Nazi-controlled Reichstag passed "enabling" legislation declaring that the executive had the power to make laws. The Act, referred to as "The Act to Relieve the Distress of the People and the Reich" cemented dictatorial power in Germany under Hitler. It essentially transformed into legislation legal opinions previously prepared by Schmitt. These authorised executive rule because of the "state of exception" in Germany, namely its economic and political crisis and the alleged threat of revolution. Schmitt set out a "legal defence" of the enabling legislation in the *Deutsche Juristen Zeitung* on March 25, 1933, in which he opined that the executive prerogative was unlimited at a time of national crisis (cited in F. Neumann, *Behemoth; The Structure and Practice of National Socialism*, London 1942).

Schmitt was a reactionary with a deep-felt hostility to the participation of the masses in the Weimar democracy after World War I. Like many right-wing intellectuals of his generation, he despaired at the liberalism, and instability, of the modern world, which he felt to be, with his strong Catholic middle class background, devoid of order and meaning. Schmitt loathed the cosmopolitan melding of liberalism, Protestantism and assimilated Jewish culture in Germany in the late 19th and early 20th centuries. His witnessing of the communist revolution in Bavaria in 1919 intensified his authoritarian support of the violent use of state power against socialist revolution.

Against the backdrop of the instability of the Weimar years, Schmitt developed increasingly dictatorial conceptions of state rule, based on "exceptions" and "emergencies" that justified deviations from the political "norm." In his work published in 1922, entitled *Political Theology*, Schmitt expounded the idea of the "state of exception" (*Ausnahmezustand*). This theory was developed through a right-wing jurisprudential critique of "normativism" in positivist legal thought, which held that law was the expression of general abstract norms applicable in all circumstances. In particular, Schmitt developed the idea of the "state of exception" in a critique of the positivist legal theories of the Austrian legal scholar Hans Kelsen (who had Social Democratic sympathies and was an intellectual opponent of Schmitt).

Schmitt rejected the idea that abstract norms formed the basis of law. He maintained that "like every other order the legal order rests on a decision and not a norm." Sovereignty, according to Schmitt, was based on decision and not legality. Most significantly, Schmitt argued, the state confronted situations outside the norm that were exceptional. The Sovereign, he declared, in his most notorious phrase, "is he who decides on the state of exception." The exception could not be mediated by legal concepts, and therefore all order was based on decision alone. There could be no "normative" regulation of exceptional situations. The authority that brought order to the exceptional state was the *sine qua non* of the legal order. In sum, Schmitt declared, *auctoritas non veritas facit legem*—authority not truth makes the laws. He was consciously preparing a radical theoretical framework for the violent Nazi destruction of liberal parliamentarism and the socialist movement.

As the Nazis consolidated power, Schmitt propounded theories in support of the "Fuhrerprinzip"—the leader principle. He claimed the fuhrer was the highest judge in the nation, from whom there lay no appeal. The leader was the embodiment of the peoples' will and therefore, Schmitt claimed, "law is the plan and the will of the leader" ("Fuhrer Schutzt das Recht" in *Positionen und Begriffe*, Berlin 1934) .

Twenty years of attacks on constitutionalism

For the past two decades, the constitutional foundations of liberal democracy have been under attack. This political legal process has been driven by a deepening economic crisis and intensifying class conflict. Most significantly, it is the product of social inequality of a historically unprecedented magnitude. Bourgeois democracy and traditional parliamentary rule are totally incompatible with vast concentrations of wealth.

In the epoch of imperialism, the dynamics of class society give rise to similar general political and legal phenomena in all capitalist countries. Under the immense pressures of class conflict, economic crisis and inter-imperial rivalry, the ruling class attacks democratic structures as it seeks to impose its will by means of force. At the same time, partisan lawyers develop "legal theories" to justify the radical transformation of the legal-constitutional system.

In the United States, commencing with the stolen election of 2000, successive administrations have attacked the Constitution's constraints on executive power and its protection of democratic rights. Utilising the pretext of the "War on Terror," the executive invoked a "state of exception" to aggrandise executive power and foster arbitrary rule. Legal justifications and theories were developed by lawyers in the White House and Department of Justice, which drew heavily on Germanic legal traditions of StaatsRecht, which had absolutely no place in the history of American political or legal doctrine. An examination of those legal opinions and theories clearly reveals that their authors drew heavily from Schmittian legal conceptions, without expressly disclosing their provenance. Since that time, the ruling elites of the United States, culminating in the Trump administration, have continued the systematic, conscious destruction of the constitutional foundations of American representative government. This has, in fact, been a worldwide process, which can properly be described, historically, as the "Constitutional Reordering of Bourgeois Rule." Most significantly, this process has been intellectually and politically abetted by the entire liberal elite, which has been corrupted by wealth generated out of a booming stock market.

The decay and degeneration which have beset political and legal culture among the ruling elites and the liberal intelligentsia, throughout the US, UK, Europe and Australia, is extraordinary, and clearly has deep roots in the historic crisis of world capitalism. The capitulation of liberal elites to the authority of the state, and the renunciation of any allegiance to democratic rights and constitutional norms, reflects the very sharp class issues involved in this question.

Following the attack on democratic rights unleashed by the Bush administration in the wake of 9/11 and in the name of the "War on Terror," many erstwhile liberals proclaimed their support for the exceptional measures taken by the regime. They proclaimed that "the Constitution is not a suicide pact" and that national security took primacy over the Constitutional protection of rights. They said that suspension of those rights was warranted because of the terrorist threat, which was, of course, a completely bogus premise.

One prominent liberal intellectual, Michael Ignatieff, justified the suspension of Constitutional rights on the basis that it represented "the lesser evil" as compared to the terrorist threat and declared that it was necessary in the circumstances to "fight evil with evil." This really amounted to a descent into a Dark Ages conception of "legal" relations. Just to illustrate the political trajectory of this social layer, Ignatieff later headed off to become the leader of the Liberal Party of Canada. This was someone who had previously been a professor in government at Harvard, had written a prize-winning biography of Isaiah Berlin, and extolled the virtues of the liberal system of Constitutional rule.

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The spectre of revolution

The capitalist class internationally and its agents in the liberal elites, traditional parties and bureaucracies, are driven by a deep fear of working-class revolt and the spectre of socialist revolution. They know, or sense, that the settled order has completely lost its legitimacy and it faces an historic existential crisis of rule. Fear of socialism and revolution, particularly in the context of the Bolshevik success in Russia in 1917, was a central animating force that led the elites of Europe to embrace fascism in the 1930s. The elites leveraged Hitler into power in 1933 in order to destroy the socialist movement and atomise the working class. Then, as now, they felt that this was necessary to defend property and privilege. Fundamentally, fascistic movements are a product of a deep existential crisis of capitalism in the imperialist epoch—to which the bourgeoisie turns in order to resolve the crisis in its class interests—and the failure of the working class, through the betrayals of its leadership, to take state power into its own hands.

As in the 1930s, the ruling elites of all countries are increasingly building up their respective military and police state apparatuses, while, at the same time, stoking extreme nationalism and xenophobia to divide the masses and divert social tensions to protect their rule.

In the sphere of constitutionalism and democratic rights, the bourgeoisie, through its parliamentary and political agents, is rapidly and urgently dismantling constitutional rule and stripping away fundamental legal protections.

Extreme right-wing groupings are being welcomed into the "liberal-democratic" forms of government and they are exerting a dominant influence in parliamentary life. In Germany, the fascistic AfD is in charge of the Committee for Legal Affairs in the Bundestag, the federal parliament. The AfD is now the respected official Opposition party, although it is despised by the vast majority of the population.

In 2018, the Australian parliament, according to a recent legal report, stripped away fundamental legal rights in 34 new pieces of legislation. In total, the Liberal-National Coalition government has enacted 354 provisions in statutes that abrogate four key legal rights: the presumption of innocence; the right to natural justice; the right to silence; and the right against self-incrimination.

The most extensive attack on these rights has taken place in the areas of national security, taxation, and the foreign influence legislation. These measures, designed to alter the Constitutional framework of rule, are all directed at augmenting central state power, shoring up the fiscal strength of the state and expanding the state security apparatus.

The *Australian* commentary has now simply expressed in the open, the view of the ruling elites, which they have harboured for two decades: in order to deal with the emerging political crisis produced by the collapse of world capitalism, and especially the coming rebellion of the working class, dictatorship should be instituted to defend the existing order.

This open call to emergency rule and dictatorship must come as a sharp warning to the working class. Only a few days ago, plans to impose martial law in Britain were revealed, to deal with anticipated social unrest arising from a no-deal Brexit. Curfews, bans on travel, confiscation of property, suspension of laws, and the deployment of the army are all contemplated under the Civil Contingencies Act 2004. Capitalising on a crisis of its own making, the British ruling class will have no hesitation in establishing a "parliamentary dictatorship." The international working class should act accordingly, and urgently build up its own independent mass political organisations in order to defend its class interests; economic, political, and legal.

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