

Techno-regulation and law: rule, exception or state of exception?

A comment to Han Somsen and Luigi Corrias

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1 Introduction

The exchange of ideas between Somsen and Corrias about the role (and rule) of law in the wake of an impending ecological catastrophe¹ resembles the interplay between the good and the bad cop: The good guy does (and says) ‘the right thing,’ that is why he or she is usually seen as being trustworthy. Yet, the mean guy does the bulk of the work, provocative, often aggressive in style and tone, but more often than not successful in making the suspect more willing to cooperate (at least with the good cop). Now, the casting in the case is clear: Corrias seems to do ‘the right thing’ by (legitimately) claiming that legitimacy of law is too important to be sacrificed for the sake of an efficient environmental regulation.² However, I guess that after these initial words my ‘sympathy for the devil,’ the role model for all bad cops (at least in a Faustian interpretation), comes less as a surprise. In selling his point Somsen has come up with a decent and sincere, as well as thought-provoking argument, which deserved the well-argued response Corrias has written. But, in reaction to Corrias, I would say: ‘I am not convinced,’ as Joschka Fischer noted, when responding to American claims about Iraqi weapons of mass destruction. At any rate, I am not fully convinced of Corrias’ critique, and for this reason I would like to contribute some points to this discussion.

2 Politics in a modern society

Everyone reading Corrias’ closing remarks in his response to Somsen will most likely agree that this passage is beautifully written. He obviously shares Somsen’s ecological concerns; for this reason he does not challenge Somsen’s argument by disputing the scientific base of his assumption: that we are really on the brink of an ‘environmental Armageddon’. Or is this just an (epistemological) attempt to monopolize the discourse on ecological concerns? Corrias neither launches this

1 See the two contributions by Han Somsen (‘When Regulators Mean Business,’ 47–57) and Luigi Corrias (‘Law in the Twilight of Environmental Armageddon,’ 58–63), both published in *Rechtsfilosofie & Rechtstheorie* (2011) 1. Page references in the text refer to this issue.

2 It might even be possible to go one step further by saying the suspect is also pretty obvious: it is me (or, maybe, all of us) as a member of the modern civilization which is now indicted of having ransacked the world. And the big question now is: to cooperate or not to cooperate – and if so, with whom?

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kind of attack, nor accuses Somsen of a manipulating strategy.³ He is serious about the ecological challenge and he even agrees on the term ‘environmental Armageddon’ that Somsen introduced in this debate. However, Corrias questions what he tags as ‘techno-logos’ and its underlying instrumental rationality that has brought the modern world to the edge of an ecological catastrophe in the first place. Unlike Somsen he does not have faith in the power of technologies; instead he believes in a new ‘eco-logos’ as ‘a kind of thinking that understands our Earth as the place of our dwelling, the horizon that makes all our activity possible’ (63).

My guess is that Somsen is very well aware of the ethical grounding of environmental policy, and he might be also more than willing to accept the critique of instrumental rationality. His argument, though, aims at meeting the political challenge of an impending ecological catastrophe (48, *passim*). So the urgent question that he poses is what we are going to do in order to change the *behaviour* of the people if – better: when – there is not enough time left to organize a change of their *attitudes*. In my view Corrias’ ethical call for an ‘eco-logos’ tends to evade the political aspects which Somsen is very much concerned with, in particular the lack of time and the collective form of rationality, both closely related to each other.

While it is certainly true that in democratic societies radical policy changes are typically grounded in changes of the people’s belief-system, these changes need to be organized and coordinated by politics – for several reasons: To start with, environmental policy has been a classic example of the asymmetry between individual and collective rationality and the many problems of free-riding (on various levels). In addition, there is no automatism for moral/ethical justified demands in politics. Machiavelli reminds us that morality and political rationality are separate concepts and that politics has its own logic.⁴ One important implication that we can draw from Machiavelli is the ‘social groundlessness’ of politics.⁵ It means, in short, that politics is a space that emerges, if social norms (morality, tradition etc.) are inefficient in coordinating collective behaviour, but instead themselves become subject to political contestation.⁶ The lack of consensus and a considerably high degree of uncertainty about the future are the main characteristics of politics which make political decision and their legally binding consequences at

3 This is, of course, a very powerful political strategy which was recently initiated with success (in terms of attention) by among others Bjørn Lomborg, *The Skeptical Environmentalist* (Cambridge/New York: Cambridge University Press, 2001).

4 Individual virtues may have the effect of political vices, and for this reason morality is not suitable as a guideline for politics; see for example Machiavelli’s well-known discussion of cruelty and clemency in his *Il Principe*, chap. 17.

5 I borrow this term from Mark E. Warren, ‘What Should We Expect from More Democracy? Radically Democratic Responses to Politics,’ *Political Theory* 24 (1996): 245.

6 ‘In the absence of rival claims and conflicting interests, a topic never enters the political realm; no political decision needs to be made. But for the political collectivity, the ‘we’, to act, those continuing claims and interests must be resolved in a way that continues to preserve the collectivity.’ This quote is taken from Hannah F. Pitkin, *Wittgenstein and Justice. On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press, 1972), 215.

the same time necessary and (at least in a democratic setting) time-consuming. This is even truer when it comes to policy change in the complex institutional setting of representative democracies, because of the considerably high numbers of veto players and of the complex forms of learning processes that each of the different political actors are involved in.⁷ Of course, external shocks can 'help' to speed things up; 'Fukushima' may be a case in point. But this catastrophe is also an example of the severe difficulties policy-makers encounter if they have to organize policy changes on an European or international level. Thus far only some political systems, in particular the German system, have been 'shocked'.⁸

There is another point I would like to address in my critique of Corrias' call for an 'eco-logos': His critical remarks about instrumental rationality more or less sidestep the fact that politics is mainly about the ways and means 'to get things done'. It is to a large extent an ongoing struggle about the proper instruments necessary for coordinating collective actions and about the limited resources (in particular time and money) that need to be allocated. And if you take a closer look at the instruments that are also of importance in the field of environmental policy, we see that the very same forces powerfully driving modernity do not only produce these eminent ecological risks, they can also be expected to contribute substantially to the problem solving of the risks they created (among them most significantly the economy and the natural and technological sciences).⁹ These observations do not entirely disqualify Corrias' call for an 'eco-logos' as utopian thinking, but it promotes a realistic understanding of modernity in which radical changes in the field of environmental policy cannot do without technological progress accompanied by scientific advances and financed by the economy; this is, at least, a lesson we can draw from the development of modern societies so far.

3 Concepts of the state of exception

In a liberal democracy political regulations with binding legal consequences are based on constitutional provisions. Yet, in Somsen's view the severe and radical policy changes that are necessary to meet the challenges of the impending ecological catastrophe do not match with the liberal values which are at the core of constitutionalism. For him the truth is that effective regulations will have to be at

⁷ For the various forms of political learning, including 'pathological learning' see Karl Deutsch, *Nerves of Government. Models of Political Communication and Control* (New York: Free Press, 1963).

⁸ The inherent incapacity of democratic regimes to meet future challenges in time is a key insight that Hans Jonas derives from a comparison of political systems during the cold war. See Hans Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation* (Frankfurt a.M., 13. Aufl. 1998). Somsen seems to share Jonas' scepticism to a large extent.

⁹ This is part of the so-called 'reflexivity' of the modern world. To be sure, I am not saying that more technology will mitigate the risks created by technology. Indeed 'reflexive' modernity ensures us that this kind of certainty is not available. All I am saying is that the manager and the originator of these risks are more or less identical; see in this respect one of the leading advocates of 'reflexive modernity': Ulrich Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt a.M.: Suhrkamp, 1986), 254 ff.

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the expense of the legitimacy of law grounded in a liberal constitution (52); and there is no way around it: either we are serious about environmental regulating with a strict control regime that gives deviant behaviour no chance ('code'), or we go on with our liberal understanding of law framed by the well-known Lockean trilogy of individualism ('life, liberty, and estate'), but with the inevitable consequence that the future of our future is, environmentally speaking, 'dark'.

For Corrias the categorical dichotomy between effectiveness and legitimacy introduces the notion of the state of exception ('basically the same', 59) advocated – famously and infamously – by Carl Schmitt. Although Somsen explicitly wants to stay away from such 'cynical constructions' (48), Corrias skilfully prepares his comparison by reconstructing the core of Schmitt's concept (58-59). I wonder, however, whether this reference to Schmitt's concept is really an adequate one and serves Corrias' purpose well. I will not enter the details here, but the bottom line for the state of exception in a Schmittian understanding is the suspension of the legal order by a sovereign political decision that itself has no legal, but rather existential grounds.¹⁰ The 'existentialist' part, of course, fits in well with the picture of the environmental Armageddon, but the reference to the sovereign does not. Who would these sovereign regulators be? And what source of political power would they be able to rely upon for the binding (legal?) decisions. Of course, it is possible to argue that if a regulator has the power (a) to overrule constitutional safeguards and (b) to enforce compliance to the law, that this is *in fact* a suspension of the legal order making the regulator the sovereign of the (new) political order. In times of the Weimar Republic or nowadays, for instance in Egypt or Libya, it is easy to imagine (charismatic) military leaders seizing power in order to re-establish a legal order. However, in the context of EU member states this kind of legally unbound, 'pure' political power (a 'creatio ex nihilo')¹¹ looks like a chimera to me. Moreover, even in the case of exceptional measures like the technoregulation Somsen proposed it is highly unlikely that policy makers would frame these measures ensuring an efficient environmental policy as 'extra-legal' or (even) 'illegal'.¹² But if they do not define them as part of the suspension of the legal order, who then is in charge to do so? What matters to Schmitt is the decision-maker; keep in mind that it is the sovereign who decides about the state of exception,¹³ and not the change of the legal content (as radical as it may be). In other words: For Schmitt there is no 'in fact' state of exception, unless the sovereign says so. Exceptional measures may be defined as legal exceptions, but as long as they are not defined as part of a temporary ('commissarial') or permanent ('dic-

10 Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 7th ed., 1989), 9.

11 See Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot, 7th ed., 1996), 19, 37 f, 69.

12 Because, as Schmitt argues (*Politische Theologie*, 19), the sovereign authority does not need to have the legal competence of lawmaking in order to make laws.

13 Schmitt, *Politische Theologie*, 13.

tatorial') state of exception by the sovereign,¹⁴ they are part of the existing legal order.

What is at stake then in Somsen's 'thought experiment' (47, n. 3, *passim*) is not so much a suspension as a transformation of the legal order – a transformation, to be sure, that touches on the very constitutional base of legality in liberal democracy. In this respect Corrias is right to bring in the notion of the state of exception, because this transformation has the capacity to 'denature' law to the extent that we might as well acknowledge the end of law. Thus, his concern about law as code is justified: indeed, if code became the *rule*, the legal system would change its character and law would lose its inherent moment of morality.¹⁵ Indeed, techno-regulations, as rule, would resemble the notion of the state of exception, not so much in Schmitt's but in Agamben's interpretation: the main feature of his concept is the undecidability between law and fact, the twilight zone of sovereignty in which everything can happen and every action can be justified legally.¹⁶ In this sense the state of exception is not an expression of visible political power; it is the (legal) abandonment of the individual, a lawless space, which makes him/her a bare life ('*homo sacer*').¹⁷ The suspension of the legal system does not so much empower the sovereign to act as it sets the forces of the sovereign free to do whatever they want to do.¹⁸ Whereas Schmitt sees the state of exception as a temporary split between political actions on the one side and the legal frame for such actions on the other side, Agamben understands the state of exception as an emanation of the original split within the law being law and violence at the same time.¹⁹ People living in this kind of twilight zone belong to the legal system only through the 'ban,' a relation of indifference, a permanent situation in which no one can tell legally the difference between right or wrong, rule or exception, norm or fact. This is, of course, a horror scenario, but it illustrates the point that techno-regulations should only be the *exception* to the rule of law, because their legality tends to be reduced to pure force ('*Gesetzeskraft*').²⁰ For

14 For the distinction between a commissarial and dictatorial state of exception, see Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Berlin: Duncker & Humblot, 5th ed., 1989), 134 ff.

15 Corrias referred already to Lon F. Fuller. See in Hobbesian tradition also Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975).

16 Giorgio Agamben, *Ausnahmezustand. Homo sacer II.1* (Frankfurt a.M.: Suhrkamp, 2004), 45.

17 Giorgio Agamben, *Homo sacer. Die souveräne Macht und das nackte Leben* (Frankfurt a.M.: Suhrkamp, 2002), 106 f.

18 For Agamben the paradigm of this structure is Auschwitz (cf. *Homo sacer*, 179); and the archetype for the modern state of exception is not the ancient dictatorship, as it is for Schmitt, but the '*iustitium*' (cf. *Ausnahmezustand*, 52).

19 The state of exception is a symbol of violence as a constituent element of law belonging to and structuring the legal system from the very beginning: cf. Agamben, *Ausnahmezustand*, 72.

20 Agamben, *Ausnahmezustand*, 42.

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this reason they may supplement the legal system as a last resort regulation, similar to other legal provisions which exclude non-compliance by pure force.²¹

4 Law as code

The critical point of Somsen's argument is the transformation of the relationship between legal norms and legal enforcement. In his conception these two separated areas conflate with the result that the normativity of legal norms is turned into coded necessity ('must' instead of 'ought'). For Somsen, this transformation 'must' be done in the name of effectiveness, because it is the only way that enables future generations to inhabit a planet that is still worth living in.²² Of course, this line of thought begs the question whether this is still a future to look forward to; and Corrias actually raises this important question by asking 'what kind of future' (62) is awaiting us and future generations if techno-regulations take over. His main argument is centred on the concept of 'agency'; and his major concern is that techno-regulations which preclude deviant behaviour would ultimately lead to a paternalistic understanding of legality. Somsen does not dispute this assumption at all, instead he quotes a passage from Lawrence Lessig (53-54), a prominent advocate of code law, which is so telling that all Corrias needs to do is to cite Lessig again in his response (60):

'Code is an efficient means of regulation. But its perfection makes it something different. One obeys these laws as code not because one should; one obeys these laws as code because one can do nothing else. There is no choice about whether to yield to the demand for a password; one complies if one wants to enter the system. In the well implemented system, there is no civil disobedience. Law as code is a start to the perfect technology of justice.'²³

It is obvious that the 'perfection' of this kind of regulation flows from its paternalistic mode and its patronizing effects on the legal subjects, which, taken together, have severe consequences for the notion of autonomy and its relation to law. Corrias touches briefly on the topic of the legal subject (60), but (unlike a German legal scholar would do) he doesn't enter into a long discussion of the sev-

21 It may be enough to give two German examples. The first example are the provisions covering lifesaving of a hostage through killing by a police officer ('finaler Rettungsschluß': e.g. § 54 II PolG BaWü, § 63 II, 2 PolG NRW); the second example covers forced vomiting in case of drug trafficking ('Brechmitteleinsatz': § 81a StPO).

22 This assumption has been subject of some debate: See, for instance, the debate over Lomborg's *The Skeptical Environmentalist* in the 2004 special issue of *Environmental Science & Policy*. For a critical engagement with Lomborg's *Cool It: The Skeptical Environmentalist's Guide to Global Warming* (New York: Alfred A. Knopf, 2007) see Howard Friel: *The Lomborg Deception: Setting the Record Straight About Global Warming* (New Haven: Yale University Press, 2010). However, scientific-based knowledge needs to be taken into consideration for a comparison between the so-called 'war on terror' and an 'impending ecological catastrophe,' a topic that was touched briefly by both authors.

23 Lawrence Lessig, 'The Zones of Cyberspace,' *Stanford Law Review* 48 (1996): 1408.

eral legal and ethical aspects of human dignity which are involved whenever autonomy seems to be at stake. Instead, he addresses the political side of the issue and ties in more or less directly the moral issue of agency with the political issue of citizenship – challenged by Lessing's statement about justice. For Corrias the concept of law as code contradicts the very notion of citizenship inherent in the idea of democratically enacted law (60). In a fine summary of his argument he writes: '[...] without civil disobedience there can be no civil obedience and thus no citizens but then ultimately no justice either' (61). Because justice in a 'classical sense'²⁴ presupposes citizenship – that is a distinction between the entitled members of the citizenship and the non-entitled 'outsiders.'

The classical notion of justice has invited, as we all know, a protracted discussion about justice which (among other things) also entails the topic of the 'exclusiveness' of citizenship. It may be all too simple, but certainly not all wrong to say that Kantians turn the Aristotelian concept around by arguing that justice is the precondition for citizenship (and not citizenship for justice) – a citizenship that needs to be defined ultimately in cosmopolitan terms in order to get rid of the exclusion problem. For obvious reasons I cannot delve into this debate here; instead I would like to reintroduce Somsen's concern at this point by asking what the concept of agency means in a trans-generational context. It seems to me that much of the opposition (both authors talk about) between legitimacy and effectiveness with respect to environmental regulations is due to the different time structures which Corrias and Somsen use for their reference scheme. The reference scheme 'future' is easily connected to the ideal of preserving life, whereas the reference scheme 'present' is closely combined with (individual) liberty. If that assumption is correct, then it becomes apparent that the concept of citizenship in the context of trans-generational justice invites the question of who decides about the future of future generations. And the answer of the concept of citizenship as introduced by Corrias may have an (unintended) effect of exclusion: By avoiding necessary steps concerning the life of future generations – in the name of our citizenship – we treat them not as (future) citizens but as non-members of our (present) polis (or better: cosmopolis). Introducing the concept of justice means that the challenge is to find ethical criteria for a politically adequate decision here and now to the benefit of 'us and them.'

5 Republican issues in a postmodern world

Two last words in favour of Corrias. Firstly, I would like to take up his point of citizenship again by refining the political argument in the following way. What makes code law so upsetting in a moral sense, to be sure, is the paternalistic mode which disregards the concept of agency. However, in a political turn this loss (or lack of) agency can be compensated by instruments of a modern civil society which may have the effect of 'civilizing,' at least, some of the patronizing effects of techno-regulations: a monitoring system (of the techno-regulation) plus an

24 Corrias is referring to justice in the Aristotelian sense of 'giving each other his/her due.'

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ombudsman is a case in point. Instruments like those may actually contribute to the active role of the citizen. People may not have the choice to disobey, but they certainly have the choice (as citizens) to protest against abuse or mismanagement, and thus means to alter (effectively) a certain kind of techno-regulation in their community.

Secondly, I think he is perfectly right in his critique of Somsen's interpretation of the precautionary principle in the context of geo-engineering: 'The enabling character of the principle might say that measures *may* be taken, it remains silent on the question why measures *should* be taken, *which* measures, *when* and *how*.' (61) This is true from a legal perspective, because authority is not unbound power, but delegated and defined power. But it is also true from a political perspective, because here the power question 'who gets what, when, and how?' (Lasswell) needs to be answered. The ethical argument that something should be done is insufficient for binding legal decisions. On this issue (which mirrors mainly the first point of my arguments) I could not agree more with Corrias. Even (and especially) with regard to these 'potentially apocalyptic technologies' (55) the rule must be that they should not be apart from the legal system, but a part of it.