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The State of Exception: An insight into its theoretical background

Dilan Ates[*]

Abstract: *This article aims to carry out a critical examination of the state of exception within the context of modern constitutional state, to shed light on this legal anomaly that entails the suspension of rights, freedoms, and norms. The state of exception, wielding the power to annul the fundamental rights and freedoms enumerated and enshrined before it, finds its form in almost all manifestations of modern law (constitutions, laws, international law, conventions). The ambiguous position of the concept has widened the theoretical debates that accompany it. This article is an attempt to elucidate the theoretical discussions revolving around the state of exception: namely Carl Schmitt, Giorgio Agamben and Judith Butler's perspectives. The central objective is to discuss one of the aspects of the intricate relationship between modern law and sovereignty.*

Key words: *state of exception, emergency, subject of rights, suspension of the norm, rule of law*

* BA Degree in Economics and MA Degree in Human Rights, Multi-level Governance at the University of Padova; dilanate@gmail.com

1. Introduction

Modern constitutional states increasingly invoke the state of exception in an extensive, prolonged, and penetrative way. The state of exception manifests itself when the sovereign authority assumes a superior position to the legal system, leading to the suspension of established norms and the annulment of fundamental rights and freedoms. This occurrence is typically triggered by a threat that is deemed to pose a significant danger to the nation's very existence. Therefore, the proclamation of a state of emergency and the suspension of the norm are justified on grounds of safeguarding law and order. However, practical instances often reveal that the suspension of the norm not only creates a new form of the law itself but also precipitates a legal vacuum, thereby paving the way for setting up a violence[1] scene especially for the subject of rights.

A prevailing argument asserts that contemporary governments, often leveraging a discourse of perpetual crisis, exploit both genuine and/or fictitious crises to suspend the norm. The normalisation of the state of exception, whether manifested as a state of emergency or a state of siege, is a growing phenomenon, frequently observed in responses to migration, terrorist attacks, natural disasters, civil wars, and various other scenarios. This issue significantly curtails the exercise of fundamental rights and freedoms, thereby eroding the safeguards that should be afforded to individuals as subjects of rights.

Therefore, in this article, I will attempt to explain the reasons for such a widespread application of the state of exception based on the perspectives of Carl Schmitt, Giorgio Agamben, and Judith Butler's perspectives, as they offer an opportunity for us to approach this lacuna inside the law from a critical point of view. Schmitt, as a Nazi jurist, views the exception as a miraculous tool to navigate the limitations of constitutional democracies. In contrast, Agamben explores the concept of exception itself, unravelling contemporary manifestations of sovereignty. Essentially, for Schmitt, the exception serves as a means to achieve his central political objectives, whereas Agamben undertakes a genealogical study of the concept. Judith Butler focuses on the state of exception, arguing that it creates a hybrid structure that combines governmentality as a technology of power with sovereign power.

2. Introductory Remarks on the Relationship Between Law and the State of Exception

While my primary focus will revolve around these three figures, the state of exception has been largely deliberated within the existing literature

1 In this study, 'violence' does not only refer to an aggression that is often suggests a physical action. I consider 'Gewalt' in German conveys the best meaning for the concept as it refers to a kind of violence that grows through the elements of the legal system and connotates as the "(public) force, (legitimate) power, domination and authority" (Larsen, 2013).

around the legalist and extra-legalist paradigms. The answer to the question of what a duly constituted government should do when faced with a crisis threatening its existence is usually divided into those two camps. In succinct terms, legalists posit that crises imperilling the state and constitutional order must be addressed or resolved using means and solutions strictly derived from the legal framework. Although responses may differ from peacetime or normal circumstances, they must always fall within constitutional limits, ensuring that the crisis does not compromise the constitutional state's legitimacy. Only in this way can the constitutional state preserve its existence and survive the crisis still (Scheppele, 2009). Extra-legalists, on the other hand, inspired by the necessity theory, contend that serious crises that jeopardise the existence of the state can only be averted by means beyond the law. They assert that norms, designed for predictability and governance under normal conditions, inevitably prove insufficient and dysfunctional in times of chaos, aligning with the maxim: "Necessitas legem non habet" [Necessity does not have a law] (Agamben, 2008: 9).

Although this conceptual distinction provides us with theoretical latitude to some extent, its inadequacy becomes apparent when a discussion is conducted at the empirical level. Today, the state of exception is extensively codified in the written statutes of many nations: albeit under diverse nomenclatures and employing different methodologies (e.g., state of siege in the French tradition, state of emergency in the German constitution, etc.) (Özbudun, 1996; Scheppele, 2009). Moreover, it has also found a considerable place in international law. Consequently, the question shifts from the mere inclusion of the state of exception in legal frameworks to a more nuanced inquiry: Does the fact that it has been integrated into law, regulated by constitutions and legislation, imply that states and sovereign entities consistently adhere to these regulations and operate within the confines delineated by these legal frameworks?

Examining the most telling example of 9/11, it becomes evident that the matter lies not in whether the state of exception derives its legitimacy from the jus scriptum, but rather in the potential scope of arbitrary executive authority. In the aftermath of 9/11, the global stage witnessed an array of excessive and arbitrary measures, the suspension of human rights conventions, and substantial infringements on rights, particularly in the UK. This unfolding of events underscores that the state of exception, while ostensibly grounded in legal frameworks, has, in practice, forged its legal order. Consequently, this has precipitated the erosion of the rule of law regime.

In essence, the issue lies not in the preservation of the legitimacy of the constitutional state in responding to crises within the legal frameworks, but rather in the unprecedented expansion of executive powers, rendering them unpredictable and capable of creating the law of exception. That

is to say, the distinction between legalists and extra-legalists and their respective oppositions becomes blurred in practice. The core predicament stems from the intertwining of this rights-suspending situation with the legal framework, sovereignty, and its justification derived from executive discourse. Rather than a categorical notion, it should be underscored as a phenomenon emerging from within the law. The examination should focus on the 'withdrawal' of the law, making room for such violence. That is why I believe it is important to elaborate on the theoretical underpinning of the state of exception and to shed light on the locus of this ambiguous phenomenon, i.e., its controversial position in the modern constitutional state and its relationship with sovereignty and law.

3. Sovereign, Decision, and the Law: Carl Schmitt

If the state of exception presents itself as an anomaly within the legal structure of the modern constitutional state, Carl Schmitt regards this anomaly as a possibility to resurrect the individual sovereign and restore its indivisibility once more. For this very reason, according to him, it amounts to a miracle. In doing so, he assigns an autonomous meaning to the act of *decision* as the fundamental manifestation of sovereignty, as his famous quote displays: "Sovereign is he who decides on the exception" (Schmitt, 2005).

In exploring the nexus of political theology, sovereignty, and the state of exception, Schmitt mainly criticises liberal constitutional doctrine which includes neo-Kantian elements. Influenced by Hobbes, he seeks to consolidate sovereign power, particularly in times of crisis threatening the state's existence. As a Nazi jurist, his objective is to transcend the constitutional limitations of the modern state structure for the sake of the continuity of the Weimar State. Schmitt challenges the views of some liberal constitutional theorists and, notably, examines the ideas of Kelsen, one of the neo-Kantian rationalist jurists. According to Kelsen's liberal doctrine, the state is neither the founder nor the source of the legal order (Schmitt, 2005: 18), it simply enacts law and does not interfere with beyond. Liberal thought, which places the state in an apolitical and neutral position, thus either ignores the problem of sovereignty or tries to evade it by negation (Schmitt, 2005: 23). Therefore, the liberal approach puts the norm at its centre and builds the entire legal system on norms. Neither sovereignty nor the exception, in which sovereignty manifests itself most clearly, can find a place in this legal order; jurists of this system completely exclude the exception, and hence the decision. However, according to Schmitt, the legal order has two pillars: norm and decision. Norm can never be applied to chaos or crisis, since it can only foresee the normal and undisturbed situation. Therefore, by its very nature, it cannot contain or subsume the exception. In a chaotic situation, where the norm cannot be the answer, there is a decision arising *ex nihilo*. Schmitt assigns an autonomous status to the act of decision, and it is a constitutive element.

According to him, every legal order is based on a decision (Schmitt, 2005: 10) and this very decision brings us to the exception. Schmitt (Schmitt, 2005: 36-40) thinks that the common definition of sovereignty as the supreme and primary ruling power is not functional, and prefers to construct an account of sovereignty in concrete cases, that is, in the event of a dispute, based on who will decide on issues such as the public and/or state's interest, public security and order, public welfare, etc (Schmitt, 2005: 6). However, the exception is not a catch-all concept that comprises of all kinds of security measures as already mentioned, but its decisive dimension is that of granting unlimited power to the authority. Thereby, a sovereign appears, who can suspend the entire existing order and manifest itself with its new order. The preeminence of the sovereign as an authority is not to be erased, but to prevail, as he realises himself through the decision on the exception.

In this respect, the sovereign entity or agent is the one who decides 1) whether there is an emergency and 2) what measures to be taken to eliminate it. That is to say, it is the sovereign who determines which emergency threatens the survival of the state and order, and to what extent, and at the moment of the decision, it comes to play the role of the guardian of the legal order.

Then where exactly is the guardian of the law located in the law? In *Political Theology*, Schmitt puts it this way: "By making such a decision, the sovereign is on the one hand outside the normal legal order, but on the other hand, since it is in his hands whether the constitution can be suspended in its entirety or not, he is at the same time inside this order" (Schmitt, 2005: 7). In other words, it is an authority that is situated both "here and there", an authority that can determine its position according to the urgency of the situation, and it is both legal and beyond legality. It is right inside the legal system because it can create its order, it is beyond legality because it can suspend the rule of law, constitution, rights, parliament, and/or legislation. This is the area where Schmitt posits law (positive law in the literal sense) as a subordinate entity compared to the political one, so politics prevails over the law. As supra, Schmitt aimed to restore the sovereign's power and he saw this possibility at the moment of deciding on what constitutes the exception. The rule of law could therefore be bent in the ruler's favour at the moment of suspension.

4. Exception-as-a-rule: Giorgio Agamben's Theory on the Suspension of Law

Whereas Schmitt is considered to be the most controversial theorist of the state of emergency in the 20th century, the new angle Giorgio Agamben has brought to the conceptualisation of the state of exception should also be emphasised. Agamben's theory on the state of exception bears reflexions on Benjamin's concept of law-making violence and Foucault's biopolitics

thesis and situates them on a different trajectory; one of the theorists he is undoubtedly most influenced by is Carl Schmitt. I will be focusing on the last of his trilogy: state of exception to unveil his perspective.

Agamben considers it to be a great missing element of the legal doctrine that, after Schmitt, public law has not addressed the concept of the state of exception comprehensively and critically. He argues that the state of exception has been treated by jurists as a "*quaestio facti*", whereas it is a "genuine juridical problem" (Agamben, 2008). The absence of such an assessment, that is, the confinement of the state of exception to a factual setting, corresponds to a significant gap. As discussed above, there is a zone of ambiguity where the state of exception is located. Agamben states that "only if the veil covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the difference -or the supposed difference - between the political and the juridical, and between law and the living being" (Agamben, 2008: 2). Agamben's explicit effort is to incorporate the state of exception into a theory of sovereignty as well as politics. In constructing his theory, he frequently engages with the present and antiquity, mostly with Roman Law.

Throughout the Middle Ages, necessity was the basis for justifying exceptional measures. According to this view, since the state of exception is reduced to a necessity (civil war, confusion, crisis, etc.), it is asserted that the necessity is, by definition, not an element of the law. In this way, the whole problem of legitimisation of the state of exception can be puzzled out: it was done because it was necessary. In this period, the necessity was a sufficient reason for transgressing the legal order and was considered sufficient to explain it, especially in isolated cases. After all, laws were enacted for the common good of humankind, but in a case of necessity, it is legitimate to derogate from laws if they are not sufficient in an unexpected, conflictual situation.

As for the modern epoch, if we take a look at the historical panorama given by Agamben (Agamben, 2008: 27-51) we see that the state of emergency is pervasive and that it can easily be found in constitutions and laws, as well as its practical presence. Indeed, today, almost all of the constitutions include the state of emergency provisions or enact laws in their national legislations specifically for regulating the state of emergencies. Contemporary examples from many countries and the abundance of the state of exception proclamations in especially Western political traditions prove that the provisional abolition of the distinction among the legislative, executive, and juridical powers is a lasting practise of government (Agamben, 2008: 7). For example, it can be observed in Germany in 1923, in France several times in 1925, 1935 and 1937, in the UK in 1920, in Italy after the 1908 earthquake and many other instances (Agamben, 2008: 11-22).

All these examples are essentially fuelled by and are contemporary political manifestations of a view that grounds the state of exception in *necessity* and *urgency*. If we are to discuss the state of exception through necessity, this can only mean that necessity implies a lacuna inside the law. The problem is that this perception claims to fill this gap, which was supposedly declared to have emerged at a time of necessity with the law while ignoring that the decision was taken directly from the realm of politics. Far from being an answer to a normative lacuna, this explanation of the state of exception opens another fictional gap to protect the norm and the order: a lacuna that is, for sure, beyond the realm of legality.

Giorgio Agamben posits a prominent notion in his work, specifically the concept of "exception-as-a-rule," contending that the exception has transformed into a norm within contemporary political landscapes. This idea, supported by historical instances from the twentieth century, continues to echo in academic discourses, with scholars such as Butler (2004), Hardt and Negri (2000), Neocleous (2006), and Neal (2012) contributing their interpretations. But what does Agamben mean when he argues that the exception has become a rule? He interprets Schmittian perspective towards the miraculous aspect of exception. As mentioned above, Carl Schmitt aims to attribute the qualities of saviour to the act of deciding on what constitutes an exception. Only then, will the personal element of sovereignty revive, and the exception carries saviour qualities.

When exception became a routine part of the legal order, it lost its miraculous and redemptive significance. This state of exception/moment of decision, therefore, has become nothing but a repetitive entity, a usual part of the law. Therefore, Agamben contends that Schmitt's attempt to attribute of the exception to the norm failed when the exception became a routine part of the legal order, losing its significance. Agamben's work state of exception is a declaration of the bankruptcy of the Schmittean diagram of exception (Huysmans, 2008). That is to say, if the exception becomes a rule (if it is resorted to too much and often), what Schmitt foresaw/wished for is destroyed: The sovereign/exception ceases to be regulative/saving and becomes just an ordinary part of an order: a mere repetition.

5. A Brief Account of Butler's Theory

Judith Butler comes into play when the state of exception becomes a governmental technique, that is when the law is being instrumentalised by the ruling authorities when the suspension of law is deemed to be necessary. In her book *Precarious Life: The Power of Mourning and Violence*, Butler refers to the theories of sovereignty and the state of exception when discussing the indefinite detention that took place in Guantanamo Bay

after 9/11. It is necessary to touch on Butler's theory, as her work represents a fitting intertextuality of the theories we have analysed so far.

Butler challenges the general misconception of Foucault's theories on the exercise of power. According to her, Foucault does not draw a strict chronological line between the premodern understanding of sovereignty and governmentality[2]. Although Foucault says in his *Security, Territory, Population* lectures that 'the more I have spoken about population, the more I have stopped saying 'sovereign'" (Foucault, 2007), his theory is generally understood as if governmentality has completely replaced sovereignty. However, instead of presenting such a chronological order, Foucault states that the triad of governmentality, sovereignty, and discipline reign simultaneously and is employed whenever the power deems it necessary to do so: As a historical formation, it progresses by layering, rather than replacing each other.

What Butler problematises is the perception of governmentality that has been employed as a remedy for the supposed collapse of imperious sovereignty: that is, governmentality does not coincide with the collapse of coercive sovereignty, and it does not appear as a solution to revitalise it. In other words, these are not two separate things in which one is extinguished while the other intensifies its power, they exist at the same time. Yet, governmentality does not work to hide the vulgar aspects of sovereignty, on the contrary, it reveals those violent aspects and reproduces the sovereign. According to Butler, a state of exception is when the governmentality and sovereign power form a hybrid structure and one consolidates the other.

The dual and simultaneous exercise of these two operations also works through the self-consolidation of sovereignty. When the power of making decisions is granted to a President or a political entity, it results "as if we have returned to a historical time in which sovereignty was indivisible, before the separation of powers has instated itself as a precondition of political modernity" (Butler, 2004: 55). Therefore, the suspension of law in the modern constitutional state breaks the assumed chronological order in the state power: and verifies the coexistence of sovereign power and governmentality: "Whereas the suspension of law can be read as a tactic of governmentality, it has to be seen in this context as also making room

2 According to Butler's definition, governmentality "is broadly understood as a mode of power concerned with maintenance and control of bodies and persons, the production and regulation of persons and populations, and the circulation of goods insofar as they maintain and restrict the life of the population" (Butler, 2004: 52). In Foucault's thinking, governmentality is a field in which the state "vitalises" itself: and if it were not for this vitalisation, we would have witnessed the state's decay. According to Foucault, it is precisely governmentality that "allows the state to remain in existence" (quoted in ibid: 52).

for the resurgence of sovereignty, and in this way both operations work together" (Butler, 2004: 54-5).

Butler's scholarly contribution holds significance in illuminating the concrete reality and contemporary politics, unveiling the intricate ways in which law functions as a tool for the objectives of governmentality and the resurgence of an omnipotent sovereign. Her work encapsulates the idea that sovereignty, traditionally understood, does not re-emerge in its erstwhile guise, but instead assumes a different form, manifesting itself in an ethereal manner. This underscores the transformative nature of sovereignty, challenging preconceived notions about its disappearance, and emphasising its elusive, ghost-like presence in contemporary contexts.

6. Final Remarks

Butler has written her book after the US state of emergency proclamation and the article that I have cited the most is about the situation of the captives in Guantanamo Bay, who are stripped of their status as a subject of the law. The state of emergency declaration of 2001 has the most important and prevalent impacts on the global sphere and those impacts have resonated in Butler's effort to understand and explain the present characteristics of the state of exception. After September 11, President Bush constantly referred to himself as the "Commander in Chief of the Army", and this "must be considered in the context of this presidential claim to sovereign powers in emergency situations" (Agamben, 2008: 34) and eventually, as making the emergency the rule. Neocleous (2006), alludes to Schmitt and points to the moment of decision, and claims that the key date for us is 9/14, the date when George W. Bush declared a state of emergency. In a *de facto* suspension of law at both national and international levels, on 21 March 2002, the US Department of Defence and the Department of Justice introduced regulations (irregularities) for military tribunals to try prisoners detained domestically and at Guantanamo Bay. According to these rules, in some cases, indefinite detention is possible even without a court order.

Thus, for those persons, the law ceases to exist. These people are indefinitely deprived of the protection of the law, and at this point the unlawful exercise of sovereignty becomes unlimited. That is to say, the sovereign both confirms its place outside the law by suspending the law, creates its system by establishing a new law, and leaves some people in a gap created by the suspension of the law. While 'indefinite detention' is an illegitimate exercise of power, it is an important part of a broader tactic to neutralise the rule of law in the name of security, "It becomes the occasion and how the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life in the US" (Butler, 2004). In that sense, Butler

seems to agree with Agamben regarding the permanent character of the exception.

Today, not only in the USA, but also in many other countries around the world, the state of emergency has become a form of governance that can be invoked quite often, extensively, and penetrative. The discussion has also aimed to question the legal paradigm that enables the executive power in modern states to do so. That is to say, this form of authoritarianism arising from the gap in the law (whether the law would be national or international) and the state of being entrenched in this gap should lead us to question the relationship between the law and, in this case, the executive power, the excessive usage of the exception.

Owing to this relation of intrinsicness, the state of exception no longer manifests itself as an anomaly, but as a governmental technique, as a constitutive and self-preserving paradigm of the legal order. The practical consequence of this paradigm is the extension of executive powers to include legislative power through various decrees and legal measures. As Durantaye says, one of Agamben's main aims is to "show that exceptional circumstances are not so exceptional in state life" (Durantaye quoted in Aydin, 2006).

As a result, throughout this article, I aimed to elaborate on the theoretical foundations of the state of exception and to shed light on the position of this ambiguous and controversial situation and its relationship with sovereignty and law. The distinction between legalist and extra-legalist approaches, which comprise the broadest area of discussion in the literature, is insufficient in this sense, as it does not address the sovereignty factor. Suspension of the norm is undoubtedly a problem of sovereignty, and today it is essential to evaluate this problem from the executive point of view. For this reason, I think it is more critical to rely on the contributions of thinkers who discuss the state of exception intertwined with the issue of sovereignty and to analyse its relationship with law. For legal order to co-exist with such a lacuna, makes civil liberties, fundamental rights, in short, life itself a matter of subject for the politics which instrumentalises the law. At the moment of state of exception, the relationship of the subject of rights with the law becomes an exclusionary one, they are being included in the legal order through exclusion. They are exposed to the law, but the norm is no longer functional. In essence, the exception has become an entity that creates its law.

It is imperative to analyse this form of sovereignty exercised through the executive power and the administrative bureaucracy and to dissect its relationship (instrumental, internal, or external) with the law. Sovereignty,

which emerges with a "ghostly" structure with the process of constant legitimisation and self-justification, reminds us that we are positioned in a very precarious condition as the subject of rights. Similarly, as Agamben states, "We can all be drawn into this space absent of norm". This is not so much a warning, but rather a call to challenge the violence that emerges out of the law.

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