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STATE OF EXCEPTION[1]

In his Political Theology, Carl Schmitt established the essential proximity between the state of exception and sovereignty. But although his famous definition of the sovereign as "the one who can proclaim a state of exception" has been commented on many times, we still lack a genuine theory of the state of exception within public law. For legal theorists as well as legal historians it seems as if the problem would be more of a factual question than an authentic legal question.

The very definition of the term is complex, since it is situated at the limit of law and of politics. According to a widespread conception, the state of exception would be situated at an "ambiguous and uncertain fringe at the intersection of the legal and the political," and would constitute a "point of disequilibrium between public law and political fact." The task of defining its limits is nevertheless nothing less than urgent. And, indeed, if the exceptional measures that characterize the state of exception are the result of periods of political crisis, and if they for this very reason must be understood through the terrain of politics rather than through the legal or constitutional terrain, they find themselves in the paradoxical position of legal measures that cannot be understood from a legal point of view, and the state of exception presents itself as the legal form of that which can have no legal form.

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And, furthermore, if the sovereign exception is the original set-up through which law relates to life in order to include it in the very same gesture that suspends its own exercise, then a theory of the state of exception would be the preliminary condition for an understanding of the bond between the living being and law. To lift the veil that covers this uncertain terrain between, on the one hand, public law and political fact, and on the other, legal order and life, is to grasp the significance of this difference, or presumed difference, between the political and the legal; and between law and life. Among the elements that render a definition of the state of exception thorny, we find the relationship it has to civil war, insurrection and the right to resist. And, in fact, since civil war is the opposite of the normal state, it tends to coalesce with the state of exception, which becomes the immediate response of the State when faced with the gravest kind of internal conflict. In this way, the 20th century has produced a paradoxical phenomenon defined as "legal civil war".

Let us look at the case of Nazi Germany. Just after Hitler came to power (or, to be more precise, just after he was offered power) he proclaimed, on February 28, 1933, the Decree for the Protection of the People and the State. This decree suspends all the articles in the Weimar Constitution maintaining individual liberties. Since this decree was never revoked, we can say that the entire Third Reich from a legal point of view was a twelve year-long state of exception. And in this sense we can define modern totalitarianism as the institution, by way of a state of exception, of a legal civil war that permits the elimination not only of political adversaries, but whole categories of the population that resist being integrated into the political system. Thus the intentional creation of a permanent state of exception has become one of the most important measures of contemporary States, democracies included. And furthermore, it is not necessary that a state of exception be declared in the technical sense of the term.

Global civil war

At least since Napoleon's decree of December 24, 1811, French doctrine has opposed a "fictitious or political" state of siege in contradistinction to a military state of siege. In this context, English jurisprudence speaks of a "fancied exception"; Nazi legal theorists spoke unconditionally of an "intentional state of exception" in order to install the National Socialist State. During the world wars, the recourse to a state of exception was spread to all the belligerent States. Today, in the face of the continuous progression of something that could be defined as a "global civil war", the state of exception tends more and more to

present itself as the dominant paradigm of government in contemporary politics. Once the state of exception has become the rule, there is a danger that this transformation of a provisional and exceptional measure into a technique of government will entail the loss of the traditional distinction between different forms of Constitution.

The basic significance of the state of exception as an original structure through which law incorporates the living being – and, this, by suspending itself – has emerged with full clarity in the military order that the President of the United States issued on November 13, 2001. The issue was to subject non-citizens suspected of terrorist activities to special jurisdiction that would include "indefinite detention" and military tribunals. The U.S. Patriot Act of October 26, 2001, already authorized the Attorney General to detain every alien suspected of endangering national security. Nevertheless, within seven days, this alien had to either be expelled or accused of some crime. What was new in Bush's order was that it radically eradicated the legal status of these individuals, and produced entities that could be neither named nor classified by the Law. Those Talibans captured in Afghanistan are not only excluded from the status as Prisoners of War defined by the Geneva Conventions, they do not correspond to any jurisdiction set by American law: neither prisoners nor accused, they are simply detainees, they are subjected to pure de facto sovereignty/to a detention that is indefinite not only in its temporal sense, but also in its nature, since it is outside of the law and of all forms of legal control. With the detainees at Guantamo Bay, naked life returns to its most extreme indetermination.

The most rigorous attempt to construct a theory of the state of exception can be found in the work of Carl Schmitt. The essentials of his theory can be found in *Dictatorship*, as well in *Political Theology*, published one year later. Because these two books, published in the early 1920s, set a paradigm that is not only contemporary, but may in fact find its true completion only today, it is necessary to give a resume of their fundamental theses.

Doctrine of sovereignty

The objective of both these books is to inscribe the state of exception into a legal context. Schmitt knows perfectly well that the state of exception, in as far as it enacts a "suspension of the legal order in its totality", seems to "escape every legal consideration"; but for him the issue is to ensure a relation, no matter of what type, between the state of exception and the legal order: "The state of ex-

ception is always distinguished from anarchy and chaos and, in the legal sense, there is still order in it, even though it is not a legal order." This articulation is paradoxical, since, that which should be inscribed within the legal realm is essentially exterior to it, corresponding to nothing less than the suspension of the legal order itself. Whatever the nature of the operator of this inscription of the state of exception into the legal order, Schmitt needs to show that the suspension of law still derives from the legal domain, and not from simple anarchy. In this way, the state of exception introduces a zone of anomy into the law, which, according to Schmitt, renders possible an effective ordering of reality. Now we understand why the theory of the state of exception, in *Political Theology*, can be presented as a doctrine of sovereignty. The sovereign, who can proclaim a state of exception, is thereby ensured of remaining anchored in the legal order. But precisely because the decision here concerns the annulation of the norm, and consequently, because the state of exception represents the control of a space that is neither external nor internal, "the sovereign remains exterior to the normally valid legal order, and nevertheless belongs to it, since he is responsible for decision whether the Constitution can be suspended in toto."

Ecstasy-belonging

To be outside and yet belong: such is the topological structure of the state of exception, and since the being of the sovereign, who decides over the exception, is logically defined by this very structure, he may also be characterized by the oxymoron of an "ecstasy-belonging."

1. In 1990, Jacques Derrida gave a lecture in New York entitled *Force de loi: le fondement mystique de l'autorite*. [«Force of Law: the Mystical Foundation of Authority»] The lecture, that in fact consisted of a reading of an essay by Walter Benjamin, *Towards a Critique of Violence*, provoked a big debate among philosophers and legal theorists. That no one had proposed an analysis of the seemingly enigmatic formula that gave the lecture its title is not only a sign of the profound chiasm separating philosophical and legal culture, but of the decadence of the latter. The syntagm «Force de loi» refers back to a long tradition of Roman and Medieval Law where it signifies «efficacy, the capacity to oblige,» in a general sense. But it was only in the modern era, in the context of the French Revolution, that this expression began designating the supreme value of acts expressed by an assembly representative of the people. In article 6 from the Constitution of 1791, «force de loi» designates the indestructible character of the law, that the sovereign himself can neither abrogate nor modify.

From a technical point of view, it is important to note that in modern as well as ancient doctrine, the syntagm «force de loi» refers not to the law itself, but to the decrees which have, as the expression goes, «force de loi» – decrees that the executive power in certain cases can be authorized to give, and most notably in the case of a state of exception. The concept of «force de loi», as a technical legal term defines a separation between the efficacy of law and its formal essence, by which the decrees and measures that are not formally laws still acquire its force.

Anomic space

This type of confusion between the acts by an executive power and those by a legislative power is a necessary characteristic of the state of exception. (The most extreme case being the Nazi regime, where, as Eichmann constantly repeated, «the words of the Fuhrer had the force of law.») And in contemporary democracies, the creation of laws by governmental decrees that are subsequently ratified by Parliament has become a routine practice. Today the Republic is not parliamentary. It is governmental. But from a technical point of view, what is specific for the state of exception is not so much the confusion of powers as it is the isolation of the force of law from the law itself. The state of exception defines a regime of the law within which the norm is valid but cannot be applied (since it has no force), and where acts that do not have the value of law acquire the force of law. This means, ultimately, that the force of law fluctuates as an indeterminate element that can be claimed both by the authority of the State or by a revolutionary organization. The state of exception is an anomic space in which what is at stake is a force of law without law. Such a force of law is indeed a mystical element, or rather a fiction by means of which the law attempts to make anomy a part of itself. But how should we understand such a mystical element, one by which the law survives its own effacement and acts as a pure force in the state of exception?

2. The specific quality of the state of exception appears clearly if we examine one measure in Roman Law that may be considered as its true archetype, the *iustitium*. When the Roman Senate was alerted to a situation that seemed to threaten or compromise the Republic, they pronounced a *senatus consultum ultimum*, whereby consuls (or their substitutes, and each citizen) were compelled to take all possible measures to assure the security of the State. The *senatus consultum* implied a decree by which one declared the *tumultus*, i.e., a state of exception caused by internal disorder or an insurrection whose consequence was the proclamation of a *iustutium*.

The term *iustitium* – construed precisely like *solstitium* – literally signifies «to arrest, suspend the *ius*, the legal order.» The Roman grammarians explained the term in the following way: «When the law marks a point of arrest, just as the sun in its solstice.» Consequently, the *iustitium* was not so much a suspension within the framework of the administration of justice, as a suspension of the law itself. If we would like to grasp the nature and structure of the state of exception, we first must comprehend the paradoxical status of this legal institution that simply consists in the production of a leg. void, the production of a space entirely deprived by *ius*. Consider the *iustitium* mentioned by Cicero in one of his Philippic Discourses. Anthony's army is marching toward Rome, and the consul Cicero addresses the Senate in the following terms: «I judge it necessary to declare *tumultus*, to proclaim *iustitium* and to prepare for combat.» The usual translation of *iustitium* as «legal vacancy» here seems quite pointless. On the contrary, faced with a dangerous situation, the issue is to abolish the restrictions imposed by the laws on action by the magistrate – i.e., essentially the interdiction against putting a citizen to death without having recourse to popular judgment.

Faced with this anomic space that violently comes to coalesce with that of the City, both ancient and modern writers seem to oscillate between two contradictory conceptions: either to make *iustitium* correspond to the idea of a complete anomy within which all power and all legal structures are abolished, or to conceive of it as the very plentitude of law where it coincides with the totality of the real.

Un-executing the law

Whence the question: what is the nature of the acts committed during *iustitium*? From the moment they are carried out in a legal void they ought to be considered as pure facts with no legal connotation: The question is important, because we are here contemplating a sphere of action that implies above all the license to kill. Thus historians have asked the question of whether a magistrate who kills a citizen during a *iustitium* can be put on trial for homicide once the *iustitium* is over. Here we are faced with a type of action which appears to exceed the traditional legal distinction between legislation, execution, and transgression. The magistrate who acts during the *iustitium* is like an officer during the state of exception, who neither carries out the law, nor transgresses it, just as little as he is in the process of creating a new law. To use a paradoxical expression, we could say that he is in the process of «un-executing» the law.

But what does it meant un-execute the law? How should we conceive of this particular class within the entire range of human actions? Let us now attempt to develop the results of our genealogical investigation into the *iustitium* from the perspective of a general theory of the state of exception.

– The state of exception is not a dictatorship, but a space devoid of law. In the Roman Constitution, the dictator was a certain type of magistrate who received his power from a law voted on by the people. The *iustitium*, on the contrary, just as the modern state of exception does not imply the creation of a new magistrate, only the creation of zone of anomy in which all legal determinations find themselves inactivated. In this way, and in spite of the common view, neither Mussolini nor Hitler can be technically defined as dictators. Hitler, in particular, was Chancellor of the Reich, legally appointed by the president. What characterizes the Nazi regime, and makes it into such a dangerous model, is that it allowed the Weimar Constitution to exist, while doubling it with a secondary and legally non-formalized structure the could not exist alongside the first without the support of a generalize state of exception.

– For one reason or another this space devoid of law seems so essential to the legal order itself that the latter makes every possible attempt to assure a relation to the former, as if the law in order to guarantee its functioning would necessarily have to entertain a relation to an anomy.

Future violence

3. It is precisely in this perspective that we have to read the debate on the state of exception which pitted Walter Benjamin and Carl Schmitt against each other between 1928 and 1940. The starting point of the discussion is normally located in Benjamin's reading of *Political Theology* in 1923, and in the many citations from Schmitt's theory of sovereignty that appeared in *The Origin of German Tragic Drama*. Benjamin's acknowledging of Schmitt's influence on his own thought has always been considered scandalous. Without going into the details of this demonstration, I think it possible to inverse the charge of scandal, in suggesting that Schmitt's theory of sovereignty can be read as the response to Benjamin's critique of violence. What is the problem Benjamin poses in his *Critique of Violence*? For him, the question is how to establish the possibility of a future violence outside of, or beyond the law, a violence which could rupture the dialectic between the violence that poses and the one that conserves the law. Benjamin calls this other violence «pure,» «divine,» or «revolutionary». That which the law cannot stand, that which it resents as an

intolerable menace, is the existence of a violence that would be exterior to it, and this not only because its finalities would be incompatible with the purpose of the legal order, but because of the «simple fact of its exteriority».

Now we understand the sense in which Schmitt's doctrine of sovereignty can be considered as a response to Benjamin's critique. The state of exception is precisely that space in which Schmitt attempts to comprehend and incorporate into the thesis that there is a pure violence existing outside of the law. For Schmitt, there is no such thing as pure violence, there is no violence absolutely exterior to the *nomos*, because revolutionary violence, once the state of exception is established, it always finds itself included in the law. The state of exception is thus the means invented by Schmitt to respond to Benjamin's thesis that there is a pure violence.

The decisive document in the Benjamin/Schmitt dossier is surely the 8th of the theses on the concept of history: «The tradition of the oppressed teaches us that the 'state of exception' in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of exception, and this will improve our position in the struggle against Fascism.»

Exception as a rule

That the state of exception since then has become the norm does not only signify that its undecidability has reached a point of culmination, but also that it is no longer capable of fulfilling the task assigned to it by Schmitt. According to him, the functioning of the legal order rests in the last instance on an arrangement, the state of exception, whose aim it is to make the norm applicable by a temporary suspension of its exercise. But if the exception becomes the rule, this arrangement can no longer function and Schmitt's theory of the state of exception breaks down. In this perspective, the distinction proposed by Benjamin between – an effective state of exception and a fictitious state of exception is essential, although little noticed. It can be found already in Schmitt, who borrowed it from French legal doctrine; but this latter, in line with his critique of the liberal idea of a state governed by law, deems any state of exception which professes to be governed by law to be fictitious.

Battle of the giants

Benjamin reformulates the opposition in order to turn it against Schmitt: once the possibility of a state of exception, in which the exception and the

norm are temporally and spatially distinct, has fallen away, what becomes effective is the state of exception in which we are living, and where we can no longer distinguish the rule. In this case, all fiction of a bond between it and law disappears: there is only a zone of anomy dominated by pure violence with no legal cover. Now we are in a position to better understand the debate between Schmitt and Benjamin. The dispute occurs in that anomic zone which for Schmitt must maintain its connection to law at all costs, whereas for Benjamin it has to be twisted free and liberated from this relation. What is at issue here is the relation between violence and law, i.e., the status of violence as a cipher for political action. The logomachia over anomy seems to be equally decisive for Western politics as the «battle of the giants around being» that has defined Western metaphysics. To pure being as the ultimate stake of metaphysics, corresponds pure violence as the ultimate stake of the political; to the onto-theological strategy that wants pure being within the net of logos, corresponds the strategy of exception that has to secure the relation between violence and law. It is as if law and logos would need an anomic or «a-logic» zone of suspension in order to found their relation to life.

4. The structural proximity between law and anomy, between pure violence and the state of exception also has, as is often the case, an inverted figure. Historians, ethnologists, and folklore specialists are well acquainted with anomic festivals, like the Roman Saturnalias, the charivari, and the Medieval carnival, that suspend and invert the legal and social relations defining normal order. Masters pass over into the service of servants, men dress up and behave like animals, bad habits and crimes that would normally be illegal are suddenly authorized. Karl Meuli was the first to emphasize the connection between these anomic festivals and the situations of suspended law that characterize certain archaic penal institutions. Here, as well as in the *iustitium*, it is possible to kill a man without going to trial, to destroy his house, and take his belongings. Far from reproducing a mythological past, the disorder of the carnival and the tumultuous destruction of the charivari re-actualize a real historical situation of anomy. The ambiguous connection between law and anomy is thus brought to light: the state of exception is transformed into an unrestrained festival where one displays pure violence in order to enjoy it in full freedom.

5. The Western political system thus seems to be a double apparatus, founded in a dialectic between two heterogeneous and, as it were, antithetical elements; *nomos* and anomy, legal right and pure violence, the law and the forms of life whose articulation is to be guaranteed by the state of exception. As long as these elements remain separated, their dialectic works, but when they tend

toward a reciprocal indetermination and to a fusion into a unique power with two sides, when the state of exception becomes the rule, the political system transforms into an apparatus of death. We ask: why does *nomos* have a constitutive need for anomy? Why does the politics of the West have to measure up to this interior void? What, then, is the substance of the political, if it is essentially assigned to this legal vacuum? As long as we are not able to respond to these questions, we can no more respond to this other question whose echo traverses all of Western political history: what does it mean to act politically?