State of Exception / Giorgio Agamben; □
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1 ℵ The State of Exception as a Paradigm of Government

1.1 The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book *Politische Theologie* (1922). Although his famous definition of the sovereign as "he who decides on the state of exception" has been widely commented on and discussed, there is still no theory of the state of exception in public law, and jurists and theorists of public law seem to regard the problem more as a *quaestio facti* than as a genuine juridical problem. Not only is such a theory deemed illegitimate by those authors who (following the ancient maxim according to which *necessitas legem non habet* [necessity has no law]) affirm that the state of necessity, on which the exception is founded, cannot have a juridical form, but it is difficult even to arrive at a definition of the term given its position at the limit between politics and law. Indeed, according to a widely held opinion, the state of exception constitutes a "point of imbalance between public law and political fact" (Saint-Bonnet 2001, 28) that is situated—like civil war, insurrection and resistance—in an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political" (Fontana 1999, 16). The question of borders becomes all the more urgent: if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds (De Martino 1973, 320), then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.

It is this no-man's-land between public law and political fact, and between the juridical order and life, that the present study seeks to

investigate. 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. And perhaps only then will it be possible to answer the question that never ceases to reverberate in the history of Western politics: what does it mean to act politically?

1.2 One of the elements that make the state of exception so difficult to define is certainly its close relationship to civil war, insurrection, and resistance. Because civil war is the opposite of normal conditions, it lies in a zone of undecidability with respect to the state of exception, which is state power's immediate response to the most extreme internal conflicts. Thus, over the course of the twentieth century, we have been able to witness a paradoxical phenomenon that has been effectively defined as a "legal civil war" (Schnur 1983). Let us take the case of the Nazi State. No sooner did Hitler take power (or, as we should perhaps more accurately say, no sooner was power given to him) than, on February 28, he proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties. The decree was never repealed, so that from a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years. In this sense, modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. Since then, the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones.

Faced with the unstoppable progression of what has been called a "global civil war," the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a provisional and exceptional measure into a technique of government threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms. Indeed, from this perspective,

the state of exception appears as a threshold of indeterminacy between democracy and absolutism.

✕ The expression "global civil war" appears in the same year (1963) in both Hannah Arendt's *On Revolution* and Carl Schmitt's *Theory of the Partisan*. However, as we will see, the distinction between a "real state of exception" (*état de siège effectif*) and a "fictitious state of exception" (*état de siège fictif*) goes back to French public law theory and was already clearly articulated in Theodor Reinach's book *De l'état de siège. Étude historique et juridique* (1885), which is at the origins of the Schmittian and Benjaminian opposition between a real and a fictitious state of exception. Anglo-Saxon jurisprudence prefers to speak here of "fancied emergency." For their part, Nazi jurists spoke openly of a *gewollte Ausnahmezustand*, a "willed state of exception," "for the sake of establishing the National Socialist State" (Werner Spohr, quoted in Drobische and Wieland 1993, 28).

1.3 The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the "military order" issued by the president of the United States on November 13, 2001, which authorized the "indefinite detention" and trial by "military commissions" (not to be confused with the military tribunals provided for by the law of war) of noncitizens suspected of involvement in terrorist activities.

The USA Patriot Act issued by the U.S. Senate on October 26, 2001, already allowed the attorney general to "take into custody" any alien suspected of activities that endangered "the national security of the United States," but within seven days the alien had to be either released or charged with the violation of immigration laws or some other criminal offense. What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American laws. Neither prisoners nor persons accused, but simply "detainees," they are the object of a pure de facto rule,

of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi *Lager* [camps], who, along with their citizenship, had lost every legal identity, but at least retained their identity as Jews. As Judith Butler has effectively shown, in the detainee at Guantánamo, bare life reaches its maximum indeterminacy.

1.4 The uncertainty of the concept is exactly matched by terminological uncertainty. The present study will use the syntagma *state of exception* as the technical term for the consistent set of legal phenomena that it seeks to define. This term, which is common in German theory (*Ausnahmezustand*, but also *Notstand*, "state of necessity"), is foreign to Italian and French theory, which prefer to speak of *emergency decrees* and *state of siege* (political or fictitious, *état de siège fictif*). In Anglo-Saxon theory, the terms *martial law* and *emergency powers* prevail.

If, as has been suggested, terminology is the properly poetic moment of thought, then terminological choices can never be neutral. In this sense, the choice of the term *state of exception* implies a position taken on both the nature of the phenomenon that we seek to investigate and the logic most suitable for understanding it. Though the notions of *state of siege* and *martial law* express a connection with the state of war that has been historically decisive and is present to this day, they nevertheless prove to be inadequate to define the proper structure of the phenomenon, and they must therefore be qualified as *political* or *fictitious*, terms that are themselves misleading in some ways. The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept.

ℵ The history of the term *fictitious or political state of siege* is instructive in this regard. It goes back to the French doctrine that—in reference to Napoleon's decree of December 24, 1811—provided for the possibility of a state of siege that the emperor could declare whether or not a city was actually under attack or directly threatened by enemy forces, "whenever circumstances require giving more forces and more power to the military police, without it being necessary

to put the place in a state of siege" (Reinach 1885, 109). The institution of the state of siege has its origin in the French Constituent Assembly's decree of July 8, 1791, which distinguished among *état de paix*, in which military authority and civil authority each acts in its own sphere; *état de guerre*, in which civil authority must act in concert with military authority; and *état de siège*, in which "all the functions entrusted to the civil authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility" (ibid.). The decree referred only to military strongholds and ports, but with the law of 19 Fructidor Year 5, the Directory assimilated municipalities in the interior with the strongholds and, with the law of 18 Fructidor of the same year, granted itself the right to put a city in a state of siege. The subsequent history of the state of siege is the history of its gradual emancipation from the wartime situation to which it was originally bound in order to be used as an extraordinary police measure to cope with internal sedition and disorder, thus changing from a real, or military, state of siege to a fictitious, or political one. In any case, it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one.

The idea of a suspension of the constitution was introduced for the first time in the constitution of 22 Frimaire Year 8, Article 92 of which reads, "In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution. In such cases, this suspension can be provisionally declared by a decree of the government if the legislative body is in recess, provided that this body be convened as soon as possible by an article of the same decree." The city or region in question was declared *hors la constitution*. Although the paradigm is, on the one hand (in the state of siege) the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or of those constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the *state of exception*.

ℵ The expression *full powers (pleins pouvoirs)*, which is sometimes used to characterize the state of exception, refers to the expansion of the powers of the government, and in particular the conferral on the executive of the power to issue decrees having the force of law. It derives from the notion of *plenitudo potestatis*, which was elaborated in that true and proper laboratory of modern public legal

terminology that was canon law. The presupposition here is that the state of exception entails a return to an original, pleromatic state in which the distinction among the different powers (legislative, executive, etc.) has not yet been produced. As we will see, the state of exception constitutes rather a kenomatic state, an emptiness of law, and the idea of an originary indistinction and fullness of power must be considered a legal mythologeme analogous to the idea of a state of nature (and it is not by chance that it was precisely Schmitt who had recourse to this mythologeme). In any case, the term *full powers* describes one of the executive power's possible modes of action during the state of exception, but it does not coincide with it.

1.5 Between 1934 and 1948, in the face of the collapse of Europe's democracies, the theory of the state of exception (which had made a first, isolated appearance in 1921 with Schmitt's book *Dictatorship*) saw a moment of particular fortune, but it is significant that this occurred in the pseudomorphic form of a debate over so-called constitutional dictatorship.

This term (which German jurists had already used to indicate the emergency [*eccezionali*] powers that Article 48 of the Weimar Constitution granted the president of the Reich [Hugo Preuss: *Reichsverfassungsmäßige Diktatur*]) was taken up again and developed by Frederick M. Watkins ("The Problem of Constitutional Dictatorship," 1940), Carl J. Friedrich (*Constitutional Government and Democracy,* [1941] 1950), and finally Clinton L. Rossiter (*Constitutional Dictatorship: Crisis Government in the Modern Democracies,* 1948). Before them, we must also at least mention the book by the Swedish jurist Herbert Tingsten, *Les pleins pouvoirs. L'expansion des pouvoirs gouvernementaux pendant et après la Grande Guerre* (1934). While these books are quite varied and as a whole more dependent on Schmitt's theory than a first reading might suggest, they are nevertheless equally important because they record for the first time how the democratic regimes were transformed by the gradual expansion of the executive's powers during the two world wars and, more generally, by the state of exception that had accompanied and followed those wars. They are in some ways the heralds who announced what we today have clearly before our eyes—namely, that since "the state of exception . . . has become the rule" (Benjamin 1942, 697/257), it not only appears increasingly as a technique of government rather than an

exceptional measure, but it also lets its own nature as the constitutive paradigm of the juridical order come to light.

Tingsten's analysis centers on an essential technical problem that profoundly marks the evolution of the modern parliamentary regimes: the delegation contained in the "full powers" laws mentioned above, and the resulting extension of the executive's powers into the legislative sphere through the issuance of decrees and measures. "By 'full powers laws' we mean those laws by which an exceptionally broad regulatory power is granted to the executive, particularly the power to modify or abrogate by decree the laws in force" (Tingsten 1934, 13). Because laws of this nature, which should be issued to cope with exceptional circumstances of necessity or emergency, conflict with the fundamental hierarchy of law and regulation in democratic constitutions and delegate to the executive [*governo*] a legislative power that should rest exclusively with parliament, Tingsten seeks to examine the situation that arose in a series of countries (France, Switzerland, Belgium, the United States, England, Italy, Austria, and Germany) from the systematic expansion of executive [*governamentali*] powers during World War One, when a state of siege was declared or full powers laws issued in many of the warring states (and even in neutral ones, like Switzerland). The book goes no further than recording a large number of case histories; nevertheless, in the conclusion the author seems to realize that although a temporary and controlled use of full powers is theoretically compatible with democratic constitutions, "a systematic and regular exercise of the institution necessarily leads to the 'liquidation' of democracy" (333). In fact, the gradual erosion of the legislative powers of parliament—which today is often limited to ratifying measures that the executive issues through decrees having the force of law—has since then become a common practice. From this perspective, World War One (and the years following it) appear as a laboratory for testing and honing the functional mechanisms and apparatuses of the state of exception as a paradigm of government. One of the essential characteristics of the state of exception—the provisional abolition of the distinction among legislative, executive, and judicial powers—here shows its tendency to become a lasting practice of government.

Friedrich's book makes much more use than is apparent of Schmitt's

theory of dictatorship, which is dismissed in a footnote as "a partisan tract" (Friedrich [1941] 1950, 664). Schmitt's distinction between commissarial dictatorship and sovereign dictatorship reappears here as an opposition between constitutional dictatorship, which seeks to safeguard the constitutional order, and unconstitutional dictatorship, which leads to its overthrow. The impossibility of defining and overcoming the forces that determine the transition from the first to the second form of dictatorship (which is precisely what happened, for example, in Germany) is the fundamental aporia of Friedrich's book, as it is generally of all theories of constitutional dictatorship. All such theories remain prisoner in the vicious circle in which the emergency measures they seek to justify in the name of defending the democratic constitution are the same ones that lead to its ruin:

> [T]here are no ultimate institutional safeguards available for insuring that emergency powers be used for the purpose of preserving the Constitution. Only the people's own determination to see them so used can make sure of that. . . . All in all the quasi-dictatorial provisions of modern constitutional systems, be they martial rule, state of siege, or constitutional emergency powers, fail to conform to any exacting standard of effective limitations upon a temporary concentration of powers. Consequently, all these systems are liable to be transformed into totalitarian schemes if conditions become favorable to it. (584)

In Rossiter's book these aporias explode into open contradictions. Unlike Tingsten and Friedrich, Rossiter explicitly seeks to justify constitutional dictatorship through a broad historical examination. His hypothesis here is that because the democratic regime, with its complex balance of powers, is conceived to function under normal circumstances, "*in time of crisis a democratic, constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions.* This alteration invariably involves government of a stronger character; that is, *the government will have more power and the people fewer rights*" (Rossiter 1948, 5). Rossiter is aware that constitutional dictatorship (that is, the state of exception) has, in fact, become a paradigm of government ("a well-established principle

of constitutional government" [4]) and that as such it is fraught with dangers; nevertheless, it is precisely the immanent necessity of constitutional dictatorship that he intends to demonstrate. But as he makes this attempt, he entangles himself in irresolvable contradictions. Indeed, Schmitt's model (which he judges to be "trail-blazing, if somewhat occasional," and which he seeks to correct [14]), in which the distinction between commissarial dictatorship and sovereign dictatorship is not one of nature but of degree (with the decisive figure undoubtedly being the latter), is not so easily overcome. Although Rossiter provides no fewer than eleven criteria for distinguishing constitutional dictatorship from unconstitutional dictatorship, none of them is capable either of defining a substantial difference between the two or of ruling out the passage from one to the other. The fact is that the two essential criteria of absolute necessity and temporariness (which all the others come down to in the last analysis) contradict what Rossiter knows perfectly well, that is, that the state of exception has by now become the rule: "In the Atomic Age upon which the world is now entering, the use of constitutional emergency powers may well become the rule and not the exception" (297); or as he says even more clearly at the end of the book, "In describing the emergency powers of the western democracies, this book may have given the impression that such techniques of government as executive dictatorship, the delegation of legislative power, and lawmaking by administrative degree were purely transitory and temporary in nature. Such an impression would be distinctly misleading. . . . The instruments of government depicted here as temporary 'crisis' arrangements have in some countries, and may eventually in all countries, become lasting peacetime institutions" (313). This prediction, which came eight years after Benjamin's first formulation in the eighth thesis on the concept of history, was undoubtedly accurate; but the words that conclude the book sound even more grotesque: "No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself" (314).

1.6 An examination of how the state of exception is situated in the legal traditions of the Western states reveals a division—clear in principle, but hazier in fact—between orders that regulate the state of exception in the

text of the constitution or by a law and those that prefer not to regulate the problem explicitly. To the first group belong France (where the modern state of exception was born in the time of the Revolution) and Germany; to the second belong Italy, Switzerland, England, and the United States. Scholarship is also correspondingly divided between writers who favor a constitutional or legislative provision for the state of exception and others (Carl Schmitt foremost among them) who unreservedly criticize the pretense of regulating by law what by definition cannot be put in norms [*normato*]. Though on the level of the formal constitution the distinction is undoubtedly important (insofar as it presupposes, in the latter case, that acts performed by the government outside of or in conflict with the law can theoretically be considered illegal and must therefore be rectified by a special "bill of indemnity"), on the level of the material constitution something like a state of exception exists in all the above-mentioned orders, and the history of the institution, at least since World War One, shows that its development is independent of its constitutional or legislative formalization. Thus, in the Weimar Republic (where Article 48 of the constitution regulated the powers of the president of the Reich whenever the "public security and order" [*die öffentliche Sicherheit und Ordnung*] were threatened), the state of exception performed a surely more decisive function than in Italy, where the institution was not explicitly provided for, or in France, which regulated it by a law and which also frequently had recourse to the *état de siège* and legislation by decree.

1.7 The problem of the state of exception presents clear analogies to that of the right of resistance. It has been much debated, particularly during constituent assemblies, whether the right of resistance should be included in the text of the constitution. The draft of the current Italian Constitution included an article that read, "When the public powers violate the rights and fundamental liberties guaranteed by the Constitution, resistance to oppression is a right and a duty of the citizen." This proposal, which followed a suggestion by Giuseppe Dossetti, one of the most prestigious of the leading Catholic figures, met with sharp opposition. Over the course of the debate the opinion that it was impossible to legally regulate something that, by its nature, was removed

from the sphere of positive law prevailed, and the article was not approved. However, in the Constitution of the German Federal Republic there is an article (Article 20) that unequivocally legalizes the right of resistance, stating that "against anyone who attempts to abolish that order [the democratic constitution], all Germans have a right of resistance, if no other remedies are possible."

The opposing arguments here are exactly symmetrical to the ones that divide advocates of legalizing the state of exception in the text of the constitution or a special law and those jurists who believe its normative regulation to be entirely inappropriate. It is certain, in any case, that if resistance were to become a right or even a duty (the omission of which could be punished), not only would the constitution end up positing itself as an absolutely untouchable and all-encompassing value, but the citizens' political choices would also end up being determined by juridical norms [*giuridicamente normate*]. The fact is that in both the right of resistance and the state of exception, what is ultimately at issue is the question of the juridical significance of a sphere of action that is in itself extrajuridical. Two theses are at odds here: One asserts that law must coincide with the norm, and the other holds that the sphere of law exceeds the norm. But in the last analysis, the two positions agree in ruling out the existence of a sphere of human action that is entirely removed from law.

❧ A BRIEF HISTORY OF THE STATE OF EXCEPTION. We have already seen how the state of siege had its origin in France during the Revolution. After being established with the Constituent Assembly's decree of July 8, 1791, it acquired its proper physiognomy as *état de siège fictif* or *état de siège politique* with the Directorial law of August 27, 1797, and, finally, with Napoleon's decree of December 24, 1811. The idea of a suspension of the constitution (of the "rule of the constitution") had instead been introduced, as we have also seen, by the Constitution of 22 Frimaire Year 8. Article 14 of the *Charte* of 1814 granted the sovereign the power to "make the regulations and ordinances necessary for the execution of the laws and the security of the State"; because of the vagueness of the formula, Chateaubriand observed "that it is possible that one fine morning the whole *Charte* will be forfeited for the benefit of Article 14." The state of siege was expressly mentioned in the *Acte additionel* to the Constitution of April 22, 1815, which stated that it could only be declared with a law. Since then,

moments of constitutional crisis in France over the course of the nineteenth and twentieth centuries have been marked by legislation on the state of siege. After the fall of the July Monarchy, a decree by the Constituent Assembly on June 24, 1848, put Paris in a state of siege and assigned General Cavaignac the task of restoring order in the city. Consequently, an article was included in the new constitution of November 4, 1848, establishing that the occasions, forms, and effects of the state of siege would be firmly set by a law. From this moment on, the dominant principle in the French tradition (though, as we will see, not without exceptions) has been that the power to suspend the laws can belong only to the same power that produces them, that is, parliament (in contrast to the German tradition, which entrusted this power to the head of state). The law of August 9, 1849 (which was partially restricted later by the law of April 3, 1878), consequently established that a political state of siege could be declared by parliament (or, additionally, by the head of state) in the case of imminent danger to external or internal security. Napoleon III had recourse several times to this law and, once installed in power, he transferred, in the constitution of January 1852, the exclusive power to proclaim a state of siege to the head of state. The Franco-Prussian War and the insurrection of the Commune coincided with an unprecedented generalization of the state of exception, which was proclaimed in forty departments and lasted in some of them until 1876. On the basis of these experiences, and after MacMahon's failed coup d'état in May 1877, the law of 1849 was modified to establish that a state of siege could be declared only with a law (or, if the Chamber of Deputies was not in session, by the head of state, who was then obligated to convene parliament within two days) in the event of "imminent danger resulting from foreign war or armed insurrection" (law of April 3, 1878, Art. 1).

World War One coincided with a permanent state of exception in the majority of the warring countries. On August 2, 1914, President Poincaré issued a decree that put the entire country in a state of siege, and this decree was converted into law by parliament two days later. The state of siege remained in force until October 12, 1919. Although the activity of parliament, which was suspended during the first six months of the war, recommenced in January 1915, many of the laws passed were, in truth, pure and simple delegations of legislative power to the executive, such as the law of February 10, 1918, which granted the government an all but absolute power to regulate by decree the production and trade of foodstuffs. As Tingsten has observed, in this way the executive power was transformed into a legislative organ in the material sense of the term (Tingsten

1934, 18). In any case, it was during this period that exceptional legislation by executive [*governativo*] decree (which is now perfectly familiar to us) became a regular practice in the European democracies.

Predictably, the expansion of the executive's powers into the legislative sphere continued after the end of hostilities, and it is significant that military emergency now ceded its place to economic emergency (with an implicit assimilation between war and economics). In January 1924, at a time of serious crisis that threatened the stability of the franc, the Poincaré government asked for full powers over financial matters. After a bitter debate, in which the opposition pointed out that this was tantamount to parliament renouncing its own constitutional powers, the law was passed on March 22, with a four-month limit on the government's special powers. Analogous measures were brought to a vote in 1935 by the Laval government, which issued more than five hundred decrees "having force of law" in order to avoid the devaluation of the franc. The opposition from the left, led by Léon Blum, strongly opposed this "fascist" practice, but it is significant that once the Left took power with the Popular Front, it asked parliament in June 1937 for full powers in order to devalue the franc, establish exchange control, and impose new taxes. As has been observed (Rossiter 1948, 123), this meant that the new practice of legislation by executive [*governativo*] decree, which had been inaugurated during the war, was by now a practice accepted by all political sides. On June 30, 1937, the powers that had been denied Blum were granted to the Chautemps government, in which several key ministries were entrusted to nonsocialists. And on April 10, 1938, Édouard Daladier requested and obtained from parliament exceptional powers to legislate by decree in order to cope with both the threat of Nazi Germany and the economic crisis. It can therefore be said that until the end of the Third Republic "the normal procedures of parliamentary democracy were in a state of suspension" (124). When we study the birth of the so-called dictatorial regimes in Italy and Germany, it is important not to forget this concurrent process that transformed the democratic constitutions between the two world wars. Under the pressure of the paradigm of the state of exception, the entire politico-constitutional life of Western societies began gradually to assume a new form, which has perhaps only today reached its full development. In December 1939, after the outbreak of the war, the Daladier government obtained the power to take by decree all measures necessary to ensure the defense of the nation. Parliament remained in session (except when it was suspended for a month in order to deprive the communist parliamentarians of their immunity), but all legislative activity lay

firmly in the hands of the executive. By the time Marshal Pétain assumed power, the French parliament was a shadow of itself. Nevertheless, the Constitutional Act of July 11, 1940, granted the head of state the power to proclaim a state of siege throughout the entire national territory (which by then was partially occupied by the German army).

In the present constitution, the state of exception is regulated by Article 16, which De Gaulle had proposed. The article establishes that the president of the Republic may take all necessary measures "when the institutions of the Republic, the independence of the Nation, the integrity of its territory, or the execution of its international commitments are seriously and immediately threatened and the regular functioning of the constitutional public powers is interrupted." In April 1961, during the Algerian crisis, De Gaulle had recourse to Article 16 even though the functioning of the public powers had not been interrupted. Since that time, Article 16 has never again been invoked, but, in conformity with a continuing tendency in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.

The history of Article 48 of the Weimar Constitution is so tightly woven into the history of Germany between the wars that it is impossible to understand Hitler's rise to power without first analyzing the uses and abuses of this article in the years between 1919 and 1933. Its immediate precedent was Article 68 of the Bismarckian Constitution, which, in cases where "public security was threatened in the territory of the Reich," granted the emperor the power to declare a part of the Reich to be in a state of war (*Kriegszustand*), whose conditions and limitations followed those set forth in the Prussian law of June 4, 1851, concerning the state of siege. Amid the disorder and rioting that followed the end of the war, the deputies of the National Assembly that was to vote on the new constitution (assisted by jurists among whom the name of Hugo Preuss stands out) included an article that granted the president of the Reich extremely broad emergency [*eccezionali*] powers. The text of Article 48 reads, "If security and public order are seriously [*erheblich*] disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights [*Grundrechte*] established in Articles 114, 115, 117, 118, 123, 124, and 153." The article added that a law would specify in detail the conditions and limitations under which this presidential power was to be exercised. Since that law was never passed, the president's emergency [*eccezionali*] powers remained so indeterminate that not only did theorists regularly use the phrase "presidential dictatorship" in reference to Article 48, but in 1925 Schmitt could write that "no constitution on earth had so easily legalized a coup d'état as did the Weimar Constitution" (Schmitt 1995, 25).

Save for a relative pause between 1925 and 1929, the governments of the Republic, beginning with Brüning's, made continual use of Article 48, proclaiming a state of exception and issuing emergency decrees on more than two hundred and fifty occasions; among other things, they employed it to imprison thousands of communist militants and to set up special tribunals authorized to pronounce capital sentences. On several occasions, particularly in October 1923, the government had recourse to Article 48 to cope with the fall of the mark, thus confirming the modern tendency to conflate politico-military and economic crises.

It is well known that the last years of the Weimar Republic passed entirely under a regime of the state of exception; it is less obvious to note that Hitler could probably not have taken power had the country not been under a regime of presidential dictatorship for nearly three years and had parliament been functioning. In July 1930, the Brüning government was put in the minority, but Brüning did not resign. Instead, President Hindenburg granted him recourse to Article 48 and dissolved the Reichstag. From that moment on, Germany in fact ceased to be a parliamentary republic. Parliament met only seven times for no longer than twelve months in all, while a fluctuating coalition of Social Democrats and centrists stood by and watched a government that by then answered only to the president of the Reich. In 1932, Hindenburg—reelected president over Hitler and Thälmann—forced Brüning to resign and named the centrist von Papen to his post. On June 4, the Reichstag was dissolved and never reconvened until the advent of Nazism. On July 20, a state of exception was proclaimed in the Prussian territory, and von Papen was named Reich Commissioner for Prussia—ousting Otto Braun's Social Democratic government.

The state of exception in which Germany found itself during the Hindenburg presidency was justified by Schmitt on a constitutional level by the idea that the president acted as the "guardian of the constitution" (Schmitt 1931); but the end of the Weimar Republic clearly demonstrates that, on the contrary, a "protected democracy" is not a democracy at all, and that the paradigm of constitutional dictatorship functions instead as a transitional phase that leads inevitably to the establishment of a totalitarian regime.

Given these precedents, it is understandable that the constitution of the Federal Republic did not mention the state of exception. Nevertheless, on June 24, 1968, the "grand coalition" of Christian Democrats and Social Democrats passed

a law for the amendment of the constitution (*Gesetz zur Ergänzung des Grundgesetzes*) that reintroduced the state of exception (defined as the "state of internal necessity," *innere Notstand*). However, with an unintended irony, for the first time in the history of the institution, the proclamation of the state of exception was provided for not simply to safeguard public order and security, but to defend the "liberal-democratic constitution." By this point, protected democracy had become the rule.

On August 3, 1914, the Swiss Federal Assembly granted the Federal Council "the unlimited power to take all measures necessary to guarantee the security, integrity, and neutrality of Switzerland." This unusual act—by virtue of which a non-warring state granted powers to the executive that were even vaster and vaguer than those received by the governments of countries directly involved in the war—is of interest because of the debates it provoked both in the assembly itself and in the Swiss Federal Court when the citizens objected that the act was unconstitutional. The tenacity with which on this occasion the Swiss jurists (nearly thirty years ahead of the theorists of constitutional dictatorship) sought (like Waldkirch and Burckhardt) to derive the legitimacy of the state of exception from the text of the constitution itself (specifically, Article 2, which read, "the aim of the Confederation is to ensure the independence of the fatherland against the foreigner [and] to maintain internal tranquility and order"), or (like Hoerni and Fleiner) to ground the state of exception in a law of necessity "inherent in the very existence of the State," or (like His) in a juridical lacuna that the exceptional provisions must fill, shows that the theory of the state of exception is by no means the exclusive legacy of the antidemocratic tradition.

In Italy the history and legal situation of the state of exception are of particular interest with regard to legislation by emergency executive [*governativi*] decrees (the so-called law-decrees). Indeed, from this viewpoint one could say that Italy functioned as a true and proper juridico-political laboratory for organizing the process (which was also occurring to differing degrees in other European states) by which the law-decree "changed from a derogatory and exceptional instrument for normative production to an ordinary source for the production of law" (Fresa 1981, 156). But this also means that one of the essential paradigms through which democracy is transformed from parliamentary to executive [*governamentale*] was elaborated precisely by a state whose governments were often unstable. In any case, it is in this context that the emergency decree's pertinence to the problematic sphere of the state of exception comes clearly into view. The

Albertine Statute (like the current Republican Constitution) made no mention of the state of exception. Nevertheless, the governments of the kingdom resorted to proclaiming a state of siege many times: in Palermo and the Sicilian provinces in 1862 and 1866, in Naples in 1862, in Sicily and Lunigiana in 1894, and in Naples and Milan in 1898, where the repression of the disturbances was particularly bloody and provoked bitter debates in parliament. The declaration of a state of siege on the occasion of the earthquake of Messina and Reggio Calabria on December 28, 1908 is only apparently a different situation. Not only was the state of siege ultimately proclaimed for reasons of public order—that is, to suppress the robberies and looting provoked by the disaster—but from a theoretical standpoint, it is also significant that these acts furnished the occasion that allowed Santi Romano and other Italian jurists to elaborate the thesis (which we examine in some detail later) that necessity is the primary source of law.

In each of these cases, the state of siege was proclaimed by a royal decree that, while not requiring parliamentary ratification, was nevertheless always approved by parliament, as were other emergency decrees not related to the state of siege (in 1923 and 1924 several thousand outstanding law-decrees issued in the preceding years were thus converted into law). In 1926 the Fascist regime had a law issued that expressly regulated the matter of the law-decrees. Article 3 of this law established that, upon deliberation of the council of ministers, "norms having force of law" could be issued by royal decree "(1) when the government is delegated to do so by a law within the limits of the delegation, and (2) in extraordinary situations, in which it is required for reasons of urgent and absolute necessity. The judgment concerning necessity and urgency is not subject to any oversight other than parliament's political oversight." The decrees provided for in the second clause had to be presented to parliament for conversion into law; but parliament's total loss of autonomy during the Fascist regime rendered this condition superfluous.

Although the Fascist governments' abuse of emergency decrees was so great that in 1939 the regime itself felt it necessary to limit their reach, Article 77 of the Republican Constitution established with singular continuity that "in extraordinary situations of necessity and emergency" the government could adopt "provisional measures having force of law," which had to be presented the same day to parliament and which went out of effect if not converted into law within sixty days of their issuance.

It is well known that since then the practice of executive [*governamentale*] legislation by law-decrees has become the rule in Italy. Not only have emergency

decrees been issued in moments of political crisis, thus circumventing the constitutional principle that the rights of the citizens can be limited only by law (see, for example, the decrees issued for the repression of terrorism: the law-decree of March 28, 1978, n. 59, converted into the law of May 21 1978, n. 191 [the so-called Moro Law], and the law-decree of December 15, 1979, n. 625, converted into the law of February 6, 1980, n. 15), but law-decrees now constitute the normal form of legislation to such a degree that they have been described as "bills strengthened by guaranteed emergency" (Fresa 1981, 152). This means that the democratic principle of the separation of powers has today collapsed and that the executive power has in fact, at least partially, absorbed the legislative power. Parliament is no longer the sovereign legislative body that holds the exclusive power to bind the citizens by means of the law: it is limited to ratifying the decrees issued by the executive power. In a technical sense, the Italian Republic is no longer parliamentary, but executive [*governamentale*]. And it is significant that though this transformation of the constitutional order (which is today underway to varying degrees in all the Western democracies) is perfectly well known to jurists and politicians, it has remained entirely unnoticed by the citizens. At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon.

The only legal apparatus in England that is comparable to the French *état de siège* goes by the term *martial law;* but this concept is so vague that it has been rightly described as an "unlucky name for the justification by the common law of acts done by necessity for the defence of the Commonwealth when there is war within the realm" (Rossiter 1948, 142). This, however, does not mean that something like a state of exception could not exist. In the Mutiny Acts, the Crown's power to declare martial law was generally confined to times of war; nevertheless, it necessarily entailed sometimes serious consequences for the civilians who found themselves factually involved in the armed repression. Thus Schmitt sought to distinguish martial law from the military tribunals and summary proceedings that at first applied only to soldiers, in order to conceive of it as a purely factual proceeding and draw it closer to the state of exception: "Despite the name it bears, martial law is neither a right nor a law in this sense, but rather a proceeding guided essentially by the necessity of achieving a certain end" (Schmitt 1921, 172).

World War One played a decisive role in the generalization of exceptional

executive [*governamentali*] apparatuses in England as well. Indeed, immediately after war was declared, the government asked parliament to approve a series of emergency measures that had been prepared by the relevant ministers, and they were passed virtually without discussion. The most important of these acts was the Defence of the Realm Act of August 4, 1914, known as DORA, which not only granted the government quite vast powers to regulate the wartime economy, but also provided for serious limitations on the fundamental rights of the citizens (in particular, granting military tribunals jurisdiction over civilians). The activity of parliament saw a significant eclipse for the entire duration of the war, just as in France. And in England too this process went beyond the emergency of the war, as is shown by the approval—on October 29, 1920, in a time of strikes and social tensions—of the Emergency Powers Act. Indeed, Article 1 of the act stated that

> [i]f at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists.

Article 2 of the law gave His Majesty in Council the power to issue regulations and to grant the executive the "powers and duties . . . necessary for the preservation of the peace," and it introduced special courts ("courts of summary jurisdiction") for offenders. Even though the penalties imposed by these courts could not exceed three months in jail ("with or without hard labor"), the principle of the state of exception had been firmly introduced into English law.

The place—both logical and pragmatic—of a theory of the state of exception in the American constitution is in the dialectic between the powers of the president and those of Congress. This dialectic has taken shape historically (and in an exemplary way already beginning with the Civil War) as a conflict over supreme authority in an emergency situation; or, in Schmittian terms (and this is surely significant in a country considered to be the cradle of democracy), as a conflict over sovereign decision.

The textual basis of the conflict lies first of all in Article 1 of the constitution, which establishes that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" but does not specify which authority has the jurisdiction to decide on the suspension (even though prevailing opinion and the context of the passage itself lead one to assume that the clause is directed at Congress and not the president). The second point of conflict lies in the relation between another passage of Article 1 (which declares that the power to declare war and to raise and support the army and navy rests with Congress) and Article 2, which states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."

Both of these problems reach their critical threshold with the Civil War (1861–1865). Acting counter to the text of Article 1, on April 15, 1861, Lincoln decreed that an army of seventy-five thousand men was to be raised and convened a special session of Congress for July 4. In the ten weeks that passed between April 15 and July 4, Lincoln in fact acted as an absolute dictator (for this reason, in his book *Dictatorship*, Schmitt can refer to it as a perfect example of commissarial dictatorship: see 1921, 136). On April 27, with a technically even more significant decision, he authorized the General in Chief of the Army to suspend the writ of habeas corpus whenever he deemed it necessary along military lines between Washington and Philadelphia, where there had been disturbances. Furthermore, the president's autonomy in deciding on extraordinary measures continued even after Congress was convened (thus, on February 14, 1862, Lincoln imposed censorship of the mail and authorized the arrest and detention in military prisons of persons suspected of "disloyal and treasonable practices").

In the speech he delivered to Congress when it was finally convened on July 4, the president openly justified his actions as the holder of a supreme power to violate the constitution in a situation of necessity. "Whether strictly legal or not," he declared, the measures he had adopted had been taken "under what appeared to be a popular demand and a public necessity" in the certainty that Congress would ratify them. They were based on the conviction that even fundamental law could be violated if the very existence of the union and the juridical order were at stake ("Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?" See Rossiter 1948, 229).

It is obvious that in a wartime situation the conflict between the president and Congress is essentially theoretical. The fact is that although Congress was perfectly aware that the constitutional jurisdictions had been transgressed, it could do nothing but ratify the actions of the president, as it did on August 6, 1861. Strengthened by this approval, on September 22, 1862, the president proclaimed the emancipation of the slaves on his authority alone and, two days later, generalized the state of exception throughout the entire territory of the United States, authorizing the arrest and trial before courts martial of "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States." By this point, the president of the United States was the holder of the sovereign decision on the state of exception.

According to American historians, during World War One President Woodrow Wilson personally assumed even broader powers than those Abraham Lincoln had claimed. It is, however, necessary to specify that instead of ignoring Congress, as Lincoln had done, Wilson preferred each time to have the powers in question delegated to him by Congress. In this regard, his practice of government is closer to the one that would prevail in Europe in the same years, or to the current one, which instead of declaring the state of exception prefers to have exceptional laws issued. In any case, from 1917 to 1918, Congress approved a series of acts (from the Espionage Act of June 1917 to the Overman Act of May 1918) that granted the president complete control over the administration of the country and not only prohibited disloyal activities (such as collaboration with the enemy and the diffusion of false reports), but even made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States."

Because the sovereign power of the president is essentially grounded in the emergency linked to a state of war, over the course of the twentieth century the metaphor of war becomes an integral part of the presidential political vocabulary whenever decisions considered to be of vital importance are being imposed. Thus, in 1933, Franklin D. Roosevelt was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign:

> I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems. . . . I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require. . . . But in the event that the Congress shall fail to take [the necessary measures] and in the event

> that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe. (Roosevelt 1938, 14–15)

It is well not to forget that, from the constitutional standpoint, the New Deal was realized by delegating to the president (through a series of statutes culminating in the National Recovery Act of June 16, 1933) an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century.

The outbreak of World War Two extended these powers with the proclamation of a "limited" national emergency on September 8, 1939, which became unlimited on May 27, 1941. On September 7, 1942, while requesting that Congress repeal a law concerning economic matters, the president renewed his claim to sovereign powers during the emergency: "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. . . . The American people can . . . be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat" (Rossiter 1948, 268–69). The most spectacular violation of civil rights (all the more serious because of its solely racial motivation) occurred on February 19, 1942, with the internment of seventy thousand American citizens of Japanese descent who resided on the West Coast (along with forty thousand Japanese citizens who lived and worked there).

President Bush's decision to refer to himself constantly as the "Commander in Chief of the Army" after September 11, 2001, must be considered in the context of this presidential claim to sovereign powers in emergency situations. If, as we have seen, the assumption of this title entails a direct reference to the state of exception, then Bush is attempting to produce a situation in which the emergency becomes the rule, and the very distinction between peace and war (and between foreign and civil war) becomes impossible.

1.8 The differences in the legal traditions correspond in scholarship to the division between those who seek to include the state of exception within the sphere of the juridical order and those who consider it

something external, that is, an essentially political, or in any case extrajuridical, phenomenon. Among the former, some (such as Santi Romano, Hauriou, and Mortati) understand the state of exception to be an integral part of positive law because the necessity that grounds it acts as an autonomous source of law, while others (such as Hoerni, Ranelletti, and Rossiter) conceive of it as the state's subjective (natural or constitutional) right to its own preservation. Those in the latter group (such as Biscaretti, Balladore-Pallieri, and Carré de Malberg) instead consider the state of exception and the necessity that grounds it to be essentially extrajuridical, de facto elements, even though they may have consequences in the sphere of law. Julius Hatschek has summarized the various positions in the contrast between an *objektive Notstandstheorie*, according to which every act performed outside of or in conflict with the law in a state of necessity is contrary to law and, as such, is legally chargeable; and a *subjektive Notstandstheorie*, according to which emergency [*eccezionali*] powers are grounded in "a constitutional or preconstitutional (natural) right" of the state (Hatschek 1923, 158ff.), regarding which good faith is enough to guarantee immunity.

The simple topographical opposition (inside/outside) implicit in these theories seems insufficient to account for the phenomenon that it should explain. If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? How can an anomie be inscribed within the juridical order? And if the state of exception is instead only a de facto situation, and is as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned? And what is the meaning of this lacuna?

In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order. Hence the interest of those theories that, like Schmitt's, complicate the topographical opposition into a more complex topological relation, in which the very limit of the juridical order is at issue. In any

case, to understand the problem of the state of exception, one must first correctly determine its localization (or illocalization). As we will see, the conflict over the state of exception presents itself essentially as a dispute over its proper *locus*.

1.9 A recurrent opinion posits the concept of necessity as the foundation of the state of exception. According to a tenaciously repeated Latin adage (a history of the *adagia*'s strategic function in legal literature has yet to be written), *necessitas legem non habet*, "necessity has no law," which is interpreted in two opposing ways: "necessity does not recognize any law" and "necessity creates its own law" (*nécessité fait loi*). In both cases, the theory of the state of exception is wholly reduced to the theory of the *status necessitatis*, so that a judgment concerning the existence of the latter resolves the question concerning the legitimacy of the former. Therefore, any discussion of the structure and meaning of the state of exception first requires an analysis of the legal concept of necessity.

The principle according to which *necessitas legem non habet* was formulated in Gratian's *Decretum*. It appears there two times: first in the gloss and then in the text. The gloss (which refers to a passage in which Gratian limits himself to stating generically that "many things are done against the rule out of necessity or for whatever other cause" [*pars I. dist. 48*]) appears to attribute to necessity the power to render the illicit licit (*Si propter necessitatem aliquid fit, illud licite fit: quia quod non est licitum in lege, necessitas facit licitum. Item necessitas legem non habet* [If something is done out of necessity, it is done licitly, since what is not licit in law necessity makes licit. Likewise necessity has no law]). But the sense in which this should be taken is made clearer by a later passage in Gratian's text concerning the celebration of the mass (*pars III. dist. 1. c. 11*). After having stated that the sacrifice must be offered on the altar or in a consecrated place, Gratian adds, "It is preferable not to sing or listen to the mass than to celebrate it in places where it should not be celebrated, unless it happens because of a supreme necessity, for necessity has no law" (*nisi pro summa necessitate contingat, quoniam necessitas legem non habet*). More than rendering the illicit licit, necessity acts here to justify a single, specific case of transgression by means of an exception.

This is clear in the way Thomas in the *Summa theologica* develops

and comments on this principle precisely in relation to the sovereign's power to grant dispensations from the law (*Prima secundae, q. 96, art. 6: utrum ei qui subditur legi, liceat praeter verba legis agere* [whether one who is subject to law may act against the letter of the law]):

> If observing the letter of the law does not entail an immediate danger that must be dealt with at once, it is not in the power of any man to interpret what is of use or of harm to the city; this can be done only by the sovereign who, in a case of this sort, has the authority to grant dispensations from the law. If there is, however, a sudden danger, regarding which there is no time for recourse to a higher authority, the very necessity carries a dispensation with it, for necessity is not subject to the law [*ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi*].

Here, the theory of necessity is none other than a theory of the exception (*dispensatio*) by virtue of which a particular case is released from the obligation to observe the law. Necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm: "He who acts beyond the letter of the law in a case of necessity does not judge by the law itself but judges by the particular case, in which he sees that the letter of the law is not to be observed [*non iudicat de ipsa lege, sed iudicat de casu singulari, in quo videt verba legis observanda non esse*]." The ultimate ground of the exception here is not necessity but the principle according to which "every law is ordained for the common well-being of men, and only for this does it have the force and reason of law [*vim et rationem legis*]; if it fails in this regard, it has no capacity to bind [*virtutem obligandi non habet*]." In the case of necessity, the *vis obligandi* of the law fails, because in this case the goal of *salus hominum* is lacking. What is at issue here is clearly not a *status* or situation of the juridical order as such (the state of exception or necessity); rather, in each instance it is a question of a particular case in which the *vis* and *ratio* of the law find no application.

8 We find an example of the law's ceasing to apply *ex dispensatione misericordiae* [out of a dispensation of mercy] in a peculiar passage from Gratian where the canonist states that the Church can elect not to punish a transgression in

a situation where the transgressive deed has already occurred (*pro eventu rei* [for the consequence of the thing]: for example in a case where a person who could not accede to the episcopate has in fact already been ordained as bishop). Paradoxically, the law is not applied here precisely because the transgressive act has effectively already been committed and punishing it would anyway entail negative consequences for the Church. In analyzing this text, Anton Schütz has rightly observed that "in conditioning validity by facticity, in seeking contact with an extrajuridical reality, [Gratian] prevents the law from referring only to the law, and thus prevents the closure of the juridical system" (Schütz 1995, 120).

In this sense, the medieval exception represents an opening of the juridical system to an external fact, a sort of *fictio legis* by which, in this case, one acts as if the bishop had been legitimately elected. The modern state of exception is instead an attempt to include the exception itself within the juridical order by creating a zone of indistinction in which fact and law coincide.

ℵ We find an implicit critique of the state of exception in Dante's *De monarchia*. Seeking to prove that Rome gained dominion over the world not through violence but *iure*, Dante states that it is impossible to obtain the end of law (that is, the common good) without law, and that therefore "whoever intends to achieve the end of law, must proceed with law [*quicunque finem iuris intendit cum iure graditur*]" (2.5.22). The idea that a suspension of law may be necessary for the common good is foreign to the medieval world.

1.10 It is only with the moderns that the state of necessity tends to be included within the juridical order and to appear as a true and proper "state" of the law. The principle according to which necessity defines a unique situation in which the law loses its *vis obligandi* (this is the sense of the adage *necessitas legem non habet*) is reversed, becoming the principle according to which necessity constitutes, so to speak, the ultimate ground and very source of the law. This is true not only for those writers who sought in this way to justify the national interests of one state against another (as in the formula *Not kennt kein Gebot* [necessity knows no law], used by the Prussian Chancellor Bethmann-Hollweg and taken up again in Josef Kohler's book of that title [1915]), but also for those jurists, from Jellinek to Duguit, who see necessity as the foundation of the validity of decrees having force of law issued by the executive in the state of exception.

It is interesting to analyze from this perspective the extreme position of Santi Romano, a jurist who had a considerable influence on European legal thought between the wars. For Romano, not only is necessity not unrelated to the juridical order, but it is the first and originary source of law. He begins by distinguishing between, on the one hand, those who see necessity as a juridical fact or even a subjective right of the state, which is ultimately grounded as such in the legislation in force and in the general principles of law, and, on the other hand, those who think necessity is a mere fact and that therefore the emergency [*eccezionali*] powers founded upon it have no basis in the legislative system. According to Romano, both positions, which agree in their identification of the juridical order [*il diritto*] with the law [*la legge*],* are incorrect, insofar as they disavow the existence of a true and proper source of law beyond legislation.

> The necessity with which we are concerned here must be conceived of as a state of affairs that, at least as a rule and in a complete and practically effective way, cannot be regulated by previously established norms. But if it has no law, it makes law, as another common expression has it; which means that it itself constitutes a true and proper source of law. . . . It can be said that necessity is the first and originary source of all law, such that by comparison the others are to be considered somehow derivative. . . . And it is to necessity that the origin and legitimation of the legal institution par excellence, namely, the state, and its constitutional order in general, must be traced back, when it is established as a de facto process, for example, on the way to revolution. And what occurs in the initial moment of a particular regime can also repeat itself, though in an exceptional way and with

* The two terms here are *diritto* and *legge*, both of which are usually translated in English as "law." While these terms have close correspondences in French (*droit, loi*), Spanish (*derecho, ley*), and German (*Recht, Gesetz*), some of their sense is inevitably lost in the passage to English. Among their meanings, *diritto* carries the sense of law in the abstract, or the entire sphere of law, while *legge* refers to the specific body of rules that a community or state considers binding. Here and in a few other cases where this distinction is critical, I have, following the author's suggestion, rendered *diritto* as "the juridical order" and *legge* as "the law."—Trans.

more attenuated characteristics, even after the regime has formed and regulated its fundamental institutions. (Romano 1909, 362)

As a figure of necessity, the state of exception therefore appears (alongside revolution and the de facto establishment of a constitutional system) as an "illegal" but perfectly "juridical and constitutional" measure that is realized in the production of new norms (or of a new juridical order):

> The formula . . . according to which, in Italian law, the state of siege is a measure that is contrary to the law (let us even say illegal) but is at the same time in conformity with the unwritten positive law, and is for this reason juridical and constitutional, seems to be the most accurate and fitting formula. From both the logical and the historical points of view, necessity's ability to overrule the law derives from its very nature and its originary character. Certainly, the law has by now become the highest and most general manifestation of the juridical norm, but it is an exaggeration to want to extend its dominion beyond its own field. There are norms that cannot or should not be written; there are others that cannot be determined except when the circumstances arise for which they must serve. (Romano 1909, 364)

The gesture of Antigone, which opposed the written law to the *agrapta nomima* [unwritten laws] is here reversed and asserted in defense of the constituted order. But in 1944, by which time a civil war was under way in his country, the elderly jurist (who had already studied the de facto establishment of constitutional orders) returned to consider the question of necessity, this time in relation to revolution. Although revolution is certainly a state of fact that "cannot be regulated in its course by those state powers that it tends to subvert and destroy" and in this sense *is by definition* "antijuridical, even when it is just" (Romano 1983, 222), it can, however, appear this way only

> with respect to the positive law of the state against which it is directed, but that does not mean that, from the very different point of view from which it defines itself, it is not a movement ordered and regulated by its own law. This also means that it is an order that must

> be classified in the category of originary juridical orders, in the now well-known sense given to this expression. In this sense, and within the limits of the sphere we have indicated, we can thus speak of a law of revolution. An examination of how the most important revolutions, including the most recent ones, have unfolded would be of great interest for demonstrating the thesis that we have advanced, which could at first sight seem paradoxical: revolution is violence, but it is juridically organized violence. (Romano 1983, 224)

Thus, in the forms of both the state of exception and revolution, the *status necessitatis* appears as an ambiguous and uncertain zone in which de facto proceedings, which are in themselves extra- or antijuridical, pass over into law, and juridical norms blur with mere fact—that is, a threshold where fact and law seem to become undecidable. If it has been effectively said that in the state of exception fact is converted into law ("Emergency is a state of fact; however, as the brocard fittingly says, *e facto oritur ius* [law arises from fact]" [Arangio-Ruiz 1913, 528]), the opposite is also true, that is, that an inverse movement also acts in the state of exception, by which law is suspended and obliterated in fact. The essential point, in any case, is that a threshold of undecidability is produced at which *factum* and *ius* fade into each other.

Hence the aporias that every attempt to define necessity is unable to resolve. If a measure taken out of necessity is already a juridical norm and not simply fact, why must it be ratified and approved by a law, as Santi Romano (along with the majority of writers) believes it must? If it is already law, why does it not last if it is not approved by the legislative bodies? And if instead it is not law, but simply fact, why do the legal effects of its ratification begin not from the moment it is converted into law, but *ex tunc* [from then]? (Duguit rightly notes that this retroactivity is a fiction and that ratification can produce its effects only from the moment at which it occurs [Duguit 1930, 754].)

But the extreme aporia against which the entire theory of the state of necessity ultimately runs aground concerns the very nature of necessity, which writers continue more or less unconsciously to think of as an objective situation. This naive conception—which presupposes a pure factuality that the conception itself has called into question—is easily

critiqued by those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so.

> The concept of necessity is an entirely subjective one, relative to the aim that one wants to achieve. It may be said that necessity dictates the issuance of a given norm, because otherwise the existing juridical order is threatened with ruin; but there must be agreement on the point that the existing order must be preserved. A revolutionary uprising may proclaim the necessity of a new norm that annuls the existing institutions that are contrary to the new exigencies; but there must be agreement in the belief that the existing order must be disrupted in observance of new exigencies. In both cases . . . the recourse to necessity entails a moral or political (or, in any case, extrajuridical) evaluation, by which the juridical order is judged and is held to be worthy of preservation or strengthening even at the price of its possible violation. For this reason, the principle of necessity is, in every case, always a revolutionary principle. (Balladore-Pallieri 1970, 168)

The attempt to resolve the state of exception into the state of necessity thus runs up against as many and even more serious aporias of the phenomenon that it should have explained. Not only does necessity ultimately come down to a decision, but that on which it decides is, in truth, something undecidable in fact and law.

✖ Schmitt (who refers several times to Santi Romano in his writings) probably knew of Romano's attempt to ground the state of exception in necessity as the originary source of law. His theory of sovereignty as the decision on the exception grants the *Notstand* a properly fundamental rank, one that is certainly comparable to the rank given it by Romano, who made it the originary figure of the juridical order. Furthermore, he shares with Romano the idea that the juridical order [*il diritto*] is not exhausted in the law [*la legge*] (it is not by chance that he cites Romano precisely in the context of his critique of the liberal *Rechtsstaat*); but while the Italian jurist wholly equates the state with law, and therefore denies all juridical relevance of the concept of constituent power, Schmitt sees the state

of exception as precisely the moment in which state and law reveal their irreducible difference (in the state of exception "the state continues to exist, while law recedes" [Schmitt 1922, 13/12]), and thus he can ground the extreme figure of the state of exception—sovereign dictatorship—in the *pouvoir constituant.*

1.11 According to some writers, in the state of necessity "the judge elaborates a positive law of crisis, just as, in normal times, he fills in juridical lacunae" (Mathiot 1956, 424). In this way the problem of the state of exception is put into relation with a particularly interesting problem in legal theory, that of lacunae in the juridical order [*il diritto*]. At least as early as Article 4 of the Napoleonic Code ("The judge who refuses to judge, on the pretence of silence, obscurity or insufficiency of the law, can be prosecuted on the charge of denial of justice"), in the majority of modern legal systems the judge is obligated to pronounce judgment even in the presence of a lacuna in the law [*la legge*]. In analogy with the principle according to which the law [*la legge*] may have lacunae, but the juridical order [*il diritto*] admits none, the state of necessity is thus interpreted as a lacuna in public law, which the executive power is obligated to remedy. In this way, a principle that concerns the judiciary power is extended to the executive power.

But in what does the lacuna in question actually consist? Is there truly something like a lacuna in the strict sense? Here, the lacuna does not concern a deficiency in the text of the legislation that must be completed by the judge; it concerns, rather, a *suspension* of the order that is in force in order to guarantee its existence. Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation. The lacuna is not within the law [*la legge*], but concerns its relation to reality, the very possibility of its application. It is as if the juridical order [*il diritto*] contained an essential fracture between the position of the norm and its application, which, in extreme situations, can be filled only by means of the state of exception, that is, by creating a zone in which application is suspended, but the law [*la legge*], as such, remains in force.