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THE STATE OF EXCEPTION AT THE LEGAL BOUNDARIES**
Re-evaluation of a critical concept

ABSTRACT: This article focuses on the notion of the state of exception, accounting for its legal and political meanings. In discussing Agamben's analysis of the state of exception, the article provides an alternative genesis of the state of exception, with a special focus on the role of liberalism, nuclear war, and the sources of the state of exception that was instituted in the U.S.A. after the terrorist attacks on September 11. The article stresses that the state of exception should not be described as an "anomic state" that suspends the law, but that the relationships are much more complex, wherein the legal and non-legal "organically" intertwine. The article ends with an analysis of the neoliberal relationship to the state of exception.

Keywords: state of exception, illegality and anomie, Agamben, liberalism, nuclear war, neoliberalism

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The notion of the state of exception creates a whole host of dilemmas and causes not only legal but political self-interpretation. In political philosophy, the state of exception is traditionally interpreted as the coming into force of a dictatorship of the political life and the relevant questions (the duration, prominent subjects who determine the path of the state of exception, the declaration, and interpretation).[1] Situations wherein the state of exception had extended throughout time while being grounded in a non-punctual temporal form have previously existed.[2] However, the accumulation of different states of exception in the previous decades causes fierce debates: has democracy reached the breaking point due to the recurrence of the states of exception?[3] Has the state of exception become the "new normal", which would necessitate a change between the standard relationship between rules and exceptions?[4] In that sense, an "ordinary exception" could be discussed, or an "exception that does not match its own term".[5] Some authors generalize the indication of the claim that we are in a "society where the state of exception rules".[6] If the state of exception is the "new normal", is it irreversible? Does that deconstruct the long-established proscribed norms that freedom can be limited, but only with the aim of indirectly affirming it?[7]

This notion is located on the borders of law. Its definition has been made the theme from the legal perspective many times,[8] but there are substantial difficulties in determining it concisely. Heterogeneous examples simply don't allow for a generalization. Some legal practitioners protest against generalizing the state of exception: this would make the standard formula of the

[1] Manin, B. (2009). Le paradigme de l'exception: L'Etat face au nouveau terrorisme. Retrieved on 10/26/2020 from: http://www.laviedesidees.fr/Le-paradigme-de-l-exception.html.

[2] Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.

[3] Schottdorf, T. (2018). Law, democracy and the state of exception: A theory-centred analysis of the democratic legal state in times of exception. *Zeitschrift für Politikwissenschaft*, 28, 423–437.

[4] Förster, A., Lemke M. (2016). Ausnahmezustände: Varianten und ihre Recht-fertigungen am Beispiel der USA. In: *Legitimitätspraxis: Politikwissenschaftliche und soziologische Perspektiven* (hrsg. Matthias Lemke et al.). Wiesbaden: VS Verlag, 13–37.

[5] Troper, M. (2007). L'état d'exception n'a rien d'exceptionnel. In: *L'exception dans tous ses états*, S. Théodorou (dir.). Paris: Editions Parenthèses, 163–175.

[6] PROKLA-Redaktion (2016). Der globale Kapitalismus im Ausnahmezustand. *PROKLA,* 4, 507–542

[7] Atanassov, E., Katznelson, I. State of Exception in the Anglo-American Liberal Tradition. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0153-0Z

[8] For example, Flor, G. (1954). Fragen des Ausnahme- und Staatsnotrechts. *Juristische Rundschau*, 4. Available at: https://doi.org/10.1515/juru.1954.1954.4.125.

suspension of rights in situations of extreme threat fail.[9] Does the state of exception cause an *excess* of politics to the extent that it suppresses the "rule of law", or at least endangers the concept of a "constitutional state"? Does the state of exception demonstrate an "irreducible reality of politics"[10] which overrules law? Or, is it an expression of the potential for *violence* that is inseparably stored in the law itself?[11]

In Serbia, the state of exception has been declared a few times in the previous decades – for example, during the NATO bombing, then after the assassination of Zoran Đinđić, due to a rise in water levels and floods, and because of the pandemic outbreak. Most of these cases raised questions regarding the legality and legitimacy of the state of exception. Who can institute it and who can lift it? What is the purpose, the function of the state of exception? Can it be misused?

We will attempt to answer these questions by selecting certain aspects of the historical dynamic of the state of exception, as well as reflecting on the relevant conceptual dilemmas and the tension of the notion itself. Simultaneously, the organic part of our argument is a *critique* of the approach of modern theorists, whose reflexivity has the relevant legal contours, namely, the orientation of Giorgio Agamben. First, we will describe his thoughts on the matter in short, and then give a critique, to reach a conclusion at the end.

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As it regards the legal-philosophical conceptualization of the state of exception, the emblematic *State of Exception* by Giorgio Agamben (despite various critiques[12]) is still an exigent reference point.[13] A short reminder: Agamben claims that we are dealing with a paradoxical and "indistinct" notion. Measures which cannot be understood within legal boundaries are employed during a state of exception; we are dealing with a "no man's land" between rights and politics, with a gap and a "zone of indifference", about the space of indeterminateness and the inability to make decisions, about a quasi-legal or

[9] Saint-Bonnet, F. (2007). L'état d'exception et la qualification juridique. *Cahiers de la recherche sur les droits fondamentaux* 6, 29–38. Valim, R. (2018). State of exception: the legal form of neoliberalism, *Zeitschrift für Politikwissenschaft*. Available at: https://doi.org/10.1007/s41358-018-0143-2.

[10] Hummel J. (2005). *Carl Schmitt: L'irréductible réalité du politique*. Paris: Éditions Michalon.

[11] Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp, 74.

[12] Neilson, B. (2014). Zones: Beyond the Logic of Exception. *Concentric: Literary and Cultural Studies*, 40 (2), 11–28.

[13] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press.

even illegal suspension of rights. The role of an "anomic" state of exception is different in certain systems: sometimes, the procedure to declare a state of exception is clearly regulated, sometimes the rules are more or less concealed, and sometimes the possibility of a state of exception is totally ignored, as if such a transcendental possibility is fully outside of the existing norms.

According to one maxim, "necessity" in a state of exception does not cause law (*necessitas legem non habet*). Yet, according to another school of thought, necessity is an inexhaustible source of law (*nécessité fait loi*), or at least tightly bound to unwritten norms. For example, it can be noticed that, regarding the institutional infrastructure, parliament gives away some of its authority and sometimes the authority is forcibly taken. Thus, Agamben uses complex formulations to describe this state: it is *both* internal *and* external, so it represents a paradoxical "topological structure" (Agamben also uses the phrase ecstasy-belonging).

Further, a state of exception is also paradoxical in the sense that it perpetuates *in potentia*, i.e. it turns an exception into a rule. Because of this, (the controversial) Carl Schmitt suggests that a state of exception does not represent anarchy (in the pejorative sense) – within it, order definitely exists, although not necessarily a "legal" order.[14] Because during a state of exception established institutions are suspended, certain social actors make decisions directly, by "commanding". Consequently, will becomes independent in relation to law, and, in general, *voluntas* overcomes public *ratio*.

We know that according to Schmitt, the sovereign decides on the state of exception. It should be added that during a state of exception the dominating subjects and the ones being dominated (namely, they become unclassified, unnamed, etc.) become involved. According to Agamben, this classification includes various historical subjects who had lost their legal status: the *homo sacer* in Ancient Rome, the Jewish people in Nazi Germany, the Japanese people in the U.S.A. during World War II, or those who lost their basic rights by the enactment of the *Patriot Act* in the U.S.A. in 2001.

Agamben provides the archaeology and genealogy of the notion of the state of exception. He starts from Ancient Rome, then mentions the state of exception in the context of the English Commonwealth, and gives a detailed description of the different European understandings of the notion (état de siège, Ausnahmezustand, martial law, emergency powers). Further, he points to the fact that a state of exception was commonplace in many countries during World War I and that Hitler could use it only because it was already in place between 1919 and 1933 in the framework of the Weimar Republic.

[14] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 33.

Agamben claims that a state of exception is currently a common tactic of rule, that is, the *signum* of the epoche that has the potential to make the state a constant. Finally, it should be noted: Agamben offers a problematic alternative, namely, an "authentic state of exception" which relativizes or even deactivates the ruling law – relying on Franz Kafka and Walter Benjamin, he wishes for a projection with an authentic symbiosis of life and law. However, we cannot reflect on that alternative here.

We are circumventing the manifold difficulties of Agamben's legal-political philosophy (although they reflect on his theory on the state of exception[15]), and focus only on the specific problems.

First, Agamben uses the theory of "totalitarianism" uncritically. His procedure is problematic for many reasons: he equates Nazism/fascism with bolshevism/Stalinism, and that in accordance with the Cold War framework. Besides that, his conceptual framework disallows an adequate understanding of the Nazi system. Agamben "totalizes" Nazi Germany and understands it as a monolithic metaphysical field, even though it was much more complex. For example, the euthanasia programme was a crime within the established legal system of the Third Reich. Besides, concentration camps existed in parallel to the legal system – in other words, the *Rechtstaat* never truly ceased to exist.

The dilemma of "legal stability *versus* political expediency"[16] was extremely important, thus there was no impossibility of distinguishing between legal and extra-legal moments, i.e. norms and exceptions, as Agamben suggests. It is relevant to note that sometimes the Nazi state attempted to place the legal system in "brackets", but at the same time it was in symbiosis with the legal infrastructure. We can still learn from the theory of the dual Nazi state by social democrat lawyer Ernst Fraenkel which stresses that even the Gestapo was in harmony with the laws (SS member Werner Best typically stated that conflict with legality was "out of the question"). Fraenkel writes: "A Dual State may be said to exist whenever there is organizational unification of leadership, regardless of whether there is any internal differentiation in the substantive law."[17] Similar questions emerge regarding fascist Italy.[18] What

[15] For example, see: Losoncz, M. (2016). Macht und indifferente (Im)Potenz in Agambens Philosophie. In Radinković Ž. et alii (ur.) *Politiken des Lebens: Technik, Moral und Recht als institutionelle Gestalten der menschlichen Lebensform.* Belgrade: Institute for philosophy and social theory, 55–79. Lemke, Th. (2011). *Biopolitics: An Advanced Introduction*. New York –London: New York University Press, 53–65. Toscano, A. (2011). Divine management: Critical remarks on Giorgio Agamben's the kingdom and the glory. *Angelaki*, 16 (3): 125–136.

[16] Takayoshi, I. (2011). Can philosophy explain Nazi violence? Giorgio Agamben and the problem of the 'historico-philosophical' method. *Journal of Genocide Research,* 13 (1–2): 56.

[17] Fraenkel, E. (2017). *The Dual State*. Oxford: Oxford University Press, 154.

[18] Sørenson, G. (2001). The Dual State and Fascism. *Totalitarian Movements and Political Religions*, 2 (3): 28–29.

Eugen Kogon called the SS state and what Fraenkel called the dual state does *not* suspend rights in their totality. On the contrary, a "normal-normative" and a prerogative state mostly function *in parallel.* It is symptomatic that Fraenkel warns the readers to be very careful with the term "totalitarianism".[19]

On the one hand, Agamben claims that in a state of exception there is a "threshold of indeterminacy between democracy and absolutism."[20] *On the other hand*, he claims that he wanted to bring to light the "fiction that governs this *arcanum imperii* (secret of power) par excellence of our time."[21] However, a state of exception has no *a priori* relation to democracy in principle. In some situations, the state of exception truly emerges based on the "will of the people" – *yet, the entire mechanism exactly serves to introduce mechanisms which break free of any democratic control, i.e. de-democratization.* Undoubtedly, situations exist wherein the state of exception is a useful temporary means; for example, when gaps in law give no solution to existing challenges. Agamben is partially correct when he suggests that the democratic-revolutionary tradition had also contributed to the state of exception[22] (Benjamin's classic question is: how is an *authentic* state of exception possible, where life is not subject to legal mechanisms, nor extrainstitutional-extrajudicial processes.) But, a state of exception is also possible in systems where there is *no* rule of the people, e.g. in *non*-democratic liberal frameworks (we should remember that many classical liberal thinkers were against democracy).

Agamben's mentions of absolutism and *arcanum imperii* are even less correct. Absolutism is a specific historical form that has no structural similarity to the modern situation. Absolute power rested in the strata of society where the public consciousness as a "communicative rationality" did not exist. *Arcanum imperii* is a specific type of secret which is a characteristic aspect of an absolutistic secret.[23] Today, state secrets and secret services are regulated by laws so some degree of democratic control is expected, while in the absolutism paradigm a secret rests on the pure and uncontrolled self-will of the ruler and their state apparatuses. It is anachronistic to suggest that *arcanum imperii* still exists – in the modern era, we are dealing with a different para-

[19] In this passage, insights from Mark Losoncz's text, which is still in the form of a manuscript, were used: *Secrecy, Power and the Figure of the Double*.

[20] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 3.

[21] *Ibid*., 86.

[22] See the definition of the state of exception in Munich in 1919 from the position of the revolutionaries, Blanck, Th. (2018). A revolutionary state of exception. *Zeitschrift f*ür *Politikwissenschaft*, 28, 453–467.

[23] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch, 105–115.

digm, which Eva Horn rightly names the *secretum* paradigm.[24] *Absolute rule and democracy are not commensurable, thus there is no possible "threshold of indeterminacy" between them*.

But Agamben becomes even more confusing when he attempts to present a comprehensive theory on the *genesis* of the state of exception: "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."[25] In another place, Agamben mentions that "internal sedition and disorder"[26] are among the key sources of the modern conception of the state of exception, thus that it is tightly linked with the idea of the right to resist (*ius resistendi*). However, Agamben himself mentions that, for example, in 1920, a state of exception was declared with the aim of stifling strikes, not to empower them.[27] Agamben could respond that this does not mean that the source is not found in the "democratic-revolutionary tradition", *but in actuality, he cannot encompass the genesis of the modern state of exception.*

In fact, the modern term of state of exception stems from *liberalism*.[28] As Mark Neocleous demonstrates, the idea of the state of exception can be found in John Locke, in the invocation of prerogatives: "this power presupposes discrete action for the public good, without legal regulations, or even against them", sometimes even "against the letter of the law."[29] This *source form* of the state of exception is in no terms "democratic"; quite the opposite, it necessitates arbitrary power which people leave in the hands of those who rule. Locke's theory is not limited to international relationships, what's more, he suggests that internal and external dealings cannot be separated. Pointing to the manner in which Locke refers to "necessity", Neocleous links the concept of the state of exception with the idea of the reason of state which overcomes legal limitations – he claims that Locke's *prerogative state* is a liberal variation of the reason of state (thus Locke is closer to Machiavelli and Hobbes than it might at first appear). Locke does not provide anything substantial regarding limiting mechanisms: he simply suggests that people have "no recourse... but to appeal to Heaven"[30].

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[24] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch*,* 102, 108.

[25] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 5.

[26] *Ibid*., 5.

[27] *Ibid*., 19.

[28] A similar mistake is made by Camus, G. (1966) L'état de nécessité en démocratie. *Revue internationale de droit compare,* 18 (4), 957–959.

[29] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 15.

[30] *Ibid*., 20.

Neocleous claims that similar arguments can be found with many other thinkers; however, for us, it was important that similar strategies show up with modern authors. For example, Michael Walzer claims that a *supreme emergency* allows for the murder of innocents, as well as a suspension of basic freedoms, while Jeremy Waldron believes that arrests and detainments without an investigatory procedure can be justified. Referring to them, Neocleous concludes that within liberalism *security* takes precedence over *liberty*, and the state of exception is "the central category for building the liberal order".[31] He demonstrates that the state of exception is not so closely related to the "democratic-revolutionary tradition", but to the history of wars, that is, with repression over colonial peoples and the workers' movement.[32] For Neocleous, it is important that the state of exception has a clear function within the framework of capitalism. Not only has employing the state of exception served to break up strikes during the 20th century, but the invocation of an *emergency* was used to start the persecution of communists as a supreme threat to the established order. Neocleous believes that a capitalist system will always acquiesce to *irrational* interventions by the government if they serve to maintain the *rationality* of capitalist mechanisms[33]. According to his narrative, "Hitler was not revolutionary, but only adapted the ideas which were central to forming the bourgeois state"[34], thus the state of exception served a "preventive contra-revolution"; namely, the fight against the communist and social-democratic movements (the first prisoners of the concentration camps truly were members of the workers' movement).

Carl Schmitt makes a similar mistake with his claim that, from his Nazi perspective, liberalism disregards the state of exception and favours a weak state – *on the contrary, Nazism only perfected what liberalism prepared*. The state of exception declared during the introduction of Roosevelt's welfare state is interpreted in a similar way – during a time of intense class conflict (when there was around 2000 separate work stoppages that mobilized 1.5 million workers), Roosevelt used the state of exception with the aim of preventing the communist revolution. *In other words, the breaking of the rules of the established order served to stabilize the capitalist order.*

When this perspective is taken into account, it is not surprising that in 1997, around 100 states declared states of exception. Of course, the state of exception does not need to be tied to wars and the consolidation of feeble

[31] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 8.

[32] See above, Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3).

[33] Neocleous, M. (2008). *Op. cit.*, 37.

[34] *Ibid*., 55.

capitalism. On the contrary, there is a wide spectrum of "content" of the state of exception, from football hooliganism to a war on drugs, from ecological issues to child abuse.

Agamben quotes Rossiter who claims that "in the Atomic Age… the use of constitutional emergency powers may well become the rule and not the exception."[35] It is problematic that Agamben does not explain how a (potential) state of exception is the cause of a nuclear catastrophe. Then, he does not even attempt to explain what kind of state of exception can originate because of a nuclear war. Finally, he sees no substantial link between a state of exception that is related to a nuclear catastrophe and the one that was declared in the U.S.A. in 2001 – his analysis of the latter form is up in the air. *Thus, Agamben lacks an understanding of the causal relation, and consequently the contextualization of the later development of the concept of the state of exception*.

Analysing the consequences of the bombing of Hiroshima and Nagasaki, we have already discussed the key consequences of a nuclear war, including the issue of the state of exception.[36] Relying on the writings of Daniel Ellsberg[37], we have stressed that all U.S. presidents from Truman to Trump used nuclear war as a means of coercion against other nations, i.e. it was not just a bluff in all situations, but a real danger. Further, we have pointed out the fact that scientist and the military elites expected that nuclear war with the Sino-Soviet bloc would cause around 600 million casualties ("a hundred Holocausts"), but even those calculations were incorrect as they did not factor radioactive rainout, nuclear winter, or global famine – in effect, nuclear war could have resulted in the extinction of humanity and all mammals – omnicide.

In this context, the issue of the state of exception emerges in full force: Daniel Ellsberg, the creator of the so-called Ellsberg paradox, warns that there is substantial risk of a nuclear attack happening. The position of the U.S. elites is that the U.S. must initiate the first, »preventive« strike – such a situation can occur if, for example, the intentions of the opponent are wrongly interpreted (as had happened in 1979, 1980, and 1983; almost with tragic consequences). What concerns Ellsberg even more is that the decision on the strike is not the privilege of the president, but even lower-ranked persons in the state apparatus can make the decision in certain circumstances. It is no accident that Americans call these plans »contingency plans« ... "[A]ccidental detonations, potential disasters, and other sources should be added. And we have not yet even

[35] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 9.

[36] Losoncz, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?* Retrieved on 28/10/2020, from: https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefiranje-neukrotive-dece/.

[37] Ellsberg, D. (2017). *The Doomsday Machine: Confessions of a Nuclear War Planner*. New York et alii: Bloombury.

mention the doomsday machine (from the title of Ellsberg's book), which can be activated automatically, without human decisions"[38].

All characteristics of the state of exception can found in the presented argumentation. *First*, using the necessity (if necessary) of the attack as the reason is the key moment, as it serves to legitimize nuclear war. *Second*, and in this case, the fact that only the privileged sovereign, the representative of sovereignty, decides on an attack during a state of exception, that is, about the state of exception itself, plays a remarkable role. Although, the issue is even more complex, as in practice lower-ranked subjects of the ruling hierarchy ("micro-sovereigns") can eventually make the relevant decision (e.g. lacking orders, a soldier in an aircraft with nuclear armament can interpret a given fact as motivation for attack). *Third,* uncertainty, contingencies, alert conditions, the supposed necessity for urgency and swiftness play a decisive role. Ellsberg introduces the concept/notion of a*mbiguity* to describe the extreme uncertainty of all decisions regarding a nuclear attack – previous experience is lacking, the circumstances are often unclear, not all of the implications are known ahead of time, etc. The sovereign is often akin to Benjamin's impotent baroque sovereign who does not possess the ability or the right circumstances to make a correct decision.[39] In the majority of cases, the conditions for rational decision-making are missing and the space to manoeuvre is limited – the use of hyper-rationalized technology turns into irrationality. *Fourth*, nuclear planning is done by the "deep state", of which the surface state knows little. We are dealing with a *top secret* (or *for the president's eyes only*); furthermore, sometimes even the president is not informed (e.g. *eyes only for Paul Nitze)*. As is the case with the state of exception generally speaking, neither the public knows the details (the motivations and consequences of decisions, etc.), nor is Congress informed. The subject are state secrets which are hidden and taboo even for special executive, legislative, and judicial bodies. Thus, it is not accidental that the issue of unauthorized actions is of key importance – it can occur that an operation is conducted without the knowledge of military and political leaders, or despite their opposing directives (*in violation of the strict letter of their orders*), so the actions are executed, but despite the basic legal and moral expectations.

Of course, secrets serve an ambivalent role: if the existence and the quantity/quality of a nuclear moment are unknown to the enemy, then the given

[38] Lošonc, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?. Retrieved on 28. 10. 2020, from: https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefiranje-neukrotive-dece/*

[39] See: Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 55.

empire cannot coerce their actions. On the other hand, if the details of the nuclear armament are public, then that can lead to a lack of strategic options. For nations that are the subjects of attacks after nuclear aggression, their existence will be brought into question. In such a situation, it can happen that the mechanisms of the state of exception need to be used, especially if the government becomes "acephalous" – so, if after the attack it loses its military or political leaders. Ellsberg himself proposes different tenets regarding nuclear attacks: for example, much stricter control of the decision-making process and a much more cautious approach regarding the source of the contingency.

In any case, this example demonstrates that the state of exception should not only be interpreted as a phenomenon that "suspends rights" in their entirety. Nor is the state of exception a totally "anomic state". *In fact, the relationship between the state of exception and the legal order is complex*: sometimes the state of exception ("the deep state") acts as a parasite on the legal mechanisms ("the surface state"), sometimes those exact legal mechanisms "legalize illegality", and, it not contested, sometimes these processes are diametrically opposed. Careful consideration of the phenomenon of nuclear armament shows that we are not dealing with an abstract problem of the era after Hiroshima and Nagasaki, but that the question of the state of exception is firmly concrete from a legal perspective.

However, the legal-political argumentation regarding nuclear war has expanded over time. Quoting Peter Dale Scott: "but the planning eventually necessitated the suspension of the constitution, not only »after a nuclear war«, but for any »national security emergency«. This was defined in Executive Order 12656 of 1988 as »any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States«. It is clear that 9/11 fit the definition."[40] According to Scott's thesis, a mechanism called the *Continuity of Government* (*COG*) was planned since the 1950s. Scott identifies certain groups (*Federal Emergency Management Agency [FEMA]*, *Continuity of Government Interagency Group*, etc.) and eras (among others, the Regan administration) when this "secret contingency plan" was upgraded and, what is more, politicized. For example, the cooperation between FEMA and lieutenant colonel Oliver North (who was a member of the National Security Council) led to the concretization of plans which presupposed the suspension of the constitution in case of an eventual war, the dangerous actions of eco-activists, or activists who help refugees. The plans put the focus on surveillance and detainment of dissidents, as well as those who participate in the insur-

[40] Scott, P. D. (2007). *The Road to 9/11: Wealth, Empire and the Future of America*. Berkeley–London–Los Angeles: University of California Press, 228.

gency (*counterinsurgency plan*), within plan "Rex 84" and operation "Garden Plot", among others. The plans were so secretive, that during the hearing of Oliver North held for the Iran-Contra affair, even Rep. Jack Brooks concluded that it would not be worthwhile to go into details regarding the planned suspension of the constitution. Scott points out that the planning was primarily done outside of the institutional framework, fully outside of the purview of the government. These were "private" parallel structures which included, among others, president and CEO of G.D. Searle & Company, Donald Rumsfeld, and congressmen from Wyoming, Dick Cheney – people who also had key roles in declaring the state of exception after September 11, 2001. Cheney and FEMA were again united in 2001 – this is how the highly classified documents regarding the "continuity of operational plans" were made. Little is known about the circumstances in which the new plans were implemented and the exact content of these documents is unknown. As Benjamin and Agamben suggest that in a state of exception there is *tension* between the "normal" and "exceptional", so Scott claims that the characteristics of the state of exception need to be understood in a specific way. However, his approach is different than the approaches of the aforementioned theoreticians: he believes that "continuity of government" should be renamed to "change of government", given that FEMA would take on the authority of the government (if needed, even a new president would be selected). All of this concerns the "command and control" of unauthorized persons, a "government on hold", which would exceed the normal division of government. Scott claims that everything that was planned during the 1980s was instituted in 2001: warrantless detention, warrantless eavesdropping, and the uncontrolled militarization of the United States.[41] He stresses that the "continuity of government" is still active – with his allies, he is unsuccessfully attempting to convince the members of Congress to end the state of exception.

In summary, Agamben incorrectly determines the genealogy of the modern mechanisms of the state of exception. For him, events after September 11 appear as a *deus ex machina*, with no causal explanation for the sources of the plans presented – the continuity between a hypothetical state of exception due to nuclear war and the state of exception that was declared after the terrorist attacks is especially unclear.

And if the starting point is that the perception of the crisis[42] is constitutive for comprehending the state of exception, we can state: *a non-punctual*

[41] Scott, P. D. (2010). *"Continuity of Government" Planning: War, Terror and the Supplanting of the U.S. Constitution*. Retrieved on 29. 10. 2020, from: https://apjjf.org/-Peter-Dale-Scott/3362/article.html).

[42] Goupy, M. (2017). L'état d'exception, une catégorie d'analyse utile?: Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault. *Revue interdisciplinaire d›études juridiques*, 79 (2), 97–111.

state of exception suits non-punctual crisis processes. Namely, the crisis plane of the modern era necessitates that, unlike in previous eras, modern crises are not "finalized", do not get "solved", but continue through time. A typical example is the 2007 crisis that still causes regressive tendencies. The forceful austerity measures instituted in the European Union in the last decade are a representative example; they were implemented in relation to the emerging state of exception, causing a multitude of, as well as opposite, interpretations which focused on the problem of the state of exception.[43] Many discussions regarding the competency of the un-democratically implemented measures as an economic paradigm revolved around the state of exception, which served as the legitimization of the matrices for arranging the European economic policy. Accordingly, the state of exception has reached the European debate stage and, as can be observed, the perception of a deep crisis induced the expansion of the debates.[44] Additionally, the crisis specificity of the epoch is found in the condensation of the different modalities of crisis (ecological, financial, etc.) which simultaneously manifest their effects. The shape of the different and condensed crises can no longer be the classical treatment of crisis that temporally limits the crisis processes which do not end. The postulate of a crisis that is temporally and spatially bordered does not meet the new pattern: now, crises emerge in accordance with the logic of cumulative causality, i.e. in accordance with the logic of the self-strengthening of the crises processes with uncertain outcomes.

The change in meaning of crisis is unfolding in the context of the changed relationship between the economic sphere and law.[45] Many discussions on the phenomena of the "economization of law", the transformed "fix", and the "law-economy complex"[46] exist: in short, the legal reasoning is adapted to "neoliberal" rationalization, or *mimetically* heeds/maintains the authoritative and hegemonic logic of economic "incentives".[47] It should be noted that these tendencies modify the notion of the state of exception. Namely, that is the only way to understand such indications regarding law when formulated the following

[43] Scharpf, F. W. (2017). De-constitutionalisation and majority rule: A democratic vision for Europe, *European Law Journal*, 23, 315–334.

[44] Lošonc, A. (2018). Evropska Unija i tehnokratsko starateljstvo. *Theoria*, 61 (2), 37.

[45] Backhaus, J. G. (2017). Jurists' economics versus economic analysis of law: A critique of professor Posner's "economic" approach to law by reference to a case concerning damages for loss of earning capacity. *European Journal of Law and Economics*, DOI 10.1007/s10657–017–9559–2. Kuhner, T. (2011). Citizens United as neoliberal Jurisprudence: The Resurgence of economic Theory. *Virginia Journal of Social Policy and the Law,* 18:3, 398–401.

[46] Lošonc, A., Bunčić S., Ivanišević A. (2019). Ordoliberal Articulation of Law-Economy Complex. *Pravni zapisi*, 2, 358–381.

[47] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal.* London: Blackwell, 95.

way: "the state of exception is the legal form of neoliberalism"[48], further, in neoliberalism "the exception becomes the rule"[49] or the indication that *an economy determined by crisis becomes the foremost measure for the existence of the state of exception.*[50]

Law that is regularly described as "relatively autonomous" (Buckle) in regards to the economic domain becomes endangered to be repeatedly subsumed to the triumphant neoliberal economic matrices. Only, this does not narrow the range of the "rule of law", as social actors do *not* stop invoking "the law". However, neoliberal conquests, appropriations, the imposition of different levies (and anything else that belongs to the neoliberal arsenal) create a paradoxical situation that certain legal experts describe as "the rule of law but without legality".[51] The state of exception that is continually perpetuated comes close to this situation.

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We have critically examined the analysis of the Italian legal and political philosopher Giorgio Agamben regarding his determination of the state of exception. We have stated the reasons for our critique and attempted to demonstrate via selected examples (nuclear war, Nazism, the *Patriot Act* in the U.S.A.), as well as by the example of the economization of the state of exception in crisis processes, that the dichotomous separation of the state of exception and the "normal" state, and the characterization of the state of exception according to the suspensions of rights, does not get to the essence (even if one insists on the moments of "paradox"). In that sense, "anomie" is not an explanation that can articulate the state of exception, which is a proportionally more complex notion than Agamben's projections. It is more worthwhile, regarding the phenomenology of the state of exception, to take into account the amalgam of legal and non-legal moments. Some empirical research conclusively proves this.[52]

[48] Valim, R. (2018). State of exception: The legal form of neoliberalism, *Zeitschrift für Politikwissenschaft*. Available at: https://doi.org/10.1007/s41358-018-0143-2.

[49] Biebricher, Th. (2014). Sovereignty, Norms, and Exception in Neoliberalism. *Qui Parle*, 23, 1, 77–107.

[50] Best, J. (2007). Why the Economy is Often the Exception to Politics as Usual, *Theory, Culture & Society,* 24 (4), 87–109.

[51] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal.* London: Blackwell, 89.

[52] Jakab, A. (2005). German constitutional law and doctrine on state of exception: Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, 07 (5), 453–477.

The state of exception actually accentuates the relationship between the legal and non-legal (*Nichtrectlichen*[53]) and raises questions regarding the normative plane of law, as well as the "institutionalization of law" in general. More precisely, there is no dichotomy between law and non-law: law *ex ante* projects "legal states" and "legal persons" into the domain of non-law. Law does not confront "chaos", an undefined state; law, anticipating and in advance defining non-law, in advance implementing its "form" into the domain of non-law, comprehends non-law from its own perspective. It is a "self-reflection"[54], *self-differentiation* of law, i.e. by postulating non-law, law realizes "self-relating", that is: "*modern law converts non-law into its own opportunity*."[55] So a state of exception is a situation wherein there is no merging of law and non-law, as much as there is "self-relating law", especially in crisis processes. And if it is true that the state of exception is the "legal form" of triumphant neoliberalism, then the state of exception is the perpetuating of "self-relating" law.

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