Emergency, Exception, Legality: On the Politics of Jurisprudence

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The COVID-19 pandemic together with the recent unlawful use of force by the Russian Federation against Ukraine, have brought to the forefront, as matter of academic concern and public scrutiny the concept of emergency, and to a greater or lesser extent that of the state of exception. These recent developments not only bear witness to which extent the constitutional and international law landscapes have shifted and thus challenging traditional paradigms of understanding legality, but they have also signalled the limits of our legal systems when dealing with situations of fundamental disruption. Through its relatively long timeline, global outreach and unprecedent levels of disruption in the post-war context, the COVID-19 pandemic has brought with a distinct clarity the importance of emergency regulations in our societies alongside the difficulties raised by dealing with new forms of sanitary threat in a globalised world.[1] For its part, the military threat raised by the most serious conflict in Europe in decades, revives the dark legal history of the interwar years, by placing once again emergency and exceptions at the centre of our polities. These dramatic developments have made us aware of the existing legal mechanisms for tackling crisis as well of the legal and constitutional arsenal that contemporary legal systems can deploy in such situations. Last, but not least, the pandemic has unearthed the limits that these dispositive face within the legal horizon of our polities, the paradoxes they are able to generate, and the uncertainty and vagueness that they condone.

As a final formal rational legal guideline for mitigating crisis, emergency appears to be a notoriously elusive concept for both constitutional law and legal theory, with far-reaching effects over the conceptual coherence and consistency along various fields from international human rights law to public law, political theory and political philosophy. Elucidating the scope and the meaning of the emergency seems not only an urgent task, in the light of the ongoing crisis generated by the pandemic and the military aggression, but also considering the overall devaluation of legality that is affecting our legal systems.[2]

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[1] J.M.S. de la Garza, *COVID-19 and Constitutional Law*, México 2020; A. Lebret, *COVID-19 pandemic and derogation to human rights*, "Journal of Law and the Biosciences" 7/2020, pp. 1–15.

[2] C. Cercel, *The Destruction of Legal Reason: Lessons from the Past*, "Acta Universitatis Lodziensis. Folia Iuridica" 89/2019, pp. 15–30; idem, *Pandemic, Exception and the Law: Notes on the Shattered Nomos of Europe*, "Acta Universitatis Lodziensis. Folia Iuridica" 96/2021, pp. 83–97.

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In what follows my aim is to contribute to the theory of emergency from a legal theoretical perspective, involving insights from legal history, intellectual history and comparative law. The argument that I advance here is a call for conceptual clarity grounded in historical analysis. In this sense, I intend to respond to the conflation between *emergency* and *exception*, advancing the claim that these concepts, even if connected, connote a different semantic sphere and rely on different intellectual genealogies. They do so insofar they are built upon and denote a different understanding of legality. In other words, the distinction between *emergency* and *exception* is logical, epistemic, and, as I shall try to substantiate, a political one, insofar as the different understanding of legality which underpins them also evoke different political theories of law. Exploring their connection and their possible conflation, analysing them with a view to explain their use, appears to be a critical task. Such an undertaking is essential for lawyers acting within the fields of constitutional law, human rights law, but also for legal philosophers, political theorists and political scientists, insofar the theory of emergency is fundamental to understanding current challenges raised by social, political and economic tensions that travers our societies and affect the operation of the law.

In a first part I shall present briefly the essential theoretical and historical features underlying the concept of emergency in constitutional law and human rights law. Second, I shall move towards a brief introduction into the concept of exception in its relation to emergency. Finally, I shall reflect on the jurisprudential and philosophical positions supporting the parallel understandings of emergency and exception, while also inquiring into the subjacent political commitments that can be delineated within their intellectual genealogies. In doing so, I shall argue in favour of keeping both emergency and exception in a mutual tension with a view to turning them into a critical device of analysing the operation of the law. Thematically I shall draw in a first part on constitutional theory of emergency, while trying to ground it later within a Kelsenian jurisprudential stand. Moreover, I shall also rely on Giorgio Agamben and the literature analysing the exception, while attempting to offer a genealogical analysis of the work of Carl Schmitt.

1. The Core of Emergency

Defining emergency formally, as a constitutional theoretical concept transcending national constitutional provisions and constitutional experiences, is a daunting – indeed – almost impossible task. This difficulty goes to the very heart of the problem, as emergency is one of those legal concepts that is by definition – fact intensive, opening the formal structure of the law to the multifaceted aspects of reality. In other words, emergency evokes "context-generated acts – acts performed not under the guidance of rules, but under the force of circumstances"[3]. With emergency, lawyers of all creeds, even those who follow

[3] A. Harel, *Why Law Matters*, Oxford 2014, p. 107.

the path of formalism as a jurisprudential position, encounter the "heavy materiality"[4] of social, economic and political dynamics that affect our polities. Because of this, attempting to understand emergency through the proposition of an all-encompassing theoretical concept is a way of doing violence[5] both to a polymorphous legal reality of various constitutional orders, identities and legal cultures, and to a history of legal practices that have marked the very development of emergency.

While noting these difficulties, it is important to acknowledge as a preliminary caveat the fact that the synoptic analysis I am sketching here exercises a high level of hermeneutic pressure,[6] devised precisely to "bracket" the multiform and resistant materiality of legal histories and legal cultures. However, this exercise is perhaps not futile, insofar as a bird-eye view of *emergency* in contemporary constitutional law could be instructive at least in order to enable us to tackle the *margins*, that is the intellectual and conceptual frontiers of this concept in order to further ground it in its proper legal theoretical and historical framework.

To begin with, as with any difficult legal concept, one would benefit from the insights of analytic jurisprudence, which could offer a somewhat safe ground by distinguishing between the *core* and *the penumbra* of the concept.[7] Following this rather artificial distinction on the path opened by British legal theorist H.L.A. Hart, we can consider emergency as a constitutional device apt to ensure the consistency and efficacy of the constitutional systems in situations of crisis.[8]

Indeed, the Paris minimum standards drawn by the International Law Association of 1985 contemplate emergency as a legal mechanism that is *declared* when states face a situation of "public emergency which threatens the life of a nation".[9] For its part, Article 15 of the European Convention of Human Rights contemplates the derogation from the provisions of the Conventions within situations of emergency. These documents, one as juristic writing, the other as binding human rights law, point towards the emergency as a legal, constitutional or quasi-legal device that implies a derogation from regular standards of conduct that reveals an exceptional nature within the operation of the law. As useful as they are in expressing on one side a *communis opinio doctorum*, and on the

[4] M. Foucault, *L'ordre du discours*, Paris 1971, p. 10.

[5] P. Legrand, *The Same and the Different*, [in:] P. Legrand, R. Munday, *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, pp. 278–279.

[6] P. Legrand, *Comparative Legal Studies and the Matter of Authenticity*, "Journal of Comparative Law" 1/2006, p. 371.

[7] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, "Harvard Law Review" 71/1958, p. 607.

[8] C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton 1949, p. 5; O. Gross, F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge 2006, pp. 2–3; A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford 2018, pp. 2–4.

[9] R.B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, "American Journal of International Law" 79/1985, p. 1073.

other hand, the positive law from a human rights perspective, they do not exhaust the meanings of emergency and present themselves as not being particularly useful when tackling the internal point of view of constitutional law and theory.

On this last point, an investigation on the literature examining the concept would be more useful. Almost all literature examining emergency points towards its roots in the *practice* of dictatorship in Roman Republic, almost re-iterating the fact that when faced with a threat, a dictatorship lasting six months was instituted in order to respond to the peril of facing the Republic.[10] While limited in time, these dictatorial powers were bound only in relation to the nature of the danger, yet otherwise they took the form of *full powers*: "once the imperium conferred upon him, the dictator became as absolute a ruler as could well be imagined"[11], emphasising thus the unlimited character of dictatorial powers in ancient times.

Similarly, drawing on the Roman example, which often acts in the background of these analyses, when studying emergency, legal theorists and constitutional lawyers tend to emphasise a number of elements, that would represent the core features of emergency. First, we are told, emergency operates as a *permission*[12] to deviate from the established rules that is *already* inscribed within the legal system or tacitly allowed by the law: "the entire purpose of declaring a state of emergency is to enable powers not ordinarily permissible under the constraints of the constitution".[13] In essence, this derogation is necessary for the survival of the legal system as a whole. At a constitutional level such a derogation would normally take the form of a temporary suspension of constitutional protections, including the full exercise of constitutional rights, the partial or the total suspension of constitutional process, such as a temporary suspension or deviation from the principle of the separation of powers.[14] Overall, emergency seems to be at odds with the principle of the rule of law, insofar as it threatens legal certainty and legal consistency, affecting "the principle of legality which requires that laws be enunciated clearly so as to ensure certainty as to a law's scope and application".[15] However, there is already a conceptual inner limitation that operates at this level: first emergency is to be strongly if not strictly connected to the context that has generated the legal or constitutional measures, these measures being as such limited in scope.[16] Second, there is also a temporal limit, as the derogation is to be

[10] T. Reinach, *De l'état de siège et des institutions du salut public*, Paris 1885, p. 16; C. Rossiter, *Constitutional Dictatorship*, op. cit., p. 23; O. Gross, F. Ni Aolain, op. cit., pp. 17–24; N.C. Lazar, *Making Emergencies Safe for Democracy: The Roman Dictatorship and the Rule of Law in the Study of Crisis Government*, "Constellations" 13/2006, pp. 506–521.

[11] C. Rossiter, op. cit., p. 23.

[12] H. Kelsen, *Théorie générale des normes*, Paris 1996, pp. 128–129.

[13] A. Greene, op. cit., p. 19

[14] B. Ackermann, *The Emergency Constitution*, "Yale Law Journal" 113/2004, p. 1068.

[15] A. Greene, op. cit., p. 21.

[16] J. Ferejohn, P. Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, "International Journal of Constitutional Law" 2/2004, p. 228.

limited in and to the time of the crisis context that needs to be addressed.[17] At the end of emergency, we are told, "rights are to be restored, legal processes resumed".[18]

The literature on emergency almost unanimously agrees on the imbalance that modern emergencies create even within stable constitutional systems by supporting an increased, and often unchecked, power of the executives:

> in times of crisis a democratic, constitutional government, must be temporarily altered *to whatever degree* is necessary to overcome the peril and restore normal conditions.[19]

2. Emergency's Penumbras

However, if this is what tends to pertain to the *core* of the concept of emergency, there are already some contentious zones about its definition. First, if emergency is to be strictly connected to constitutional contexts, then it calls into question what the theory defines as the model of accommodation,[20] i.e. the particular provisions or institutional practices through which emergency is limited or integrated within the system. On one hand, we can take stock of the classical distinctions between constitutional systems that regulate emergency themselves through constitutional provisions,[21] and systems that simply allow emergency based on a *doctrine of necessity.*[22] Traditionally, the epitome of such models of accommodation would be the French constitution, with specific provisions building on a long-standing history of constraining emergency as a matter of constitutional law[23] and the Belgian one,[24] effectively prohibiting emergency as a derogation through the operation of Article 187 of the constitution, yet integrating it as a matter of necessity.[25] In between the two antipodes, a lies a whole range of forms of accommodation, including, integration through legislative means or delegated legislation, or integration through interpretation,[26] such in the case of the United Kingdom and the United States.

Such a taxonomy also opens the question towards the definition of the constitution as a matter of form or substance. The classical distinction between written and unwritten

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[17] Ibid., p. 217.
[18] Ibid., p. 210.
[19] C. Rossiter, op. cit., p. 5.
[20] O. Gross, F. Ni Aolain, op. cit., p. 37.
[21] Ibid., pp. 37–45.
[22] Ibid., p. 49; C. Rossiter, op. cit., p. 115.
[23] Ibid., p. 26.
[24] Ibid., p. 37.
[25] C. Huberlant, État de siège et légalité d'exception en Belgique, [in:] J. Verhaegen, *Licéité en droit positif et références légales aux valeurs,* Bruxelles 1982, pp. 427–429.
[26] O. Gross, F. Ni Aolain, op. cit., pp. 50–54.

constitution, or between a formal one and an "invisible"[27] one is not particularly helpful, with many grey areas lying between the two and exposing the emergency as both a constitutional concept and a constitutional praxis, opening a zone of indistinction that calls for further exploration. For instance, the US emergency takes place within the confines of the *written* constitution as interpreted by the US Supreme Court, yet as such it traces back to a long and rather confusing series of decisions that gloss over constitutional and international law concepts. *Ex parte Millligan,*[28] one of the leading cases grounding emergency within the US constitutional framework deals explicitly with procedural matters related to trial by military tribunals, and drawing a doctrine of emergency out of its analysis, is a matter of highly theoretical interpretation that requires not only a great deal of constitutional acumen, but also a high degree of uncertainty.[29]

Similarly, evolved within the context of an unwritten, "invisible" constitution, UK emergency law is based on a patchwork of leading cases[30] and doctrinal development, much of it owed to the work of Dicey.[31] Such hazy concepts of emergency point towards the existence of a constitutional-legal framework of emergency that is difficult to locate distinctly within the legal system, and takes the form of either prerogative power, special legislation derogating from areas of constitutional principles, or from HRA provisions, or of legislation that is passed under special procedural conditions, thus circumventing parliamentary scrutiny. This uncertain status of emergency is on one hand sapping the usefulness of the existing taxonomies and reveals in a distinct manner the ongoing relevance of the *common law – civil law* distinction even for contemporary constitutional law, in spite of globalising tendencies erasing differences between constitutional traditions.

Despite these specific traits, one could still concede that there is something that could constitute as a *core* of the concept of emergency. The underlying idea is that emergency opens either a derogation from established legal and constitutional standards or suspends the normative content of these standards, in order to enable flexible responses to contextual situations that threaten the consistency and the very existence of the constitutional or legal system. At the highest level, emergency creates a normative paradox of suspending normative standards, while politically it enables the executive and administrative bodies to act without the fetters set in advance by the legislative or superior normative orders. Whether this takes the form of a declaration made in accordance to rules set out in constitutional documents, statutory frameworks, constitutional custom, case

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[27] M. Rosenfeld, *'Constitutional Identity'*, [in:] M. Rosenfeld, A. Sajó, *Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 767.

[28] Ex parte Milligan, 71 US (4 Wall.) 2(1866).

[29] O. Gross, F. Ni Aolain, op. cit., p. 86.

[30] See for instance the *Belmarsh* case: *A* v. *Secretary of State for the Home Department* [2005] 2 WLR 87.

[31] D. Dyzenhaus, *The Constitution of Law*: *Legality in Times of Emergency*, Cambridge 2006, pp. 196–199; A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, London 1915[8].

law, the doctrine, seems to matter less from this perspective: a *core* of emergency consists in this derogation that it operates. Now, this derogation or, depending on the case, suspension is taking place with an internal limitation that derives first from the *purpose* of protecting the existence of the constitutional system, and in most instances by a level of *proportion* and consistency with the *object* of the threat. Last, there seems to be a tacit consensus that these measures taken under emergency are only temporary.

These claims are to a greater extent consistent with the meaning of the international legal standards set out in Paris. They also seem to replicate the European developments before the ECHR in litigation on Article 15. Yet, they do seem to open themselves to serious criticism. While indeed the theoretical attempts at grasping emergency rely on the operation of the law, the limits of the doctrinal approach do show themselves when it comes to grasping the penumbral cases of emergency. These limits are first the results of an often-spread assumption still prevailing within legal studies that confuses normative prescriptions concerning to emergency to the object of study. In this case, there is no necessary connection between the provisions concerning the limitations of emergency and its effects and its real operation. The doctrine on these points is indeed ambiguous, yet in a revelatory manner for the purposes of jurisprudential inquiry.

3. Emergency and Legality

As we have noted, emergency's key features are its *temporary* character, its *proportionality* and *limited scope*. The point is, that constitutional systems try to shield themselves from the corrosive effects of emergency.[32] If an emergency would be able to change the constitution, to re-write it, then it is no longer within the semantic sphere of the concept, rather we are witnessing with a more or less surreptitious constitutional amendment that is most likely unconstitutional: "the executive is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system".[33] In other words, emergency makes sense only insofar as it is temporary, otherwise it turns into a distinct constitutional – or for that matter – unconstitutional practice, effectively *altering* constitutional provisions and arrangements.[34] Moreover, emergency pertains to a specific kind of constitutional practice, and if we are to follow this strand of literature, it is intrinsically connected to democratic regimes[35] at a minimum, being normally tightly interwoven to a procedural understanding of democracy.[36] Apparently, emergency as a concept cannot

[32] A. Greene, op. cit., p. 206.

[33] J. Ferejohn, P. Pasquino, op. cit., p. 211.

[34] R. Albert, Y. Roznai, *Emergency Unamendability: Limitations on Constitutional Amendment in Extreme Conditions*, "Maryland Law Review" 81/2021, pp. 243–258.

[35] J. Ferejohn, P. Pasquino, op. cit., p. 231.

[36] A. Greene, op. cit., p. 79.

be related in a significant manner with absolute rule,[37] as it is superfluous, while within the confines of authoritarian regimes, "[n]o real tension exists, nor can one exist, between liberty and security, because security is everything and liberty does not count for much".[38]

Let us suspend temporarily the theoretical intricacies raised by these penumbral situations, and continue to take stock of a fundamental limit of this theoretical model, namely what the literature covers under the label *permanent states of emergency.*[39] Taken at face value, this is a contradiction in terms, insofar as one of the main features of emergency is its temporary character. However, the experience offered by the last two decades offers numerous examples of ways in which emergencies were embedded within the *regular*, *normal* functioning and operation of the law.[40] For instance, the Patriot Act, originally a legislation determined by the terrorist threat had important provisions in place as far as 2020. The French state of emergency declared in 2015 was in force for two years, a period during which changes to criminal procedures were embedded within the legal system.[41] In this sense, modern emergencies fail to reverse back to normal, rather they create "new normals". Historical examples of emergency being embedded in the regular operation of the law abound, with Italy being an often-cited example in its post-war history,[42] and Romania during its interwar era – with emergency legislation designed to tackle political extremism becoming an integral part of the reformed authoritarian Criminal Code of 1936.[43]

From a normative standpoint, emergency continues thus to operate within the legal system surviving its temporary limits, altering the application of the law and its interpretation, however without producing an overt, ostensible and public constitutional slip. In strong connection to this practice, longer formal emergencies being declared, such as those during the pandemic or under the conditions of terrorist threat or refugee crisis, have also become part of the new normal of the functioning of the state, blurring the presupposed clear line between emergency and the legal regular, normal situation.[44] Such developments have driven attention to the *inertia* specific to emergency[45] and raised a number of important questions over the furtive effects of corroding democratic principles, the separation of powers, the rule of law and the uncertain status of fundamental

[37] J. Ferejohn, P. Pasquino, op. cit., p. 224.

[38] O. Gross, F. Ni Aolain, op. cit., p. 3.

[39] A. Greene, op. cit., p. 62.

[40] J. Ferejohn, P. Pasquino, op. cit., p. 219.

[41] Loi nº 2017–1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme.

[42] G.-G. Fusco, *Exception, Fiction, Performativity*, [in:] C. Cercel, G.-G. Fusco, S. Lavis, *States of Exception: Law, History, Theory*, Abingdon 2020, p. 26.

[43] C. Cercel, *The Enemy Within: Criminal Law and Ideology in Interwar Romania*, [in:] S. Skinner (ed.) *Fascism and Criminal Law: History, Theory, Continuity*, Oxford 2015, pp. 101–126.

[44] C. Cercel, *The Shattered Nomos of Europe*, op. cit., pp. 84–85.

[45] L.S. Bishai, *The Inertia of the Exception*, [in:] eadem, *Law, Security and the State of Perpetual Emergency,* Cheltenham 2020, p. 28.

rights and constitutional protections.[46] This is because under the declaration of emergency that is either becoming part of the law being embedded, or whose effects are sustained, constitutional arrangements risk to be effectively re-written. However, even these penumbral aspects of emergency seem not to completely erase the basic assumption of a distinct demarcation that one can draw between the normal and exceptional situation.

Most of the contemporary literature analysing emergency through these lenses shows a particular propensity in support of liberal values, and grounds itself either explicitly or implicitly on an intellectual genealogy that connects it to liberal constitutionalism at a minimum. While it is contentious, especially for common law countries, that Hans Kelsen has shaped legal thinking about emergency, the prevalent position fits well with his legal theory and to a larger extent to the political theory sustaining it. It is also important to note the traces of Kelsen in the postwar international law thinking,[47] as well as the general Kelsenian turn that has affected constitutionalism in European context especially after 1989. The central area of concern that can be identified here in Kelsen's pure theory of law, is already present from the 1930s onwards, namely the identity thesis.[48] In short, unlike other German constitutional theorists preceding him, such as Laband and Jellinek,[49] Kelsen would refuse to see the state as a dual entity – on one side political and on the other side legal. For Kelsen, a purely legal position would enable the lawyer to see through its legal lenses only the legal aspect of the state. This does not necessarily mean that politics disappears from the functioning of the state, but that if the state is to be a *Rechtsstaat*, it is to be not only bound by law, but also equal to its legal apparatus.[50] Insofar as the state is "a social structure" analysable as "a system of human behaviour" based on coercion, it can be properly understood in terms of law: "the state … is a legal system"[51].

One should not easily dismiss this position as radical or idealistic. This is because insofar one agrees that the constitution has a normative content that can be derived from a *Grundnorm*, then it follows that the norms that constitute the legal order of which the state – i.e. public law – is a central part, cannot be grasped otherwise than by reference to this foundational normative content. Any activity of the state therefore, insofar as it is able to institute legal duties cannot but take the form of normative commands that are consistent with the superior norms.

This jurisprudential stand is central for grasping the operation of emergency, and its original form takes the form of a criticism that Kelsen levels against the idea that in situations of "national emergency", the state's action "can even go against the statute".[52]

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[46] A. Greene, op. cit., p. 62.

[47] H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems,* New York 1951.

[48] A. Greene, op. cit., p. 66.

[49] G. Jellinek, *Allgemeine Staatslehre*, Berlin 1914.

[50] H. Kelsen, *Introduction to the Problems of Legal Theory*, Oxford 1992 [1934], p. 100.

[51] Ibidem.

[52] Ibid., p. 94.

In other words, insofar as the legal system has to support its existence it can do this only legally and by means of permitting a lawful derogation. At a limit, any other attempt of moving beyond the law cannot be anything but an unconstitutional or illegal mean attempting to move beyond the existing legal order. While such a stand cannot account for the grey zones within the legal system created by emergency – for indeed these grey zones are either unconstitutional amendments or illegal secondary legislation or derogations already permitted under the basic norm – it certainly epitomizes the net distinction between *legality* and its lack thereof. Legality in this sense, is equated with a certain consistence of the legal system, that is based both on *validity* and *efficacy*.[53] This position is somewhat echoed within the *common law* tradition by the Hartian model which can account for the core of the law as constituted in and by rules grounded in the social fact of the rule of recognition[54] and the possibility of discretion exercised by law officials in the absence or rules or due to their vagueness.[55] Emergency, as we understand it within the contemporary doctrine is a threshold concept within liberal legality – a temporary, limited, necessary and proportional – loophole within the legal system that is accounted for by the very existence of the legal system.

4. The Shadow of Exception

There seems to be a strong case for using emergency and exception interchangeably. They are both concepts that trace back to the same legal operation – the suspensions of legal normative provisions as a response to situations of crisis. They are both developed within the same cultural tradition of European or Western public law, and they do indeed seem to raise similar questions about the consistency and coherence of legality, legal validity and the status of the law in modernity.

However, the overlap ends most likely here, and by conflating the two, one risks to obscure if not effectively elide the different intellectual genealogies they rely upon, the jurisprudential stands that they represent and on which they are built upon, and finally the critical potential that the exception is able to offer to legal studies by its very juxtaposition to that of exception. The starting point to grasping the core meaning of the exception is the rather plain observation that the literature instituting, exploring and glossing on this concept, lays largely within the confines of legal philosophy, philosophy proper, cultural studies, and political theory. This does indeed call for an important epistemic question related to the status of jurisprudential concepts at the border between legal studies and politics, and furthermore between the still limited bridges between constitutional law and the broader sphere of the humanities. It is as if by perpetuating the concept of emergency, and expunging the theoretical, political, ethical and historical

[53] Ibid., p. 60.

[54] H.L.A. Hart, *The Concept of Law*, Oxford 1961, pp. 105–106.

[55] D. Dyzenhaus, op. cit., pp. 21–22.

thorny questions raised by the exception from the ambit of constitutional law proper, they are deemed to disappear. At the antipodes, the use of the concept the exception outside legal studies is also prone to obscuring its jurisprudential thrust, and erasing the inner intellectual history in which it has emerged.[56]

But beyond these observations pertaining to the *use* of the concept, my claim is that between the two also lies a *logical* distinction that derives from the different intellectual outset that they represent. To start with, a first theory of the exception is offered by Carl Schmitt in his *Political Theology,*[57] drawing on his more historically attuned study of *dictatorship*. The state of exception is at a face value just another formula covering state of emergency, insofar the now infamous Article 48 of the Weimar Constitution (emergency decrees) stated the conditions for instituting a *state of exception* (*Ausnahmezustand*). Yet, from the very first lines of *Political theology* we understand that the stakes of the concept are higher, and they do not simply concern the operation of the law in one particular area of constitutional law: "the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege".[58] Rather, at this is part of the *core* of exception, it reveals the very status of the law as depending on a decision of a sovereign body: "every legal order is based on a decision… the legal order rests on a decision and not on a norm".[59]

This jurisprudential stand is perhaps not new especially to the common law tradition, insofar as it echoes the Austinian command theory, positing that law is an expression of a sovereign command.[60] The distinction, however, is somewhat important, insofar as the decision about suspending the normative order for the sake of its protection, is for Schmitt, revealing of a preceding essentially political assessment, that is distinguishing between the *normal* and the *exceptional* situation: "[fo]r a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists".[61]

The regular functioning of the law is thus revealing of *normal* concrete order that is essentially political. To some extent counterintuitively, the norm is already an expression of the exception: "[t]he exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception".[62] It follows then, that the law is never stable, at least in modern societies from which the reference to transcendent values has been excluded from the ambit of juridical thinking: "All law is 'situational law'. The

[56] G.-G. Fusco, C. Cercel, S. Lavis, *Untimely considerations on the state of exception*, [in:] C. Cercel, G.-G. Fusco, S. Lavis, *States of Exception: Law, History, Theory*, op. cit., pp. 1–14.

[57] C. Schmitt, *Political Theology*, Cambridge 1985 [1922].

[58] Ibid., p. 5.

[59] Ibid., p. 10.

[60] J. Austin, *The Province of Jurisprudence Determined*, London 1861, p. 27.

[61] C. Schmitt, *Political Theology*, op. cit., p. 13.

[62] Ibid., p. 15.

sovereign produces and guarantees the situation in its totality".[63] In a very specific sense, the Schmittian position is that of a natural law without nature, a positivism that does not negate the a priori dimension of normative statements, but places the state as a mediator between the realm of values and politico-legal reality.[64] The exception is precisely this juncture point, the synapse connecting *Is* and *Ought*, and its presence within the legal system is revealing for the whole functioning of the legal system. Schmitt's political leanings from reactionary Catholicism in the 1920s to National-Socialism in the 1930s,[65] are themselves expressive of the authoritarian features that his jurisprudence took, but they need to be understood precisely in relation to the performative nature of the law as a discourse that anchors a particular reality, and of the exception as the device able to produce such an anchoring of values.

The reception of Schmitt's concept of exception in the work of Giorgio Agamben, a prominent Italian philosopher, grounding his work within the critical and phenomenological tradition of Michel Foucault, Hannah Arendt and Martin Heidegger, is to some extent surprising, insofar as his project is to revise the political ontology of Western thought by identifying the *proper* place of politics.[66] In his analysis of political philosophy and the genealogy of central concepts of political thought, Agamben uncovers the *exception* as the locus proper through which bare life is given a *political* form, by a suspension of the rules – legal or political – otherwise said as the operation through which life as such is connected to the law and a pure force of law creates the legal subject.[67] In other words, "at once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested".[68]

At the core of the exception seems to be not its legal contextual nature, but rather is operation, the fact that by the suspension of normative statements, a political order and structure is brought about in a zone of indistinction between norms and facts:

> (t)he situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right, but instead institutes a paradoxical threshold of indistinction between the two.[69]

Agamben's concept of exception, not unlike, Schmitt's, builds loosely[70] on the historical experience of emergency in the past two centuries, and glosses on the Roman

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[63] Ibid., p. 13.
[64] C. Schmitt, *La valeur de l'Etat et la signification de l'individu*, Geneva 2003 [1914], pp. 100–102.
[65] G. Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*; London 2000, pp. 176–178.
[66] G. Agamben, *State of Exception*, Chicago 2005.
[67] Ibid., p. 40.
[68] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford 1998, p. 9.
[69] Ibid., p. 18.
[70] G. Agamben, *State of Exception*, op. cit., pp. 12–17.

origins of this constitutional institution, endeavouring even further into revealing anthropological structures of the Western mind.[71] For instance, the analysis of the Roman praxis of *justitium* – a standstill of the law – what one is able to capture from a formal standpoint, a distinctive feature of emergency, it is not its complete retracing or erasure, rather its continual latent potentiality, which subsists even in crisis.[72] Conversely, such a reading of the exception, as essentially a zone of indistinction between law and fact, between order and disorder, opens the possibility for exploring law as already interwoven with lawlessness, and of political order with chaos:

> on the one hand … the juridical void at issue in the state of exception seems absolutely unthinkable to the law; on the other hand, this unthinkable thing nevertheless has a strategic relevance for the juridical order and must not be allowed to slip away at any cost.[73]

Even if more refined in his historical analysis of *dictatorship* – understood as a technique of government under exceptional circumstances – Schmitt also uncovers the penumbras and paradoxes of exception. Indeed, what transpires from his historical investigation, there is a turn from the model of a *commissarial dictatorship* – a constitutional technique of exercising full powers in a limited manner in both cope and time with a view of restoring the original constitution that is threatened[74] – towards *sovereign dictstorship*. A sovereign dictator is no longer bound by the original constitution, but aims, through dictatorial means to bring about a new constitution, not yet existent:

> [it] does not suspend an existing constitution through a law based on the constitution – a constitutional law; rather it seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible[75].

Such a position presents the sovereign not as an authentic revolutionary subject, but precisely as a nexus between the legal past and a new legal future, emphasising the essentially free nature of sovereign power in modernity to institute legal orders, and the transformative potential of the exception.

What is to be noted in both projects, is first the way in which they both attempt to render meaningful politically the paradoxes raised by the suspension of the law, a point that the theory of emergency, as a legal theory, consciously avoids. Agamben attempts to grasp the exception as a fracture within the law, that reveals its facticity. The accent falls on the possibility of withdrawing from the actions of the suspended law and opening a new way for thinking politics that is not tainted by legal categories, and that would

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[71] Ibid., p. 73.
[72] Ibid., pp. 42–49.
[73] Ibid., p. 51.
[74] C. Schmitt, *Dictatorship,* Cambridge 2014 [1921], p. xliii.
[75] Ibid., p. 119.

enable a new subjectivity beyond the forces that determine a form of the human subject. In short, understanding exception, means being able to understand law as a human construct from which one can subtract itself: "to show the law in its nonrelation to life and life in its nonrelation to law is to open a space between them for human action".[76]

For Schmitt, the exception is what ultimately proves the subsistence of order. Within the suspension of the law, what counts politically is precisely the possibility of creating order, whether one is the previous constitution or the new one:

> [w]hat characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is dear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.[77]

The core of the exception is then its *autonomy* as a practice: "the history of the institution, at least since World War One, shows that its development is *independent* of its constitutional or legislative formalisation".[78] It is a practice that is exemplary first for the structure and nature of the law and politics (as for Schmitt), or even for the whole politico-legal thought of the Western tradition (as for Agamben). The exception is not limited in neither time nor space. On the contrary it reveals that any attempt at normative constraints is futile, insofar as the exception finds itself at the core of legal arrangements within our societies. The exception is also ubiquitous. It is not a "black hole"[79] within the legal system that can be easily separated and contained, nor even a simple grey area of legal concepts blurring the purportedly clear meaning of legal norms. Rather, looked at through the lenses of exception, the whole legal system seems to be a grey area of indeterminate concepts.

This final point calls for a necessary conclusion. Emergency is an essentially doctrinal creation. Whether it can be considered as a theoretically meaningful concept, this can be done only within the relatively narrow sphere of constitutional theory, comparative constitutional law and international human rights law. As such it tends to remain too grounded within the normative promises and primarily declaratory positions of various legal documents, and less within institutional practices. This rather narrow focus of emergency is not able to account for the penumbral aspects of the concept other than through *aporias* – the notion of *permanent state of emergency* bears witness for this tendency. On the other hand, the concept of exception, by its exemplary dimension and its broad sphere of application – could account at least functionally on precisely the grey zones of emergency. The distinction between the two concept is not only a logical as they connote different spheres of the operation of the law, but also two theoretical tendencies and

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[76] G. Agamben, *State of Exception*, op. cit., p. 88.

[77] C. Schmitt, *Political Theology*, op. cit., p.12.

[78] G. Agamben, *State of Exception*, op. cit., p. 10 [emphasis added].

[79] D. Dyzenhaus, op. cit., p. 30. A legal black whole is, 'space devoid of rule-of-law controls'.

political commitments. Emergency necessarily presupposes a stable normative framework that either grounds constitutionally or legally the emergency, or that can be reconstructed by the return to normalcy. The exception, on the other hand, reveals precisely the fundamentally indeterminate nature of normative frameworks, be they political, legal, or linguistic – as Agamben would do in the pages of *Homo sacer*.[80]

The distinction is also political: emergency is a concept connected to democratic practices and pertains to a genealogy that values normative stability as an ostensible value. The exception is a concept that conceives the law as a part of a wider political framework and does not find any necessary value within normative stability. Distinguishing between the to does not dispense us from considering the relevance of emergency or exception. On the contrary, it enables us to see in a new light the limits of the current constitutional-*cum*-international doctrine. It places the burden on constitutional lawyers to reflect on the exception beyond some sweeping remarks on the work of Carl Schmitt and Agamben. Conversely, the broad and autonomous characters of the exception call for a more historically grounded and jurisprudentially attuned understanding of the exception.[81]

There was a time when jurisprudential knowledge on emergency was doubled by political theoretical and historical insights within the concept of *dictatorship*. The works of Marx,[82] Schmitt and Rossiter stand witness for this tendency. Maybe it is time to be able to reconnect them again and reconsider this tradition of thinking law and political power as sides of the same coin.

[80] Where he writes, that 'to speak is … always "to speak the law"': G. Agamben, *Homo Sacer*, op. cit., p. 20.

[81] C. Cercel, *'Through a glass, darkly': Law, History and the Frontispiece of Exception*, [in:] C. Cercel, G.-G. Fusco, S. Lavis, op. cit., pp. 34–53.

[82] C. Cercel, *Marx's concept of dictatorship*, [in:] U. Oszu, P. O'Connell, *Research Handbook on Law and Marxism*, Cheltenham 2020, pp. 61–76.