

The State of Exception

Written by Davide Giordanengo

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DAVIDE GIORDANENGO, JUN 21 2016

After World War II, the horror of the Holocaust and the concentration camps led the international community to develop universal human rights, grouped under a solemn declaration, in order to prevent that tragedy from happening again. The most terrible aspect of the conditions which the Jews suffered in those camps was that they were stripped of any rights, both legal and natural ones. However, in the last twenty years the world has, according to Giorgio Agamben, witnessed a renewed emergence of camps whose logic is similar to those in Nazi Germany: prisoners detained there are tortured, sexually abused and denied any rights that are commonly attributed to human beings almost everywhere. If these camps are illegal, they are not completely outside the law, but they are permitted under the extraordinary circumstance of the “War on Terror”. What Agamben has rightly stressed is that the concept of a “state of exception” under which the legal order is not valid, that a lot of countries implicitly adopt in the fighting against terrorism, is the same behind the concentration camps. Nazi Germany, in fact, did not operate in violation of the Weimar Constitution, but within the framework of its articles that allowed the government to suspend individual rights in case of necessity. Thus, “from a juridical perspective, the entire Third Reich can be considered a state of exception that lasted twelve years” (Agamben 2005: 2).

Starting from this standpoint, the essay will be concerned with assessing the relevance of Agamben’s peculiar reading of the state of exception as paradigm of government for contemporary international politics. In doing so, it will first analyse Agamben’s conceptualization of the exception and its connection to the condition of “bare life”. Then, it will proceed by outlining two cases that testify the emergence of the state of exception and its value as an explanatory tool for understanding extant trends in politics. France and Pakistan will provide the examples for demonstrating how the state of exception can explain domestic and international deprivation of rights in both Western and postcolonial states. Since every theory can be improved, however, the conclusion will assess some aspects which may have been neglected in Agamben’s works.

Agamben and the State of Exception

The concept of the state of exception has a long history, since discussion upon it can be traced back to the French Revolution (Agamben 2005: 2). It defines a special condition in which the juridical order is actually suspended due to an emergency or a serious crisis threatening the state. In such a situation, the sovereign, i.e. the executive power, prevails over the others and the basic laws and norms can be violated by the state while facing the crisis. The idea that the exception is the fundament of law has not been originally formulated by Agamben, but had been developed by Carl Schmitt (2005) and Walter Benjamin (2004) in the first decades of the twentieth century. Benjamin only tangentially reflected on the issue of exception in his analysis of the existence of a pure form of violence, which he calls “divine violence”, outside the law, and claimed precisely that the exception is excluded from the juridical order by the sovereign. Schmitt conceptualized sovereign power as possessing the authority to suspend the legal system and declare a state of exception if the country faced an existential threat to its integrity (Schmitt 2005). As Vaughan-Williams frames it, “for Schmitt, the essence of sovereignty is understood to be a monopoly on the ability to decide on the exception”, thus rephrasing and correcting the Weberian theorization of sovereignty as the monopoly on the use of violence (Vaughan-Williams 2008: 329). As a matter of fact, grounding the state of exception both within and beyond the law was Schmitt’s most significant intuition. He argued that the decision on exception is above the normative framework in that it consists in the temporary suspension of the legal constraints on sovereignty, but that at the same time the exception is what defines the condition of possibility for the law to exist (Schmitt 2005). The

The State of Exception

Written by Davide Giordanengo

legal order, in fact, is negatively characterized by its opposite, that is a state of exception which highlights what is comprised within the law, and thus what the realm of such a law is, by creating a situation in which the normative order does not apply. In Jef Huysmans' words, "the norm does not define the exception but the exception defines the norm" (Huysmans 2006: 136).

Agamben starts his inquiry from this theoretical perspective aiming at the formulation of a general theory of the state of exception, which, he claims, has become "the dominant paradigm of government in contemporary politics" (Agamben 2005). He reads the emergence of exception in a Foucauldian sense, since he focuses his analysis on the "biopolitical significance" of exceptionalism as a widespread political device. For Agamben, such suspension of the law is pivotal in that it directly affects people's lives, not as subjects of politics or citizens, but as human beings as such. The key of Agamben's thought, around which the theory of the state of exception revolves, is the indistinction, in the realm of politics, between the external and the internal, between the private life – which he calls *zoe* – and the public sphere, the one characterizing life as *bios* (Agamben 1998). This Aristotelian distinction does not hold anymore for Agamben, since the sovereign power needs to blur the lines in order to legitimize its ever-growing control over the lives of its citizens. The indistinct form of human being that is created in this process is called *homo sacer* (Agamben 1998). This figure has been reduced to what he defines as "bare life", meaning that the sovereign has complete authority over *homo sacer*, not only as a citizen of a state, but even to the point of acting upon his/her own natural life, depriving this individual of the right to live. The locus where people are stripped to a "bare life" is defined by Agamben as the camp, with a clear reference to concentration camps in Nazi Germany, where Jews were denied not only political rights, but also the condition of human beings itself (Agamben 1998).

As Vaughan-Williams has correctly stressed, the meaning of the concept of "bare life" does not lie in the reduction of political to natural life, of *bios* to *zoe*, but in the indistinction between the two of them: "bare life is a form of life that is amenable to the sway of the sovereign power because it is banned from the realm of law and politics [...] whenever and wherever the law is suspended" (Vaughan-Williams 2008: 333). As he elsewhere stated, the principal difference between Foucault and Agamben lies in this indistinctiveness that characterizes contemporary politics: while for the first biopolitics consisted in the inclusion of natural life in the sovereign's control, the latter claims that politics is inherently biopolitical (Vaughan-Williams 2009). For Agamben, *zoe* can never be totally separated from *bios*, since exclusion in a sense reinforces the relationship with the other object that is included. In a similar way, the state of exception is coterminous with the law, since it defines the borders of the normative order. According to Agamben, "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" (Agamben 2005). The significance of this "zone of indifference" for contemporary international politics has, however, been largely neglected, mainly due to the conceptual difficulty of renouncing to a clear inside/outside dichotomy in favour of a theory of indistinction. For this reason, Agamben has argued for the need to develop what he describes as a "logic of the field", where stark lines of differentiation cannot be drawn (Agamben 2004). Central to this is the concept of the ban, which is a political device that simultaneously exclude an individual from a community while defining the very exclusion through a continued relation with it: not being part of a society defines the banned element precisely in terms of that society from which he is outlawed. The ban is conceptually connected to the state of exception not only because they both produce the exclusion of an object from a realm through the continuous reference to that context. At a more profound level, they both perform the function of constituting a social group by exploiting the fear of the diverse, of the inhuman, the-different- from-us. According to scholars who have focused on theory of identity and securitization, such as David Campbell, identity is shaped by difference, i.e. a certain "we" requires a different "them", in order to create their identity as peculiar and distinct from others. As Campbell states, "[t]he passage from difference to identity as marked by the rite of citizenship is concerned with the elimination of that which is alien, foreign, and perceived as a threat to a secure state" (Campbell 1992: 42). Such an elimination and distinction is exactly what the state of exception is about, since it legitimizes itself in reference with an external threat which has to be dealt with through exceptional measures, and at the same time it strengthens national identity by depicting the enemy as inhuman, and thus unworthy of being treated as other than "bare life". As it has been noticed by Aradau and Van Munster, "exceptionalism does not just play upon public panics, but also institutionalizes fear of the enemy as the constitutive principle for society" (Aradau/Van Munster 2009: 689). Accordingly, the use of exceptional measures is effective both in creating a sense of danger around which to unite the nation whilst reinforcing the particular self, and in delegitimizing and dehumanizing the other by

The State of Exception

Written by Davide Giordanengo

reducing the alien to “bare life”. That is precisely what happened in the detention camp at Guantanamo Bay, or at the Abu Ghraib prison in Iraq, where prisoners were denied both the rights to be put on trial according to American law, and the status of prisoners of war as stated by the Geneva Convention (Agamben 2005).

The essay will now proceed in outlining how the paradigm of the state of exception is commonly employed as a device of government of the population both in the Western countries, particularly in the United States and in Europe, and in postcolonial regions, especially in the Middle East, which is the battlefield of the so-called “War on Terror”. The state of exception in France will highlight the first outcome of exceptionalism, i.e. the strengthening of the sovereign power against the legal democratic order and its effectiveness in creating a sense of danger. The exception as the condition of the FATA region of Pakistan, instead, will show the more “international” effects of exceptionalism. It will focus on how both the US-led drone strikes and the Pakistani central government have delegitimized citizens of that area, who live in a permanent condition of “second-class” citizenship, where the constitution does not apply.

State of Exception in the West: France

The state of exception has been a persistent feature of European states at least since World War I. Agamben traces its origin back to the French Revolution, when revolutionaries introduced the possibility of suspending the constitution in face of a great danger. It is interesting to note that, although the suspension of the legal order had been declared in many states during the two World Wars, France’s constitution explicitly regulates still today the declaration of a state of emergency, while most Western constitutions (the German, the Italian, the British and the American ones) do not mention such a suspension. For this reason, Agamben indicates that “the declaration of the state of exception [in France] has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government” (Agamben 2005). While he is referring here to the declaration of emergency due to the Algerian War, his analysis acquired new relevance in the aftermath of the terrorist attacks that hit Paris in November 2015. Immediately following the strikes, President François Hollande invoked the state of emergency according to Article 16 of the French constitution, which was first declared for three months, but has been subsequently extended for other three, and it is now expected to expire on May 26, 2016 (France24 2016). Prime Minister Manuel Valls has, however, expressed the intention of maintaining it in place until the “total and global war” with ISIS will come to an end (Boyle 2016). This prolonged exceptionalism has sparked several protests in the country and has led the United Nations to warn France that it is imposing “excessive and disproportionate restrictions on human rights” (Dearden 2016).

Bringing the state of emergency into force in the country, in fact, gives full powers to the President of the Republic, enhances the authority of the police forces, prohibits mass gatherings and demonstrations and, most crucially, allows that suspects be arrested and detained without any formal charge, similarly to the condition of the prisoners in Guantanamo. The arrest without a clear accusation is manifestly contrary to the principle of habeas corpus, and thus the theme of natural and political life, of the indistinction between bios and zoe reappears. In such a situation, there is no difference between citizens and immigrants, a fact which is stressed by the debate currently being held in the French National Assembly over depriving people convicted for terrorism of their French citizenship, an action that would literally reduce such individuals to a condition of “bare life”.

Reflecting on the state of emergency in the country, Agamben expresses his concerns about the transformation of France into a “security state”, one which bases its legitimacy upon the propagation of fear, not upon its elimination (Agamben 2015). The state of emergency produces then both “a new form of social relation, namely one of generalized, limitless control” and the depoliticization of citizens, who are not seen as active participants in the democratic process, but as a group who needs to be protected by the state. This process is strikingly similar to the theories of Schmitt and Nazi jurists, who operated the elimination of the society from the sphere of politics, conceiving the people not “as a multi-faceted and autonomous political dynamic” but rather as “a political entity [existing] only by being called into existence by the ruler” (Huysmans 2008: 170). Such a process is reinforced by the use of a narrative depicting France as “at war” with terrorists. The rhetoric of war performs the function of increasing support for the government, through the so-called “rally-around-the-flag effect”, and serves the purpose of unifying the society against a common enemy. Thus, it sharpens the “us versus them” perception: “[f]ear integrates political

The State of Exception

Written by Davide Giordanengo

communities according to friend/enemy lines and creates homogenous identities that need to be defended” (Aradau/Van Munster 2009: 690). This trend is significant in that it highlights the continuities that still persist between democratic and authoritarian states, and the danger of a suspension of the legal order could further weaken the already stretched European democracies.

The State of Exception in the Postcolonial world: Pakistan

The rise of exceptionalist policies is also helpful in explaining practices of dehumanization of the other that are currently being employed in postcolonial countries, both by the West and by local governments. It has to be stressed that the state of exception is not limited to the domestic sphere, but also bears an international significance. The realm of the international has, in fact, always been described in terms of war and exceptional conditions that distinguish it from domestic politics (Aradau/Van Munster 2009). As Walker affirms, the international has been represented in terms of international law and the idea of modernity, which is derived from the Enlightenment, and the norms for participating in the inter-state relations are defined according to such rationality. In such a context, “exceptions may be enacted as a claim about inhumanity” (Walker 2006: 76), that is, all individuals not belonging or conforming to such a paradigm are considered as not being human beings, but rather as pre-human or inhuman persons, to which the legal juridical order that sustains the international, i.e. the regime of human rights, does not apply. Such “wasted lives”, as Bauman has labeled them, are then excluded by the community of humans and treated as human waste, disposable lives that are superfluous, not necessary to the current order but at the same time part of it: they are “the waste of order-building combined into the main preoccupation and metafunction of the state, as well as providing the foundation for its claim to authority” (Baumann 2004).

The claim to exceptional policies is a biopolitical practice that has been constantly used by the sovereign to exert domination over the bodies of its subjects, particularly through the lens of race, which has been employed as a means for depriving individuals of their humanity (Foucault 2004). Interestingly, a similar account of the colonial and postcolonial domination is the one proposed by Mbembe, in his analysis of what he defines as “the right to dispose” that the colonial master enjoyed on the colonized other, seen not as a human, but as an animal (Mbembe 2001). The state of exception is thus used to reinstate a hierarchy of worth (Jabri 2013), which assesses that some bodies are disposable and reducible to “bare life”, whilst others are worthy of full rights. That life of individuals outside the West has been reduced to a form of “bare life” is particularly evident with regards to the situation of the inhabitants of the Federally Administered Tribal Area of Pakistan, the region where most of the US drone strikes are focused. Two aspects here suggests the reduction of inhabitants of the area to a form of human being who are outside the normative order. Firstly, the drone strikes launched by the US against what it defines as terrorists are both outside the international law, since the claim of the Obama administration that the US is exercising its right of self-defence is not universally accepted, and without any accountability (Christine Fair 2014). In such a context, it is impossible to prove whether the targets killed were effectively al-Qaeda operatives or civilians, and the number of casualties has not been publicly released by the US. Thus, people living in the FATA are neither protected by international law, which should apply in a war zone (even though the US is not officially at war with Pakistan) nor recognized as citizens who have the right to a fair trial before being labeled as terrorists and executed.

Secondly, inhabitants of the FATA do not even enjoy the same rights as their fellow Pakistani citizens. The constitution of Pakistan does not apply to that territory, which is governed through the so-called Frontier Crimes Regulation, “a colonial governance instrument”(Christine Fair 2014). Under the FCR, tribes that are deemed uncooperative or dangerous can be stripped of their right to participate in the local government by the government representative, who acts as an absolute sovereign. He can even decide to ban or exile an individual and deprive him/her of the political agency, thus reinforcing the mechanism of the ban which we have mentioned before. This framework of government is in contrast with the Pakistani constitution and the human rights treaties that the country has signed. FATA inhabitants are best understood as second-class citizens, who are denied protection and recognition by the US and their own state, and live under a permanent state of exception.

Conclusion

The essay has tried to demonstrate the relevance of the concept of the state of exception in explaining recent

The State of Exception

Written by Davide Giordanengo

developments in contemporary politics. It can both account for the growing securitization which Western states are enduring as a response to the so-called global “War on Terror” and for the blurring of lines between inside/outside, legality and illegality, which is the typical feature of this century. A common trend appears to be forming, one which relies on the legal indistinction between private and public life, and which encompasses both Western states and postcolonial peoples. However, as every theory, whilst being a valid explanatory tool for understanding the present, it is not perfect. For example, the reduction to “bare life” is more easily produced along racial lines, since, as Judith Butler has correctly argued, certain populations are more frequently subject to such a dehumanization, especially black and Arab/Muslim people (Butler 2006). Although proposals moving in the direction of stripping individuals of their citizenship are becoming matter of debate in national parliaments, such measures are often implicitly directed against Muslim people or descendants of immigrants, who are still regarded as a foreign other menacing the true, local, white identity of European countries. More in general, Agamben does not focus sufficiently on the role played by society, offering a top-down approach according to which the sovereign is always acting on the subjects and imposing the state of exception on them. Whilst Huysmans’ reading of the “bare life” as being “not political” because it ignores that life as such only exist within a broader societal context seems to have mistaken that the politicization of life itself is the issue for Agamben, his remarks about the lack of agency is correct. In this respect, William Connolly (Connolly 2004) has rightly expressed the importance of the political sphere in which the sovereign operates, particularly by exploiting societal fears: Nazi Germany, for instance, relied on a widespread feeling of anti-Semitism that preceded Nazism. It must be recognized that the state of exception as a legal system is not the sole cause of totalitarianism, and that jurisprudence is often reflective of changing in the society, instead of contributing itself to those changes.

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The State of Exception

Written by Davide Giordanengo

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Written by: Davide Giordanengo
Written at: King's College London
Written for: Nicholas Michelsen
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