The State of Exception as a Paradigm of Government

1.1 The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book Politischer Theorie (1922). Although his famous definition of the sovereign as "he who decides on the state of exception" has been widely commented on and discussed, there is still no theory of the state of exception in public law, and jurisprudence and theorists of public law seem to regard the problem more as a quasist fact than as a genuine juridical problem. Not only is such a theory deemed illegitimate by those authors who (following the ancient maxim according to which necessitas legem non habet [necessity has no law]) affirm that the state of necessity, on which the exception is founded, cannot have a juridical form, but it is difficult even to arrive at a definition of the term given its position at the limit between politics and law. Indeed, according to a widely held opinion, the state of exception constitutes a "pox of imbalance between public law and political fact" (Saint-Bonnet 2000, 28) that is situated—like civil war, insurrection and resistance—in an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political" (Fontana 1999, 165). The question of borders becomes all the more urgent if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds (De Martino 1973, 310), then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.

It is this no-man's-land between public law and political fact, and between the juridical order and life, that the present study seeks to
investigate. Only if the veto covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the differences—or the supposed differences—between the political and the juridical, and between law and the living being. And perhaps only then will be possible to answer the question that never ceases to reverberate in the history of Western politics: what does it mean to act politically?

1.3. One of the elements that make the state of exception so difficult to define is certainly its close relationship to civil war, insurrection, and existence. Because civil war is the opposite of normal conditions, it lies in a zone of indiscernibility with respect to the state of exception, which is state power's immediate response to the most extreme internal conflicts. Thus, over the course of the twentieth century, we have been able to witness a paradoxical phenomenon that has been effectively defined as a "legitimate war" (Schmitt 1981). Let us take the case of the Nazi State. No sooner did Hitler take power (or, so we should perhaps more accurately say, no sooner was power given to him) than, on February 28, he proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties. The decree was not repealed, so that from a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years. In this sense, modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. Since then, the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones.

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

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

The expression "global civil war" appears in the same year (1981) in both Hannah Arendt's On Revolution and Carl Schmitt's The Concept of the Political. However, as we will see, the distinction between a "real state of exception" (état de siege effectif) and a "notional state of exception" (état de siege fictif) goes back to French public law theory and was clearly articulated in Théodore Hirsch's book De l'état de siège: Étude historique et juridique (1845), which is at the origin of the Schmittian and Benjaminian opposition between a real and a notional state of exception. Anglo-Saxon jurisprudence copies to speak here of "fected emergencies" for their part, Nazi jurisprudence openly of a possible exhaluation of a "fected state of exception" "for the sake of establishing the National Socialist State" (Weber Spehl, quoted in Debiache and Wieland 1993, 185).

1.3. The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the "military order" issued by the president of the United States on November 21, 2001, who authorized the "indefinite detention" and trial by "military commissions" (not to be confused with the military tribunals provided for by the law of war) of noncitizens suspected of involvement in terrorist activities.

The USA Detainee Act issued by the US Senate on October 26, 2001, already allowed the attorney general to "take into custody" any aliens suspected of activities that endangered "the national security of the United States," but within seven days the aliens had to be either released or charged with the violation of immigration law or some other criminal offense. What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unmappable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American law. Neither prisoners nor persons accused, but simply "detainees," they are the object of a pure de facto rule,
of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi Lager (camp), who, along with their citizenship, had lost every legal identity, but at least retained their identity as Jews. As Judith Butler has effectively shown, in the de-tainer at Guantanamo, base life reaches its maximum indeterminacy.

1.4 The uncertainty of the concept is exactly matched by terminological uncertainty. The present study will use the synonyms state of exception as the technical term for the consistent set of legal phenomena that it seeks to define. This term, which is common in German theory (Ausnahmezustand, but also Nötizstaat, "state of necessity"), is foreign to Italian and French theory, which prefer to speak of emergency decrees and state of siege (political or fictitious, stata di seque stra ficta). In Anglo-Saxon theory, the terms martial law and emergency powers prevail. If, as has been suggested, terminology is the proper poetic moment of thought, then terminological choices can never be neutral. In this sense, the choice of the term state of exception implies a position taken on both the nature of the phenomenon that we seek to investigate and the logic most suitable for understanding it. Though the notions of state of siege and martial law express a connection with the state of war that has been historically decisive and is present to this day, they nevertheless prove to be inadequate to define the proper structure of the phenomenon, and they must therefore be qualified as political or fictitious, terms that are themselves misleading, in some ways. The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept.

II The history of the term fictitious or political state of siege is instructive in this regard. It goes back to the French doctrine that—in reference to Napoleon's decree of December 24, 1814—provided for the possibility of a state of siege that the emperor could declare whether or not a city was actually under attack or directly threatened by enemy forces, "whenever circumstances require giving more force and more power to the military police, without it being necessary to put the place in a state of siege" (Reinach 1886, 109). The institution of the state of siege has its origins in the French Constituent Assembly's decree of July 8, 1791, which distinguished among droit de paix, in which military authority and civil authority each acts in its own sphere, droit de guerre, in which civil authority must act in concert with military authority; and droit de siege, which in all three functions entrusted to the civil authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility" (Réd.,). The decree referred only to military strongholds and ports, but with the law of 30 Fructidor Year V, the Directory extended municipal authorities in the interior with the strongholds and, with the law of 30 Fructidor of the same year, granted itself the right to put a city in a state of siege. The subsequent history of the state of siege is the history of its gradual estrangement from the wartime situation to which it was originally bound in order to be used as an extraordinary police measure to cope with internal sedition and disorder, thus changing from a real, or military, state of siege to a fictitious, or political one. In any case, it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one.

The idea of suspension of the constitution was introduced for the first time in the constitution of 13 Frimaire Year 8, Article 95 of which reads, "In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution. In such cases, this suspension can be provisionally declared by a decree of the government if the legislative body is in recess, provided that this body be convened as soon as possible by an article of the same decree." The city or region in question was declared in a constitution, although the paradigm is, on the one hand (in the state of siege) the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or of those constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the state of exception.

The expression full powers (pouvoirs pleins), which is sometimes used to characterize the state of exception, refers to the expansion of the powers of the government, in particular the sanctioned on the executive of the power to issue decrees having the force of law. It derives from the notion of plebiscite pouvoir, which was elaborated in that true and proper laboratory of modern public legal
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In Chapter One, the term "exception" is explained. The exception serves as an additional layer in the administrative structure. The exception is essentially a mechanism that allows for temporary deviations from the established rules or procedures. It is designed to accommodate unforeseen circumstances or to allow for flexibility in decision-making.

The essence of the exception lies in its temporary nature. It is not intended to become a permanent feature of the system. The exception is intended to be a tool for problem-solving in specific situations, rather than a fundamental change to the overall system.

The exception is typically used to address situations that are outside the ordinary course of events. These situations may include emergency situations, unforeseen circumstances, or other extraordinary events that require immediate action.

In the context of government and administration, the exception serves as a mechanism for balancing the need for flexibility with the requirement for accountability and transparency. It allows for the temporary deviance from established rules or procedures, while ensuring that the actions taken are closely monitored and evaluated.

In summary, the exception is a tool that is used to address temporary deviations from the established rules or procedures. It is intended to be a temporary measure that allows for flexibility in decision-making, while ensuring that the actions taken are closely monitored and evaluated.

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theory of dictatorship, which is dismissed as a footnote as "a participation without voting." (Frederick 1997, 1999, 1996). Schmidt distinguishes between an "improving" and a "dividing" dictatorship. The former is characterized by the willingness of the regime to improve the living standards of its citizens through economic and social reforms. The latter, on the other hand, is characterized by the use of violence and repression to maintain power and prevent any form of opposition. Schmidt's distinction is useful in understanding the diversity of dictatorship regimes and their impact on political stability and economic development.

In the context of the European Union, dictatorship regimes are often associated with authoritarianism and a lack of democratic governance. The EU has been active in promoting democratic transitions and encouraging the development of multiparty systems and free elections. However, the process of democratization is not always smooth, and there have been instances where the EU's efforts have been criticized for being insufficient or ineffective. The focus on democracy and human rights in the EU's relations with authoritarian regimes is a matter of continuing debate and reflection.

In conclusion, the theory of dictatorship raises important questions about political and economic systems, and the implications for international relations, governance, and democracy. The challenges of democratic transitions and the maintenance of democratic norms and values remain significant areas of research and policy formulation.

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Chapter One
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From the perspective of political science, dictatorship regimes are often viewed as a deviation from the norms of democratic governance. The EU has been active in promoting democratic transitions and encouraging the development of multiparty systems and free elections. However, the process of democratization is not always smooth, and there have been instances where the EU's efforts have been criticized for being insufficient or ineffective. The focus on democracy and human rights in the EU's relations with authoritarian regimes is a matter of continuing debate and reflection.

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

5.7 The problem of the state of exception presents clear analogies to that of the right of resistance. It has been much debated, particularly during constituent assemblies, whether the right of resistance should be included in the text of the constitution. The draft of the current Italian Constitution included an article that read, "When the public powers violate the rights and fundamental liberties guaranteed by the Constitution, resistance to oppression is a right and a duty of the citizen." This proposal, which followed a suggestion by Giuseppe Dossetti, one of the most prestigious and leading Catholic figures, met with sharp opposition. Over the course of the debate the opinion that it was impossible to legally regulate something that, by its nature, was removed from the sphere of positive law prevailed, and the article was not approved. However, in the Constitution of the German Federal Republic there is an article (Article 55) that unequivocally regulates the right of resistance, stating that "against anyone who attempts to abolish the order [the democratic constitution], all Germans have a right of resistance, if no other remedies are possible." The opposing arguments here are clearly symmetrical to the ones that divide advocates of legalizing the state of exception in the text of the constitution or a special law and those jurists who believe its normative regulation to be entirely inappropriate. It's certain, in any case, that if resistance were to become a right or even a duty (the omission of which could be punished), not only would the constitution end up posing itself as an absolutely unchangeable and all-encompassing rule, but the citizens' political choices would also end up being determined by juridical norms [juridica norma]. The fact is that in both the right of resistance and the state of exception, what is ultimately at issue is the question of the juridical significance of a sphere of action that is in itself extrajudicial. Two theses are at odds here: one asserts that law must coincide with the norm, and the other holds that the sphere of law exceeds the norm. But in the last analysis, the two positions agree in ruling out the existence of a sphere of human action that is entirely removed from law.

I. A BRIEF HISTORY OF THE STATE OF EXCEPTION. We have already seen how the state of siege had its origins in France during the Revolution. After being established with the Constituent Assembly's decree of July 8, 1793, it acquired its proper physiognomy as état de siège both in the siege-policies with the Directoire's law of August 27, 1793 and, finally, with Napoleon's decree of December 24, 1810. The idea of a suspension of the constitution (the "rule of the constitution") had not been introduced, as we have also seen, by the Constitution of 1792. France Year 8. Article 38 of the Charter of 1793 granted the sovereign the power to "make the regulations and ordinances necessary for the execution of the laws and the security of the State"; because of the vagueness of the formula, Chateaubriand observed "that it is possible that one fine morning the whole Charter will be forlorn for the benefit of Article 38." The state of siege was expressly mentioned in the Act addressed to the Constitution of April 22, 1815, which stated that it could only be declared with a law. Since then,
moments of constitutional crisis in France over the course of the nineteenth and twentieth centuries have been marked by legislation on the state of siege. After the fall of the July Monarchy, a decree by the Constituent Assembly on June 24, 1848, put Paris in a state of siege and assigned General Cavaignac the task of restoring order in the city. Consequently, an article was included in the new constitution of November 4, 1848, establishing that the occasions, forms, and effects of the state of siege would be firmly set by a law. From this moment on, the dominant principle in the French tradition (though, as we shall see, not without exception) has been that the power to suspend the laws can belong only to the same power that produces them, that is, parliament (in contrast to the German tradition, which entrusts this power to the head of state). The law of August 9, 1870 (which was partially restricted later by the law of April 3, 1878), consequently established that a political state of siege could be declared by parliament (or, additionally, by the head of state) in the case of imminent danger to external or internal security. Napoleon III had recourse several times to this law and, once installed in power, he transferred, in the constitution of January 1852, the exclusive power to proclaim a state of siege to the head of state. The Franco-Prussian War and the interruption of the Commune coincided with an unprecedented use of the state of exception, which was proclaimed in forty departments and lasted in some of them until 1871. On the basis of these experiences, and after MacMahon's failed coup d'état in May 1870, the law of 1870 was modified to establish that a state of siege could be declared only with a law (or, if the Chamber of Deputies was out in session, by the head of state, who was then obliged to convene parliament within two days) in the event of "imminent danger resulting from foreign war or annual insurrection" (law of April 3, 1878, Art. 1).

World War One coincided with a permanent state of exception in the majority of the warring countries. On August 2, 1914, President Poincaré issued a decree that put the entire country in a state of siege, and this decree was converted into law by parliament two days later. The state of siege remained in force until October 25, 1919. Although the activity of parliament, which was suspended during the first six months of the war, recommenced in January 1915, many of the laws passed were, in truth, pure and simple delegations of legislative power to the executive, such as the law of February 12, 1915, which granted the government an all-powerful power to regulate by decree the production and trade of foodstuffs. As Tingenot has observed, in this way the executive power was transformed into a legislative organ in the material sense of the term (Tingenot 1951, 403). In any case, it was during this period that exceptional legislation by executive ("government") decree (which is now perfectly familiar to us) became a regular practice in the European democracies. Predictably, the expansion of the executive's power into the legislative sphere continued after the end of hostilities, and it is significant that military emergency now ceded its place to economic emergency (with an implicit mobilisation between war and economics). In January 1934, a time of serious crisis that threatened the stability of the Francs, the Poincaré government asked for full powers over financial matters. After a bitter debate, in which the opposition pointed out that this was tantamount to parliament renouncing its own constitutional powers, the law was passed on March 22, with a four-month limit on the government's special powers. Analogous measures were brought to a vote in 1935 by the Laval government, which issued more than five hundred decrees "having force of law" in order to avoid the devolution of the franc. The opposition from the left, led by Léon Blum, strongly opposed this "fascist" practice, but it is significant that once the Left took power with the Popular Front, it asked parliament in June 1937 for full powers in order to devolve the franc, establish exchange control, and impose new taxes. As has been observed (Bosset 1968, 133), this meant that the new practice of legislation by executive ("government") decree, which had been inaugurated during the war, was now a practice accepted by all political sides. On June 30, 1937, the powers that had been desired Blum were granted to the Chamber of governments, in which several key ministers were entrusted to neosocialists. And on April 30, 1938, Edouard Daladier requested and obtained from parliament exceptional powers to legislate by decree in order to cope with the threat of Nazi Germany and the economic crisis. It can therefore be said that until the end of the Third Republic "the normal procedures of parliamentary democracy were in a state of suspension" (xix). When we study the birth of the so-called dictatorial regimes in Italy and Germany, it is important not to forget this concurrent process that transformed the democratic constitutions between the two world wars. Under the pressure of the paradigm of the state of exception, the entire political-constitutional life of Western societies began gradually to assume a new form, which has perhaps only today reached its full development. In December 1939, after the outbreak of the war, the Dullesberg government obtained the power to take by decree all measures necessary to ensure the defense of the nation. Parliament remained in session (except when it was suspended for a month in order to deplore the communist parliamentary threat), but all legislative activity lay
firmly in the hands of the executive. By the time Marshal Pétain assumed power, the French parliament was a shadow of itself. Nevertheless, the Constitutional Act of July 1940, granted the head of state the powers to proclaim a state of siege throughout the entire national territory (which by then was partially occupied by the German army).

In the present constitution, the state of exception is regulated by Article 68, which for the first time in the history of France establishes that the president of the Republic may take all necessary measures "when the institutions of the Republic, the independence of the Nation, the integrity of its territory, or the execution of its international commitments are seriously and immediately threatened and the regular functioning of the constitutional public powers is interrupted." In April 1919, during the Algerian crisis, De Castries had recourse to Article 68 at even though the functioning of the public powers had not been interrupted. Since that time, Article 68 has never again been invoked, but, in conformity with a continuing tendency in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.

The history of Article 48 of the Weimar Constitution is so tightly woven into the history of Germany between the wars that it is impossible to understand Hitler's rise to power without first analyzing the uses and abuses of this article in the years between 1919 and 1933. Its immediate predecessor was Article 68 of the Weimar Constitution, which, in cases where "public security was threatened in the territory of the Reich," granted the emperor the power to declare a part of the Reich to be in a state of war (Kriegszustand), whose conditions and limitations followed those set forth in the Prussian law of June 4, 1871, concerning the state of siege. amid the disorder and vising that followed the end of the war, the deputies of the National Assembly that was to vote on the new constitution (assembled by jurisprudence whom the name of Hugo Pfitz stands out) included in the article that granted the president of the Reich extremely broad emergency (Emergency powers. The text of Article 48 reads, "If security and public order are seriously intruded or threatened in the German Reich, the president of the Reich may take the measures necessary to restore national security and public order, with the help of the armed forces if required."

The article added that a law should specify in detail the conditions and limitations under which this presidential power was to be exercised. Since that law was never passed, the president's emergency (Emergency powers remained so indeterminate that not only did theorists regularly use the phrase "Presidential dictatorship" in reference to Article 48, but in 1954 Schmitt could write that "no constitution on earth had so easily legalized a coup d'état as did the Weimar Constitution" (Schmitt 1955, 155).

For a relative peace between 1933 and 1939, the governments of the Republic, beginning with Hitler's, moved continually Article of 48, proclaiming a state of exception and issuing emergency decrees on no more than two hundred and fifty occasions among other things, they employed it to imprison thousands of communist militants and to set up special tribunals authorized to pronounce capital sentences. On several occasions, particularly in October 1933, the governments had recourse to Article 48 to cope with the fall of the mark, thus reaffirming the modern tendency to coalesce political-military and economic crises.

It is well known that the last years of the Weimar Republic passed entirely under a regime of state of exception; it is less obvious to note that Hitler could probably have taken power had the country not been under a regime of presidential dictatorship for nearly three years and had parliament been functioning.

In July 1932, the Hindenburg government was put in the minority, but Breuning did not resign. Instead, President Hindenburg granted him recourse to Article 48 and dissolved the Reichstag. From that moment on, Germany in fact ceased to be a parliamentary republic. Parliament met only seven times for no longer than twelve months in all, while a fluctuating coalition of Social Democrats and centrists stood by and watched a government that then answered only to the president of the Reich. In 1933, Hindenburg—re-elected president over Hitler and Thälmann—forced Breuning to resign and named the centrist von Papen to his post. On June 4, the Reichstag was dissolved and never reconvened until the advent of Nazism. On July 26, a state of exception was proclaimed in the Prussian territory, and von Papen was named Reich Commissioner for Prussia—leaving Otto Braun's Social Democratic government.

The state of exception in which Germany found itself during the Hindenburg presidency was justified by Schmitt on a constitutional level by the idea that the president is as the "guardian of the constitution" (Schmitt 1920) but the end of the Weimar Republic clearly demonstrates that, on the contrary, a "protected democracy" is not a democracy at all, and that the paradigm of constitutional dictatorship functions instead as a transitional phase that leads inevitably to the establishment of a totalitarian regime.

Given these precedents, it is understandable that the constitution of the Federal Republic did not mention the state of exception. Nevertheless, on June 24, 1968, the "grand coalition" of Christian Democrats and Social Democrats passed...
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Albertine Statute (like the current Republican Constitution) made no mention of the state of exception. Nevertheless, the governments of the kingdom resorted to proclaiming a state of siege many times in Poland and the Polish provinces in 1816 and 1817, in Naples in 1818, in Sardinia and Sicily in 1813 and 1814, and in Naples and Milan in 1821, where the repression of the disturbances was particularly bloody and provoked bitter debates in parliament. The declaration of a state of siege on the occasion of the earthquake of Messina and Reggio Caltanissetta on December 28, 1894 is only apparently a different situation. Not only was the state of siege ultimately proclaimed for reasons of public order—that is, to suppress the rebellions and lootings provoked by the disaster—but from a theoretical standpoint, it is also significant that these acts furnished the occasion that allowed Savoia Romans and other Italian jurists to elaborate the thesis (which we examine in some detail later) that necessity is the primary source of law.

In each of these cases, the state of siege was proclaimed by a royal decree that, while not requiring parliamentary ratification, was nevertheless always approved by parliament, as were other emergency decrees not related to the state of siege (in 1912 and 1913 several thousand small law decrees issued in the preceding years were thus converted into laws). In 1936 the Fascist regime had a law issued that expressly regulated the matter of the law decrees. Article 3 of this law established that, upon deliberation of the council of ministers, "necessity having force of law" could be issued by royal decree. The law was delegated to do so by a law within the limits of the delegation, and (2) in extraordinary situations, in which it is required for reasons of urgent and absolute necessity. The judgment concerning necessity and urgency is not subject to any oversight other than parliament's political oversight. The decrees provided for in the second clause had to be presented to parliament for conversion into law, but parliament's total loss of autonomy during the Fascist regime rendered this condition superfluous.

Although the Fascist government's abuse of emergency law was so great that in 1931 the regime itself felt it necessary to limit such powers, Article 77 of the Republican Constitution established such singular continuity that "in extraordinary situations of necessity and emergency" the government could adopt "provisional measures having force of law," which had to be presented the same day to parliament and which went out of effect if not converted into law within sixty days of their issuance.

It is well known that since then the practice of executive (governmental) legislation by law decrees has become the rule in Italy. Not only have emergency
executive governmental power appears in England as well. Indeed, immediately after war was declared, the government asked parliament to approve a series of emergency measures that had been prepared by the relevant ministers, and they were passed virtually without discussion. The most important of these acts was the Defence of the Realm Act of August 4, 1914, known as the DORA, which not only granted the government quite vast powers to regulate the wartime economy, but also provided for serious limitations on the fundamental rights of the citizens (in particular, granting military tribunals jurisdiction over civilians). The activity of parliament saw a significant eclipse for the entire duration of the war, just as in France. And in England too this process went beyond the emergency of the war, as is shown by the approval—on October 28, 1919, in a time of strikes and social tension—of the Emergency Powers Act. Indeed, Article 1 of the act stated that

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

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

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

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

Both of these problems reach their critical threshold with the Civil War (1861–1865). Acting counter to the Article I, on April 15, 1861, Lincoln decreed that an army at seventy-five thousand men was to be raised and convened special session of Congress for July 4. In the ten weeks that passed between April 15 and July 4, Lincoln in fact acted as an absolute dictator. For this reason, in his book "Lincoln's War," Schmitt can refer to it as a perfect example of constitutional dictatorship: see 325, 326. On April 15, with a technically even more significant decision, he authorized the General in Chief of the Army to suspend the writ of habeas corpus whenever he deemed it accessory along military lines between Washington and Philadelphia, where there had been disturbances. Furthermore, the president's autonomy in deciding on extraordinary measures continued even after Congress was convened (May, on February 14, 1861, Lincoln imposed censorship of the mail and authorized the arrest and detention in military prisons of persons suspected of "disloyal and treasonable practices").

In the epoch he delivered to Congress when it was finally convened on July 4, the president openly justified his actions as the holder of a superior power to violate the constitution in a situation of necessity. "Whether strictly legal or not," he declared, the measures he had adopted had been taken "under what appeared to be a popular demand and a public necessity" in the certainty that Congress would ratify them. They were based on the conviction that even fundamental law could be violated if the very existence of the union and the juridical order were at stake ("Are all the laws but one to go unexecuted, and the Government itself to be in pieces let that one be violated!") (see Roosevelt, 1915, 297). It is obvious that in wartime situations the conflict between the president and Congress is essentially theoretical. The fact is that although Congress was perfectly aware that the constitutional jurisdictions had been transgressed, it could do nothing but ratify the actions of the president - as it did on August 6, 1864. Strengthened by this approval, on September 17, 1862, the president proclaimed his amendment of the laws on his authority alone until, two days later, generalized the state of exception throughout the entire territory of the United States, authorizing the arrest and trial before courts martial of "all Rebels and Insurgents, their allies and abettors within the United States, and all persons discouraging voluntary resistance, resisting militia drafts, or guilty of any disloyal practice, offending and conspire to Rebel against the authority of the United States." By this point, the president of the United States was the holder of the sovereign decision on the state of exception.

According to American historians, during World War One President Woodrow Wilson personally assumed even broader powers than those Abraham Lincoln had claimed. It is, however, necessary to specify that instead of ignoring Congress, as Lincoln had done, Wilson preferred each time to have the powers in question delegated to him by Congress. In this regard, his practice of government is closer to the one that would prevail in Europe in the same years, or to the current one, which instead of declaring the state of exception prefers to have exceptional laws issued. In 1917, in 1919 to 1919, Congress approved a series of acts (from the Espionage Act of 1917 to the Sedition Act of May 1918) that granted the president complete control over the administration of the country and not only prohibited discoursed activities (only in collaboration with the enemy and the diffusion of false reports), but even inside is a crime to "willfully cause, print, write, or publish any false, profane, seditious, or abusive language about the form of government of the United States.

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

I突出问题 unsurprisingly the leadership of this great army of our people dedicated to a disciplined attack over common problems. . . . I am prepared under my constitutional duty to accommodate the moment that a stricten Nation in the midst of a troubled world may require . . . But in the event that the Congress shall fail to take [the necessary measures] and in the event
that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one re- 

taining instrument to meet the crisis—a broad Executive power to wage war against the enemy, as great as the power that would be given to me if we were in fact invaded by a foreign foe. (Roosevelt 1938, 14–15)

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

ty-first century.

The outbreak of World War Two extended these powers with the proclama-
tion of a "limited" national emergency on September 8, 1939, which became un-
limited on May 27, 1940. On September 7, 1940, while requesting that Congress 

report a law concerning economic matters, the president renewed his claim to sovereign powers during the emergency: "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. . . . The American people can... be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defense" (Roosevelt 1940, 200–65). The most

spectacular violation of civil rights (all the more serious because of its widely

social motivation) occurred on February 19, 1942, with the internment of sev-

enty thousand American citizens of Japanese descent who resided on the West

Coast (along with forty thousand Japanese citizens who lived and worked there).

President Bush's decision to order to himself constantly as the "Commensu-
der in Chief of the Army" after September 11, 2001, must be considered in the con-
inual of this presidential claim to sovereign powers in emergency situations.

If, as we have seen, the assumption of this title entails a dance reference to the

state of exception, then Bush is attempting to produce a situation in which the

emergency becomes the rule, and the very distinction between peace and war

(and between foreign and civil war) becomes impossible.

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

something external, that is, an essentially political, or in any case extra-

juridical, phenomenon. Among the former, some (such as Sant Ro-
mans, Eulenburg, and Morstel) understand the state of exception to be

an integral part of positive law because the necessity that grounds it acts as

an autonomous source of law, while others (such as Hoerni, Randel-
letti, and Rassler) conceive of it as the state's subjective (natural or con-

stitutional) right to its own preservation. Those in the latter group (such as Bizanet, Balladone-Pallieri, and Carré de Malberg) instead

consider the state of exception and the necessity that grounds it to be essen-

tially extrajuridical, de facto elements, even though they may have con-

sequences in the sphere of law. Julius Hatshok has summarized the various

positions in the context between an objetivo Nostroandhaciea, according to which every act performed outside of or in conflict with the

law in a state of necessity is contrary to law and, as such, is legally

chargeable; and a subjetive Nostroandhaciea, according to which emer-

gency (accidentally) powers are grounded in "a constitutional or precon-

stitutional (natural) right" of the state (Hatshok 1973, 188ff.), regarding

which good faith is enough to guarantee immunity.

The simple topographical opposition (inside/outside) implicit in these theories seems insufficient to account for the phenomenon that it should explain. If the state of exception's characteristic property is a

(total or partial) suspension of the juridical order, how can such a sus-

pension still be contained within it? How can an amnestic be inscribed within the juridical order? And if the state of exception is instead only a de facto situation, and as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive

situation is concerned? And what is the meaning of this lacunae?

In truth, the state of exception is neither external nor internal to the

juridical order, and the problem of defining it conceals precisely a

threshold, or a zone of indiscernibility, where inside and outside do not

exclude each other but rather blur with each other. The suspension of the

norm does not mean its abolition, and the zone of amnesia that it

establishes is not (or at least claims not to be) unrelated to the juridical

order. Hence the interest of those theories that, like Schmitt's, compli-
cate the topographical opposition into a more complex topological re-

lation, in which the very limit of the juridical order is at issue. In any
...case, to understand the problem of the state of the exception, one must first consider the underlying principle, specifically the notion of necessity as it relates to the allocation of resources (or discretion) in a way that is consistent with the overall objectives of the system. The theory of necessity is often seen as a way to justify the allocation of resources, where the necessity of an action is determined by the context and the available options.

The principle of necessity functions in legal contexts by establishing the legitimacy of a decision based on the circumstances at hand. However, it is important to note that the concept of necessity is not always easy to define, as it depends on the subjective interpretation of the circumstances. In the case of necessity, the decision-making process is influenced by the available information, the potential consequences of the decision, and the values and priorities of the decision-makers.

This concept is often applied in situations where there is a conflict of interests, such as in economic, legal, or ethical contexts. The decision-making process can be complex, and the application of the principle of necessity requires careful consideration of all relevant factors.

In conclusion, the theory of necessity plays a crucial role in the allocation of resources, but it is important to be aware of its limitations and to consider the potential consequences of any decision that is based on this principle.
a situation where the transgressive deed has already occurred (pro eventu rei [for the consequence of the thing]); for example in a case where a person who could not attend to the episcopal act has in fact already been ordained as bishop. 

Paradoxically, the law is not applied here precisely because the transgressive act has effectively already been committed and punishing it would improperly entail negative consequences for the Church. In weighing this text, Anton Schiitte has rightly observed that "in condemning validity by faciatura, in seeking contact with an extrajuridical reality, [Cicero] prevents the law from referring only to the law, and thus prevents the closure of the juridical system" (Schiitte 1993, 110).

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

If we find an implicit critique of the state of exception in Dante's De Iure Naturali. Seeking to prove that Rome gained dominion over the world not through violence but love, Dante states that it is impossible to obtain the end of law (that is, the common good) without law, and that therefore "whoever intends to achieve the end of law, must proceed with law [sperandem quem juris fundamentum aut justi fundamentum]" (3:22). The idea that a suspension of law may be necessary for the common good is foreign to the medieval world.

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It is only with the moderns that the state of necessity tends to be included within the juridical order and to appear as a true and proper "state" of the law. The principle according to which necessity defines a unique situation in which the law loses its "vitae obliganda" (this is the sense of the edage necessitas legem non habet) is reversed, becoming the principle according to which necessity constitutes, so to speak, the ultimate ground and very source of the law. This is true not only for those writers who sought in this way to justify the national interests of one state against another (as in the formula Non justum esse Caesaris "necessity knows no law," used by the Prussian Chancellor Berthmann-Holdweg and taken up again in Josef Kohler’s book of that title [1993]), but also for those jurists, from Jellinek to Duguit, who see necessity as the foundation of the validity of decrees having force of law issued by the executive in the state of exception.

The State of Exception as a Paradigm of Government

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

The necessity with which we are concerned here must be conceived of as a state of affairs that, at least as a rule and in a complete and practically effective way, cannot be regulated by previously established norms. But if it has no law, it makes law, as another common expression has it, which means that it itself constitutes a true and proper source of law. . . . It can be said that necessity is the first and originar source of all law, such that by comparison the others are to be considered somehow derivative. . . . And it is to necessity that the origin and legitimation of the legal institution: per excelso—i.e., the state, and its constitutional order in general—must be traced back, when it is established as a de facto process, for example, on the way to revolution. And what occurs in the initial moment of a particular regime can also repeat itself, though in an exceptional way and with
critiqued by those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so.

The concept of necessity is an entirely subjective one, relative to the aims that one wants to achieve. It may be said that necessity dictates the issuance of a given norm, because otherwise the existing juridical order is threatened with ruin; but there must be agreement on the point that the existing order must be preserved. A revolutionary attitude may proclaim the necessity of a new norm that annuls the existing institutions that are contrary to the new exigencies; but there must be agreement in the belief that the existing order must be disrupted in observance of new exigencies. In both cases...the recourse to necessity entails a moral or political (or, in any case, extra-constitutional) evaluation, by which the juridical order is judged and is held to be worthy of preservation or strengthening even at the price of its possible violation. For this reason, the principle of necessity is, in every case, always a revolutionary principle. (Tassadore-Pullieri 1974, 108)

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

It is possible that Schmitt (who refers several times to Santu Romano in his writings) probably knew of Romano’s attempt to ground the state of exception in necessity as the originary source of law. His theory of sovereignty as the decision on the exception grants the Necessity a property fundamental law, one that is certainly comparable to the rank given it by Romano, who made it the originary figure of the juridical order. Furthermore, he shares with Romano the idea that the juridical order ([diritto] is not enhanced in the law ([legge]) it is not by chance that he cites Romano positively in the context of his critique of the liberal philosophy; but while he Italian jurist wholly equates the state with law, and therefore denies all juridical relevance of the concept of constituent power, Schmitt sees the state of exception as precisely the moment in which state and law reveal their irreducible difference (in the state of exception "the state continues to exist, while law no longer" [Schmitt 1931, 1982]), and thus he can avoid the extreme figure of the state of exception—sovereign dictatorship—in the power constituent.

1.13 According to some writers, in the state of necessity "the judge elaborates a positive law of crisis, just as, in normal times, he fills in juridical lacunae" (Matthot 1966, 242). In this way the problem of the state of exception is put into relation with a particularly interesting problem in legal theory, that of lacunae in the juridical order ([diritto]). At least as early as Article 4 of the Napoleonic Code ("The judge who refuses to judge, on the pretext of silence, obscurity or insufficiency of the law, can be prosecuted on the charge of denial of justice"); in the majority of modern legal systems the judge is obligated to pronounce judgment even in the presence of a lacuna in the law ([legge]). In analogy with the principle according to which the law ([legge]) may have lacunae, but the juridical order ([diritto]) admits none, the state of necessity is thus interpreted as a lacuna in public law, which the executive power is obligated to remedy. In this way, a principle that concerns the judiciary power is extended to the executive power.

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