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# Legalizing Lawlessness: On Giorgio Agamben's State of Exception

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## Abstract

*This review essay examines in some detail Giorgio Agamben's recent State of Exception, his third in a series of books that reconstruct sovereignty using a range of interdisciplinary and critical tools. Engaging with Agamben's text on its own terms – rather than focusing on the potential deficiencies of an approach that eschews standard doctrinal and empirical research – the essay seeks to distil a set of conceptual and analogical perspectives that might help interpret the significance of the present rise of emergency regimes. The essay concludes by exploring whether Agamben's work might enrich legal inquiry, despite its often alien tenor, by reviewing some recent cases in the UK and the US involving exceptional measures.*

For all the talk of empire, new security paradigms and executive privilege, there have been remarkably few theoretical efforts to tease out the deep structures underlying the shifting currents of our evolving legal-political culture. *State of Exception*, Giorgio Agamben's third volume in a series also comprising his 1998 *Homo Sacer* and 1995 *Remnants of Auschwitz* provides a glimpse of how such a theory might look. This is a timely and sustained inquiry into the now near ubiquitous state of emergency (or of exception, siege, necessity, or martial law), reaching back through medieval to Roman juridical conceptions of sovereign authority. Agamben identifies the state of exception as a modern institution, with roots in the French revolution, ascendancy

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during the First World War, and dominance by the mid-20th century as the ‘paradigmatic form of government’. However, the complex thesis presented in this treatise goes far beyond the paradoxical assertion that the state of exception is today the rule – it elaborates a theory of law to account for the existence of a realm of human activity not subject to law. The legal production of the state of exception appears in this story as an ongoing imperative to colonize ‘life itself’. Although the outcome of this encroaching process is by no means certain, the stakes, as Agamben perceives them, could not be higher: it signals the slow disappearance of meaningful political action.

That larger thesis emerges only gradually. To begin, Agamben identifies two main schools of thought on the legality of the state of exception. The first views it as ‘an integral part of positive law because the necessity that grounds it is an autonomous source of law’.<sup>1</sup> This approach is today codified in international law through the notion of derogation. When faced with a public emergency that ‘threatens the life of the nation’, international human rights treaties – and many constitutions – permit states to suspend the protection of certain basic rights.<sup>2</sup> The existence of derogation-like clauses is generally represented as a ‘concession’ to the ‘inevitability’ of exceptional state measures in times of emergency, and also as a means to somehow control these.<sup>3</sup> As such, they have been viewed as ‘one of the greatest achievements of contemporary international law’.<sup>4</sup> In practice, the derogation model ‘creates a space between fundamental rights and the rule of law’, wherein states can remain lawful while transgressing individual rights – effectively creating, in the words of Tom Hickman, a ‘double-layered constitutional system’.<sup>5</sup>

Agamben’s second group<sup>6</sup> understands the state of exception to be ‘essentially extrajudicial’, something prior to or other than law. For these writers, a constitutional endorsement of the state of exception is a pragmatic recognition of limited constitutional dominion. Echoing Alexander Hamilton, that ‘[t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed’,<sup>7</sup> proponents argue that it is neither possible nor desirable to control executive action in times of emergency using standard judicial accountability mechanisms.<sup>8</sup> A legal space must instead be opened for untrammelled state action, albeit only for the time it

<sup>1</sup> G. Agamben, *State of Exception* (2005), at 23 [hereinafter *State of Exception*]. Agamben refers to the jurists Santi Romano, Hauriou, Mortati, Hoerni, Ranelletti and Rossiter.

<sup>2</sup> See International Covenant on Civil and Political Rights (ICCPR; entered into force 1976), Art. 4; European Convention on Human Rights (ECHR; entered into force 1950), Art. 15; American Convention on Human Rights (ACHR; entered into force 1978), Art. 27.

<sup>3</sup> Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism’, 68 *Modern Law Review* (2005) 655, at 657.

<sup>4</sup> Klein, ‘Jaime Oraa, Human Rights in States of Emergency in International Law’ (book review) 4 *EJIL* (1993) 134.

<sup>5</sup> Hickman, *supra* note 3, at 659.

<sup>6</sup> *State of Exception*, at 23, referring to the jurists Biscaretti, Balladore-Pallieri and Carré de Malberg.

<sup>7</sup> J. Madison, A. Hamilton and J. Jay, *The Federalist Papers* (1987), 185.

<sup>8</sup> See Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’, 112 *Yale L.J.* (2003) 1011, at 1021–1024. See also Hickman, *supra* note 3, at 658.

takes to restore the constitutional order. Attempts to impose legal controls will merely infect ordinary rights protections with extraordinary elasticity. Agamben, however, rejects both approaches – ‘the state of exception is neither internal nor external 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 one another’. At root, he wonders: ‘How can an anomie be inscribed within the juridical order?’<sup>9</sup>

To lift the ‘veil covering this ambiguous zone’, Agamben offers a juridical genealogy of the state of exception: the repeated and variegated efforts throughout the Western legal tradition to extricate sovereign power entirely from the habitus of law or, in a related move, to legislate for the law’s own suspension. Agamben notes approvingly the medieval conception of the exception, citing Gratian, Thomas Aquinas and Dante, which serves not to ‘render the illicit licit’ but ‘to justify a single, specific case of transgression by means of exception’. An example, taken from Gratian, is the post hoc recognition of a bishop ordained despite a lack of qualifications – in order to avoid rupture within the church. For the common good, the law’s strictures were exceptionally disregarded, a move which ‘prevents the law from referring only to the law and thus prevents the closure of the juridical system’, in the words of Antonin Schütz.<sup>10</sup>

The modern formulation of the state of exception arrives with a 1789 decree of the French constituent assembly, distinguishing a ‘state of peace’ from a ‘state of siege’ in which ‘all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility’.<sup>11</sup> From there the state of exception is gradually emancipated from its war context and is introduced during peacetime to cope with social disorder and economic crises. The key observations are, first, that ‘the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one’,<sup>12</sup> second, that the state of exception immediately assumes a ‘fictitious’ or political character, where a vocabulary of war is maintained metaphorically to justify recourse to extensive government powers. These points are demonstrated repeatedly in Agamben’s brief history of the state of exception in Europe and the United States, from the introduction of states of emergency to deal with financial crises in Germany in 1923<sup>13</sup> and France in 1925, 1935 and 1937,<sup>14</sup> to union strikes and social upheaval in Britain in 1920,<sup>15</sup> earthquakes in Italy in 1908,<sup>16</sup> and, perhaps most

<sup>9</sup> The translator, Kevin Attlee, generally uses ‘juridical order’ for the Italian *diritto*, whereas *legge* is translated as ‘law’. See *State of Exception*, at 27.

<sup>10</sup> Schütz, ‘L’immaculée conception de l’interpète et l’émergence du système juridique: A propos de fiction et construction en droit’, *Droits* (1995) 120, cited in *State of Exception*, at 26.

<sup>11</sup> T. Reinach, *De L’état de siège. Étude historique et juridique* (1885), at 109, cited in *State of Exception*, at 5.

<sup>12</sup> *State of Exception*, at 5.

<sup>13</sup> *Ibid.*, at 15.

<sup>14</sup> *Ibid.*, at 13.

<sup>15</sup> *Ibid.*, at 19.

<sup>16</sup> *Ibid.*, at 17.

strikingly, by Presidents Lincoln – to provide a basis for the abolition of slavery in 1862 – and Roosevelt, to ensure passage of the New Deal in 1933.<sup>17</sup> Roosevelt's words in this context are illustrative: 'I shall ask the Congress for the one remaining instrument to meet the crisis – broad Executive power to wage war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.'<sup>18</sup> The present 'permanent state of exception' too should, Agamben indicates, be understood as a fiction sustained through military metaphor.

## 1 The Liminal Space of Law

Having consolidated the conceptual background, Agamben proposes a theory of the state of exception as 'the preliminary condition for any definition of the relation that binds and at the same time abandons the living being to the law'. His inquiry concerns the origins and liminal space of law – how law copes when confronted by the irreducibly non-legal: 'life itself'. The state of exception is the recognition of law's outside but it simultaneously prompts sovereign attempts to encompass that very outside within the law. Agamben finds this 'long battle over anomie' at the heart of Carl Schmitt's well-known definition of the sovereign as 'he who decides on the exception', by means of which Schmitt ties the state of exception to dictatorship: the dictator/sovereign unites the legal and the non-legal by means of an extralegal decision 'having the force of law'. In this way, according to Schmitt, the juridical order is preserved even when the law itself is suspended. This can take place in two ways. In a 'commissarial dictatorship' the law is temporarily suspended in order that it might ultimately be implemented.<sup>19</sup> Although unapplied, the law remains in force: the constitution provides a supra-statutory background that renders its suspension lawful. In a second version, 'sovereign dictatorship', the state of exception signifies the exercise of 'constituent power': in effect, it is a moment where no constitution or law applies other than the sovereign decision itself.<sup>20</sup> The archetypal moment is the immediate aftermath of the French revolution – but, in principle, wherever an old order is overthrown and a new one introduced (as for example in Iraq) this moment is accompanied by an effective suspension of law, during which period only the sovereign decides on the existence and content of law. The violence of martial law and sovereign decree is therefore, in Schmitt's writing, legitimate over and against other manifestations of extrajudicial violence.

Agamben rejects Schmitt's position and moves to displace any theory that 'seeks to annex the state of exception immediately to the law' or to 'inscribe [it] indirectly in a juridical context' and to salvage it instead as law's 'other': 'the state of exception is not a "state of law" but a space without law', a 'zone of anomie'.<sup>21</sup> It is not equivalent to a

<sup>17</sup> *Ibid.*, at 21–22.

<sup>18</sup> F. D. Roosevelt, *The Public Papers and Addresses*, vol. 2 (1938), cited in *State of Exception*, at 22.

<sup>19</sup> *State of Exception*, at 33.

<sup>20</sup> *Ibid.*, at 34.

<sup>21</sup> *Ibid.*, at 50–51.

dictatorship, where laws continue to be made and applied (albeit non-democratically), but one in which law is rather entirely emptied of content. In Agamben's analysis, Schmitt's 'paradoxical' formulation – which attempts to reinsert a legal vacuum into the legal order – is rather designed to privilege sovereign violence at all costs. Agamben challenges Schmitt's paradigm through the voice of Walter Benjamin, whose 1921 'Critique of Violence' speaks of a 'pure' or 'divine' violence that is neither subject to nor preserving of law,<sup>22</sup> that may appear as a flash of revolutionary transcendence<sup>23</sup> and that Agamben reads as a 'cipher for human activity'.<sup>24</sup> Schmitt's state of exception, on this reading, is a legal edifice constructed to domesticate the very possibility of non-state (or pure) violence. In sum, Benjamin and Schmitt agree on the existence of anomic violence – but they treat it differently, either as the divine violence that 'neither makes nor preserves law, but deposes it' or as the last frontier to be annexed by the sovereign by means of the state of exception.<sup>25</sup> The legal category of the emergency, then, extends or completes law's empire. Agamben concludes that the state of exception is therefore 'a *fictio iuris* par excellence which claims to maintain the law in its very suspension', but produces instead a violence that has 'shed every relation to law'.<sup>26</sup>

While this assertion remains unsupported by empirical reference or example – indeed, this is a general problem in Agamben's writing – it nevertheless corresponds obliquely to the emergent phenomena referred to variously as global law, the transnational rule of law, and the fragmentation of international law.<sup>27</sup> Agamben extends this argument along two countervailing paths – backwards to establish parallels with

<sup>22</sup> Benjamin, 'Critique of Violence', in W. Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings* (P. Demetz (ed.), 1986), at 300. Benjamin opposes this 'divine violence' to the 'mythical violence' of the state: 'if mythical violence is lawmaking, divine violence is law-destroying.' *Ibid.*, at 297.

<sup>23</sup> Benjamin, 'Theses on the Philosophy of History', in W. Benjamin, *Illuminations* (H. Arendt (ed.), 1969), 254.

<sup>24</sup> *State of Exception*, at 59.

<sup>25</sup> This is not merely a question of textual exegesis; recent negotiations on the international legal definition of 'terrorism' have long stalled on just this issue – should all violence undertaken to overthrow states be internationally outlawed, foreclosing from international law all violent expression that is already and necessarily unlawful in a given state? Or should revolution remain internationally unregulated, given that any regulation will, in any case, fail to comprehend action which succeeds in 'deposing' the law? (UN Doc A/59/37, paras 15–16). See generally the deliberations of the Ad Hoc Committee established by GA Res. 51/210 of 17 December 1996, available at <http://www.un.org/law/terrorism> (accessed 24 February 2006).

<sup>26</sup> *State of Exception*, at 59.

<sup>27</sup> On 'global law', see, for example, the Global Administrative Law project at NYU Law School ([http://www.iilj.org/global\\_adlaw/](http://www.iilj.org/global_adlaw/)). See also Abbott, *et al.*, 'The Concept of Legalization' in R. Keohane (ed.), *Power and Governance in a Partially Globalized World* (2002); Cohen, 'Whose Sovereignty? Empire Versus International Law' 18 *Ethics and International Affairs* (2004) 1; G. Teubner (ed.), *Global Law Without a State* (1997). The literature on the transnational rule of law is extensive; good starting places are T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006), and the annotated 'law and justice institutions' bibliography on the World Bank website (<http://www.worldbank.org>). On the 'fragmentation' of international law see the work of the International Law Commission, UN Doc A/60/10 (2005) *Report of the International Law Commission, Fifty Seventh Session*; Koskeniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden JIL* (2003) 553.

Roman imperialism, and forwards towards a theory of the relation between law and anomie. The first path locates a parallel (or, possibly, origin) of the contemporary state of exception in the Roman notion of *iustitium*.<sup>28</sup> This was the suspension of the application of law in the Roman republic, following a declaration of a state of emergency (*tumultus*) by the Senate, to the actions of magistrates and even citizens; the word alters its meaning with the onset of the Roman Empire,<sup>29</sup> ultimately referring to a period of institutionalized chaos following the death of the emperor, pending the inauguration of a successor. The later Roman *iustitium*, a declaration of anomie, explicitly signals the hiatus between one sovereign legal order and the next. Indeed, the *iustitium* becomes an effective instrument of the emperor, to be turned on or off at will.<sup>30</sup> It is in his discussion of *iustitium*, a state in which certain laws simply do not apply, that Agamben reclaims the state of exception as a zone not of law but of anomie, not amenable to capture by law.<sup>31</sup>

The second path of inquiry – dealing with the relation between law and ‘life itself’ – is somewhat more complex and appears almost parenthetically throughout the text.<sup>32</sup> Agamben views the relation between law and the court process as isomorphic to the Saussurean linguistic paradigm of the relation between *langue* and *parole*. Just as any specific instance of speech (*parole*) requires the background existence of a self-sufficient universe of language, but reaches beyond that background to touch specific non-linguistic phenomena, so in a court-trial, judges apply to specific cases laws that depend for their effect on the existence of a self-referential legal system. The application of law by judges is, like speech, an enunciative act that applies the general to the particular. But just as speech acts can fail to connect with actual phenomena, circulating instead in the abstract self-referentiality of *langue*, similarly, law can be applied without explicit recognition of any reality outside its own abstract realm (the ‘closure’ whose avoidance Schütz approves of in Gratian). And just as structural linguists once feared that the physical world risks becoming inaccessible *per se*, trapped outside a self-referential and abstract ‘prisonhouse of language’,<sup>33</sup> so too law can shape and limit the politically possible, rendering a world without sovereign ascendancy unthinkable or unattainable. Fundamentally, Agamben worries that attempts like Schmitt’s, both past and contemporary, to legislate for anomie – that is, to encompass the non-legal within the law – amount to a denial of the existence of an extralegal reality: the existing ‘juridical order’ becomes total. The thesis is stated most clearly in the last paragraph of the book:

To show law in its nonrelation to life and life in its nonrelation to law means to open a space between them for human action, which once claimed for itself the name of ‘politics’. Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself, at best, as

<sup>28</sup> *State of Exception*, at 42

<sup>29</sup> *Ibid.*, at 65.

<sup>30</sup> *Ibid.*, at 68.

<sup>31</sup> *Ibid.*, at 50.

<sup>32</sup> *Ibid.*, at 36, 39, 60, 70.

<sup>33</sup> The position is stated perhaps most clearly in Frederic Jameson’s book of that name. See F. Jameson, *The Prisonhouse of Language* (1972).

constituent power (that is, violence that makes law), when it is not reduced to merely the power to negotiate with the law.<sup>34</sup>

As a final figure of illustration, Agamben follows the Roman relation of *auctoritas* (first of the Senate in ratifying the will of the people, later of the emperor) to the *potestas* of the magistrate. *Auctoritas*, which is 'the power to suspend or reactivate the law, but is not formally in force as law' is located in the figure of authority, and is an attribute not of law but of life itself, deriving originally from the people of the republic, later from the person of the emperor.<sup>35</sup> It exists in a binary relationship 'at once of exclusion and supplementation' to *potestas*, the magistrate's power to execute the law.<sup>36</sup> Through Augustus' *auctoritas*, he 'legitimizes and guarantees the whole of Roman political life'.<sup>37</sup> Bringing the parallel forward to contemporary experience, Agamben writes:

As long as the two elements [i.e. *auctoritas* and *potestas* or life and law] remain correlated yet conceptually, temporally and subjectively distinct . . . their dialectic . . . can nevertheless function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine.<sup>38</sup>

More than a hint of Benjamin's political theology of messianic revolution permeates the final pages.

## 2 Sovereign Checks

Fascinating, provocative and erudite, *State of Exception* is nevertheless frequently as gnomic as it is compelling: at times a little more clarity or probing would be welcome. The assertion of a permanent state of exception since World War I, described as 'a laboratory for testing and honing the functional mechanisms and apparatuses of the state of exception as a paradigm of government',<sup>39</sup> is short of both empirical substantiation and conceptual clarification. Still, at first sight, the available data would seem to bolster Agamben's case. Constitutional provisions allowing for states of emergency have effectively globalized in the course of the 20th century – at least 147 countries had something of the sort by 1996.<sup>40</sup> Governments have taken regular – in some countries constant – recourse to this mechanism: in 1978 an estimated 30 countries were in some form of state of emergency;<sup>41</sup> by 1986 the number was 70.<sup>42</sup> However,

<sup>34</sup> *Ibid.*, at 88.

<sup>35</sup> *Ibid.*, at 79.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at 82.

<sup>38</sup> *Ibid.*, at 86.

<sup>39</sup> *Ibid.*, at 7.

<sup>40</sup> See Camp Keith and Poe, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration', 26 *Human Rights Quarterly* (2004) 1071, at 1080.

<sup>41</sup> International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1993), at 413.

<sup>42</sup> J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (1994), at 3–4.

this added detail does little to illuminate Agamben's main argument concerning the emergence of a new juridical space at global level: developments within individual countries rather reflect than drive this larger pattern, and focusing on them tends to open up areas of easy contestation that are not fundamental to his point. In any case, the increasingly loud official insistence on a new condition of emergency without visible end – a supposed paradigm shift echoing through the din of the 'war on terror' – is by far the better indicator of this book's central thesis. What is uniquely valuable here is the penetrating search for the broad juridical precedents that underpin these fantastic claims of security imperatives and lend them traction. It may be best to view this book as opening a potentially fruitful avenue for legal scholars to explore with more precise tools.

A more worrying gap throughout the book is its minimal and inconclusive discussion of the separation of powers.<sup>43</sup> Agamben registers historical moments of contestation between executives and legislatures for control over the state of exception. Today many countries require parliamentary ratification, sometimes post hoc, of the executive or presidential prerogative to 'decide on the exception'.<sup>44</sup> He frequently characterizes sovereign expansion in terms of recourse to the decree, and clearly views parliamentary marginalization as an indicator of the same phenomenon. Certainly there is no shortage of examples, both past and present, of parliaments bowing too easily to executive demands couched in terms of emergency. At bottom, however, parliamentary oversight appears in this story as an ambiguous side-issue, not fundamentally decisive. The question raised here – but not answered – is whether the institutional division of government power can prevent or retard the state's proclivity to expansionary legalism – or whether on the contrary it is rather an irrelevance or even a catalyst – as Hannah Arendt once suggested: 'the principle of separation of power . . . actually provides a kind of mechanism built into the very heart of government, through which new power is constantly generated'.<sup>45</sup>

The possible importance of the judiciary – not only in ascertaining the law but also in cordoning off its domain – is not discussed at all. This is the more striking as judicial processes are at the centre of recent debate on the state of emergency. The US Supreme Court and Britain's Law Lords both ruled in 2004 on cases relating directly to executive emergency measures. The UK case, *A. v. Secretary of State for the Home Department*, involved judicial review of the government's derogation from its human rights obligations and subsequent indefinite detention without trial of eight non-nationals.<sup>46</sup> The Lords examined both points: whether there was in fact a situation of emergency requiring derogation (there was), and whether the actions

<sup>43</sup> For more detailed discussion, see Humphreys, 'Nomarchy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle', *Cambridge Review of International Affairs* (forthcoming 2006).

<sup>44</sup> The state of exception can be called by the executive alone in 50 of 147 countries studied by Keith and Poe; parliamentary confirmation of the executive decision is explicitly required in a further 49 constitutions; the legislature has sole authority in just 16 countries. Keith and Poe, *supra* note 40, at 1079–1080.

<sup>45</sup> H. Arendt, *On Revolution* (1990), at 151–152.

<sup>46</sup> *A. v. Secretary of State for the Home Department* [2004] UKHL 56.

taken were 'proportional'<sup>47</sup> to the threat (they were not). On the first question, Lord Bingham wrote for the majority:

It is perhaps preferable to approach this question as one of demarcation of functions or . . . 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. . . It is the function of political and not judicial bodies to resolve political questions. The present question seems to me to be very much at the political end of the spectrum.<sup>48</sup>

Lord Bingham's position focuses the grammar of Schmitt's dictum – 'sovereign is he who decides on the exception' – and although some commentators wished for a more rigorous burden on the government to 'advance clear and convincing evidence' of the need for derogation powers,<sup>49</sup> few questioned the basic principle articulated – that of a deferential model of separation of powers.<sup>50</sup> Bingham's conclusion is also in keeping with – and relied upon – the case law of the European Court of Human Rights, which has deferred to national authorities on derogation decisions in all but one instance.<sup>51</sup> That 1969 finding concerned a military regime – Greece was, crucially, not a democracy at the time – which had effectively triggered the conditions leading to 'emergency'.<sup>52</sup> In response to the ruling, Greece withdrew from the Council of Europe.<sup>53</sup>

A. nevertheless matters, not simply because the Lords rejected the particular law under review<sup>54</sup> – but rather because in doing so, they drew attention to a critical structural element of derogation regimes *tout court*. Hickman's notion of a 'double-layered constitutional system' recalls the 'dual state' promulgated in Fascist Italy and Nazi Germany, which 'placed beside the legal constitution a second structure, often not legally formalized, that could exist alongside the other because of the state of

<sup>47</sup> The European Court of Human Rights uses 'strict requirement' rather than 'proportionality' as the standard test in cases of derogation. See Hickman, *supra* note 3, at 665.

<sup>48</sup> A., at para. 29.

<sup>49</sup> Hickman, *supra* note 3, at 662.

<sup>50</sup> See, for example, Tierney, 'Determining the Exception: What Role for the Parliament and the Courts?' 68 *Modern Law Review* (2005) 668; Dyzenhaus, 'An Unfortunate Outburst of Anglo-Saxon Parochialism', 68 *Modern Law Review* (2005) 673; Hiebert, 'Parliamentary Review of Terrorism Measures', 68 *Modern Law Review* (2005) 676; The Rt Hon Lady Justice Arden, 'Human Rights in the Age of Terrorism', University of Essex and Clifford Chance Lecture (27 January 2005).

<sup>51</sup> See especially *Lawless v. Ireland* (No.3) (App. 332/57) judgement of 1 July 1961. The ruling, establishing a wide 'margin of appreciation' for states, is the standard reference for Strasbourg case law on Art. 15 (regarding derogation). See also: *Ireland v. United Kingdom*, (App. 5310/71), judgment of 18 January 1978; *Branigan and McBride v. United Kingdom* (Apps. 14553/89;14554/89), judgment of 26 May 1993; *Aksoy v. Turkey* (21987/93, judgement of 18 December 1996); *Demir v. Turkey*, (22280/93, judgment of 5 December 2002); *Yaman v. Turkey*, (32446/96, judgement of 2 November 2004); *Sakik v. Turkey* (23878/94;23879/94;23880/94, judgment 26 November 1997) and *Sadak v. Turkey* (25142/94;27099/95, judgment of 8 April 2004).

<sup>52</sup> The Greek Case, 12 YB 1 ECom HR (1969). See Tierney, *supra* note 53, at 669.

<sup>53</sup> Greece rejoined the Council of Europe in 1974.

<sup>54</sup> Anti-terrorism, Crime and Security Act 2001, Part 4 (Immigration and Asylum). The derogation was enacted with the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).

exception'.<sup>55</sup> Just as an extra-constitutional system within a dual state applies only to a specific group – historically, Jews or political enemies – so must a double-layered constitution introduce some criteria for distinguishing between those who are subject to a suspension of rights, and those who are not. When, as in this case, the rights to be suspended include that to liberty subject to trial, some form of 'profiling' seems inevitable to take the place of court-proven guilt – likely grounds include race, ethnicity, religion, and nationality. In *A.*, the government explicitly argued that their measures were allowable because they applied only to non-nationals. The Lords rejected this argument as irrational (in that there was no reason to assume only foreigners might be terrorists) and 'discriminatory'. The latter ruling is the more remarkable as it goes beyond Strasbourg jurisprudence in two respects: first in finding discrimination in connection with derogation – a case previously alleged but never accepted by the European court – second, in ruling against discrimination on grounds of 'nationality', which is not explicitly protected by the European Convention on Human Rights (on which the UK Human Rights Act is based).<sup>56</sup> In this way, the judgment in *A.* appears to hold out – however temporarily – against the encroachment of rule by exception, formally deferring to executive decision, while substantively intervening.

In a somewhat analogous case in the United States, *Rasul v. Bush*, the Supreme Court in 2004 upheld the right of non-citizens imprisoned on non-US territory to habeas corpus review.<sup>57</sup> The case involved 10 detainees held at Guantánamo Bay – whose very existence is a bold illustration of legally constituted anomic space – on the basis of a congressional law allowing for exceptional measures.<sup>58</sup> In effect, the court rejected a technical argument attempting to parse between 'sovereignty' (Cuba's) and 'jurisdiction' (of the United States federal courts). The formalization and voiding of the notion of 'sovereignty' is particularly suggestive in the context of Agamben's suggested dichotomy between *auctoritas* and *potestas* – where *potestas* is here coterminous with jurisdiction. Yet successful court contestation on the appropriate parameters of the anomic zone led ultimately to its expansion: legislation, signed into

<sup>55</sup> *State of Exception*, at 48. This conception was first described by E. Fraenkel, *Dual State* (1941).

<sup>56</sup> See ECHR Art. 14. Derogation from Art. 14 is not explicitly prohibited, but the government had not done so, as the Lords pointed out. Ergec argues that Art. 14 is implicitly non-derogable but this has never been tested. As for the ICCPR, which was negotiated following the ECHR, in response to state concerns that discrimination might be necessary during an emergency, Art. 4 on derogation specifies a shorter list of prohibited grounds than Art. 26 prohibiting discrimination. See R. Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: étude sur article 15 de la Convention européenne des droits de l'homme* (1987), 278–288. See also UN Human Rights Committee, General Comment No. 29 on States of Emergency (CCPR/C/21/Rev.1/Add.1), Art. 8; Art. 13(c); Art. 13 (e). For an overview of human rights norms in states of emergency, S. R. Chowdhury, *The Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1989).

<sup>57</sup> *Rasul v. Bush* (03-334) 542 U.S. 466 (2004). On this and the related *Hamdi v. Rumsfeld* 542 U.S. 507 (2004), see Dworkin, 'What the Court Really Said', *The New York Review of Books*, Vol. 51, No. 13 (24 August 2004).

<sup>58</sup> The Authorization for Use of Military Force (AUMF) passed by Congress a week after 11 September 2001, permits the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' and to prevent future attacks. 115 Stat 224, note following 50 USCS § 1541.

effect on 30 December 2005, simply suspended all judicial habeas corpus review of Guantánamo detainee cases.<sup>59</sup>

Common to both *A.* and *Rasul* is that the cases concerned non-citizens, and involved the contestation of their most basic rights. They invoke Agamben's figure of *homo sacer* – bare life – the human being stripped of political and legal attributes, whose very existence is a sign of, and countersign to, the sovereign's bloating potency.<sup>60</sup> In both cases, the courts moved to restore or reassure minimal rights to these individuals – an outcome which suggests at least the relevance of a judicial role to Agamben's story. Yet both cases can equally be situated in an overall context of burgeoning sovereignty, and in neither case is the judicial intervention truly decisive. On one hand, the confident removal of *habeas corpus* and judicial review from the Guantánamo detainees illustrates sharply the direct line or 'symmetry' between sovereign power and the nakedness of 'bare life' – the subject of *Homo Sacer* ('the fundamental activity of sovereign power is the production of bare life').<sup>61</sup> At the same time, the proposed and effected solution for the non-national detainees in the *A.* case – house arrest and electronic tagging – point ominously towards the technologies of 'biopolitical' control that Agamben identifies in that book.<sup>62</sup>

Agamben's refusal to examine the minutiae of legal and jurisprudential developments may instead enable him to focus squarely on the substrata of juridico-political evolution that conditions the parameters within which court contestation is constrained. At one point in *State of Exception*, Agamben mourns 'the complete separation between philosophical and legal cultures [and] the latter's decline'.<sup>63</sup> Together with *Homo Sacer*, an equally sophisticated analysis of contemporary developments, *State of Exception* permits a reinvigoration of the relationship between philosophy and law – and the latter's enrichment. These books, whatever their flaws as comprehensive or evidentiary accounts, constitute a radical and hopefully controversial challenge to the predominant account of modern law's expansion as a simple and necessary global extension of the rule of law.

<sup>59</sup> Detainee Treatment Act of 2005, as included in the Department of Defense Appropriations Act, 2006, agreed to by the US House and Senate, and signed by President Bush, 30 December 2005. Section 1005 (e) reads: 'no court, justice, or judge shall have jurisdiction to hear or consider – (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba. . .'. The Act requires that a Combat Status Review Tribunal determine the 'combat status' of detainees, and gives the Court of Appeals for the District of Columbia Circuit 'exclusive jurisdiction' over validity of any such designation.

<sup>60</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), at 100–101.

<sup>61</sup> *Ibid.*, at 181. See in particular 119–180 on the 'camp' as 'the space that is opened when the state of exception becomes the rule' (168–169).

<sup>62</sup> *Ibid.*, at 3–7.

<sup>63</sup> *State of Exception*, at 37.