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Walter Benjamin vs. Carl Schmitt: Giorgio Agamben Intensifies the Debate on the State of Exception

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Abstract: *In his book State of Exception, Giorgio Agamben seeks to build a public law theory of the state of exception. The concept is in its evolution for a century now. The initial philosophical debate on it, an explicit one, took between Carl Schmitt and Hans Kelsen. Apart from it, according to Agamben, an implicit debate between Walter Benjamin and Carl Schmitt. Excavating and analyzing this debate, Agamben demonstrates that Benjamin subverts Schmitt's effort to justify and rationalize exceptions to (the rule of) law. While Agamben Agamben's reenactment of the debate between Benjamin and Schmitt is illuminating and valuable for conceptual purposes, I argue in this essay, by engaging a textual analysis approach, that his highlighted juxtapositions are asymmetric, the arguments are reiterative, and the dialogic ends up in ambiguity.*

Key Words: State of Exception, Giorgio Agamben, Carl Schmitt, Hans Kelsen, Dialectics, Walter Benjamin

Introduction

It is imperative to briefly introduce the concept of the state of exception and the contradictions inherent in it before highlighting Agamben's intensification of the debate between the two leading thinkers on it—Walter Benjamin and Carl Schmitt. One of the most concise and much-referred definitions of the state of exception is given by Carl Schmitt: Sovereign is the one who decides on the exception. In this one short sentence, he relates exception and sovereignty with each other and defines them both. The power inherent in sovereignty or sovereign power can be seen at the moment of taking a decision on exception, and vice versa. In this way, Schmitt has explained that the state of exception is not only decided by the sovereign but the latter also decides when such an exception is at hand. Accordingly, he has split exceptions into real and fictitious ones because it is the sovereign who decides upon its existence. In simple terms, a state of exception refers to a juridical crisis or an emergency situation in the political sphere that threatens to break the law (and/or in such a situation the sovereign himself/herself breaks the law to deal with it). Thus it is an anathema to the rule of law. It involves authoritative decision-making as an alternative to overcome the constraining limits of positive laws and democratic

processes, and such decision-making is increasingly becoming common within our democratic world.

The history of the concept goes back to the French Revolution and can be further stretched back, because of its relationship with sovereign power, to Roman law. Revolutions exhibit exceptional power that can break the law and institute new laws. Whether revolutions come from outside the existing order or build inside it is a question of contention that we'll see soon. Whether revolutions are a reflection of divine power or not is yet another question or a corollary of the earlier one. Theoretically speaking, the history of the concept of the state of exception is related to the realist school of thought, which Schmitt has referred to as starting from Jean Bodin and Thomas Hobbes. For example, Schmitt takes his favourite passage in Thomas Hobbes' *Leviathan* by proclaiming sovereign power and not truth makes laws. The realist school of thought is opposed to Immanuel Kant's, and especially by legal neo-Kantians and legal positivists, who stress the rule of law and posit that the body of law is complete with no room for an exception to arise.

Toward the turn of the century, and especially with the War on Terrorism, the concept of a state of exception has generated a renewed and rigorous interest among academicians. A couple of years before

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the 9/11 terrorist incidents and the resulting increase in powers of the executive branch of governments around the world, Agamben presented his influential treatise *Homo Sacer*. Taking the Foucauldian line of thought about the formation of sovereign power in the modern world to the next level, Agamben analyzed the relationship between bare life and sovereign power. He claimed that the idea of sovereignty as power over "life" was implicitly there in our modern democracies. In his next treatise, which he presented after the 9/11 terrorist incidents, he takes this line of argument forward to the legal realm by building on Carl Schmitt, especially his idea of the state of exception. As this book comes after 9/11 and the increased powers of the executive, it levels a legal-historical critique of the sovereign power and how it builds in the politico-legal realm. One of their significant contributions in it is his excavation of the debate between Carl Schmitt and Walter Benjamin in the first half of the 20th century. While both philosophers chastised how sovereign power was used against bare life, the difference in their approach and reference vantage grounds is highlighted by Agamben to show whose idea was more sophisticated and potentially humane. In the passages that follow I engage the textual analysis approach and comment upon how Agamben has re-enacted this forgotten debate and made his point about the modern-day challenge of state of exception.

Agamben's Reenactment of the Debate Between Benjamin and Schmitt

In his treatise, *State of Exception*, Giorgio Agamben claims that a silent, nuanced, and extended debate on the concept of the state of exception took place between Walter Benjamin and Carl Schmitt in the first quarter of the 20th century. Dedicating a full chapter to this debate in his treatise, Agamben writes that Benjamin's essay "Critique of Violence" and Schmitt's treatise *Political Theology* were locked in this debate. I would like to quote him here at some length to give the exact claim:

The theory of sovereignty that Schmitt develops in his *Political Theology* can be read as a precise response to Benjamin's essay. While the strategy of "Critique of Violence" was aimed at ensuring the existence of pure and anomic violence, Schmitt instead seeks to lead such violence back to a juridical context. The state of exception is the space in which he tries to capture Benjamin's idea of pure violence and inscribe anomie within the very body of the *nomos*. According to Schmitt, there cannot be pure violence—that is, violence absolutely outside the law—because in the state of exception it is included in the law through its

very exclusion. That is to say, that the state of exception is the device by means of which Schmitt responds to Benjamin's affirmation of a wholly anomic human action."

It should be said at the outset that in his treatise *Political Theology* Schmitt doesn't refer anywhere that he responded to Benjamin, but that he responded to neo-Kantians and legal positivists like Hans Kelsen and others. (Schmitt, 2005). However, let's accept Agamben's claim that Schmitt was "precisely" responding to Benjamin so that we move ahead to observe the point I want to make about the dialectical asymmetry in the debate that Agamben has pointed to.

In the passage quoted above Agamben is pointing to certain initial moves and countermoves made by Benjamin and Schmitt in the debate. First goes Benjamin saying that there takes place law-making violence for constituting a juridical order or simply a political society, which is reinforced and maintained by law-preserving violence, but which is overcome by law-destroying violence (or pure/divine violence) that challenges and shakes the very foundations of the constituted juridical order. We see a dialectical schema developing here, even though Benjamin doesn't clearly refer to Hegel. Let me also quickly point out that Benjamin did not make it clear or concrete as to what form or shape could the law-destroying violence (which Agamben is referring to here as wholly anomic human action) take. Nevertheless what we find clear about it is that he enlisted a Judaic concept of divine wrath and conceptualized (or *secularized*) it for the purpose of contemporary politics, while leaving it open for the future generation of thinkers to further explain. Zizek, for instance, has recently explained it as people's revolutionary justice/vengeance. I will return to Zizek in a moment.

Here let's continue with Agamben. In the above passage he says that the debate begins when Schmitt responds in *Political Theology* to Benjamin's dialectical stages of the relationship between law and violence in "Critique of Violence," and later he would also add that in fact, Benjamin had responded in "Critique of Violence" to Schmitt's treatise *Dictatorship*. Anyway, the point Agamben makes is that Schmitt identifies Benjaminian law-destroying or pure violence with a state of exception and then captures and incorporates it inside the juridical order. And thereby submits it to the sovereign (or his discretion) for making a decision, i.e., to decide whether or not a particular extreme political event or conditions amount to a state of exception and what measures the sovereign should take to deal with it. In other words, Agamben is alluding to the fact of the matter that political events that could amount to Benjamin's law-destroying

violence/divine/pure violence are being put to the discretion of the sovereign by Schmitt for a decision whether they are pure violence or not and what the sovereign can do about them.

However, Agamben says that Benjamin would not agree to submit the divine/pure violence to the sovereign's discretion. He would rather keep it outside his purview. For this, he complicates the concept of the sovereign itself by introducing the concept of the baroque sovereign. Now the baroque sovereign is one whose *tragedy* is that he is unable to decide on a state of exception. Why? Because there emerges (or always-present) a gap between power and the capacity or ability of the sovereign to exercise it. Agamben doesn't give any concrete example to explain this situation—it is therefore more dramatic and tragedy (German literary trope). He rather gives throws the onus back on Schmitt who in his Dictatorship talks about the dictator turning powerless because of the development of this gap. Nevertheless, we can say that perhaps a state of exception becomes so powerful that the sovereign becomes incapable or impotent in front of it. With these complicated arguments, Agamben says, the debate reaches its *dialectical* climax. Let us have a look at Agamben's passages to pin down the exact moves:

The baroque concept of sovereignty, Benjamin writes, 'develops from a discussion of the state of exception, and makes it the most important function of the sovereign to exclude this.' In substituting 'to exclude' for 'to decide,' Benjamin surreptitiously alters Schmitt's definition in the very gesture with which he claims to evoke it: in deciding on the state of exception, the sovereign must not in some way include it in the juridical order; he must, on the contrary, exclude it, leave it outside of the juridical order. (Agamben [2005:55](#))

Again

The division between sovereign power and the exercise of that power corresponds exactly to that between norms of law and norms of the realization of law, which in Dictatorship was the foundation of commissarial dictatorship. In *Political Theology* Schmitt responded to Benjamin's critique of the dialectic between constituent power and constituted power by introducing the concept of decision, and to this countermove, Benjamin replies by bringing in Schmitt's distinction between the norm and its realization. The sovereign, who should decide every time on the exception, is precisely the place where the fracture that divides the body of the law becomes impossible to mend: between *Macht* and *Vermogen*,

between power and its exercise, a gap opens in which no decision is capable of filling. (Agamben [2005:56](#))

Now we see that just as the complexity of the debate reaches its climax, so does the confusion about the dialectical stages. Unless (the meaning in) the original Italian text is different, the present English version of the chapter doesn't make Agamben any more clear.

Critique of Agamben's Reenactment of the Debate

However, let us break it down and try to understand it. We can say that there are two aspects involved here: one relating to the state of exception and the other to the sovereign (and perhaps a third one that connects the two together). With regard to the former, in the above-quoted passages, Agamben is saying that Benjamin excluded the exception (or Benjamin's baroque sovereign excluded it), rather than allowing retaining it as included exclusion. So dialectically speaking what equation we are reaching here with Agamben's complication of it: excluded-exclusion or included exclusion-exclusion? On the other hand, with regard to the aspect of the sovereign, Agamben says that Benjamin points to the tragedy of the sovereign, which is that in the face of a state of exception he becomes impotent or powerless. The reason for this impotency given is that there is a gap between the authority and its exercise, which the sovereign is unable to bridge (somehow). This position can be understood and juxtaposed by another observation of Schmitt in his same treatise where he writes that there is a gap between law and its applicability, which is bridged by the judge. Here Schmitt acknowledges that such bridging is subjective and therefore theoretically speaking could be treated as tantamount to not-able-to-be bridged. Even if we disregard the similarity in these two positions—that of Benjamin and Schmitt—what dialectical level of the debate have we reached with Agamben's explanation. Perhaps if we join the two presuppositions above to see the next dialectical level then it will look like this:

From Sovereign to Impotent Sovereign

From Inclusion (Schmitt) to Exclusion (Benjamin) to Included-Exclusion (Schmitt) to again Exclusion or Excluded-exclusion (Benjamin).

Agamben's Benjamin final dialectal stage: An Impotent Sovereign excluding an Exclusion (or excluding Schmitt's included-exclusion)

So we are faced with three negatives (impotent sovereign, act of excluding, and exclusion). While semantically, metaphorically, and in artwork, it would

sound/look appealing, from the point of view of political dialectics it would be difficult to know what dialectical stage have we finally arrived at. Let me leave this question for future thinkers to further ponder on it.

Here I would like to go back and demonstrate the essential lack of symmetry in Agamben's reenacted debate. First, Schmitt clearly says that he was responding to neo-Kantians. He didn't hesitate to name them and all those thinkers who he disagreed with, for example, Hans Kelsen, Hugo Neo-Kantian like Hans Kelsen were of the view that the legal system has wholeness about it and has the answer to all the issues arising in it. In other words, there could be nothing outside it or external to it. So there was no place for exception (or in fact politics) in it. Schmitt was responding to them as a realist political thinker saying that this wholeness of the legal system was a mere façade, which would not be able to hold back resistance building in it. Now if we look closely at this debate between Schmitt and neo-Kantians we notice that the latter is saying that there is nothing outside the law while the former is saying that there will be exceptions that will be outside the law's purview. Let's also note that though Schmitt is saying that the exception is outside or external to the juridical order it builds in the layers or interstices of its crust. That means that somehow it is included in the system or building because of the operation of the system. Doesn't this understanding come close to Agamben's other thesis about *homo sacer*; the included exclusion.

Second, the dialectical stages in Benjamin and Schmitt are not as antagonistic as Agamben points out. For instance, Benjamin's essay "Critique of Violence" describes three dialectical stages—constituent violence, constituted violence, and divine violence. We find that the conditions for the strike of divine/pure violence begin in the second stage, *i.e.*, in the constituted juridical order. So how far this position is different from what Schmitt is saying in *Political Theology*: "In the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition." Let me reproduce at length this key paragraph from his treatise:

Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves

everything; It confirms not only the rule but also its existence, which derives only from the exception. In the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition. (Schmitt [2005:15](#))

Here *the power of real life* and its way of breaking through the crust is comparable to the second stage in Benjamin which gives way to pure violence. It builds inside constituted juridical order. It can be understood as a form of resistance and/or reaction building in a system that is getting torpid because of excesses or being out of touch with socio-economic changes and technology.

Third, there is the question of inside versus outside that reflects on the asymmetry of the debate. In Benjaminian's second stage when an exception is built in the constituted juridical order it seems to be inside—though in the form of included exclusion—for both. However, Agamben would insist that Benjaminian divine violence strikes from the outside. For this, we need to have a closer look at the concept of divine violence. While it is well-known that the concept is not clear, and perhaps Benjamin himself left it open to different interpretations, it has its origin in Judaic theology. Benjamin borrowed it from there and took off its theological hide to make it, what Schmitt calls, a secularized concept—and thus the realization of political theology. While in its pure theological form the concept of divine violence refers to violence that descends from Heavens—the outside, the transcendence. But its secularization essentially takes away part of the theological understanding and trades off transcendence with immanence. Nevertheless, the elements of suddenness, immense short-lived power, and the unknowable moment of the divine strike have been retained in it. In this way, it resembles a revolutionary strike in immanence. Žižek has for instance explained the concept from this point of view. He says that it is about revolutionary acts in the immanence. He further says that it can be understood from the old saying: the voice of people is the voice of God. He also gives examples from contemporary revolutionary movements. Let me quote him:

Divine violence should thus be conceived as divine in the precise sense of the old Latin motto *vox populi, vox dei*: not in the perverse sense of 'we are doing it as mere instruments of the People's Will,' but as the heroic assumption of the solitude of sovereign decision...When those outside the structured social field strike 'blindly,' demanding and enacting immediate justice/vengeance, this is divine violence. Recall, a decade or so ago, the panic in Rio de Janeiro when crowds descended from the favelas into the rich

part of the city and started looting and burning supermarkets. This was indeed divine violence. (Zizek [2008:202](#))

In short, in its secularized form the divine or pure violence is an included exclusion. It also seems too close to what Schmitt is calling "the power of real-life" building inside the constituted juridical order. While Agamben says that Benjamin and Schmitt are different, to me it seems that their analyses are considerably symmetric, at least at this stage.

Similarly, another point that Agamben raises about the baroque sovereign is comparable to Schmitt's debate with neo-Kantians on the gap between the judge and the law. While neo-Kantians were of the view that law provided an answer to all issues arising in a juridical order almost seamlessly, Schmitt was of the opinion that there was an essential gap between the judge and the law that is bridged by the former using his discretion or subjective decision. In this way, he also objected to the objectivity of the mechanism of juridical order. On the other hand, in the concept of baroque sovereignty, Benjamin is also following the same argument that there is a gap between sovereignty and the exercise of sovereignty (which a sovereign should be exercising according to the will of the people). Because this gap is (perhaps) bridged by the sovereign's subjective decision, he is unable to represent the will of the people, rather ignore

it, but then that will is bound to return in the form of divine/pure violence.

Conclusion

The state of exception is a complicated concept. It has its relevance to law, politics and even arts/aesthetics. Since the War on Terrorism and increased instances of the exercise of sovereign power on the part of states, the concept of the state of exception has found its new relevance. On the applied side it is unproblematically employed by scholars in the study of wars, emergencies, and violence. However, on the theoretical side, the debate on its exact nature still goes on. Agamben's recent effort to conceptualize it and clarify its understanding has only led to further debate. One of the aspects that he has pointed to relating to the difference in understanding of the two leading thinkers of the previous century—Benjamin and Schmitt—remain the focus of this article. I demonstrated that Agamben has increased the debate further by juxtaposing these two thinkers. I pointed out that Schmitt was engaged with neo-Kantians rather than with Benjamin in the first place. Second, I pointed out that the dialectical stages in the Benjamin and Schmitt debate are not as antagonistic as Agamben thinks. Lastly, I pointed out that the question of inside versus outside only reflects back on the asymmetry of the debate as Agamben presents.

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