Originalni naučni rad
DOI: 10.5937/gakv92-29229
UDC 342.7:321(497.11)

Dr Alpar Losoncz[*]
Dopisni član Srpske akademije nauka i umetnosti
Univerzitet u Novom Sadu, Fakultet tehničkih nauka
ORCid: 0000-0002-5046-6170

Dr Mark Losoncz[**]
Institut za filozofiju i društvenu teoriju u Beogradu
ORCid: 0000-0001-7495-1122

VANREDNO STANJE NA GRANICAMA PRAVA[***]
Prevrednovanje jednog kritičkog koncepta

SAŽETAK: Članak se fokusira na pojam vanrednog stanja, uzimajući u obzir njegova pravna i politička značenja. Raspravljajući s Agambenovom analizom vanrednog stanja, članak nudi alternativno objašnjenje geneze vanrednog stanja, sa posebnim osvrtom na ulogu liberalizma, nuklearnog rata i izvora vanrednog stanja koje je bilo uvedeno u SAD nakon terorističkih napada 11. septembra. U članku se naglašava da vanredno stanje ne treba opisati kao „anomično stanje" koje suspenduje pravo, već je reč o mnogo kompleksnijim odnosima u kojima se ono pravno i nepravno „organski" prepliću. Članak se završava analizom neoliberalnog odnosa prema vanrednom stanju.

Ključne reči: vanredno stanje, ilegalnost i anomija, Agamben, liberalizam, nuklearni rat, neoliberalizam

[*] alpar@uns.ac.rs
[**] losonczmark@gmail.com
[***] Rad je primljen: 3. 11. 2020, izmenjena verzija rada dostavljena je 18. 11. 2020, a rad je prihvaćen za objavljivanje 18. 11. 2020. godine.

Pojam vanrednog stanja stvara čitavu seriju različitih dilema i izaziva ne samo pravno, nego i političko samorazumevanje. U političkoj filozofiji dotično stanje se tradicionalno tretira povodom stupanja diktature u politički život i odgovarajućih pitanja (trajanje vanrednog stanja, istaknuti subjekti koji određuju tokove stanja, deklaracija i interpretacija).[1] Već i ranije su postojale situacije kada se vanredno stanje protezalo u vremenu fiksirajući se u nepunktualnoj temporalnoj formi.[2] Ali kumulacija vanrednih stanja u poslednjim decenijama proizvodi žustre rasprave: da li je demokratija došla u krajnju opasnost usled ponavljanja vanrednog stanja?[3] Da li je vanredno stanje „nova normalnost" što bi podrazumevalo da se menja standardni odnos između pravila i izuzetka?[4] U tom smislu bi se moglo govoriti o „redovnom izuzetku", ili o „izuzetku koji ne odgovara svom sopstvenom pojmu".[5] Neki autori generalizuju naznaku tvrdnje da se nalazimo u „društvu gde gospodari vanredno stanje".[6] Ako je vanredno stanje „nova normalnost", da li je to ireverzibilno? Da li je time definitivno dekonstruisana davno projicirana normativnost da se sloboda može ograničavati, ali samo posredne afirmacije slobode?[7]

Pojam se zapravo nalazi na *granicama prava*. Njegova definicija je mnogo puta tematizovana i u pravnoj perspektivi,[8] ali postoje stanovite teškoće njegovog konciznog određivanja. Heterogeni primeri jednostavno ne dozvoljavaju prebrzu generalizaciju. Neki pravnici protestuju protiv generalizacije vanrednog stanja: tako bi se standardna formula o suspenziji prava u situaciji robusne pretnje izjalovila.[9] Da li u vanrednom stanju postoji *višak* politike

[1] Manin, B. (2009). Le paradigme de l'exception: L'Etat face au nouveau terrorisme. Preuzeto 10/26/2020 sa http://www.laviedesidees.fr/Le-paradigme-de-l-exception.html

[2] Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism, *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.

[3] Schottdorf, T. (2018). Law, democracy and the state of exception: A theory-centred analysis of the democratic legal state in times of exception. *Zeitschrift für Politikwissenschaft*, 28, 423–437.

[4] Förster, A., Lemke, M. (2016). Ausnahmezustände: Varianten und ihre Recht-fertigungen am Beispiel der USA. In: *Legitimitätspraxis: Politikwissenschaftliche und soziologische Perspektiven* (hrsg. Matthias Lemke et al.). Wiesbaden: VS Verlag, 13–37.

[5] Troper, M. (2007). L'état d'exception n'a rien d'exceptionnel. In: *L'exception dans tous ses états*, S. Théodorou (dir.). Paris: Editions Parenthèses, 163–175.

[6] PROKLA-Redaktion (2016). Der globale Kapitalismus im Ausnahmezustand. *PROKLA,* 4, 507–542.

[7] Atanassov, E., Katznelson, I. State of Exception in the Anglo-American Liberal Tradition. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0153-0Z

[8] Npr. Flor, G. (1954). Fragen des Ausnahme- und Staatsnotrechts. *Juristische Rundschau*, 4, https://doi.org/10.1515/juru.1954.1954.4.125

[9] Saint-Bonnet, F. (2007). L'état d'exception et la qualification juridique. *Cahiers de la recherche sur les droits fondamentaux* 6, 29–38. Valim, R. (2018). State of exception: the legal form of neoliberalism. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0143-2

u odnosu koji potire „vladavinu prava" ili barem dovodi u opasnost koncept „pravne države? Da li vanredno stanje pokazuje nesvodivu „ireduktibilnu realnost politike"[10] koja natpisuje i pravo? Ili je to ipak tek izraz potencijalnosti *nasilja* koje je imanentno pohranjeno u samom pravu?[11]

Vanredno stanje je u poslednjim decenijama proglašavano nekoliko puta u Srbiji: na primer tokom NATO bombardovanja, zatim nakon ubistva Zorana Đinđića, zbog rasta vodostaja i poplava, te zbog proglašenja pandemije. U većini ovih slučaja postavljala su se pitanja povodom legalnosti i legitimnosti vanrednog stanja. Ko ima pravo da uvede vanredno stanje i ko može da ga ukine? Čemo služi vanredno stanje, šta je njegova funkcija? Da li je moguća zloupotreba vanrednog stanja?

Na ova pitanja pokušavamo odgovarati selekcijom određenih aspekata istorijske dinamike vanrednog stanja, kao i promišljanjem relevantnih konceptualnih dilema i napetosti dotičnog pojma. Istovremeno, organski deo naše argumentacija je *kritika* pristupa savremenog teoretičara čija refleksivnost ima relevantne pravne konture, naime orijentacije Đorđa Agambena (Giorgio Agamben). Prvo ćemo kratko opisati njegove refleksije, posle toga ćemo realizovati kritiku, da bismo na kraju izveli konkluziju.

*
* *

U pogledu pravno-filozofske konceptualizacije vanrednog stanja emblematično *Vanredno stanje* Đorđa Agambena (uprkos različitim kritikama[12]) još uvek predstavlja neizostavnu repernu tačku.[13] Da se kratko podsetimo: Agamben tvrdi da je reč o paradoksalnom i „graničnom" pojmu. Vanredno stanje priziva mere koje se ne mogu razumeti u legalnim okvirima; reč je o „ničijoj zemlji" između prava i politike, o međuprostoru i „zoni indiferencije", o prostoru indeterminisanosti i nemogućnosti odlučivanja, o kvazipravnom ili čak ilegalnom suspendovanju prava. Uloga „anomičnog" vanrednog stanja je različita u pojedinim sistemima: ponekad je procedura proglašenja vanrednog stanja jasno regulisana, ponekad su ta pravila manje-više prikrivena, a ponekad je mogućnost vanrednog stanja potpuno prećutana, kao da se dotična transcendentalna mogućnost potpuno nalazi van okvira postojećih normi.

[10] Hummel J. (2005). *Carl Schmitt: L'irréductible réalité du politique*. Paris: Éditions Michalon.

[11] Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp, 74.

[12] Neilson, B. (2014). Zones: Beyond the Logic of Exception. *Concentric: Literary and Cultural Studies*, 40(2), 11–28.

[13] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press.

Prema jednoj izreci, „nužnost" u vanrednom stanju ne iziskuje pravo *(necessitas legem non habet).* No, prema drugoj orijentaciji upravo je nužnost nepresušni izvor prava *(nécessité fait loi),* ili je nužnost barem čvrsto povezana sa nepisanim pravom. Primećujemo npr. da se u pogledu institucionalne infrastrukture parlament odriče određenih svojih prava, a ponekad se parlamentu nasilno oduzimaju prava. Stoga se Agamben služi složenim formulacijama da bi opisao ovakvo stanje: ono je istovremeno *i* iznutra *i* izvan, te predstavlja paradoksalnu „topološku figuru" (Agamben koristi i izraz „ekstaza-pripadanje").

Nadalje, vanredno stanje je paradoksalno i u tom smislu što se *in potentia* perpetuira, odnosno izuzetak pretvara u pravilo. Zbog toga (kontroverzni) Karl Šmit sugeriše da vanredno stanje ne predstavlja anarhiju (u pežorativnom smislu reči) – u njemu i te kako postoji poredak, mada nije nužno da je to „pravni" poredak.[14] S obzirom na to da su za vreme vanrednog stanja uobičajene etablirane institucije suspendovane, pojedini društveni akteri donose odluke na neposredan način, pukim „komandovanjem". Sledstveno tome, volja se osamostaljuje u odnosu na zakon i, uopšte, *voluntas* nadmašuje javni *ratio*.

Znamo da prema Šmitu suveren odlučuje o vanrednom stanju. Treba dodati da u situaciji vanrednog stanja i subjekti dominacije i oni nad kojima se dominira (naime, oni postaju neklasifikovani, neimenovani, itd.) bivaju involvirani. Ovde pripadaju prema Agambenu različiti istorijski subjekti koji su izgubili pravni status: *homo sacer* u antičkom Rimu, Jevreji u nacističkoj Nemačkoj, Japanci u SAD tokom Drugog svetskog rata, ili oni koji su izgubili bazična prava uvođenjem *Patriot Act*-a u SAD 2001. godine.

Agamben nudi arheologiju i genealogiju pojma vanrednog stanja. Polazi od antičkog Rima, zatim pominje vanredno stanje u kontekstu engleskog *Commonwealth*-a i detaljno opisuje različita evropska shvatanja (*état de siège, Ausnahmezustand, martial law, emergency powers*). Nadalje, ukazuje na činjenicu da je vanredno stanje bilo rasprostranjeno u mnogim zemljama već tokom Prvog svetskog rata, te da je Hitler mogao da instrumentalizuje vanredno stanje samo zato što je ono već postojalo između 1919. i 1933. godine u vajmarskim okvirima.

Agamben tvrdi da je vanredno stanje danas uobičajena tehnika vladanja, to jest, *signum* epohe koja sadrži mogućnost da to stanje bude konstantno. Na kraju i to da pomenemo: Agamben nudi i jednu problematičnu alternativu, naime, „autentično vanredno stanje" u kojem se relativizuje ili čak i deaktivira vladajuće pravo – oslanjajući se na Franca Kafku i Valtera Benjamina, on želi projekciju s autentičnom simbiozom života i prava. Ali, istu alternativu ovde ne možemo tretirati.

[14] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 33.

Prenebregavamo mnogobrojne teškoće Agambenove pravno-političke filozofije (mada se one odražavaju i na njegovu teoriju vanrednog stanja[15]), i usredsređujemo se samo na specifične teškoće.

Prvo, Agamben nekritički koristi teoriju „totalitarizma". Njegov postupak je problematičan zbog mnogih razloga: izjednačava nacizam/fašizam sa boljševizmom/staljinizmom, i to u skladu sa hladnoratovskim obrascem. Osim toga, njegov konceptualni okvir onemogućava da se nacistički sistem razumeva na adekvatan način. Agamben „totalizuje" nacističku Nemačku, shvata je kao monolitno metafizičko polje, iako je dotična konstelacija bila mnogo složenija. Primera radi, program eutanazije je predstavljao zločin i to u okviru etabliranog pravnog sistema Trećeg rajha. Pored toga, koncentracioni logori su postojali paralelno sa pravnim sistemom – drugim rečima, *Rechtstaat* nikada nije nestao u potpunosti.

Dilema „legalna stabilnost *versus* politička svrsishodnost"[16] bila je izuzetno važna, te uopšte nije postojala nemogućnost razlikovanja između pravnih i nepravnih momenata, odnosno norme i izuzetka, kako to inače Agamben sugeriše. Relevantno je da se ponekad nacistička država doduše trudila da legalni sistem stavi u „zagrade", ali je istovremeno živela i u simbiozi sa legalnom infrastrukturom. Još uvek je poučna teorija o dualnoj nacističkoj državi socijaldemokratskog pravnika Ernsta Frenkela koja naglašava da je čak i Gestapo bio u harmoniji sa zakonima (član SS-a Verner Best (Werner Best) je tipično izjavio da konflikt sa legalnošću „ne dolazi u obzir"). Frenkel (Fraenkel) piše: „dualna država postoji uvek kada postoji organizacijsko jedinstvo vođstva, bez obzira na to da li ima unutrašnje diferencijacije naspram supstantivnog prava."[17] Slična pitanja se pojavljuju i u pogledu fašističke Italije.[18] Ono što je Ojgon Kogon (Eugene Kogon) nazvao SS državom i ono što je Frenkel nazvao dualnom državom, *ne* suspenduje pravo u celini. Naprotiv, „normalno-normativna" država i država uredbi *(prerogative state)* uglavnom funkcioniše *paralelno*. Simptomatično je što Frenkel upozorava čitaoce da budu veoma oprezni sa izrazom „totalitarizam".[19]

---

[15] V.: npr. Losoncz, M. (2016). Macht und indifferente (Im)Potenz in Agambens Philosophie. In: Radinković, Ž. et alii (ur.) *Politiken des Lebens: Technik, Moral und Recht als institutionelle Gestalten der menschlichen Lebensform.* Belgrade: Institut za filozofiju i društvenu teoriju, 55–79. Lemke, Th. (2011). *Biopolitics: An Advanced Introduction*. New York – London: New York University Press, 53–65. Toscano, A. (2011). Divine management: Critical remarks on Giorgio Agamben's the kingdom and the glory. *Angelaki*, 16 (3), 125–136.

[16] Takayoshi, I. (2011). Can philosophy explain Nazi violence? Giorgio Agamben and the problem of the 'historico-philosophical' method. *Journal of Genocide Research,* 13 (1–2), 56.

[17] Fraenkel, E. (2017). *The Dual State*. Oxford: Oxford University Press, 154.

[18] Sørenson, G. (2001). The Dual State and Fascism. *Totalitarian Movements and Political Religions*, 2 (3), 28–29.

[19] U ovom pasusu iskoristili smo uvide iz teksta Marka Lošonca koji je još uvek u rukopisu: *Secrecy, Power and the Figure of the Double*.

To će reći: u pogledu nacističkog vanrednog stanja Agamben pogrešno interpretira jednu razgranatu istorijsku konjunkturu. *Vanredno stanje kao takvo nije supendovalo pravo u celini, tačnije je da je duboka država* (deep state) *ponekad bila u konfliktu sa površnom državom* (shallow state)*, a ponekad je dobila legitimaciju upravo na osnovu uobičajenih i uhodanih mehanizama.* Štaviše, moglo bi se reći da je vanredno stanje efikasnije ukoliko je podržano od strane normi i zakona. Vanredno stanje jeste paradoksalna figura, ali ne u smislu kako ga Agamben prezentuje.

Agamben *s jedne strane* tvrdi da u vanrednom stanju postoji „prag indeterminisanosti između demokratije i apsolutizma"[20]. *S druge strane* tvrdi da je želeo da baci svetlo „na fikciju koja vlada nad *arcanum imperii* [tajna moći, imperije, vladavine] *par excellence* u naše doba"[21]. Međutim, vanredno stanje načelno nema *a priori* nikakve veze sa demokratijom. U nekim situacijama vanredno stanje pojavljuje se odista na osnovu pozivanja na „narodnu volju" – *ipak, čitav mehanizam upravo služi uvođenju mehanizama koji izmiču svakoj demokratskoj kontroli, odnosno služi dedemokratizaciji*. Nesumnjivo, postoje situacije u kojima vanredno stanje može biti korisno privremeno sredstvo, kada na primer praznine u zakonima ne pružaju rešenje u pogledu nastalih izazova. Agamben je tek donekle u pravu kada sugeriše da je i demokratsko-revolucionarna tradicija dala svoj doprinos u odnosu na vanredno stanje.[22] (Benjaminovo klasično pitanje glasi: kako je moguće *autentično* vanredno stanje u kojem život nije podređen niti pravnim mehanizmima, niti vaninstitucionalno-ekstralegalnim procesima.) Ali, vanredno stanje je moguće i u sistemima *bez* vladavine naroda, na primer u *ne*demokratskim liberalnim političkim okvirima (setimo se toga da su mnogi klasični liberalni mislioci bili protiv demokratije).

No još više je pogrešno pominjanje apsolutizma i *arcanum imperii*-a kod Agambena. Apsolutizam je specifična istorijska forma koja nema strukturalne sličnosti sa sadašnjom situacijom. Apsolutistička moć je bila na delu u društvu u kojem javni um kao „komunikativna racionalnost" još nije postojao. *Arcanum imperii* je specifična vrsta tajne koja je karakterističan aspekt apsolutističke tajne.[23] Dok se danas državna tajna i tajne službe regulišu zakonima, te se očekuje barem neka vrsta demokratske kontrole, u apsolutističkoj

[20] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 3.

[21] *Ibid*., 86.

[22] Neka se vidi artikulacija vanrednog stanja u Minhenu 1919. od strane revolucionara, Blanck, Th. (2018). A revolutionary state of exception. *Zeitschrift für Politikwissenschaft*, 28, 453–467.

[23] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch, 105–115.

paradigmi tajna počiva na čistoj i nekontrolisanoj samovolji vladara i njegovog državnog aparata. Anahronizam je sugerisati da i danas postoji *arcanum imperii* – u današnje doba je reč o drugačijoj paradigmi koju Eva Horn, pogađajući, naziva paradigmom *secretum*-a.[24]*Apsolutistička vlast i demokratija nisu komenzurabilne, te nije moguć ni „prag indeterminisanosti" između njih*.

Ali Agamben postaje još konfuzniji kada pokušava da ponudi obuhvatnu teoriju o *genezi* vanrednog stanja: „važno je da ne zaboravimo da je moderno vanredno stanje proizvod demokratsko-revolucionarne, a ne apsolutističke tradicije"[25]. Agamben i na drugom mestu pominje da su „građanski rat, otpor i pobuna"[26] među ključnim izvorima modernog koncepta vanrednog stanja, te da je on čvrsto povezan sa idejom prava na otpor *(ius resistendi)*. Međutim, i sam Agamben pominje da je na primer 1920. godine vanredno stanje proglašeno upravo u cilju represije nad štrajkovima a ne u njihovo ime.[27] Agamben bi mogao da odgovori da to ne znači da izvor nije u „demokratsko-revolucionarnoj tradiciji", *ali on zapravo ne može da obuhvati genezu modernog vanrednog stanja.*

U stvari, moderni pojam vanrednog stanja potiče iz *liberalizma*.[28] Kao što Mark Nukleus (Neokleus) pokazuje, ideja vanrednog stanja pojavljuje se već kod Džona Loka, i to u obliku pozivanja na naredbe *(prerogative)*: „ova moć podrazumeva diskretno delanje, radi javnog dobra, bez pravnih propisa, ili čak i protiv njih", dakle ponekad i „protiv neposrednog slova zakona"[29]. Ova *izvorna forma* vanrednog stanja nipošto nije „demokratska", naprotiv, ona podrazumeva arbitrarnu moć koju ljudi u potpunosti prepuštaju onima koji vladaju. Lokova teorija nije ograničena na međunarodne odnose, štaviše, on sugeriše da se unutrašnji i spoljašnji poslovi ne mogu razdvojiti. Ukazujući na način na koji se Lok poziva na „nužnost", Nukleus povezuje koncept vanrednog stanja sa idejom državnog rezona koji takođe prevazilazi pravna ograničenja – on tvrdi da je Lokov *prerogative state* liberalna varijacija državnog rezona (te je Lok bliži Makijaveliju i Hobsu no što nam se čini na prvi pogled). Lok zapravo ne nudi ništa ozbiljnije u pogledu kočnica: on samo sugeriše da narodi nemaju „nikakav lek..., osim da apeluju nebesima"[30].

---

[24] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion.* Frankfurt am Main: Fischer Taschenbuch, 102, 108.

[25] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 5.

[26] *Ibid*., 5.

[27] *Ibid*., 19.

[28] To ne pogađa ni Camus, G. (1966). L'état de nécessité en démocratie. *Revue internationale de droit compare,* 18 (4), 957–959.

[29] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 15.

[30] *Ibid*., 20.

Nukleus tvrdi da se slična argumentacija može pronaći kod mnogih drugih mislilaca, no za nas je bitno da se slične pojmovne strategije pojavljuju i kod savremenih autora. Majkl Volcer (Majkl Volzer) npr. tvrdi da *supreme emergency* dozvoljava i ubistvo nevinih ljudi, kao i suspendovanje osnovnih sloboda, a Džeremi Voldron (Jeremy Waldron) smatra da hapšenje, zatvaranje bez istražnog postupka može biti opravdano. Pozivajući se i na njih, Nukleus zaključuje da u liberalizmu bezbednost *(security)* stiče primat u odnosu na slobodu *(liberty)*, a vanredno stanje je „centralna kategorija liberalnog građenja poretka"[31]. On pokazuje da vanredno stanje nema toliko veze sa „demokratsko-revolucionarnom tradicijom", nego sa istorijom ratova, odnosno sa represijom nad kolonijalnim narodima i radničkim pokretom.[32] Za Nukleusa je važno da vanredno stanje ima jasnu funkcionalnost u okviru kapitalizma. Ne samo što je vladavina vanrednim stanjem služila razbijanju štrajkova tokom čitavog XX veka, nego je prizivanje *emergency* služilo i pokretanju progona protiv komunista kao vrhovne opasnosti za poredak. Nukleus smatra da će kapitalistički poredak uvek pristati na *iracionalne* intervencije vlasti ukoliko one služe održavanju *racionalnosti* kapitalističkih mehanizama[33]. Prema njegovom narativu, „Hitler nije bio revolucionaran, već je samo adaptirao ideje koje su bile centralne za formiranje buržoaske države"[34], te je vanredno stanje služilo „preventivnoj kontrarevoluciji", naime, borbi protiv komunističkog i socijaldemokratskog pokreta (prvi zarobljenici u koncentracionim logorima bili su odista članovi radničkog pokreta).

Utoliko i Karl Šmit (Carl Schmitt) greši kada iz svoje nacističke perspektive tvrdi da liberalizam zanemaruje vanredno stanje i daje prednost slaboj državi – *naprotiv, nacizam je samo usavršio ono što je liberalizam pripremao*. Na sličan način se interpretira i vanredno stanje prilikom uvođenja Ruzveltove države blagostanja – u razdoblje intenzivnih klasnih konflikata (kada je bilo oko 2.000 različitih obustavljanja rada koja su mobilizovala 1,5 miliona radnika), Ruzveltu je vanredno stanje služilo u cilju blokiranja komunističke revolucije. *Drugim rečima, kršenje pravila poretka služilo je stabilizaciji kapitalističkog poretka.*

Uzimamo li ovakvu perspektivu u obzir, tada nije iznenađujuće što je recimo 1997. godine oko sto zemalja proglasilo vanredno stanje. Naravno, vanredno stanje ne mora da se vezuje za ratove i konsolidaciju oronulog kapitalizma.

[31] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 8.

[32] Vidi gore, Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.

[33] Neocleous, M. (2008). *Op. cit.*, 37.

[34] *Ibid*., 55.

Naprotiv, postoji širok spektar „sadržaja" vanrednog stanja, od fudbalskog huliganizma do rata protiv droge, od ekoloških problema do zlostavljanja dece.

Agamben citira Rositera (Elliot Rossiter) koji tvrdi da „u atomskom razdoblju... upotreba ustavne hitnosti postaje pravilo, ne izuzetak".[35] Problematično je da Agamben ne objašnjava na koji način je (potencijalno) vanredno stanje uzrok nuklearne katastrofe. Zatim, on čak i ne pokušava da objasni kakvo vanredno stanje može da nastane zbog nuklearnog rata. Na kraju, on ne vidi suštinsku vezu između vanrednog stanja koje je vezano za nuklearnu katastrofu i vanrednog stanja koje je uvedeno u SAD 2001. godine – njegova analiza potonjeg oblika vanrednog stanja lebdi u vazduhu. *Prema tome, kod njega nedostaje razumevanje uzročno-posledičnih odnosa, te kontekstualizacija kasnijeg razvoja koncepta vanrednog stanja*.

Analizirajući posledice bombardovanja Hirošime i Nagasakija, već smo govorili o ključnim karakteristikama nuklearnog rata, uključujući i problem vanrednog stanja.[36] Oslanjajući se na knjigu Danijela Elsberga (Daniel Ellsberg)[37], naglašavali smo da su svi američki predsednici, od Trumana do Trampa, ucenjivali druge narode nuklearnim ratom, odnosno da nije bilo reči samo o blefiranju u svim situacijama, već o realnoj opasnosti. Nadalje, skrenuli smo pažnju i na činjenicu da su naučnici i militarne elite očekivali da će nuklearni rat sa kinesko-sovjetskim blokom prouzrokovati oko 600 miliona žrtava („sto Holokausta"), ali čak je i ta kalkulacija bila pogrešna jer nije uzela u obzir radioaktivnu kišu, nuklearnu zimu i globalno gladovanje – zapravo, nuklearni rat je mogao da rezultira prestankom čovečanstva i svih sisara – omnicidom.

U ovom kontekstu se pojavljuje problem vanrednog stanja u punoj meri: Danijel Elsberg – inače autor tzv. Elsbergovog paradoksa – upozorava da postoji veliki rizik da će se nuklearni napad dogoditi. Stav američkih elita je da SAD moraju pokrenuti prvi, „preventivni" napad – to se može dogoditi ako se, na primer, pogrešno procenjuje namera neprijatelja (to se događalo 1979, 1980. i 1983, umalo sa tragičnim posledicama). Elsberga još više brine to što odluka o napadu zapravo nije privilegija predsednika, već i niži u državnom aparatu mogu o tome da odlučuju, barem u nekim okolnostima. Nije slučajno što Amerikanci ove planove nazivaju „planovima kontingencije". „...Treba dodati slučajne detonacije, moguće nesreće i druge izvore. A još nismo ni pomenuli mašineriju (iz naslova Elsbergove knjige), koja se može aktivirati automatski, bez ljudske odluke"[38].

---

[35] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 9.

[36] Losoncz, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?*. Preuzeto 28/10/2020 sa https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefiranje-neukrotive-dece/

[37] Ellsberg, D. (2017). *The Doomsday Machine: Confessions of a Nuclear War Planner*. New York et alii: Bloombury.

[38] Lošonc, M. (2020). *Op. cit.*

U predočenoj argumentaciji su prisutne sve bitne karakteristike vanrednog stanja. *Prvo*, pozivanje na nužnost *(if necessary)* napada je ključni momenat, ono služi kao legitimacija za nuklearni rat. *Drugo*, i u ovom slučaju činjenica da samo privilegovani suveren, reprezentant suvereniteta odlučuje o napadu u vanrednom stanju, odnosno o vanrednom stanju uopšte, igra izvanrednu ulogu. Doduše, problem je i kompleksniji, jer u praksi eventualno različiti subjekti na nižim stepenicama u hijerarhiji vlasti („mikrosuvereni") mogu doneti merodavnu odluku (na primer ako nedostaju direktive, vojnik u avionu sa nuklearnim oružjem može datu činjenicu pogrešno da tumači kao motivaciju za napad). *Treće*, neizvesnost kontingencije, *alert conditions*, navodna nužnost hitnosti i brzina imaju odlučujuću ulogu. Elsberg uvodi koncept/termin *ambiguity* da bi opisao ekstremnu neizvesnost koja je tipična za odluke o nuklearnom napadu – nedostaje iskustvo, okolnosti često nisu poznate, ne znaju se unapred sve implikacije, itd. Suveren je često poput Benjaminovog impotentnog baroknog vladara koji nema uslove niti sposobnosti da donese pravu odluku.[39] U većini slučajeva nedostaju uslovi racionalnog odlučivanja, manevarski prostor je ograničen – upotreba hiperracionalizovane tehnologije pretvara se u iracionalnost. *Četvrto*, nuklearno planiranje je akcija „duboke države" o kojoj površna država malo toga zna. Reč je o tajni koja je *top secret* (ili *for the president's eye only*), štaviše, ponekad čak ni predsednik nije upućen (na primer: *eyes only for Paul Nitze*). Kao u slučaju vanrednog stanja generalno gledano, niti javnost zna za detalje (motivacije i posledice odluka, itd.), niti je kongres obavešten. Reč je o najvišim državnim tajnama koje su prikrivene i tabu čak i za specijalne izvršne, zakonodavne ili sudske organe. Stoga nije slučajno što je problem neautorizovane akcije od ključnog značaja – može se desiti da će se jedna operacija ostvariti bez znanja političkih ili militarnih lidera, odnosno uprkos njihovim suprotnim direktivama *(in violation of the strict letter of their orders)*, te da se egzekucija dogodi, ali uprkos elementarnim pravnim i moralnim očekivanjima.

Naravno, tajna ima ambivalentnu ulogu: ukoliko su postojanje i kvalitet/kvantitet nuklearnog momenta nepoznati za neprijatelje, onda ih dotična imperija ne može ucenjivati. S druge strane, ukoliko su detalji nuklearnog naoružavanja potpuno javni, onda to može da znači nedostatak strateške racionalnosti. U zemljama koje su predmet napada, nakon nuklearne agresije opstanak će se dovesti u pitanje. U takvoj situaciji se može desiti da treba upotrebiti mehanizme vanrednog stanja, naročito ako vlast postane „akefalna" – dakle ako na kraju napada ostane bez političkih i militarnih lidera. Inače, sam Elsberg predlaže različita načela u pogledu nuklearnih planova: na primer stražu kontrolu odlučivanja i mnogo oprezniji odnos prema izazovima pomenute kontingencije.

[39] V.: Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 55.

U svakom slučaju, i na ovom primeru se vidi da vanredno stanje ne treba predstavljati kao fenomen koji se iscrpljuje u tome što „suspenduje pravo" u celosti. Niti je vanredno stanje totalno „anomično stanje". *U stvari, veze između vanrednog stanja i pravnog poretka su kompleksne:* ponekad vanredno stanje („duboka država") parazitira na pravnim mehanizmima („površnoj državi"), ponekad upravo pravni mehanizmi „legalizuju ilegalnost", a nije sporno, ponekad su ovi procesi dijametralno suprotstavljeni. Pažljivije razmatranje nuklearnog naoružavanja pokazuje da nije reč o apstraktnom problemu jedne nove epohe posle Hirošime i Nagasakija, već je pitanje vanrednog stanja veoma konkretno u pravnoj perspektivi.

No pravno-politička argumentacija u vezi sa nuklearnim ratom vremenom je bila proširena. Citiramo Pitera Dejla Skota: „ali je planiranje eventualno zahtevalo suspendovanje Ustava, ne samo 'nakon nuklearnog rata', već u slučaju bilo koje 'hitnosti u odnosu na nacionalnu bezbednost'. To je bilo definisano naredbom 12656 iz 1988. godine kao 'bilo koji događaj, uključujući prirodnu katastrofu, vojni napad, tehnološku hitnost, ili druge forme hitnosti koje degradiraju ili ozbiljno prete nacionalnoj bezbednosti SAD'. Očigledno je da je 9/11 odgovarao toj definiciji."[40] Prema Skotovoj tezi, već od 1950-ih planiran je mehanizam koji se zvao *Continuity of Government (COG)*. Skot identifikuje izvesne grupe (*Federal Emergency Management Agency [FEMA]*, *Continuity of Government Interagency Group*, itd.) i epohe (između ostalog, Reganovu administraciju) kada je ovaj „tajni plan kontingencije" bio unapređen, štaviše politizovan. Primera radi, u saradnji FEMA-e i potpukovnika Olivera Norta (koji je bio i član Nacionalnog saveta za bezbednost) iskristalisali su se planovi koji bi podrazumevali suspendovanje Ustava usred eventualnog rata, opasnog delanja ekoloških aktivista ili aktivista koji pomažu izbeglicama. Planovi su posvetili posebnu pažnju kako nadziranju i zatvaranju disidenata, tako i onima koji učestvuju u pobuni (*counterinsurgency plan*), između ostalog unutar plana „Spojnica" ili operacije „Bašta". Planovi su u toj meri bili tajni da je prilikom saslušanja Olivera Norta prilikom Iran-Kontra afere čak i predsedavajući Džek Bruks zaključio da ne bi bilo celishodno da se ulazi u detalje u pogledu planiranog suspendovanja Ustava. Skot ukazuje na to da se planiranje prevashodno odvijalo u vaninstitucionalnim okvirima, potpuno izvan vidokruga vlade. Radilo se o „privatnim" paralelnim strukturama u kojima su učestvovali, između ostalog, i vođa Dž. D. Serl & Ko. grupe (G. D. Searle & Co. group), Donald Ramsfeld (Donald Henry Rumsfeld), odnosno kongresmen iz Vajominga, Dik Čejni (Dick Cheney) – ljudi koji su imali odlučujuću ulogu i prilikom proglašenja vanrednog stanja povodom 11. septembra 2001. godine. Čejni i FEMA

[40] Scott, P. D. (2007). *The Road to 9/11: Wealth, Empire and the Future of America*. Berkeley–London–Los Angeles: University of California Press, 228.

su bili ponovo ujedinjeni 2001. godine – tako su nastali strogo poverljivi dokumenti o „kontinuitetu operativnih planova". Malo toga se zna o okolnostima u kojima su novi planovi implementirani, a nije poznat ni tačan sadržaj ovih dokumenata. Kao što Benjamin i Agamben sugerišu da u slučaju vanrednog stanja postoji *napetost* između „normalnog" i „izvanrednog", tako i Skot tvrdi da karakteristike vanrednog stanja treba razumeti na specifičan način. Doduše, njegov pristup je drugačiji u odnosu na pomenute teoretičare: on smatra da bi „kontinuitet vlade" trebalo nazvati „promenom vlade" s obzirom da bi FEMA preuzela ovlašćenja vlade (u slučaju potrebe, čak i novi predsednik bi bio imenovan). Sve ovo tiče se „komandovanja i kontrole" neovlašćenih lica, „vlade na čekanju" koja bi prevazišla uobičajenu podelu vlasti. Skot tvrdi da je 2001. godine bilo implementirano sve što je već 1980-ih bilo planirano: detencija bez ovlašćenja, nadziranje bez naloga i nekontrolisana militarizacija SAD.[41] On naglašava da je „kontinuitet vlade" i danas na delu – on sa svojim saveznicima neupešno pokušava da ubedi članove kongresa da okončaju vanredno stanje.

Sumarno rečeno, Agambenov promašuje genealogiju savremenih mehanizama vanrednog stanja. Kod njega se događaji nakon 11. septembra pojavljuju kao *deus ex machina*, bez kauzalnog objašnjenja samih izvora predočenih planova – naročito nije jasan kontinuitet između hipotetičkog vanrednog stanja u slučaju nuklearnog rata i vanrednog stanja koje je bilo proglašeno nakon terorističkih napada.

Najzad, Agambenovi koncepti ne bacaju svetlo na krucijalno bitan izvor vanrednih stanja u poslednjim decenijama. Naime, beležimo uznapredovalu *ekonomizaciju* kao metaokvir za realizaciju vanrednog stanja, tačnije, možemo govoriti o ekonomizaciji značenja vanrednog stanja. Ovde u stvari treba da povežemo dva aspekta: *krizni horizont* sadašnje epohe i *ekonomizaciju* koja zahvata i pravo.

I pođemo li od toga da je percepcija krize[42] konstitutivna za poimanje vanrednog stanja, možemo reći: *nepunktualnim kriznim procesima odgovara nepunktualno vanredno stanje*. Naime, krizni horizont sadašnjosti podrazumeva da se, za razliku od pređašnjih epoha, današnje krize ne „finalizuju", ne dobijaju „razrešenje", nego se rasprostiru u vremenu. Tipičan primer je kriza koja je izbila 2007. godine, te koja još uvek proizvodi regresivne tendencije. Nasilna štednja koja je sprovedena na nivou Evropske unije u poslednjoj deceniji predstavlja reprezentativan primer; ona je realizovana upravo u znaku nastalog

[41] Scott, P. D. (2010). *„Continuity of Government" Planning: War, Terror and the Supplanting of the U. S. Constitution*. Preuzeto 29. 10. 2020. sa: https://apjjf.org/-Peter-Dale-Scott/3362/article.html

[42] Goupy, M. (2017). L'état d'exception, une catégorie d'analyse utile?: Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault. *Revue interdisciplinaire d'études juridiques*, 79 (2), 97–111.

vanrednog stanja izazivajući mnoštvo različitih, tako i oprečnih tumačenja koja su problematizovala upravo fenomen vanrednog stanja.[43] Mnogobrojne diskusije u vezi sa kompetentnošću nedemokratski izvedene štednje kao ekonomske paradigme okretale su se oko pojma vanrednog stanja, koje je poslužilo kao legitimacijska matrica za upriličavanje evropske ekonomske politike. Prema tome, vanredno stanje je nužno dospelo i u orbitu evropskih debata i, kao što vidimo, upravo je percepcija duboke krize indukovala rasplamsavanje diskusija o vanrednom stanju.[44] Osim toga, kriznoj određenosti epohe pripada kondenzacija različitih modaliteta krize (ekološka, finansijska, itd.) koji istovremeno ispoljavaju dejstvo. Figura različitih i kondenzovanih kriza više ne može biti klasično tretiranje krize koje temporalno zaokružuje krizne procese a koji se ne završavaju. Postulat krize koja je vremenski i prostorno omeđena ne pogađa nastalu konstelaciju: krize se sada pomaljaju po logici kumulativne kauzalnosti, odnosno po logici samoosnaženja kriznih procesa uz neizvesne ishode.

Promena značenja krize se odvija u kontekstu promene odnosa između ekonomske sfere i prava.[45] O fenomenima „ekonomizacije prava", o transformisanom „fiksu" i „neksusu ekonomije i prava"[46] postoje mnogobrojne rasprave: ukratko rečeno, pravni rezon se prilagođava „neoliberalnoj" racionalizaciji, ili *mimetički* prati/odražava autoritativnu i hegemonsku logiku ekononomskih „podsticaja".[47] Primetimo da ovakve tendencije preinačuju i pojam vanrednog stanja. Naime, samo tako možemo razumeti takve naznake povodom prava kao sledeću formulaciju: „vanredno stanje je pravna forma neoliberalizma",[48] nadalje, u neoliberalizmu „izuzetak postaje pravilo"[49], ili naznaku da *krizama determinisana ekonomija postaje vodeće merilo za važenje vanrednog stanja*.[50]

---

[43] Scharpf, F. W. (2017). De-constitutionalisation and majority rule: A democratic vision for Europe, *European Law Journal*, 23, 315–334.

[44] Lošonc, A. (2018). Evropska unija i tehnokratsko starateljstvo. *Theoria*, 61 (2), 37.

[45] Backhaus, J. G. (2017). Jurists' economics versus economic analysis of law: A critique of professor Posner's „economic" approach to law by reference to a case concerning damages for loss of earning capacity. *European Journal of Law and Economics*, DOI 10.1007/s10657–017–9559–2. Kuhner, T. (2011). Citizens United as neoliberal Jurisprudence: The Resurgence of economic Theory. *Virginia Journal of Social Policy and the Law,* 18:3, 398–401.

[46] Lošonc, A., Bunčić S., Ivanišević, A. (2019). Ordoliberal Articulation of Law-Economy Complex. *Pravni zapisi*, 2, 358–381.

[47] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal.* London: Blackwell, 95.

[48] Valim, R. (2018). State of exception: The legal form of neoliberalism. *Zeitschrift für Politikwissenschaft.* https://doi.org/10.1007/s41358-018-0143-2.

[49] Biebricher, Th. (2014). Sovereignty, Norms, and Exception in Neoliberalism. *Qui Parle*, 23, 1, 77–107.

[50] Best, J. (2007). Why the Economy is Often the Exception to Politics as Usual. *Theory, Culture & Society,* 24 (4), 87–109.

Pravo koje se standardno opisuje kao „relativno autonomno" (Bukel) u odnosu na ekonomski domen dospeva u opasnost da iterativno bude supsumirano u odnosu na trijumfirajuće neoliberalizovane ekonomske matrice. Samo, to ne znači da se time sužava opseg „vladavine prava" jer istovremeno *ne* prestaje pozivanje na „pravo" od strane društvenih aktera. Ali, neoliberalni pohodi, prisvajanja, nametanje različitih renti (i uopšte sve što pripada neoliberalnom arsenalu) stvaraju paradoksalnu situaciju koju određeni pravnici opisuju kao „vladavinu prava, ali bez legalnosti"[51]. Vanredno stanje koje se perpetuira približava se ovoj situaciji.

*
* *

Kritički smo tretirali analizu italijanskog pravno-političkog filozofa Agambena povodom njegovog određenja vanrednog stanja. Izneli smo razloge za našu kritiku i pokušali smo pokazati na izabranim primerima (nuklearni rat, nacizam, *Patriot Act* u SAD), kao i na primeru ekonomizacije vanrednog stanja u kriznim procesima, da dihotomno razdvajanje vanrednog i „normalnog" stanja i karakterizacija vanrednog stanja pomoću suspenzije prava ne pogađa suštinu (čak i ako se insistira na momentima „paradoksalnosti"). „Anomija" u tom smislu nije figura koja može da artikuliše vanredno stanje koje je srazmerno kompleksniji pojam od Agambenovih projekcija. Uputnije je u pogledu fenomenologije vanrednog stanja uzimati u obzir amalgam između pravnih i nepravnih momenata. Neka empirijska istraživanja to ubedljivo dokazuju.[52]

Vanredno stanje u stvari izoštrava odnos između prava i „neprava" (*Nichtrechtlichen*[53]) i postavlja pitanja u vezi sa normativnim horizontom prava, kao i „institucionalizacijom prava" uopšte. Tačnije, nema dihotomije između prava i neprava: pravo naime *ex ante* projicira „pravna stanja" i „pravne ličnosti" u domen neprava. Pravo se ne konfrontira sa „haosom", neartikulisanim stanjem; pravo, pretpostavljajući – unapred artikulirajući nepravo, unapred implementirajući svoju „formu" u domen neprava razumeva nepravo iz svoje sopstvene perspektive. To je „samorefleksija",[54] *samodiferencijacija* prava, odnosno postuliranjem neprava pravo realizuje „samoodnošenje", to jest: „moderno pravo pretvara nepravo u sopstvenu mogućnost".[55] Tako je i van-

[51] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal*. London: Blackwell, 89.

[52] Jakab, A. (2005). German constitutional law and doctrine on state of emergency: Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, 7 (5), 453–477.

[53] Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp, 70.

[54] Teubner, G. (1989). *Recht als autopoietisches System.* Frankfurt/M.: Suhrkamp, 29.

[55] Menke, Ch. (2014). *Op. cit.*, 76.

redno stanje situacija u kojoj nema udvajanja između prava i neprava koliko „samoodnošenja prava" i to u kriznim procesima. I ako je tačno da je vanredno stanje „pravna forma" pobedničkog neoliberalizma, onda je vanredno stanje perpetuiranje „samoodnošenja" prava.

LITERATURA

Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press.

Atanassow, E., Katznelson, I. State of Exception in the Anglo-American Liberal Tradition. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0153-0Z

Backhaus, J. G. (2017). Jurists' economics versus economic analysis of law: A critique of professor Posner's „economic" approach to law by reference to a case concerning damages for loss of earning capacity. *European Journal of Law and Economics*, DOI 10.1007/s10657-017-9559-2.

Best, J. (2007). Why the Economy is Often the Exception to Politics as Usual. *Theory, Culture & Society,* 24 (4), 87–109.

Biebricher, Th. (2014). Sovereignty, Norms, and Exception in Neoliberalism. *Qui Parle*, 23, 1, 77–107.

Blanck, Th. (2018). A revolutionary state of exception. *Zeitschrift für Politikwissenschaft*, 28, 453–467.

Camus, G. (1966). L'état de nécessité en démocratie. *Revue internationale de droit compare,* 18 (4), 957–959.

Ellsberg, D. (2017). *The Doomsday Machine: Confessions of a Nuclear War Planner*. New York et alii: Bloombury.

Flor, G. (1954). Fragen des Ausnahme- und Staatsnotrechts. *Juristische Rundschau*, 4, https://doi.org/10.1515/juru.1954.1954.4.125

Förster, A., Lemke, M. (2016). Ausnahmezustände: Varianten und ihre Recht-fertigungen am Beispiel der USA. In: *Legitimitätspraxis: Politikwissenschaftliche und soziologische Perspektiven* (hrsg. Matthias Lemke et al.). Wiesbaden: VS Verlag, 13–37.

Fraenkel, E. (2017). *The Dual State*. Oxford: Oxford University Press.

Goupy, M. (2017). L'état d'exception, une catégorie d'analyse utile? Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault. *Revue interdisciplinaire d'études juridiques*, 79 (2).

Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch, 105–115.

Hummel, J. (2005). *Carl Schmitt: L'irréductible réalité du politique*. Paris: Éditions Michalon.

Jakab, A. (2005). German constitutional law and doctrine on state of emergency: Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, 07 (5).

Kuhner, T. (2011). Citizens United as neoliberal Jurisprudence: The Resurgence of economic Theory. *Virginia Journal of Social Policy and the Law,* 18:3, 398–401.

Lemke, Th. (2011). *Biopolitics: An Advanced Introduction*. New York – London: New York University Press, 53–65.

Lošonc, A. (2018). Evropska unija i tehnokratsko starateljstvo. *Theoria*, 61 (2).

Lošonc, A., Bunčić, S., Ivanišević, A. (2019). Ordoliberal Articulation of Law-Economy Complex. *Pravni zapisi,* 2, 358–381.

Losoncz, M. (2016). Macht und indifferente (Im)Potenz in Agambens Philosophie. In Radinković, Ž. et alii (ur.) *Politiken des Lebens: Technik, Moral und Recht als institutionelle Gestalten der menschlichen Lebensform.* Belgrade: Institut za filozofiju i društvenu teoriju.

Losoncz, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?* Preuzeto 28. 10. 2020. sa https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefi ranje-neukrotive-dece/.

Manin, B. (2009). Le paradigme de l'exception: L'Etat face au nouveau terrorisme. Preuzeto 10. 26. 2020. sa http://www.laviedesidees.fr/Le-paradigme-de-l-exception.html

Mattei, U., Nader, L. (2008). *Plunder, When the Rule of Law is Illegal.* London: Blackwell.

Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp.

Neilson, B. (2014). Zones: Beyond the Logic of Exception. *Concentric: Literary and Cultural Studies*, 40 (2), 11–28.

Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press.

PROKLA-Redaktion (2016). Der globale Kapitalismus im Ausnahmezustand. *PROKLA,* 4, 507–542.

Saint-Bonnet, F. (2007). L'état d'exception et la qualification juridique. *Cahiers de la recherche sur les droits fondamentaux* 6, 29–38.

Scharpf, F. W. (2017). De-constitutionalisation and majority rule: A democratic vision for Europe, *European Law Journal*, 23, 315–334.

Schottdorf, T. (2018). Law, democracy, and the state of emergency: A theory-centred analysis of the democratic legal state in times of exception. *Zeitschrift für Politikwissenschaft*, 28, 423–437.

Scott, P. D. (2007). *The Road to 9/11: Wealth, Empire, and the Future of America*. Berkeley–London–Los Angeles: University of California Press.

Sørenson, G. (2001). The Dual State and Fascism. *Totalitarian Movements and Political Religions*, 2 (3), 28–29.

Takayoshi, I. (2011). Can philosophy explain Nazi violence? Giorgio Agamben and the problem of the „historico-philosophical" method. *Journal of Genocide Research,* 13 (1–2).

Teubner, G. (1989). *Recht als autopoietisches System*. Frankfurt/M.: Suhrkamp.

Toscano, A. (2011). Divine management: Critical remarks on Giorgio Agamben's the kingdom and the glory. *Angelaki*, 16 (3), 125–136.

Troper, M. (2007). L'état d'exception n'a rien d'exceptionnel. In: *L'exception dans tous ses états*, S. Théodorou (dir.). Paris: Editions Parenthèses, 163–175.

Valim, R. (2018). State of exception: The legal form of neoliberalism. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0143-2.

Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.

Original Scientific Article
DOI: 10.5937/gakv92-29229
UDC 321.7:321(497.11)

*Alpar Losoncz, Ph.D.**
Corresponding member of the Serbian Academy of Sciences and Arts
University of Novi Sad, Faculty of Technical Sciences
ORC id: 0000-0002-5046-6170

*Mark Losoncz, Ph.D.***
Institute for Philosophy and Social Theory in Belgrade
ORC id: 0000-0001-7495-1122

THE STATE OF EXCEPTION AT THE LEGAL BOUNDARIES*** Re-evaluation of a critical concept

ABSTRACT: This article focuses on the notion of the state of exception, accounting for its legal and political meanings. In discussing Agamben's analysis of the state of exception, the article provides an alternative genesis of the state of exception, with a special focus on the role of liberalism, nuclear war, and the sources of the state of exception that was instituted in the U.S.A. after the terrorist attacks on September 11. The article stresses that the state of exception should not be described as an "anomic state" that suspends the law, but that the relationships are much more complex, wherein the legal and non-legal "organically" intertwine. The article ends with an analysis of the neoliberal relationship to the state of exception.

Keywords: state of exception, illegality and anomie, Agamben, liberalism, nuclear war, neoliberalism

* alpar@uns.ac.rs
** losonczmark@gmail.com

*** The paper was received on November 3, 2020, the revised version was provided on November 18, 2020, and it was accepted for publication on November 18, 2020.

The notion of the state of exception creates a whole host of dilemmas and causes not only legal but political self-interpretation. In political philosophy, the state of exception is traditionally interpreted as the coming into force of a dictatorship of the political life and the relevant questions (the duration, prominent subjects who determine the path of the state of exception, the declaration, and interpretation).[1] Situations wherein the state of exception had extended throughout time while being grounded in a non-punctual temporal form have previously existed.[2] However, the accumulation of different states of exception in the previous decades causes fierce debates: has democracy reached the breaking point due to the recurrence of the states of exception?[3] Has the state of exception become the "new normal", which would necessitate a change between the standard relationship between rules and exceptions?[4] In that sense, an "ordinary exception" could be discussed, or an "exception that does not match its own term".[5] Some authors generalize the indication of the claim that we are in a "society where the state of exception rules".[6] If the state of exception is the "new normal", is it irreversible? Does that deconstruct the long-established proscribed norms that freedom can be limited, but only with the aim of indirectly affirming it?[7]

This notion is located on the borders of law. Its definition has been made the theme from the legal perspective many times,[8] but there are substantial difficulties in determining it concisely. Heterogeneous examples simply don't allow for a generalization. Some legal practitioners protest against generalizing the state of exception: this would make the standard formula of the

[1] Manin, B. (2009). Le paradigme de l'exception: L'Etat face au nouveau terrorisme. Retrieved on 10/26/2020 from: http://www.laviedesidees.fr/Le-paradigme-de-l-exception.html.

[2] Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.

[3] Schottdorf, T. (2018). Law, democracy and the state of exception: A theory-centred analysis of the democratic legal state in times of exception. *Zeitschrift für Politikwissenschaft*, 28, 423–437.

[4] Förster, A., Lemke M. (2016). Ausnahmezustände: Varianten und ihre Recht-fertigungen am Beispiel der USA. In: *Legitimitätspraxis: Politikwissenschaftliche und soziologische Perspektiven* (hrsg. Matthias Lemke et al.). Wiesbaden: VS Verlag, 13–37.

[5] Troper, M. (2007). L'état d'exception n'a rien d'exceptionnel. In: *L'exception dans tous ses états*, S. Théodorou (dir.). Paris: Editions Parenthèses, 163–175.

[6] PROKLA-Redaktion (2016). Der globale Kapitalismus im Ausnahmezustand. *PROKLA,* 4, 507–542

[7] Atanassov, E., Katznelson, I. State of Exception in the Anglo-American Liberal Tradition. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0153-0Z

[8] For example, Flor, G. (1954). Fragen des Ausnahme- und Staatsnotrechts. *Juristische Rundschau*, 4. Available at: https://doi.org/10.1515/juru.1954.1954.4.125.

suspension of rights in situations of extreme threat fail.[9] Does the state of exception cause an *excess* of politics to the extent that it suppresses the "rule of law", or at least endangers the concept of a "constitutional state"? Does the state of exception demonstrate an "irreducible reality of politics"[10] which overrules law? Or, is it an expression of the potential for *violence* that is inseparably stored in the law itself?[11]

In Serbia, the state of exception has been declared a few times in the previous decades – for example, during the NATO bombing, then after the assassination of Zoran Đinđić, due to a rise in water levels and floods, and because of the pandemic outbreak. Most of these cases raised questions regarding the legality and legitimacy of the state of exception. Who can institute it and who can lift it? What is the purpose, the function of the state of exception? Can it be misused?

We will attempt to answer these questions by selecting certain aspects of the historical dynamic of the state of exception, as well as reflecting on the relevant conceptual dilemmas and the tension of the notion itself. Simultaneously, the organic part of our argument is a *critique* of the approach of modern theorists, whose reflexivity has the relevant legal contours, namely, the orientation of Giorgio Agamben. First, we will describe his thoughts on the matter in short, and then give a critique, to reach a conclusion at the end.

*
* *

As it regards the legal-philosophical conceptualization of the state of exception, the emblematic *State of Exception* by Giorgio Agamben (despite various critiques[12]) is still an exigent reference point.[13] A short reminder: Agamben claims that we are dealing with a paradoxical and "indistinct" notion. Measures which cannot be understood within legal boundaries are employed during a state of exception; we are dealing with a "no man's land" between rights and politics, with a gap and a "zone of indifference", about the space of indeterminateness and the inability to make decisions, about a quasi-legal or

[9] Saint-Bonnet, F. (2007). L'état d'exception et la qualification juridique. *Cahiers de la recherche sur les droits fondamentaux* 6, 29–38. Valim, R. (2018). State of exception: the legal form of neoliberalism, *Zeitschrift für Politikwissenschaft*. Available at: https://doi.org/10.1007/s41358-018-0143-2.

[10] Hummel J. (2005). *Carl Schmitt: L'irréductible réalité du politique*. Paris: Éditions Michalon.

[11] Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp, 74.

[12] Neilson, B. (2014). Zones: Beyond the Logic of Exception. *Concentric: Literary and Cultural Studies*, 40 (2), 11–28.

[13] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press.

even illegal suspension of rights. The role of an "anomic" state of exception is different in certain systems: sometimes, the procedure to declare a state of exception is clearly regulated, sometimes the rules are more or less concealed, and sometimes the possibility of a state of exception is totally ignored, as if such a transcendental possibility is fully outside of the existing norms.

According to one maxim, "necessity" in a state of exception does not cause law (*necessitas legem non habet*). Yet, according to another school of thought, necessity is an inexhaustible source of law (*nécessité fait loi*), or at least tightly bound to unwritten norms. For example, it can be noticed that, regarding the institutional infrastructure, parliament gives away some of its authority and sometimes the authority is forcibly taken. Thus, Agamben uses complex formulations to describe this state: it is *both* internal *and* external, so it represents a paradoxical "topological structure" (Agamben also uses the phrase ecstasy-belonging).

Further, a state of exception is also paradoxical in the sense that it perpetuates *in potentia*, i.e. it turns an exception into a rule. Because of this, (the controversial) Carl Schmitt suggests that a state of exception does not represent anarchy (in the pejorative sense) – within it, order definitely exists, although not necessarily a "legal" order.[14] Because during a state of exception established institutions are suspended, certain social actors make decisions directly, by "commanding". Consequently, will becomes independent in relation to law, and, in general, *voluntas* overcomes public *ratio*.

We know that according to Schmitt, the sovereign decides on the state of exception. It should be added that during a state of exception the dominating subjects and the ones being dominated (namely, they become unclassified, unnamed, etc.) become involved. According to Agamben, this classification includes various historical subjects who had lost their legal status: the *homo sacer* in Ancient Rome, the Jewish people in Nazi Germany, the Japanese people in the U.S.A. during World War II, or those who lost their basic rights by the enactment of the *Patriot Act* in the U.S.A. in 2001.

Agamben provides the archaeology and genealogy of the notion of the state of exception. He starts from Ancient Rome, then mentions the state of exception in the context of the English Commonwealth, and gives a detailed description of the different European understandings of the notion (état de siège, Ausnahmezustand, martial law, emergency powers). Further, he points to the fact that a state of exception was commonplace in many countries during World War I and that Hitler could use it only because it was already in place between 1919 and 1933 in the framework of the Weimar Republic.

[14] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 33.

Agamben claims that a state of exception is currently a common tactic of rule, that is, the *signum* of the epoche that has the potential to make the state a constant. Finally, it should be noted: Agamben offers a problematic alternative, namely, an "authentic state of exception" which relativizes or even deactivates the ruling law – relying on Franz Kafka and Walter Benjamin, he wishes for a projection with an authentic symbiosis of life and law. However, we cannot reflect on that alternative here.

We are circumventing the manifold difficulties of Agamben's legal-political philosophy (although they reflect on his theory on the state of exception[15]), and focus only on the specific problems.

First, Agamben uses the theory of "totalitarianism" uncritically. His procedure is problematic for many reasons: he equates Nazism/fascism with bolshevism/Stalinism, and that in accordance with the Cold War framework. Besides that, his conceptual framework disallows an adequate understanding of the Nazi system. Agamben "totalizes" Nazi Germany and understands it as a monolithic metaphysical field, even though it was much more complex. For example, the euthanasia programme was a crime within the established legal system of the Third Reich. Besides, concentration camps existed in parallel to the legal system – in other words, the *Rechtstaat* never truly ceased to exist.

The dilemma of "legal stability *versus* political expediency"[16] was extremely important, thus there was no impossibility of distinguishing between legal and extra-legal moments, i.e. norms and exceptions, as Agamben suggests. It is relevant to note that sometimes the Nazi state attempted to place the legal system in "brackets", but at the same time it was in symbiosis with the legal infrastructure. We can still learn from the theory of the dual Nazi state by social democrat lawyer Ernst Fraenkel which stresses that even the Gestapo was in harmony with the laws (SS member Werner Best typically stated that conflict with legality was "out of the question"). Fraenkel writes: "A Dual State may be said to exist whenever there is organizational unification of leadership, regardless of whether there is any internal differentiation in the substantive law."[17] Similar questions emerge regarding fascist Italy.[18] What

[15] For example, see: Losoncz, M. (2016). Macht und indifferente (Im)Potenz in Agambens Philosophie. In Radinković Ž. et alii (ur.) *Politiken des Lebens: Technik, Moral und Recht als institutionelle Gestalten der menschlichen Lebensform.* Belgrade: Institute for philosophy and social theory, 55–79. Lemke, Th. (2011). *Biopolitics: An Advanced Introduction*. New York –London: New York University Press, 53–65. Toscano, A. (2011). Divine management: Critical remarks on Giorgio Agamben's the kingdom and the glory. *Angelaki*, 16 (3): 125–136.

[16] Takayoshi, I. (2011). Can philosophy explain Nazi violence? Giorgio Agamben and the problem of the 'historico-philosophical' method. *Journal of Genocide Research,* 13 (1–2): 56.

[17] Fraenkel, E. (2017). *The Dual State*. Oxford: Oxford University Press, 154.

[18] Sørenson, G. (2001). The Dual State and Fascism. *Totalitarian Movements and Political Religions*, 2 (3): 28–29.

Eugen Kogon called the SS state and what Fraenkel called the dual state does *not* suspend rights in their totality. On the contrary, a "normal-normative" and a prerogative state mostly function *in parallel.* It is symptomatic that Fraenkel warns the readers to be very careful with the term "totalitarianism".[19]

On the one hand, Agamben claims that in a state of exception there is a "threshold of indeterminacy between democracy and absolutism."[20] *On the other hand*, he claims that he wanted to bring to light the "fiction that governs this *arcanum imperii* (secret of power) par excellence of our time."[21] However, a state of exception has no *a priori* relation to democracy in principle. In some situations, the state of exception truly emerges based on the "will of the people" – *yet, the entire mechanism exactly serves to introduce mechanisms which break free of any democratic control, i.e. de-democratization.* Undoubtedly, situations exist wherein the state of exception is a useful temporary means; for example, when gaps in law give no solution to existing challenges. Agamben is partially correct when he suggests that the democratic-revolutionary tradition had also contributed to the state of exception[22] (Benjamin's classic question is: how is an *authentic* state of exception possible, where life is not subject to legal mechanisms, nor extrainstitutional-extrajudicial processes.) But, a state of exception is also possible in systems where there is *no* rule of the people, e.g. in *non*-democratic liberal frameworks (we should remember that many classical liberal thinkers were against democracy).

Agamben's mentions of absolutism and *arcanum imperii* are even less correct. Absolutism is a specific historical form that has no structural similarity to the modern situation. Absolute power rested in the strata of society where the public consciousness as a "communicative rationality" did not exist. *Arcanum imperii* is a specific type of secret which is a characteristic aspect of an absolutistic secret.[23] Today, state secrets and secret services are regulated by laws so some degree of democratic control is expected, while in the absolutism paradigm a secret rests on the pure and uncontrolled self-will of the ruler and their state apparatuses. It is anachronistic to suggest that *arcanum imperii* still exists – in the modern era, we are dealing with a different para-

[19] In this passage, insights from Mark Losoncz's text, which is still in the form of a manuscript, were used: *Secrecy, Power and the Figure of the Double*.

[20] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 3.

[21] *Ibid*., 86.

[22] See the definition of the state of exception in Munich in 1919 from the position of the revolutionaries, Blanck, Th. (2018). A revolutionary state of exception. *Zeitschrift f*ür *Politikwissenschaft*, 28, 453–467.

[23] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch, 105–115.

digm, which Eva Horn rightly names the *secretum* paradigm.[24] *Absolute rule and democracy are not commensurable, thus there is no possible "threshold of indeterminacy" between them*.

But Agamben becomes even more confusing when he attempts to present a comprehensive theory on the *genesis* of the state of exception: "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."[25] In another place, Agamben mentions that "internal sedition and disorder"[26] are among the key sources of the modern conception of the state of exception, thus that it is tightly linked with the idea of the right to resist (*ius resistendi*). However, Agamben himself mentions that, for example, in 1920, a state of exception was declared with the aim of stifling strikes, not to empower them.[27] Agamben could respond that this does not mean that the source is not found in the "democratic-revolutionary tradition", *but in actuality, he cannot encompass the genesis of the modern state of exception.*

In fact, the modern term of state of exception stems from *liberalism*.[28] As Mark Neocleous demonstrates, the idea of the state of exception can be found in John Locke, in the invocation of prerogatives: "this power presupposes discrete action for the public good, without legal regulations, or even against them", sometimes even "against the letter of the law."[29] This *source form* of the state of exception is in no terms "democratic"; quite the opposite, it necessitates arbitrary power which people leave in the hands of those who rule. Locke's theory is not limited to international relationships, what's more, he suggests that internal and external dealings cannot be separated. Pointing to the manner in which Locke refers to "necessity", Neocleous links the concept of the state of exception with the idea of the reason of state which overcomes legal limitations – he claims that Locke's *prerogative state* is a liberal variation of the reason of state (thus Locke is closer to Machiavelli and Hobbes than it might at first appear). Locke does not provide anything substantial regarding limiting mechanisms: he simply suggests that people have "no recourse... but to appeal to Heaven"[30].

---

[24] Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch*,* 102, 108.

[25] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 5.

[26] *Ibid*., 5.

[27] *Ibid*., 19.

[28] A similar mistake is made by Camus, G. (1966) L'état de nécessité en démocratie. *Revue internationale de droit compare,* 18 (4), 957–959.

[29] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 15.

[30] *Ibid*., 20.

Neocleous claims that similar arguments can be found with many other thinkers; however, for us, it was important that similar strategies show up with modern authors. For example, Michael Walzer claims that a *supreme emergency* allows for the murder of innocents, as well as a suspension of basic freedoms, while Jeremy Waldron believes that arrests and detainments without an investigatory procedure can be justified. Referring to them, Neocleous concludes that within liberalism *security* takes precedence over *liberty*, and the state of exception is "the central category for building the liberal order".[31] He demonstrates that the state of exception is not so closely related to the "democratic-revolutionary tradition", but to the history of wars, that is, with repression over colonial peoples and the workers' movement.[32] For Neocleous, it is important that the state of exception has a clear function within the framework of capitalism. Not only has employing the state of exception served to break up strikes during the 20th century, but the invocation of an *emergency* was used to start the persecution of communists as a supreme threat to the established order. Neocleous believes that a capitalist system will always acquiesce to *irrational* interventions by the government if they serve to maintain the *rationality* of capitalist mechanisms[33]. According to his narrative, "Hitler was not revolutionary, but only adapted the ideas which were central to forming the bourgeois state"[34], thus the state of exception served a "preventive contra-revolution"; namely, the fight against the communist and social-democratic movements (the first prisoners of the concentration camps truly were members of the workers' movement).

Carl Schmitt makes a similar mistake with his claim that, from his Nazi perspective, liberalism disregards the state of exception and favours a weak state – *on the contrary, Nazism only perfected what liberalism prepared*. The state of exception declared during the introduction of Roosevelt's welfare state is interpreted in a similar way – during a time of intense class conflict (when there was around 2000 separate work stoppages that mobilized 1.5 million workers), Roosevelt used the state of exception with the aim of preventing the communist revolution. *In other words, the breaking of the rules of the established order served to stabilize the capitalist order.*

When this perspective is taken into account, it is not surprising that in 1997, around 100 states declared states of exception. Of course, the state of exception does not need to be tied to wars and the consolidation of feeble

[31] Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press, 8.

[32] See above, Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3).

[33] Neocleous, M. (2008). *Op. cit.*, 37.

[34] *Ibid*., 55.

capitalism. On the contrary, there is a wide spectrum of "content" of the state of exception, from football hooliganism to a war on drugs, from ecological issues to child abuse.

Agamben quotes Rossiter who claims that "in the Atomic Age… the use of constitutional emergency powers may well become the rule and not the exception."[35] It is problematic that Agamben does not explain how a (potential) state of exception is the cause of a nuclear catastrophe. Then, he does not even attempt to explain what kind of state of exception can originate because of a nuclear war. Finally, he sees no substantial link between a state of exception that is related to a nuclear catastrophe and the one that was declared in the U.S.A. in 2001 – his analysis of the latter form is up in the air. *Thus, Agamben lacks an understanding of the causal relation, and consequently the contextualization of the later development of the concept of the state of exception*.

Analysing the consequences of the bombing of Hiroshima and Nagasaki, we have already discussed the key consequences of a nuclear war, including the issue of the state of exception.[36] Relying on the writings of Daniel Ellsberg[37], we have stressed that all U.S. presidents from Truman to Trump used nuclear war as a means of coercion against other nations, i.e. it was not just a bluff in all situations, but a real danger. Further, we have pointed out the fact that scientist and the military elites expected that nuclear war with the Sino-Soviet bloc would cause around 600 million casualties ("a hundred Holocausts"), but even those calculations were incorrect as they did not factor radioactive rainout, nuclear winter, or global famine – in effect, nuclear war could have resulted in the extinction of humanity and all mammals – omnicide.

In this context, the issue of the state of exception emerges in full force: Daniel Ellsberg, the creator of the so-called Ellsberg paradox, warns that there is substantial risk of a nuclear attack happening. The position of the U.S. elites is that the U.S. must initiate the first, »preventive« strike – such a situation can occur if, for example, the intentions of the opponent are wrongly interpreted (as had happened in 1979, 1980, and 1983; almost with tragic consequences). What concerns Ellsberg even more is that the decision on the strike is not the privilege of the president, but even lower-ranked persons in the state apparatus can make the decision in certain circumstances. It is no accident that Americans call these plans »contingency plans« ... "[A]ccidental detonations, potential disasters, and other sources should be added. And we have not yet even

[35] Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 9.

[36] Losoncz, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?* Retrieved on 28/10/2020, from: https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefiranje-neukrotive-dece/.

[37] Ellsberg, D. (2017). *The Doomsday Machine: Confessions of a Nuclear War Planner*. New York et alii: Bloombury.

mention the doomsday machine (from the title of Ellsberg's book), which can be activated automatically, without human decisions"[38].

All characteristics of the state of exception can found in the presented argumentation. *First*, using the necessity (if necessary) of the attack as the reason is the key moment, as it serves to legitimize nuclear war. *Second*, and in this case, the fact that only the privileged sovereign, the representative of sovereignty, decides on an attack during a state of exception, that is, about the state of exception itself, plays a remarkable role. Although, the issue is even more complex, as in practice lower-ranked subjects of the ruling hierarchy ("micro-sovereigns") can eventually make the relevant decision (e.g. lacking orders, a soldier in an aircraft with nuclear armament can interpret a given fact as motivation for attack). *Third,* uncertainty, contingencies, alert conditions, the supposed necessity for urgency and swiftness play a decisive role. Ellsberg introduces the concept/notion of a*mbiguity* to describe the extreme uncertainty of all decisions regarding a nuclear attack – previous experience is lacking, the circumstances are often unclear, not all of the implications are known ahead of time, etc. The sovereign is often akin to Benjamin's impotent baroque sovereign who does not possess the ability or the right circumstances to make a correct decision.[39] In the majority of cases, the conditions for rational decision-making are missing and the space to manoeuvre is limited – the use of hyper-rationalized technology turns into irrationality. *Fourth*, nuclear planning is done by the "deep state", of which the surface state knows little. We are dealing with a *top secret* (or *for the president's eyes only*); furthermore, sometimes even the president is not informed (e.g. *eyes only for Paul Nitze)*. As is the case with the state of exception generally speaking, neither the public knows the details (the motivations and consequences of decisions, etc.), nor is Congress informed. The subject are state secrets which are hidden and taboo even for special executive, legislative, and judicial bodies. Thus, it is not accidental that the issue of unauthorized actions is of key importance – it can occur that an operation is conducted without the knowledge of military and political leaders, or despite their opposing directives (*in violation of the strict letter of their orders*), so the actions are executed, but despite the basic legal and moral expectations.

Of course, secrets serve an ambivalent role: if the existence and the quantity/quality of a nuclear moment are unknown to the enemy, then the given

[38] Lošonc, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?. Retrieved on 28. 10. 2020, from: https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefiranje-neukrotive-dece/*

[39] See: Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press, 55.

empire cannot coerce their actions. On the other hand, if the details of the nuclear armament are public, then that can lead to a lack of strategic options. For nations that are the subjects of attacks after nuclear aggression, their existence will be brought into question. In such a situation, it can happen that the mechanisms of the state of exception need to be used, especially if the government becomes "acephalous" – so, if after the attack it loses its military or political leaders. Ellsberg himself proposes different tenets regarding nuclear attacks: for example, much stricter control of the decision-making process and a much more cautious approach regarding the source of the contingency.

In any case, this example demonstrates that the state of exception should not only be interpreted as a phenomenon that "suspends rights" in their entirety. Nor is the state of exception a totally "anomic state". *In fact, the relationship between the state of exception and the legal order is complex*: sometimes the state of exception ("the deep state") acts as a parasite on the legal mechanisms ("the surface state"), sometimes those exact legal mechanisms "legalize illegality", and, it not contested, sometimes these processes are diametrically opposed. Careful consideration of the phenomenon of nuclear armament shows that we are not dealing with an abstract problem of the era after Hiroshima and Nagasaki, but that the question of the state of exception is firmly concrete from a legal perspective.

However, the legal-political argumentation regarding nuclear war has expanded over time. Quoting Peter Dale Scott: "but the planning eventually necessitated the suspension of the constitution, not only »after a nuclear war«, but for any »national security emergency«. This was defined in Executive Order 12656 of 1988 as »any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States«. It is clear that 9/11 fit the definition."[40] According to Scott's thesis, a mechanism called the *Continuity of Government* (*COG*) was planned since the 1950s. Scott identifies certain groups (*Federal Emergency Management Agency [FEMA]*, *Continuity of Government Interagency Group*, etc.) and eras (among others, the Regan administration) when this "secret contingency plan" was upgraded and, what is more, politicized. For example, the cooperation between FEMA and lieutenant colonel Oliver North (who was a member of the National Security Council) led to the concretization of plans which presupposed the suspension of the constitution in case of an eventual war, the dangerous actions of eco-activists, or activists who help refugees. The plans put the focus on surveillance and detainment of dissidents, as well as those who participate in the insur-

[40] Scott, P. D. (2007). *The Road to 9/11: Wealth, Empire and the Future of America*. Berkeley–London–Los Angeles: University of California Press, 228.

gency (*counterinsurgency plan*), within plan "Rex 84" and operation "Garden Plot", among others. The plans were so secretive, that during the hearing of Oliver North held for the Iran-Contra affair, even Rep. Jack Brooks concluded that it would not be worthwhile to go into details regarding the planned suspension of the constitution. Scott points out that the planning was primarily done outside of the institutional framework, fully outside of the purview of the government. These were "private" parallel structures which included, among others, president and CEO of G.D. Searle & Company, Donald Rumsfeld, and congressmen from Wyoming, Dick Cheney – people who also had key roles in declaring the state of exception after September 11, 2001. Cheney and FEMA were again united in 2001 – this is how the highly classified documents regarding the "continuity of operational plans" were made. Little is known about the circumstances in which the new plans were implemented and the exact content of these documents is unknown. As Benjamin and Agamben suggest that in a state of exception there is *tension* between the "normal" and "exceptional", so Scott claims that the characteristics of the state of exception need to be understood in a specific way. However, his approach is different than the approaches of the aforementioned theoreticians: he believes that "continuity of government" should be renamed to "change of government", given that FEMA would take on the authority of the government (if needed, even a new president would be selected). All of this concerns the "command and control" of unauthorized persons, a "government on hold", which would exceed the normal division of government. Scott claims that everything that was planned during the 1980s was instituted in 2001: warrantless detention, warrantless eavesdropping, and the uncontrolled militarization of the United States.[41] He stresses that the "continuity of government" is still active – with his allies, he is unsuccessfully attempting to convince the members of Congress to end the state of exception.

In summary, Agamben incorrectly determines the genealogy of the modern mechanisms of the state of exception. For him, events after September 11 appear as a *deus ex machina*, with no causal explanation for the sources of the plans presented – the continuity between a hypothetical state of exception due to nuclear war and the state of exception that was declared after the terrorist attacks is especially unclear.

And if the starting point is that the perception of the crisis[42] is constitutive for comprehending the state of exception, we can state: *a non-punctual*

[41] Scott, P. D. (2010). *"Continuity of Government" Planning: War, Terror and the Supplanting of the U.S. Constitution*. Retrieved on 29. 10. 2020, from: https://apjjf.org/-Peter-Dale-Scott/3362/article.html).

[42] Goupy, M. (2017). L'état d'exception, une catégorie d'analyse utile?: Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault. *Revue interdisciplinaire d›études juridiques*, 79 (2), 97–111.

state of exception suits non-punctual crisis processes. Namely, the crisis plane of the modern era necessitates that, unlike in previous eras, modern crises are not "finalized", do not get "solved", but continue through time. A typical example is the 2007 crisis that still causes regressive tendencies. The forceful austerity measures instituted in the European Union in the last decade are a representative example; they were implemented in relation to the emerging state of exception, causing a multitude of, as well as opposite, interpretations which focused on the problem of the state of exception.[43] Many discussions regarding the competency of the un-democratically implemented measures as an economic paradigm revolved around the state of exception, which served as the legitimization of the matrices for arranging the European economic policy. Accordingly, the state of exception has reached the European debate stage and, as can be observed, the perception of a deep crisis induced the expansion of the debates.[44] Additionally, the crisis specificity of the epoch is found in the condensation of the different modalities of crisis (ecological, financial, etc.) which simultaneously manifest their effects. The shape of the different and condensed crises can no longer be the classical treatment of crisis that temporally limits the crisis processes which do not end. The postulate of a crisis that is temporally and spatially bordered does not meet the new pattern: now, crises emerge in accordance with the logic of cumulative causality, i.e. in accordance with the logic of the self-strengthening of the crises processes with uncertain outcomes.

The change in meaning of crisis is unfolding in the context of the changed relationship between the economic sphere and law.[45] Many discussions on the phenomena of the "economization of law", the transformed "fix", and the "law-economy complex"[46] exist: in short, the legal reasoning is adapted to "neoliberal" rationalization, or *mimetically* heeds/maintains the authoritative and hegemonic logic of economic "incentives".[47] It should be noted that these tendencies modify the notion of the state of exception. Namely, that is the only way to understand such indications regarding law when formulated the following

[43] Scharpf, F. W. (2017). De-constitutionalisation and majority rule: A democratic vision for Europe, *European Law Journal*, 23, 315–334.

[44] Lošonc, A. (2018). Evropska Unija i tehnokratsko starateljstvo. *Theoria*, 61 (2), 37.

[45] Backhaus, J. G. (2017). Jurists' economics versus economic analysis of law: A critique of professor Posner's "economic" approach to law by reference to a case concerning damages for loss of earning capacity. *European Journal of Law and Economics*, DOI 10.1007/s10657–017–9559–2. Kuhner, T. (2011). Citizens United as neoliberal Jurisprudence: The Resurgence of economic Theory. *Virginia Journal of Social Policy and the Law,* 18:3, 398–401.

[46] Lošonc, A., Bunčić S., Ivanišević A. (2019). Ordoliberal Articulation of Law-Economy Complex. *Pravni zapisi*, 2, 358–381.

[47] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal.* London: Blackwell, 95.

way: "the state of exception is the legal form of neoliberalism"[48], further, in neoliberalism "the exception becomes the rule"[49] or the indication that *an economy determined by crisis becomes the foremost measure for the existence of the state of exception.*[50]

Law that is regularly described as "relatively autonomous" (Buckle) in regards to the economic domain becomes endangered to be repeatedly subsumed to the triumphant neoliberal economic matrices. Only, this does not narrow the range of the "rule of law", as social actors do *not* stop invoking "the law". However, neoliberal conquests, appropriations, the imposition of different levies (and anything else that belongs to the neoliberal arsenal) create a paradoxical situation that certain legal experts describe as "the rule of law but without legality".[51] The state of exception that is continually perpetuated comes close to this situation.

*
* *

We have critically examined the analysis of the Italian legal and political philosopher Giorgio Agamben regarding his determination of the state of exception. We have stated the reasons for our critique and attempted to demonstrate via selected examples (nuclear war, Nazism, the *Patriot Act* in the U.S.A.), as well as by the example of the economization of the state of exception in crisis processes, that the dichotomous separation of the state of exception and the "normal" state, and the characterization of the state of exception according to the suspensions of rights, does not get to the essence (even if one insists on the moments of "paradox"). In that sense, "anomie" is not an explanation that can articulate the state of exception, which is a proportionally more complex notion than Agamben's projections. It is more worthwhile, regarding the phenomenology of the state of exception, to take into account the amalgam of legal and non-legal moments. Some empirical research conclusively proves this.[52]

[48] Valim, R. (2018). State of exception: The legal form of neoliberalism, *Zeitschrift für Politikwissenschaft*. Available at: https://doi.org/10.1007/s41358-018-0143-2.

[49] Biebricher, Th. (2014). Sovereignty, Norms, and Exception in Neoliberalism. *Qui Parle*, 23, 1, 77–107.

[50] Best, J. (2007). Why the Economy is Often the Exception to Politics as Usual, *Theory, Culture & Society,* 24 (4), 87–109.

[51] Mattei, U., Nader, L. (2008). *Plunder: When the Rule of Law is Illegal.* London: Blackwell, 89.

[52] Jakab, A. (2005). German constitutional law and doctrine on state of exception: Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, 07 (5), 453–477.

The state of exception actually accentuates the relationship between the legal and non-legal (*Nichtrectlichen*[53]) and raises questions regarding the normative plane of law, as well as the "institutionalization of law" in general. More precisely, there is no dichotomy between law and non-law: law *ex ante* projects "legal states" and "legal persons" into the domain of non-law. Law does not confront "chaos", an undefined state; law, anticipating and in advance defining non-law, in advance implementing its "form" into the domain of non-law, comprehends non-law from its own perspective. It is a "self-reflection"[54], *self-differentiation* of law, i.e. by postulating non-law, law realizes "self-relating", that is: "*modern law converts non-law into its own opportunity*."[55] So a state of exception is a situation wherein there is no merging of law and non-law, as much as there is "self-relating law", especially in crisis processes. And if it is true that the state of exception is the "legal form" of triumphant neoliberalism, then the state of exception is the perpetuating of "self-relating" law.

BIBLIOGRAPHY

Agamben, G. (2003). *State of Exception*. Chicago–London: University of Chicago Press.

Atanassow, E., Katznelson, I. State of Exception in the Anglo-American Liberal Tradition. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0153-0Z

Backhaus, J. G. (2017). Jurists' economics versus economic analysis of law: A critique of professor Posner's „economic" approach to law by reference to a case concerning damages for loss of earning capacity. *European Journal of Law and Economics*, DOI 10.1007/s10657-017-9559-2.

Best, J. (2007). Why the Economy is Often the Exception to Politics as Usual. *Theory, Culture & Society,* 24 (4), 87–109.

Biebricher, Th. (2014). Sovereignty, Norms, and Exception in Neoliberalism. *Qui Parle*, 23, 1, 77–107.

Blanck, Th. (2018). A revolutionary state of exception. *Zeitschrift für Politikwissenschaft*, 28, 453–467.

Camus, G. (1966). L'état de nécessité en démocratie. *Revue internationale de droit compare,* 18 (4), 957–959.

Ellsberg, D. (2017). *The Doomsday Machine: Confessions of a Nuclear War Planner*. New York et alii: Bloombury.

Flor, G. (1954). Fragen des Ausnahme- und Staatsnotrechts. *Juristische Rundschau*, 4, https://doi.org/10.1515/juru.1954.1954.4.125

[53] Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp. 70.

[54] Teubner, G. (1989). *Recht als autopoietisches System*. Frankfurt/M.: Suhrkamp, 29.

[55] Menke, Ch. (2014). *Op. cit.*, 76.

Förster, A., Lemke, M. (2016). Ausnahmezustände: Varianten und ihre Recht-fertigungen am Beispiel der USA. In: *Legitimitätspraxis: Politikwissenschaftliche und soziologische Perspektiven* (hrsg. Matthias Lemke et al.). Wiesbaden: VS Verlag, 13–37.

Fraenkel, E. (2017). *The Dual State*. Oxford: Oxford University Press.

Goupy, M. (2017). L'état d'exception, une catégorie d'analyse utile? Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault. *Revue interdisciplinaire d'études juridiques*, 79 (2).

Horn, E. (2007). *Der geheime Krieg: Verrat, Spionage und moderne Fiktion*. Frankfurt am Main: Fischer Taschenbuch, 105–115.

Hummel, J. (2005). *Carl Schmitt: L'irréductible réalité du politique*. Paris: Éditions Michalon.

Jakab, A. (2005). German constitutional law and doctrine on state of emergency: Paradigms and dilemmas of a traditional (continental) discourse. *German Law Journal*, 07 (5).

Kuhner, T. (2011). Citizens United as neoliberal Jurisprudence: The Resurgence of economic Theory. *Virginia Journal of Social Policy and the Law,* 18:3, 398–401.

Lemke, Th. (2011). *Biopolitics: An Advanced Introduction*. New York – London: New York University Press, 53–65.

Lošonc, A. (2018). Evropska unija i tehnokratsko starateljstvo. *Theoria*, 61 (2).

Lošonc, A., Bunčić, S., Ivanišević, A. (2019). Ordoliberal Articulation of Law-Economy Complex. *Pravni zapisi,* 2, 358–381.

Losoncz, M. (2016). Macht und indifferente (Im)Potenz in Agambens Philosophie. In Radinković, Ž. et alii (ur.) *Politiken des Lebens: Technik, Moral und Recht als institutionelle Gestalten der menschlichen Lebensform.* Belgrade: Institut za filozofiju i društvenu teoriju.

Losoncz, M. (2020). *Nuklearni rat: Smrt svih nas ili blefiranje neukrotive dece?* Preuzeto 28. 10. 2020. sa https://pescanik.net/nuklearni-rat-smrt-svih-nas-ili-blefi ranje-neukrotive-dece/.

Manin, B. (2009). Le paradigme de l'exception: L'Etat face au nouveau terrorisme. Preuzeto 10. 26. 2020. sa http://www.laviedesidees.fr/Le-paradigme-de-l-exception.html

Mattei, U., Nader, L. (2008). *Plunder, When the Rule of Law is Illegal.* London: Blackwell.

Menke, Ch. (2014). *Kritik der Rechte*. Frankfurt/M: Suhrkamp.

Neilson, B. (2014). Zones: Beyond the Logic of Exception. *Concentric: Literary and Cultural Studies*, 40 (2), 11–28.

Neocleous, M. (2008). *Critique of Security*. Edinburgh: Edinburgh University Press.

PROKLA-Redaktion (2016). Der globale Kapitalismus im Ausnahmezustand. *PROKLA,* 4, 507–542.

Saint-Bonnet, F. (2007). L'état d'exception et la qualification juridique. *Cahiers de la recherche sur les droits fondamentaux* 6, 29–38.

Scharpf, F. W. (2017). De-constitutionalisation and majority rule: A democratic vision for Europe, *European Law Journal*, 23, 315–334.

Schottdorf, T. (2018). Law, democracy, and the state of emergency: A theory-centred analysis of the democratic legal state in times of exception. *Zeitschrift für Politikwissenschaft*, 28, 423–437.

Scott, P. D. (2007). *The Road to 9/11: Wealth, Empire, and the Future of America*. Berkeley–London–Los Angeles: University of California Press.

Sørenson, G. (2001). The Dual State and Fascism. *Totalitarian Movements and Political Religions*, 2 (3), 28–29.

Takayoshi, I. (2011). Can philosophy explain Nazi violence? Giorgio Agamben and the problem of the „historico-philosophical" method. *Journal of Genocide Research,* 13 (1–2).

Teubner, G. (1989). *Recht als autopoietisches System*. Frankfurt/M.: Suhrkamp.

Toscano, A. (2011). Divine management: Critical remarks on Giorgio Agamben's the kingdom and the glory. *Angelaki*, 16 (3), 125–136.

Troper, M. (2007). L'état d'exception n'a rien d'exceptionnel. In: *L'exception dans tous ses états*, S. Théodorou (dir.). Paris: Editions Parenthèses, 163–175.

Valim, R. (2018). State of exception: The legal form of neoliberalism. *Zeitschrift für Politikwissenschaft*, https://doi.org/10.1007/s41358-018-0143-2.

Williams, R. (2010). A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism. *Interventions: International Journal of Postcolonial Studies*, 5 (3), 322–344.