



Dipartimento di Scienze Politiche Cattedra Political Philosophy

TITOLO

State of Exception: a philosophical analysis

RELATORE

Prof.
Sebastiano
Maffettone

CANDIDATO: Giacomo
Latorraca

Matr.079412

ANNO ACCADEMICO 2018/2019.....

Contents

0. Clarification
1. Introduction
2. From the “State of *normalcy*” to the “State of Exception”
 - a. Time, Space and Objective
 - b. Formal and Material Emergency Law
3. Carl Schmitt: the theorist of the Exception
 - a. Dictator as *Defensor Pacis*
 - b. Dictator as *Creator Pacis*
- 3.1. Schmitt’s Exception and the Weimar Republic
- 3.2. Four stages of presidential interventionism
4. Giorgio Agamben on Carl Schmitt and the Exception
 - a. Force of Law
5. Summing up Carl Schmitt’s theory of the Exception
6. Hans Kelsen’s *legal normativism*
 - 6.1. Kelsen and the Exception
 - a. Back to Schmitt
 - b. Kelsen responds: the *identity thesis*
7. Bonnie Honig: Emergency Politics and beyond
 - a. Bringing Politics back into the equation
 - b. Is Politics able to handle the Emergency?
 - c. Elaine Scarry and the *Democratic Exception*
8. Conclusion

Bibliography

0. Clarification

In my final thesis I am going to argue on the concept of State of Exception, on its definition and its scope. I will then try to analyse two perspectives on the topic, one that leans more towards a “State centric” conception and the other focused on the freedoms of the individuals and on the threats that such a conception of the State could pose on society. For each perspective I will briefly synthesize the ideas of some among the most important political philosophers of the past century. For the sake of my analysis I will not enter the depths of each corpus of ideas of each author, I will instead focus on those aspects that better serve my project. Regarding the first perspective on the issue, I will go through the thoughts and ideas of Carl Schmitt, as seen under the lenses of Benjamin Schupmann and Giorgio Agamben, while on the liberal side of the topic, I will analyse the thesis of Hans Kelsen elaborated by Andrej Zwitter and Bonnie Honig.

I decided to choose this particular topic because of my interest in the working mechanisms of modern democracies, which many consider being clear and easy to understand, but that actually present a number of critical issues, such as the one I am going to analyse. In my dissertation, I will highlight the important theoretical contribution of the cited scholars with a particular focus on the following questions: can a modern Liberal Democracy, that is experiencing a potentially fatal crisis, “escape” the limits and the boundaries imposed by the Constitution in order to survive? In addition, could the State in question still be considered Democratic?

Before addressing the thoughts and theories of the mentioned scholars (and others), I want to give some clarifications regarding the structuring of my thesis. I have decided to point out first, some definitions about the concept of Exception and of State of Exception, that could help addressing each author’s discussion without entering too much into their own definitions and particular considerations. In order to do so I found the work of Andrej Zwitter illuminating, mainly because of his ability to explain very complex concepts in a truly reachable way, and also because of his references to contemporary International jurisprudence. Following this introductory part, I chose to discuss the works of Carl Schmitt, a German legal scholar whose importance in the field of political theory is comparable to only a handful of his contemporaries, particularly regarding the topic of the State of Exception. I will then move on to the important contribution of Giorgio Agamben, an Italian professor and

philosophers who brilliantly analysed, in the face the challenges of the current era, Schmitt's notions and ideas, shining a new light on concepts that were mostly forgotten or disregarded. The dissertation will follow by looking at a starkly different stance, that of another bright scholar of the past century: Hans Kelsen. His state theory represent a pillar of Liberalism and his position on the exception offers an interesting opportunity of comparison with Schmitt's ideas. Finally, I chose to study the position of other two scholars, contemporary ones in this case: Bonnie Honig and Elaine Scarry. To be precise I found Scarry's theories to be a perfect contribution and a natural extension to Honig ones, as Honig herself seems to think, and because of that I decided to analyse Scarry's ideas through the lenses of Bonnie Honig. At last I tried to draw some personal conclusions on the basis of what these cultural giants have produced on the topic.

1. Introduction

A necessary introduction needs to point out at some definitions regarding the concept of Exception. For this definition, I am relying mostly on the work of Andrej Zwitter, professor of International Relations at Groningen University, who, in turn, based his conclusion on the current International Legal framework. His definition is the following:

“The State of Exception is identifiable in a change in the structure or behaviour of the State in times of crisis, emergency or natural catastrophe. It normally results in a reduction of democratic freedoms and rights of the citizens.”

Given this simple proposition, he then proceeds to break it down and to highlight the many problems that go with it, starting with the problem of wording and conceptualisation. Different legislation define the concept in different ways, sometimes through their constitution, sometimes in customary terms, and in some cases, it is not possible at all to find any definition inside the corpus of legislation of a State. The second critical point lies in the necessity of broadness of the definition itself. No State, in fact, can accurately predict which emergency would need a different form of action and therefore a too narrow definition could prevent the State to act effectively in unpredictable situations. Only by deepening the complexity of the definition it is possible to partially solve those two problems. A good example of this strategy is to insert more variables: “[...] it deals with cases where the nature of a situation requires the restructuring of state functions in order to mitigate the situation's negative effect on the state and its citizenry more effectively (better) and more efficiently

(faster).” (Andrej Zwitter, *The Rule of Law in Times of Crisis*, 2013). In this case the variables that are included into the definition and that make a better understanding of the concept possible are effectiveness and efficiency, both relative to the quality of the State’s action.

Having briefly described in which sense the State might need to reshape its structure, follows an explanation of the reasons why such a procedure may be adopted, particularly defining the differences between the State of Exception and its opposite, the State of Normalcy.

2. From the “State of *normalcy*” to the “State of Exception”

In order to define a situation where the State or any agent is behaving in an abnormal way, first the conditions of “normalcy” are to be established. In a “normal” situation, the State is not facing any particular threat to its existence or to the safety and wellbeing of its citizens, hence, a situation of crisis needs to be triggered by a threat. Three conditions must hold in order to justify a threatening situation: necessity, concreteness and urgency.

Regarding the issue of Necessity, the question that has to be answered is quite simple and aims to identify the reason why the State’s structure needs some modification. The main purpose of the State, as it has been argued by many scholars, relates to the concept of self-preservation, a necessary condition to carry out any task that may relate to the wellbeing of the citizens, the collection of taxes, the protection of borders and any other issue considered to be a specific function of the State. A consensus among theorists can be found on the idea that the State has to protect himself in order to keep functioning. Following this reasoning, the State has to have an instrument to react to any kind of threat that may come either from inside or outside its borders. Indeed, the threatening situation used to justify the triggering of a State of Exception, and thus the reshaping of the State’s structure and behaviour, has to respond to some quantitative and qualitative characteristics, thus we speak of the concept of Concreteness and Urgency.

The question of Concreteness relates to the practical definition of the examined threat. In this descriptive category, the State analyses and thus, defines, the “borders” of the threat itself. A practical example can be found in a context of a natural catastrophe that hits a particular State. In some cases, the State may necessitate a firmer hold on the behaviour of its citizens, to better handle the aftermath of such a tough situation. At the end of the day when speaking about the Concreteness of a threat the aim is to investigate the scope of the emergency that has to be

dealt with, defining in the most precise manner possible the temporal limits of the vicissitude. The issue of concreteness is deeply related with the last aspect in analysis, which is Urgency. A lack of Concreteness, in fact, leads to an absence of Urgency.

The second temporal definition of threat that could justify the triggering of a State of Exception is Urgency. In a situation of distress of great proportion, the State's effectiveness in reacting to such a situation, could result as insufficient in dealing with the threatening issue. The executive branch has a responsibility of protection towards its citizens, but in contemporary parliamentary democracies, any action of the executive has to be approved by the legislative body, often divided into one or more chambers. It is easy to understand that the possibility of an immediate threat that implies an immediate response from the government, may need a shortened legislative and executive procedure to be able to oppose or limit the potential damages caused by the imminent menace. This need, perceived by the State's bodies, is exactly the concept of Urgency. Emergencies, of any kind, are therefore situations that hit the State in an unforeseen, unforeseeable or unpreventable way, that exceed the capacity of reaction that the State possess in its "normal" configuration.

a. Time, Space and Objective

At this point in the analysis a further clarification is needed. The State of exception is, in fact, an attempt by the State to mitigate the consequences of an event that has clear and evident negative and harmful consequences on the wellbeing of the State's citizens, or that threatens the existence of the State's structures themselves. The focus must be on the event, or events', consequences. This clarification is important in order to provide a coherent and correct definition of the limits of this particular configuration of the State, insofar as the standpoint from which the analysis is made, is a liberal one. Under liberal assumptions the state of exception must exist under precise conditions, aimed at limiting the additional powers that the State obtains by declaring such a state to be in practice and at leading back the State's institutions under the constitutional limits once the emergency has been overcome. I wanted to clarify this argument as being a liberal one because on this among other controversies the opposition between the liberal and the "authoritarian" interpretation of the issue is based.

The emergency is thus a distinct crisis and should be viewed detached from its triggering event. This emergency has a beginning and an end, those are the temporal limits to be considered when the state of exception is triggered. A further limitation on the state of

exception should be considered if and when the consequences of the triggering events are particularly limited in a spatial sense. If the situation of emergency is predicted to affect only a limited area of the State that has to deal with such accident, a “local” state of exception may be more suitable than a general one, both to preserve the constitutional rights of the citizens and to better organize the handling of the situation. Lastly the clear definition of the objective of the state of exception is a necessary condition in order for it to coexist with the principles of the Rule of Law. The general definition that relates to the handling of an unpredictable situation may not be enough, since a more specific declaration of intents by the State could provide more transparency and clarity to the State’s citizens, in a matter that can potentially become a threat to the rights possessed by the citizenry under the guarantees embodied in the Constitution. In any case, any act of the State outside the framework of reaction and handling of the hardship, adopted under state of exception could and should be illegitimate.

b. Formal and Material Emergency Laws

Another aspect that is important to examine before moving to a deeper analysis of the validity of the ideas standing behind the philosophical conceptions and interpretations of the State of Exception, relates to the difference between formal and material Law of the Exception. In the best-case scenario, a State willing to act in a transparent way towards its citizens, would include in its corpus of laws a section that deals with the exceptional cases, and that practically explains the procedures that would be adopted in cases impossible to be dealt with in the normal State configuration. It is precisely this that it is referred to as the “formal” aspect of Exception Law. To put it differently, formal Exception Laws are aimed at defining the temporal and spatial limitation of the Exception in that particular State, and indeed, the objective that this form of State has to have in order to be legitimate in its existence. On the other hand, material exception law are those actions undertaken by the government from the moment of the declaration of the State of Exception, until its end. Under this light, the interconnection between these two aspects is clear, as it is clear that both the medal’s faces are fundamental in the attempt to understand the topic.

3. Carl Schmitt: the theorist of the Exception

The contribution offered by Carl Schmitt to European philosophy is among the deepest and most diverse of the twentieth century. In his studies he was inspired by a number of legal scholar and philosophers of many different eras and centuries, but the one that certainly had

the most important influence on him was Thomas Hobbes. As Benjamin Schupmann argues in his essay *Leviathan Run Aground* (2015), Schmitt's intent was to give a contribution very similar to the one given by the English philosophers, but with the proper modifications and adaptation that could restore the importance of Hobbes thought in the modern era, where the legitimacy of the State's institution was not given by a divine authority but had instead democratic roots. In this sense it is important to understand the role played by the figure of the Dictator, basically the modern version of the Ruler (the personification of the State's Leviathanic powers) cited and described by Hobbes. According to Schmitt, who in turn was in agreement with Plato, the State was the highest expression of human rationality, and the Dictator was a completely positive figure, able to guide the totality of the State's population through the hardships of an exceptional situation. Many critics have argued that Schmitt's intent was basically a malicious one, mainly liking his fascination towards the figure of the Dictator to his latter support of the Fascist ideology. In fact, a careful reading of his early writings can lead to a different conclusion, especially thinking of his deconstruction of the definition of Dictator. He decided to rework this concept because of the many contaminations that were present at the time in the common conception of the term.

a. Dictator as *Defensor Pacis*

The core of Schmitt's argument lies in the fact that Constitutions are a limited tool. In the realm of the State of normalcy, each State's Constitution should be able to deal with the regulation and preservation of each citizen's freedoms and possibilities. The problem arises when a shift in the "normal" circumstances occurs. A state of war or insurrection could pose a deadly threat to the order of the status quo, and thus, indirectly, to the civil and legal freedoms of the State's citizens. In Schmitt's words, he defines Dictatorship as "the exercise of state power freed from legal constraints for the purpose of overcoming an abnormal state, especially war and insurrection" (Shupmann 2015, chapter 5). It is of fundamental importance to understand that Schmitt saw the concept of Dictatorship as totally bound to its ends. On the same grounds, he even conceives the Law itself not as an end or a good *per se*, but as a necessary mean to the existence of society.

The question of legitimacy, in Schmitt's idea, was not to be posed, simply because he considered the Dictator to be a representative institution, if not the most representative institution. The problem here lies mainly in the fact that Schmitt barely considers the

possibility that the State could act against the wellbeing of its citizens, because of the deep connection he sees between the State and Rationality. The Dictator is the agent who brings about the possibility for the State (*Recht*) to exist, or to come back to existence. The idea one has to bear in mind while reading Schmitt is that Dictatorship cannot be seen as a violation of the *Normal* Legal Order, but more as the attempt to reconduct an *Abnormal* situation, under the legitimate, and thus, Normal, Legal order. It is an attempt to restore the most satisfactory conditions, under which life and freedom could prosper. Spinozian rationality has a great influence in this crucial point of Schmitt's argument (*in suo essere preservare*). Since the aim of the Dictator is so crucial in the preservation or restoration of the Normal Legal Order, and since the conditions of Necessity, Concreteness and Urgency (even though Schmitt never specified such characteristics in these terms), apply, it is easy to conclude that the Dictator can not operate under the legal constraints typical of a Liberal democratic State.

In other words, the deliberative nature of Democracy is seen by the author, as too much of a constraint to the powers needed in order to "save the State". In this sense, the Dictator is created under Constitutional constraints but at the same time, possess extra-constitutional powers and abilities that allow him to restore the Constitution or to protect it from internal or external threats. Schmitt referred to the concept of Dictatorship as it has been described in this paragraph with the term "Commissarial Dictatorship".

b. Dictator as *Creator Pacis*

Schmitt's interest towards the concept of Dictatorship does not end with the Commissarial version of it. In fact, he theorizes, with many references to historical cases, the concept of Sovereign Dictatorship. In this case, the Dictator is not appointed or nominated by the existing power-holders that understand the need for a less constrained (by the Republican institutions) way of action, but emerges in a particularly defined moment of complete disruption of the *Normal Status Quo*. In this scenario, "the entire legal order is suspended, and the dictator serves the purpose of bringing about an entirely new order." (Schupmnn 2015,174). While Commissarial Dictatorship has an already existing framework to look up to when trying to overcome the Abnormal or Exceptional state, the case of Sovereign Dictatorship in schmittian terms has the far more complicated purpose of the creation of a new order. This new order shall have a double purpose, that could both impose itself on the state of Abnormality (often seen by Schmitt as a belligerent scenario), and to result suitable for a long-lasting period.

3.1. Schmitt's Exception and the Weimar Republic

In order to give a concrete exemplification of Schmitt's thought, I will now briefly direct my attention to the most important case analysed by Carl Schmitt: Weimar's Republican crisis. To address this matter a concise explanation on the functioning of the Weimar Republic is needed. The principle that the creators of the Weimar's constitution had in mind when elaborating the legal and philosophical theory behind the Weimar's State, was based on the sovereignty of the Parliament, a clear expression of 18th century's ideals, that justified with the concept of legitimate sovereignty, the possibility for the Parliament to be the centre of leadership and governance of the State.

The problem with this concept, as Schmitt theorized, is related with the philosopher's stance on the importance of the Absolute constitution. He describes Constitutions as composed of a double soul: the Absolute and the Relative one. The Absolute Constitution is to be considered the depositary of the profound values that give to the State the possibility to exist, and to its citizens the ability to coexist peacefully. On the other hand, the Relative Constitution is composed of the ever-shifting stance of each different government on the various issues that are part of the discussion on the "res publica".

Schmitt's concern with the possibility of having an unbalanced centrality of the Parliament in the Republic relates to the possibility of a negative (in terms of Absolute values) politicisation of the civil society, that could, and in fact, did, affect the decisional process of the Parliament. The solution promoted by Schmitt was linked to a more "modern" conceptualization of representation.

3.2. Four stages of presidential interventionism

The figure of the President, in political terms, represented a purely neutral one. In its schmittian configuration, presidential powers consisted in four branches: the power to appoint the Chancellor (head of Parliament), the power to dissolve the chambers, to held referendums and to trigger the infamous Article 48, which basically declares the state of Exception inside the borders of the State. The logic behind the role of the President was one that enabled this figure to exert his powers in any situation where the values contained in the Absolute Constitution were threatened, either from the outside or from inside the State. Such a powerful figure was legitimized in his actions, according to Schmitt, by the fact that he represented the unitary German People. The work of abstraction made by Schmitt in this case allowed him to

justify the role of the president as the most important warrant of German's abstract will, even against the temporary will of the actual German population. Schmitt outlines the role of the president dividing his role in the face of parliament dividing it into 4 steps:

1. The President as Honest Mediator among Social "Interest-Complexes"
2. The President as Majority-Forming Objective Third
3. The President as an Independent Third Party
4. The President as assuming the Open Decision

This list has to be understood as a representation of the degree of involvement of the President in the political sphere. Each passage ought to be followed in order to properly follow the politicisation of the society, something, as already stated, seen as a negative outcome by Schmitt. In the first stage, the actions of the President are of pure mediation among different social groups. He shall act before the contention arrives to the parliament, in order to avoid the excessive fractionalisation of the Chamber. The second step would require the President to actively take part to the voting procedure. In this case the trust given to the Presidential figure is very high, since his vote is definitive and entails the decisive power to advantage the side he deems more valid. The importance of this phase is further highlighted by the following step. In the third phase in fact, the degree of actual democracy in the State (the Weimar republic in Schmitt's mind), diminishes by a great deal. At this hypothetical point in time, the president's neutrality reaches a qualitative change. He is no more an external figure to the Parliament but assumes the right to deliberate on what constitute the public good and interest, and he acts so as the figure committed to the constitutional idea of justice. If this stage of political factionalism were to be reached, in schmittian perspective, this would mean that the political discussion has reached a stage where it is so divisive and antagonistic that the State's existence itself may be at risk.

At this point of the analysis, a level of criticality in the reasoning is to be noted. In fact, according to Schmitt, the third stage of Presidential interventionism is still to be considered if not fully democratic, at least partially so. The mere fact that a parliamentary discussion could still take place is not enough to justify a figure that enjoy much less legitimisation if compared to the Parliament, to take part to the decisional process typical of parliamentary discussion.

This critic is to be explained by the fourth stage of presidential interventionism. In this last stage, the president would assume the responsibility to define the Parliament and parliamentary discussion as a chaotic arena where illegitimate and detrimental political pluralism threatens the very existence of the State. This fourth stage in the case of Weimar's republic entails triggering article 48, the article that deals with the State of Emergency. In substance Art. 48 of Weimar's Constitution is the ultimate legal instrument created in order to protect the Absolute Constitution. It is very clear at this point that the limit to the Presidential authority are more a question related to the moral and civil integrity of the President himself, rather than something legally controllable. To try to defend Schmitt at this point, one could argue that under Weimar, even if Art. 48 was triggered, the Presidential powers were still bound to the constitution (even under art. 48 the President had no right to change the constitution). Nonetheless this attempt results vastly insufficient to justify the amount of powers given to the president, especially considering how Hindenburg, once the Article was triggered under his mandate, used his powers to hand over the Republic to the rising Nazi party, led by Adolf Hitler.

Schmittian State Theory has at its core the concept of State of Exception as the last bulwark against populism, political factionalism and all centrifugal forces that could threaten the very existence of the State. Carl Schmitt was, until his late and controversial embrace of Nazi ideology, a firm supporter of Democracy as the only viable form of Government, he above all was convinced that the Values contained in the Constitution held such an importance that were to be protected in any way against anyone who showed the intention of attacking those values, either from the inside or from outside the State. Any criticism that depicts the German thinker as a "proto-fascist" theorist is misled and must come from someone who failed to understand properly the theoretical framework that lies underneath Schmitt's concept of Dictatorship and Exception. Ultimately, the only accusation that can be shared is the one contained in Hans Kelsen's critique of Schmitt's work. Kelsen, in fact, accused him of having a degree of naivety in designing such a powerful figure as the one of the President, especially in its "dictatorial" role, insofar as what he did was placing too much confidence on the human behind this figure, a confidence that especially in the Weimar's Republic case, proved to be misplaced.

4. Giorgio Agamben on Carl Schmitt and the Exception

Giorgio Agamben, an Italian scholar born in Rome in 1942, is among the most prominent academic figures that studied the concept of State of Exception. His studies concentrated on this topic particularly after the series of terrorist attacks that hit the United States in September 2001, and he focused his attention on the use made by Bush administration of Exceptional powers. His most important works in this field are the books “*Homo Sacer: Sovereign Power and Bare Life*” (1995) and “*State of Exception*” (2003). In the latter, he vastly discusses the concept of the Exception as elaborated by Carl Schmitt in opposition with other prominent voices of the first half of the past century. In particular, the book’s second chapter is entirely dedicated to Schmitt’s stance on the issue of the Exception. What Agamben brilliantly proves in his dissertation is the ultimate aim of Carl Schmitt: inscribing the Exception inside the boundaries of the Rule of Law, in order to make it possible to study it under legal assumptions.

“The specific contribution of Schmitt’s theory is precisely to have made such an articulation between state of exception and juridical order possible. It is a paradoxical articulation, for what must be inscribed within the law is essentially exterior to it [...]” (Agamben 2005, 33). In this chapter of the book, Agamben proceeds by elaborating on the two-folded strategy adopted by Schmitt in order to reach the desired outcome and does so by pointing out at the two most important works of the German philosopher: *Dictatorship* and *Political Theology*. In these two books, Schmitt, describes the two levels at which the Exception exist and operates. In “*Dictatorship*” the focus of the analysis is the duality between commissarial and sovereign dictatorship. In the first case, Schmitt explains that the meaning of the suspension of the Constitution “has the function of creating a state of affairs in which the law can be realised” (Agamben 2005, 34). In fact, in the case of commissarial dictatorship, the Exception exists as a matter of discrepancy between the constitutional norms and the norm’s application. The Constitution does not cease to be in force; it is suspended in order for the State bodies to be able to restore order in the state of affairs.

A very different situation is present in the case of sovereign dictatorship. According to Agamben’s reading of Schmitt, commissarial dictatorship “aims at creating a state of affairs in which it becomes possible to impose a new constitution” (Ibid.). As in the commissarial case, the anchorage of the dictatorial decision to the legal order is operated through the distinction between the existing Constitutional norms and their effective application, in the

sovereign dictatorship case, this role is taken by the dialectic between constituent power and constituted power. Constituent power as defined by Schmitt is “a power that, though it is not constituted in virtue of a constitution, is nevertheless connected to every existing constitution in such a way that it appears as the founding power [...] and for this reason it cannot be negated even if the existing constitution might negate it”. Agamben describes this concept as a “minimum of constitution”, existing in every politically decisive action, “therefore capable of ensuring the relation between the state of exception and the juridical order even in the case of sovereign dictatorship.” (Agamben 2005, 34).

The other work by Schmitt discussed by Agamben is *Political Theology*. It is in this endeavour that Schmitt expresses for the first time his *decisionist* position in relation to the Exception. The argument develops as follows. According to Schmitt two elements are in perpetual coexistence during the lifetime of the State: the norm and the *decision*. During the times of normalcy, when no threats menace the existence of the legal order, the norm stands tall and is the only legitimate form of interpretation of any event that concerns the public interest (i.e. in times of normalcy, Constitution and Law determine the behaviour of the State and the State’s citizens). On the other hand, in the exceptional situation occurs an annulment of the norm, in favour of the implementation of the Decision as the legitimate source and means of State action. The core of Schmitt’s argument according to Agamben is that, following this logic, the theory of the State of Exception is ultimately a theory of sovereignty: “The sovereign, who can decide on the state of exception, guarantees its anchorage to the juridical order. But precisely because the decision here concerns the very annulment of the norm [...] – “the sovereign stands outside of the normally valid juridical order, and yet belongs to it, for it is he who is responsible for deciding whether the constitution can be suspended in toto” – .” (Agamben 2005, 35).

Keeping in mind the idea by Schmitt that the only justification for a sovereign dictatorship to ever exist would be to establish the conditions necessary for the creation of a situation where the State can safely be redirected towards the supremacy of the norm, I will now conclude Agamben’s comment on Schmitt’s State theory and on his Theory on the State of Exception.

4.1. Force of Law

Agamben’s focus in concluding the chapter where he centres his attention on Schmitt’s design of the State of Exception, is set on the concept of “Force of Law”. After citing this concept in

the Roman and revolutionary French tradition, he states: “[...] both in modern and ancient doctrine the *syntagma force of law* refers in the technical sense not to the law but to those decrees (which, as we indeed say, have the force of law) that the executive power can be authorized to issue in some situation, particularly in the state of exception.” (Agamben 2005, 38). What Agamben is pointing out in this situation is that legitimacy and actual practical application of Law are completely apart during the State of Exception. In his examples he cites the practice typical of the Roman Empire, in cases when the sovereign began to “acquire the power to issue acts that tend increasingly to have the value of laws, Roman doctrine says these acts have the “force of law” (ibid.). In the Italian philosopher’s view, the situation presents an irreconcilable inconsistency with the democratic State. The state of Law in the State of Exception is such a state where the norm continues to be “in force” but loses any *force of application*. On the other hand, acts that are not infused with true legitimacy (meaning the one acquired through parliamentary discussion), being acts of the Exceptional Ruler or, *Dictator*, acquire that same force (hence, validity and certainty of application) lost by the norm. Agamben’s claim is that in a legal framework where the written and legitimate law are reduced to “scrap papers”, no accountability is possible anymore. “[...] in extreme situations “force of law” floats as an indeterminate element that can be claimed both by the state authority (which acts as a commissarial dictatorship) and by a revolutionary organization (which acts as a sovereign dictatorship).” (ibid.).

Agamben’s ultimate concern with the very concept of State of Exception lies in the possibility for a State body, endowed with exceptional powers, to get rid of all the practical procedures regarding the process of application of law. “The violence of martial law and sovereign decree is therefore, in Schmitt’s writing, legitimate over and against other manifestations of extrajudicial violence.” (Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 2006). In his argument the Exception corresponds to an anomic space in the legal sphere, potentially useful if the aim is that of protection of the existing Values intrinsic in the Constitution, as much as potentially dreadful if the unrestricted will of the “force of law” was to assume hill-lead directions.

5. Summing up Carl Schmitt’s theory of the Exception

The idea behind Carl Schmitt considerations and studies on the State of Exception is basically aimed at creating the instruments for a legitimate sovereign entity to confront a moment of

institutional, social or political distress. In the scholar's mind democratic proceduralism and the long timing needed by the parliament to take a legitimate decision could, at the moment when the crisis materialises, potentially represent the most dangerous threats to the stability and ultimately, to the very existence of the State. In his major works, *Dictatorship* and *Political Theology* he looks for a legal and philosophical solution that could render legitimate the "speeding up" of the decision-making process under Democratic rule, without losing the possibility to frame this type of *extra-legal* procedures into the legal discourse. To do so, he elaborates various concepts, all leading to the conclusion that the State of Exception shall be legitimized in its Formal legal structuring under the Rule of Law, while it should be allowed to escape the same Rule of Law that constituted the boundaries of its creation, while being in force (regarding Material Exception law).

Schmitt's corpus of ideas and writings is vast and comprehensive, as much as his arguments defending the importance of institutionalising Exceptional powers, but it has been, unfortunately, vastly disregarded in the second half of the past century studies, mainly because of his allegiance with the Nazi regime, occurred at the moment corresponding to Adolf Hitler gaining full powers over the then deceased, Republic of Weimar. Fortunately, Benjamin Schupmann and Giorgio Agamben, among others, decided to revive the ideas of Carl Schmitt, and managed to point out at the importance, as well as at the most critical points of his arguments. Agamben, gives us a reading of Schmitt that is able to show both lights and shadows of the German philosophers' legal theory, linking his considerations to the chain of events that took place after 9/11, and to the consequent crisis of the values that guided humanity towards the civil conquests obtained over the last two centuries.

6. Hans Kelsen's *legal normativism*

The first important difference to be noted between Kelsenian legal theory as opposed to the one of Schmittian origin, lies in the starting point of the two authors' discussions. The two arguments start from a fundamentally opposed idea, in the case of Kelsen we speak of "legal normativism", while on Schmitt side, we often hear of "decisionism" or "legal/political decisionism". Kelsen believed that the only practical and positive way to discuss about legal theories was to conceive the concept of law, as a detached element from the political sphere. This way, he thought, was the only way through which the most advanced and coherent legal theory could be designed. On the other hand, Schmitt, considered the political conditions of

a particular State in a defined period of time, as a fundamental tool in order to create the most practically useful and correct legal theory. Furthermore, in Schmitt the role of the decision-maker, is pivotal to the point that he defines authority as the power to decide on the exception (and thus on normalcy as well). Kelsen trust was instead placed on the purely impersonal role of Law and laws. He sought to give a logic justification to the authority intrinsically possessed by legal institutions, an authority that he justified appealing to a common root of rationality he deemed common to any human being.

From this fundamental analytical difference on, the two authors follow completely different paths. Kelsenian rationality, as stated, differentiates the legal sphere from the political one, and in fact, his isolation of the legal world is even more radical. He operates a clear-cut separation between the natural and the legal realm, especially regarding the underlying logic that creates the possibility to analyse and give substance to the two worlds. For Kelsen, two different “pair of glasses” are to be used when analysing the natural and legal world: for the former the glasses needed are those of *causality*, meaning that the natural world follows causality as a logic, and that causal interpretation is the tool needed to for the study of any natural science. The completely different world of social sciences, the science of Law included, have as object, as well as subject, society, a realm that if it was to be explained only through causal correlations would fail to be fairly represented.

Kelsen wrote that the interest of legal thought was not to be found in the physical existence of an act, or of a concrete situation, but in the interpretation of the events that takes place in the real world. In order to have the possibility of a common base for that interpretation to happen in a scientific way, he considered the concept of “norm” as fundamental. In the social sphere then, the concept of causality is substituted by the concept of norm and normativity, but what logical tool is to be used to deal with norms and normativity, if the causal reasoning is to be deemed unsuitable? Kelsen answer this question with what he calls “imputation”. The explanation Kelsen gives on this term is related with the concept of authority. In the natural world, any event happens because a previous event took place; any change in the causal reaction in the natural world can be explained by adding or subtracting a number of variables from the hypothetical equation that describes the particular event. This chain of events differs from the one taking place in the society because of the existence of the legal authority. In other words, Kelsen rightfully points out that any legal norm is the basis to which a social

behaviour *ought to* correspond. Moreover, any existent norm has the possibility to serve as legal justification for new norms to be implemented. In this sense the parallel with natural law is still useful to understand what Kelsen meant. In physics and mathematics, new laws are the product of old ones that meet new discoveries or encounter a necessity of the scientist that was not envisaged before the moment of the creation of that new law. The same process happens in the legal world, in this case without the mathematical certainty of causal logic, but with a logic based on the norm.

A further detail to the picture Kelsen takes of the legal logic that perfectly suits his reasoning, is the description of legal norms as “empty variables”, onto which a moral and legal validity is “infused” by the Norm of the norms, the so called “Grundnorm”. We could say metaphorically that the Grundnorm contains all the legal validity which is distributed to the “lower” norms formalizing/positing them in the system of law. A possible explanation to the ultimate norm considered by Kelsen, relates again to the concepts of authority and legitimacy. While in Schmitt legitimacy lied in the Parliament (direct legitimacy in contrast with the indirect legitimacy possessed by the President, even in its dictatorial role), and authority lied in the President, In Kelsen the concept of legitimacy embedded in the Grundnorm, exists inside human rationality.

“Just as we can imagine things which do not really exist but “exist” only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking – as is the basic norms of a positive legal order.” (Kelsen 1960, 9)

As this passage from Kelsen himself shows, the source of legitimacy and validity of each norm has to be found in human rationality. In order to create a formal entity that could be identified as source of legitimacy he created the Grundnorm. In the philosopher’s idea, the Grundnorm itself is to be considered as existing outside the positive legal order. It exists as *logos*, and solves to the role of the sovereign without the need for a physical sovereign to exist. Through this reasoning. Thus, Kelsen overcomes what he deemed critical in Schmitt’s legal theory, which is, in practical terms, the corruptibility of human nature and its inevitable lure for power.

6.1. Kelsen and the Exception

After this brief discussion on Hans Kelsen's legal theory, I will now move on by focusing on the philosopher's stance on the question of the Exception. I will also try to highlight how different the position of the two legal thinkers is on the matter in analysis.

6.1. Back to Schmitt

When addressing the matter of the Exception, an important question to be answered is how an exceptional or "abnormal" situation, that potentially threatens the safety and security of a State, ought to be addressed by the State itself and by its components. As explained in the section related to Carl Schmitt, the German philosopher's idea sounds pretty clear: the Parliament has the powers to deal with so-called normal situations, where and when no concrete threat is undermining the status quo, both in security related issues and in institutional related ones, while the responsibility to take a decision on the exception resides in the presidential powers (authority). In his legal theory, Schmitt considers the Exception as a pivotal concept to be understood in order to be able to deal with the Normal situation. A core concept of his thought was that, in order for the President to be able to exert his powers for the protection of the State and the Constitution, his position needed to be practically unrestrained by the institutions typical of a Republican Democracy, and thus he describes the Exceptional powers as existing outside the legal order, but guided in their existence by the law. To understand this, it is important to recall the concept of Formal and Material Exceptional or Emergency Laws. The logic followed by Schmitt is one that highlights the fact that to deal with an Exception, the Constitution has to contain a number of provisions (Formal Exceptional laws) that allow a branch of the State (in his theory the President is the one figure to assume this role) act in the most efficient and effective way (through Material legislation), with a particular accent on the matter of timing. Following this reasoning, the only way to achieve this solution, is to give theoretically unrestricted powers to the Exceptional Ruler. Again, his focus was the unlimited protection of the Values contained in the Absolute Constitution, which he deemed to be the most valuable essence of the State.

6.2. Kelsen responds: the *identity thesis*

The argument made by Kelsen, in opposition to the idea of Schmitt that gives out to the Ruling figure (the President) a potentially unlimited amount of power, fits perfectly with his legal theory. An important concept here is found in the *identity thesis*. Kelsen's idea about the legal

framework of a State is that it constitutes the ultimate form of recognition for that same State. In other words, a State and its legal order are the same thing. Even in exceptional times, being the case of war or deep institutional crisis, if a State may act against its own provisions contained into the State's Constitutions, it would ultimately cease to be the State it was before those acts.

Kelsen's approach was one that certainly recognized the importance of allowing a branch of the Government to assume a larger share of powers during a period of hardship, but nonetheless he deemed necessary for any State body that was to assume those additional powers to remain, during the whole period necessary to overcome the Exception, accountable to the prescriptions of the Constitution. In this perspective, he carries out a smart and consistent (under his own assumptions) work of semantic re-elaboration of the concept of Exceptional powers. He proceeds to define the Normal (meaning those measures and laws approved in times of Normalcy) legal procedures happening during the time of normalcy as *lex generalis*, while labelling the Exceptional laws (both formal and material) *lex specialis*. The point here made by Kelsen is a very important one, since it enables his argument to become the more suitable when discussing of the question of Emergency in the environment of Liberal Democratic States, those that, at least on paper, represent the vast majority of States at present times.

The question on how it does so is a legitimate one. As Andrej Zwitter from the University of Groningen in its essay "The Rule of Law in Times of Crisis" (University of Groningen Faculty of Law Research Paper Series No. 10/2013) legitimately points out, the very definition of a Liberal Democracy is intertwined with the concept relate to the supremacy of Law and of the Rule of Law, hence with the Law itself. In essence, any modern Liberal Democracy accepts Kelsen's identity thesis by default. If this is accepted to be the case, then there could be no doubt on the fact that a Schmittian perspective on the State of Emergency which entails the presence of extra-legal powers handed out to a branch of the government, cannot be considered suitable in the analysis of Liberal Democracies' Exceptional powers. In the Essay cited above, Zwitter elaborates three important questions to prove the superiority of Kelsen's argument in the understanding Exceptional state in present times. In elaborating those questions, willy-nilly, he also elaborated an important tool, able to put to test at least the

effective meaning of the word “Liberal” contained in the definition of modern democracies; the three questions are the following:

- 1) Can the executive organ decide upon the existence of an emergency without parliamentary control?
- 2) Can the executive enact material laws without temporal limitation for the time of an emergency?
- 3) Can the executive change the formal laws regarding emergency powers?

As Zwitter himself wrote, the more affirmative answers to those questions, the highest the degree to which a Schmittian perspective is more suitable for the analysis of the Exception, while one or more negative answers would push the considered State towards being a *Kelsenian* Democracy (liberal, that accepts the identity thesis and that labels Exceptional Powers as *lex specialis*). The conclusion reached by Zwitter is that Carl Schmitt’s analysis is not useful in a world where all Democracies are Liberal ones, as long as the Kelsenian claim regarding the identity thesis is accepted.

In any case, if this test was to be considered valid, then the study of the State of Exception would turn out to be a possible bearer of outstanding importance in determining up to which point a State can be considered a Liberal Democracy.

7. Bonnie Honig: Emergency Politics and beyond

An interesting view on the liberal side of the argument regarding the State of Exception is present in the works of Bonnie Honig, a Canadian-American feminist scholar, specialised on democratic theory. In her works, particularly in “*Emergency politics: paradox, law, democracy*” published by the Princeton University Press in 2009, she focuses on the concept of the Exception by taking a position of firm hostility towards Carl Schmitt and his legal theory, particularly regarding his stance on the Exceptional powers and his theory of sovereignty. The ideas that drive the understanding of the topic in Honig’s writings are certainly partaking with the position held by Kelsen. Even though she does not share the same analysis regarding some important aspects of the German liberal philosopher, it can be said that the two share the same overall spirit regarding this topic.

Honig’s starting point is connected with the same idea that Carl Schmitt sought to realise in his writings (the creation of a legal theory that included the notion of the Exception), but with

the exact opposite logic and premises. Her focus is set on the importance of the possibility to involve the citizenship as a whole in the process of dealing with the emergency. By citing various author's works she explains how many other scholars (Agamben is among them), have approached Schmitt's State theory by trying to partially annul the concept of Exception in toto, by stating that what is intended to be Exception can, and often does, become the norm. On the other hand, she sees authors attempting to "de-exceptionalize the emergency" by defending the primacy of the Rule of Law even in times of crisis and hardship, which is basically the idea characterizing the work by Hans Kelsen. According to Honig neither of the two arguments can be accepted in its entirety, insofar as she found some criticism to both positions.

a. Bringing Politics back into the equation

The idea of protracting the Exception as being a superfluous concept, because of the fact that any State could be performing its tasks disregarding its own constitutional provisions, and, in practice, applying the State of Exception in a permanent fashion, is rejected by Honig. Her argument on this side is that by eliminating the very notion of Exception, the democratic arena loses, to a certain extent, an array of possibilities that she still considers to be potentially important in certain situations. Regarding Kelsenian views on the Exception, she seems to see it as a too weak stance, especially when she considers the events that brought about the instalment of the Nazi regime after Weimar's collapse. Furthermore, none of the authors she discusses, focus as much as she eventually does, on the centrality of the role of Politics in the time of the Exception. Rather than finding ways to change the legal framework around or over the Exception, she prefers to focus on the possibility for a different management of the issue, again, a political one.

The reasons why she shows a degree of dissatisfaction regarding other approaches on the Emergency and Exception theories are connected to various reasons. In the first place, she focuses on the fact that no author considered how the role of the protraction of an Emergency situation by the official organs of the State as well as by the media, can and does contribute on the opinions and stances of the population. She discusses the way through which the Bush administration managed to create a climate of fear and terror after the infamous 9/11 attacks that served to justify both the invasion of Iraq (approved by the Congress through the Iraq Resolution) and the creation of the Guantanamo Bay prison camp (established in 2002), where

the Rule of Law is in great part suspended, in a clear example of ongoing local State of Exception. In the author's opinion, the management of information is in itself a matter of sovereignty. Related to the Bush administration deeds, she claims that a more truly and deeply democratised information campaign would have been part of the solution to avoid the establishment of a procedure of Exceptional State in Guantanamo.

What can be deduced from this argument is that the Exception in the present era, is not at all limited by the borders and boundaries set at the moment of the Decision (here a Schmittian connotation can be noted), but in fact begins as soon as the "propaganda" machine is set in motion. The lack of sovereignty by the population has multiple effects, among them, the one that makes the State able to use such procedures as often as it is considered necessary, even if the decision on the matter is a controversial one. Moreover, and most importantly, the lack of sovereignty is presented as lack of possibility to access knowledge and to be able to assess informed decision and thus, to give out informed consent. Her theory of the Exception where the population ought to be involved in the Exceptional procedure itself in its own right, is greatly summarised in two passages of her essay published in 2014 on the three models of Emergency Politics: "Rather than oppose democracy and emergency, then, we might think about democratic opportunities to claim sovereignty even in emergency settings." (Honig, *Three Models of Emergency Politics*, 2014). And moreover: "Democratizing emergency means seeking sovereignty, not just challenging it, and insisting that sovereignty is not just a trait of executive power that must be chastened but also potentially a trait of popular power as well, one to be generated and mobilized." (ibid.)

b. Is Politics able to handle the Emergency?

An argument that could potentially undermine Honig's aspirations to broaden the scope of popular sovereignty and thus to allow the population to be in control of such situations is certainly the complexities that an emergency, *per se*, entails. All of the rationale that lies behind what Carl Schmitt theorised was based on the notion that Exceptional powers are needed to deal with extraordinarily complex and intricate situations. Those kinds of problematics that Schmitt wanted to address were of the kind of wars, insurrections and violent political turmoil, as well as the radicalization of politics. The idea was to render the State able to deal with such issues effectively and possibly in a short period of time, in order to restore the status quo (commissarial dictatorship) or to create a new one that could

substitute the previous ill-lead one (sovereign dictatorship). How then, the already long and complex decision-making process typical of parliamentary decisions, could be helped, in dealing with and emergency, by the far more complex and, certainly longer, process of direct citizenship involvement?

The answer proposed by Honig has a double connotation. In the first one she defends the complex and conflictual nature of politics in its essence, even to the point that she refuses to accept the limits posed by The *norm* in this realm. The term “norm” here is not expressly related neither to Kelsen or Schmitt, but signifies the fact that the “rules” of politics have a starkly different origin and flexibility from those pertaining into the legal discourse. As reported by David Dyzenhaus in his essay “Emergency, Liberalism, and the State.” *Perspectives on Politics*, 2011, according to Honig: “[...] politics is essentially agonistic or conflictual in a way that it’s not controllable in advance by norm, for the norm of politics *emerge* in politics.” (Dyzenhaus, 2011). Following this argumentation, the focal point is that, to Honig, the only legitimate space of social interaction where the norm can be suspended (or barely exists, and even if existed, it would be fairly easy to ignore) cannot be other than Politics. In her opinion, this concept is not even anything that has to be established or decided upon in any way, because conflicts and antagonisms and even simple agonism that are present in the Political arena, already define its position as standing outside the boundaries of the Constitution, allowing for political decisions to be free and legitimate, without recurring to any modification in the State distribution of powers.

The second justification she proposes, can be found in the essay published by Honig in 2014, where she expands her arguments in favour of the involvement of the Political sphere in the managing of the Exception. In this essay she reviews three theories by three different authors that all defend a claim basically ascribable to the one defended by Honig herself. The focus here will be on the first of the three theories chosen by Honig to support her claims. Elaine Scarry in the book *Thinking in an Emergency* (2011) seeks to promote the culture of self-help and of preparedness of the population against emergencies of all kinds, in opposition with the picture of the State of Exception that portray the State executives, being them the President, the whole executive or others, as the recipients of a larger share of power than the one given them by the Costitution.

c. Elaine Scarry and the democratic Exception

Elaine Scarry's position on the topic is, if possible, even further than Honig's own, from the ideas expressed by Carl Schmitt. In her book from 2011, she argues that the best solution to counteract emergency situations lies in the preparation of the civilians, acted by the State, that would be grant the population the ability to "self-help", empowering their statuses instead of depriving them of civic, political or even human rights, as it could be the case in a Schmittian kind of exception. She also refuses the notion that Emergencies require quick responses and unrestricted State power to counteract them. Instead she strongly believes in the role of deliberative democracy in preventing and or impeding war or violent actions, and believes this role should not ever be discussed, if ever, it ought to be reinforced.

Her strategy is to exemplify her position by citing various examples of communities that already operate with a certain degree of preparation and mutual helping before and during exceptional crisis. From the importance of training the population to CPR (cardiopulmonary resuscitation techniques), as it happens in Sweden and other European countries, to the example of some rural Canadian communities that "hold annual training exercises for natural emergencies such as flood, fire, or drought" (Honig, *Three models of Emergency Politics*, 2014), ending with Switzerland's public nuclear shelters that would be able to host the entire Swiss population in case of nuclear catastrophe. She then puts in contrast these examples to what an Emergency procedure in case of natural or nuclear disaster would look like in the United States today. She highlights the fact that is such a situation, those who would be favoured by the rescue forces, at least in the first place, would all be part of the elites of the country, from the political, to the economic and social ones.

Through this conceptual opposition, she desires to show how a process of deeper and truer democratization than ever came into being, could be achieved. She even explains how this process should be favoured by the elites themselves. In her picture of the hypothetical contemporary Exception-triggering crisis, she shows how, at a certain moment, the collaboration of civilian population may be needed while saving or helping elites members, thus entailing a possibility for consent to be expressed (or denied), and sovereignty claimed: "consent surfaces in unexpected ways: firing nuclear weapons does not require the population's consent; building fallout shelters for the upper echelon of government does not require the population's consent, but the president's ability to get through a clogged road in an emergency will require the population's assistance and consent." (Scarry, *Thinking in an*

Emergency, 2011). Honig's comments on these concepts by adding that such decision to educate and prepare the population to emergency situations, would have a positive impact in times of normalcy: "Such preparations can make for better survival and also for better democracy, since the practice of preparing for emergency [...] socializes people into democratic habits and attitudes." (ibid.).

d. Conclusion

The philosophical and legal discussion on the State of Exception represents one of the most interesting in the recent history of political thought. The importance of this topic does not always emerge on the mainstream scholar debate, nonetheless the implications that it brings about are of the utmost importance, even for contemporary and future generations. Discussing such a thing as the position of State power's boundaries is more fertile in the moment where those limits are put into a situation of distress. All the scholars and philosophers of whom theories I have analysed present, in each of their discussions, elements of great analytic capacity. Carl Schmitt rationality fascinated me for the depth and precision in the argumentation, and for the ability shown by the philosopher to create a comprehensive structure that is able to perfectly sustain his thesis and ideas. The main weakness to be noted in Schmitt's state theory is ultimately related to his almost naïve understanding of human rationality. The figure of the Dictator, as imagined by Schmitt, resembles the idea that Plato had about philosophers in one of his most important works *The Republic*, but with an important difference. Plato imagined society as divided into classes, each of them possessing distinctive features that were supposed to represent an asset for society as a whole, if directed by the State towards the best fitting position they could assume in the classes-divide State. Among this division into classes, he identifies in the figure of the philosopher, the best fitting figure to govern a city (ancient Greece's closest parent of what is now known as State), justifying this position by claiming that in order to govern rightfully and properly, only a man endowed with wisdom, high morals and knowledge could be considered suitable. The point I want to make by citing these concepts is that, to me, Carl Schmitt relied too strongly on the trustworthiness of men. According to the German scholar, the man chosen as the President, ought to be so intrinsically loyal to the values of the Absolute constitution, that his very nature of corruptible being, could be overcome. In other words, the system elaborated by Carl Schmitt, allows a Democracy to defend itself against most of the threats that could be

presented to it, by giving the possibility of practically unrestrained judgment and decision-making power to the ruling figure in the time of emergency, placing at the same time, an incommensurable amount of trust in someone who is, ultimately, a human being. Plato would argue that, even believing in the existence of pre-determined values that define someone's inclination to justice and wisdom, without the proper education and preparation, man would always be flawed, and potentially driven to commit treason or other acts diverting from rationality. The other major criticism on Schmitt's works come from Giorgio Agamben. Agamben's analysis of Schmitt's State of Exception, reaches its peak when he discusses the meaning of what he calls "force of law". In this passage of the discussion, he rightfully point out that when presidential acts assume the form of Decisions, endowed with pure force of law, accountability is lost completely. He depicts an apparently paradoxical situation where in a collapsing State, the two models of dictatorship theorised by Schmitt (commissarial and sovereign) could actually come to existence at the same time, each own defending their own position using Schmitt's argument. The commissarial one would be trying to reinstall the pre-existent order, appealing to the Absolute Values defining the essence of the constitution, while the sovereign side would be trying to remove the existing government from power in order to install a new constitution.

On the light of these two important criticism, Schmitt's ideas and complex construction may seem to struggle to stand as a valid theory. I nonetheless think that his corpus of ideas should not be disregarded at all, and his ability to show and point out to the weaknesses of our even contemporary democratic theory still needs to be given the credits he deserves.

On the opposite side of the political spectrum of Carl Schmitt and his theory of the Exception, Hans Kelsen represents an equally brilliant and able philosopher, that created and equally complex and interesting argument on this topic. The identity thesis has had, and still today has, a very strong impact on democracy, both on the philosophical and the legal aspect of the discussion. By identifying the State with its Legal system, Kelsen created an insurmountable boundary to the State's powers, contemporarily allowing its bodies to have a certain degree of freedom of action while confronting an emergency. Its critics would argue that some emergencies require even more freedom to be counteracted and overcome effectively, but Kelsen would probably answer that a democracy exceeding the boundaries of legitimization defined by through the constitution, would lose its most important traits, and ultimately, cease

to be the bearer of freedoms, security and Rule of Law that the very notion of democracy entails. In order to address the issue of the emergency he defines the difference between *lex generalis* and *lex specialis*, the former representing the quasi-totality of legal approach a State should engage with, the latter a specific kind of legislation to be adopted in face of a natural, social or political crisis. Even in this definition he defends the position that *lex specialis* ought to exist only under the accountability realm of the Rule of Law, and may not exceed its boundaries.

Bonnie Honig and Elaine Scarry's theories conclude my dissertation, by adding new elements to the liberal position adopted by Kelsen. Both the scholars seek to implement a democratization of the Exception, more radical than the philosophical/legal argument adopted by Kelsen. Honig focuses much on the role of politics, which is, in her opinion, already the realm of the Exception, meaning that the rules of political debate and of the very political decision are hard to establish, barely existent in a sense. She sees any attempt to legally justify the exception as a mistake, insofar as a legal justification it is not needed by politics, not even in the moment of maximum distress. As a complement to this position, Elaine Scarry proposes a model that could coexist with Honig's, because it addresses not the representatives of the population, but the population *per se*. She focuses on the importance of a direct involvement of the people in the managing of the emergency, explaining how the State should train and educate its citizens to be prepared for everything, while at the same time, providing them with all the physical structures and facilities that could be needed when the crisis strikes.

Even though Scarry's analysis is deeply connected to emergencies the likes of natural disasters, wars and epidemic scenarios, while she disregards, at least partially, political and social crisis, if it was to be paired with Honig trust and confidence in the political arena's ability to deal with this other set of issues, this model could represent the best answer to the question of the Exception in the contemporary world.

Bibliography

Agamben, Giorgio. 2005. "State of Exception". University of Chicago Press, 2005.

Berkmanas, Tomas. "Schmitt V. (?) Kelsen: The total State of Exception posited for the total regulation of life". *Baltic Journal of Law & Politics* 3:2 (2010): 98-118 // DOI: 10.2478/v10076-010-0012-x

Dyzenhaus, David. Dyzenhaus, David. "Emergency, Liberalism, and the State." *Perspectives on Politics* 9, no. 1 (2011): 69-78.

Humphreys, Stephen. "Legalizing Lawlessness: On Giorgio Agamben's State of Exception". *The European Journal of International Law* Vol. 17 no.3 (2006) // DOI: 10.1093/ejil/chl020

Honig, Bonnie, "Three models of Emergency Politics", Duke University Press, 2014. // DOI: 10.1215/01903659-2686088

Luisetti, Federico. "Carl Schmitt and Giorgio Agamben, From Biopolitics to Political Romanticism", *Journal of Philosophy of Life* Vol.1, No.1 (March 2011): 49-58

Schupmann, Benjamin, "Leviathan Run Aground: Carl Schmitt's State Theory and Militant Democracy", (2015) PhD diss., Columbia University

Zwitter, Andrej, "The Rule of Law in Times of Crisis, A legal Theory on the State of Emergency in the Liberal Democracy", University of Groningen Faculty of Law Research Paper Series No. 10/2013

Sintesi dei contenuti in italiano

0. Clarification

Come il titolo di questo “capitolo 0” del mio elaborato di tesi lascia intuire, ho deciso di iniziare il mio percorso fornendo alcune delucidazioni riguardo alla metodologia, agli autori e al focus che ho deciso di dare all’argomento da me scelto: lo stato d’eccezione. Un iniziale chiarimento riguarda la mia volontà di concentrarmi, per ogni autore citato, sulla posizione da esso assunta in particolare nei confronti di questo argomento. Chiarimento che ho ritenuto necessario in quanto in alcuni casi non ho voluto approfondire le dinamiche del pensiero e della teoria politica dei pensatori da me scelti, in modo da riuscire a mantenere chiaro il focus della mia analisi. Fatto ciò, ho deciso di elencare gli studiosi da me discussi nella tesi e di fornire le motivazioni dietro alla scelta dell’argomento. La discussione attorno allo stato d’eccezione è, di per sé, una discussione sullo stato di diritto, sui concetti di legittimità e sovranità, oltre che sui limiti della democrazia come caratteristiche innegabili della stessa. Di fondamentale importanza nella creazione stessa di questo concetto, fu il “dibattito” a distanza avvenuto tra Hans Kelsen e Carl Schmitt, considerati i più importanti studiosi ad occuparsi della questione riguardante lo stato d’eccezione. Dopo aver discusso delle loro teorie, ho ritenuto importante rivedere i pensieri e i concetti di entrambi i filosofi attraverso l’interpretazione di alcuni pensatori contemporanei (Giorgio Agamben, Bonnie Honig e Elaine Scarry).

1. Introduction

Nel primo vero e proprio capitolo della tesi, ho deciso di fornire delle definizioni riguardo lo stato d’eccezione. Per l’elaborazione di queste definizioni mi sono rivolto al lavoro del prof. Andreij Zwitter dell’università di Groningen. All’interno di un essay intitolato “Rule of law in Times of Crisis” Il professore Zwitter discute la definizione stessa di Stato d’eccezione, basandosi principalmente sull’approccio adottato per questo argomento dalla giurisprudenza internazionale. Partendo da questo presupposto, il prof. Zwitter elabora la seguente definizione di Stato d’eccezione: “Con la locuzione stato di eccezione si intende un cambiamento nella struttura o nel comportamento di uno stato in un momento di crisi emergenza o catastrofe naturale. Questo cambiamento risulta normalmente nella riduzione della libertà e dei diritti democratici dei cittadini.” Successivamente, sempre seguendo il ragionamento del professore Zwitter, ho deciso di definire le motivazioni che stanno alle

spalle della decisione di uno Stato di alterare la propria configurazione per meglio poter affrontare una situazione di emergenza. Il concetto fondante dello Stato d'eccezione riguarda la definizione stessa di eccezione o emergenza, in relazione al concetto di imprevedibilità intrinsecamente presente in qualsiasi tipo di emergenza uno Stato si possa trovare ad affrontare. Non potendo definire all'interno di qualsiasi costituzione ogni possibile tipologia di crisi, non è infatti possibile elaborare dei criteri saldamente predefiniti e invalicabili che possano rendere lo Stato in grado di affrontare e superare l'emergenza in questione. Data questa impossibilità, il tentativo presente nella tesi di Zwitter è quello di porre delle condizioni di esistenza tali per cui si possa far sì che l'eccezione sia definibile, e soprattutto che le azioni di uno Stato in questo senso, possano venire analizzate dalla comunità internazionale secondo dei criteri stabiliti. I criteri definiti dal professor Zwitter affinché la volontà di uno Stato di violare la propria costituzione siano legittimi sono due e sono da intendersi in quanto relativi alla qualità dell'azione dello Stato che si trova a dover affrontare una crisi. Si tratta della possibilità per lo Stato di essere efficace ed efficiente.

2. From the "State of *normalcy*" to the "State of Exception"

Nel secondo capitolo ho provveduto ad analizzare tre ulteriori condizioni, derivate dalla necessità di efficacia ed efficienza nelle azioni dello Stato. Così facendo è possibile definire non solo i criteri per poter legittimare lo stato d'eccezione, ma anche a definirne il suo opposto, ovvero lo stato di *normalità*.

Il primo dei tre concetti presi in considerazione è relativo all'esigenza da parte dell'amministrazione pubblica di superare i propri limiti legali affinché possa essere ottenuta la preservazione dell'esistenza dello Stato stesso assieme con la salvaguardia della salute e del benessere dei cittadini. In presenza di uno stato di normalità, lo stato di diritto consente agli organi dello Stato di provvedere alla gestione della cosa pubblica con efficacia ed efficienza. Quando invece è presente una situazione di crisi, ciò non è necessariamente vero. Per poter approfondire la definizione di necessità, Zwitter si affida ad altre due variabili: la concretezza e l'urgenza. Se la minaccia imminente o la crisi avvenuta sono definibili in termini di concretezza e di assoluta urgenza, al punto di eccedere le capacità di reazione o di azione dello Stato, si rende giustificata la pretesa di necessità dell'attuazione dello stato d'eccezione.

a. Time, Space and Objective

In questo paragrafo la discussione verte sui limiti dello stato d'eccezione. Zwitter, d'accordo con la giurisprudenza internazionale, definisce tali limiti in materia di tempistica (limitazione temporale dell'eccezione), di spazio (in casi in cui l'emergenza non riguardi la totalità della nazione, i limiti dell'area interessata devono essere definiti) e obiettivo (deve esistere un chiaro e definito scopo dietro all'attuazione della sospensione di alcuni diritti dei cittadini).

b. Formal and Material Emergency law

Di ulteriore importanza è la distinzione tra legge formale d'eccezione e legge materiale d'eccezione. Questa distinzione è necessaria a descrivere da una parte le leggi presenti all'interno della normale costruzione di uno Stato atte alla regolamentazione del comportamento dello stesso in periodo d'eccezione, mentre dall'altra le vere e proprie leggi adottate durante il periodo di gestione eccezionale dello Stato dallo Stato stesso.

3. Carl Schmitt: the theorist of the Exception

Al centro di questo capitolo vi sono il pensiero del filosofo tedesco Carl Schmitt (11 Luglio 1888 – 7 Aprile 1985) e la sua definizione di Stato d'eccezione, in particolare riferimento al ruolo del dittatore, ovvero colui che, d'accordo con Schmitt, deve assumere su di sé la responsabilità di guidare il proprio Stato fuori dalla crisi. Per molti versi il pensiero di Schmitt riprende concetti elaborati da Thomas Hobbes, rielaborandoli in luce del contesto sociopolitico contemporaneo a Schmitt. I concetti da me studiati in questo caso, sono visti attraverso il lavoro di Benjamin Schupmann, assistente professore presso la Division of Social Sciences della Duke Kunshan University in Kunshan, Cina. Schupmann, nella sua ricerca *Leviathan Run Aground: Carl Schmitt's State Theory and Militant Democracy*, pubblicata dall'autore come tesi di dottorato presso la Graduate School of Arts and Sciences della Columbia University, punta a demistificare la narrativa prevalente nel mondo occidentale riguardo Carl Schmitt, le cui idee furono largamente ignorate nel corso del secolo scorso a causa della tardiva adesione del filosofo tedesco all'ideologia nazionalsocialista. I concetti principali elaborati in questo contesto e tramite l'interpretazione di Schupmann riguardano le due tipologie di dittatore, e conseguentemente, di Stato d'Eccezione. Le due possibili configurazioni vengono denominate "dittatura commissariale" e "dittatura sovrana", mentre le corrispondenti definizioni di dittatore sono descritte in termini di "defensor pacis" e "creator pacis". Il contesto in cui la prima forma di eccezione viene inserito, è un contesto di crisi politica e istituzionale, nella quale la figura del Presidente (Schmitt indica proprio il

presidente come difensore dei valori costituzionali) agisce al fine di contrastare la suddetta crisi e di ristabilire lo status quo vigente prima dello svilupparsi della crisi. Nel secondo caso in contrasto, la figura del dittatore è vista nella posizione di dover sovvertire del tutto l'ordine costituito, a causa della gravità insormontabile della crisi (sempre vista come crisi politico-istituzionale). La legittimità delle azioni del dittatore in entrambi i casi, non è discutibile secondo Schmitt, che considerando la figura del presidente come garante dei valori costituzionali, vede in esso la massima espressione di legittimità possibile.

3.1. Schmitt's Exception and the Weimar Republic

Una possibilità di almeno parziale contestualizzazione del pensiero di Schmitt viene dall'esperienza della repubblica di Weimar. Nella costituzione di Weimar, la centralità del parlamento era pressoché inattaccabile e ciò, stando al ragionamento di Schmitt, concedeva spazio potenzialmente illimitato alla rappresentazione di movimenti populistici e potenzialmente pericolosi in quanto non allineati con i valori presenti in ciò che viene definito da Schmitt la costituzione "Assoluta", ovvero l'insieme di valori messi alla base dell'esistenza dello Stato. In contrapposizione con questo modello di democrazia, Schmitt propone la creazione di una figura presidenziale che abbia in sé la potenzialità di agire da garante dei valori della costituzione Assoluta.

3.2. Four stages of presidential interventionism

Il discorso prosegue evidenziando le quattro fasi descritte da Schmitt attraverso le quali il presidente dovrebbe interagire con la vita parlamentare. Ad ogni caso corrisponde un livello crescente di instabilità politica, a partire da quella che è indicata come situazione di "normalità", caratterizzata dal completo rispetto dei canoni e dei valori costituzionali, per arrivare ad una situazione ipotetica di completa rottura tra il parlamento e la costituzione. Le quattro fasi evidenziate da Schmitt sono le seguenti: (1) la figura del presidente vista come "onesto mediatore" tra complessi di interessi sociali, (2) il ruolo del presidente come terzo imparziale coadiuvante nella formazione della maggioranza, (3) il ruolo del presidente assume vero e proprio status di terzo partito indipendente, e infine, (4) la figura del presidente insignita della responsabilità di prendere decisioni con valore di legge.

4. Giorgio Agamben on Carl Schmitt and the Exception

Il quarto capitolo tratta dell'analisi fatta da Giorgio Agamben sul concetto di Eccezione di Carl Schmitt. In particolare il focus è sulla abilità dimostrata da Schmitt nel riuscire ad inserire

lo Stato d'Eccezione all'interno del sistema legale che costituisce la teoria del diritto in chiave schmittiana. Agamben si concentra sulla modalità con cui Schmitt opera questa teorizzazione, partendo dall'analisi degli argomenti schmittiani presenti nei due maggiori lavori del filosofo tedesco: *La Dittatura* e *Teologia Politica*. Agamben analizza come ne "la Dittatura" l'eccezione è presente in quanto avviene una sospensione della validità della costituzione (che non viene però rimossa in toto), in modo tale da consentire allo Stato la possibilità di reinstaurare l'ordine nello stato delle cose. Si tratta perciò, della versione commissariale del concetto di dittatura. D'altro canto, l'analisi di Agamben prosegue, concentrandosi in questo caso sul concetto schmittiano di potere costituito e potere costituente. Stando all'analisi del professore italiano, un'altra manifestazione dell'eccezione avviene nel contesto della dialettica esistente tra questi due concetti, con particolare attenzione al lato del potere costituente. Per Schmitt esso è connesso ad ogni costituzione esistente, anche nel momento in cui non viene esplicitamente definito. Si tratta di una peculiare descrizione del concetto di legittimità, connesso fortemente alla volontà sociale di stabilirsi all'interno di un ambiente regolamentato e ordinato, che possa fornire sicurezza e protezione (Agamben definisce tutto ciò con la locuzione "minimo di costituzione").

Successivamente Agamben passa ad analizzare il contenuto di *Teologia Politica*. In quest'opera è presente l'argomentazione che definisce Schmitt in termini di "decisionismo". Con questo termine viene identificato il processo per cui, in tempo di Eccezione, l'opposizione tra norma (intesa come legge vigente e approvata da un parlamento) e decisione (presa di posizione del dittatore con valore di legge) raggiunge l'apice, in favore della seconda.

a. Force of Law

La sezione dedicata ad Agamben si conclude con la discussione di un elemento centrale per critica del professore italiano alla concezione dello stato d'eccezione in termini schmittiani, ovvero il concetto di "forza di legge". Facendo riferimento alla tradizione del diritto romano, Agamben definisce con le parole "forza di legge", la caratteristica appartenente ad azioni o decisioni prese da figure che, come il dittatore di Schmitt, assumono centralità nell'ambito del processo di legiferazione, pur non possedendo la legittimazione propria del processo legislativo parlamentare. Agamben sostiene che nel momento in cui le parole del dittatore, prive di effettiva legittimità, assumono appunto "forza di legge", a scapito della legge stessa,

lo Stato perde di credibilità al punto tale di correre il rischio di scadere in uno stato più vicino alle caratteristiche dello stato di natura piuttosto che a quello di diritto.

5. Summing up Carl Schmitt's theory of the Exception

L'intento dell'opera di studio di Carl Schmitt è identificabile nella volontà di creare i presupposti per poter fornire allo Stato i mezzi e gli strumenti per poter affrontare qualsiasi tipo di crisi in modo efficace e immediato. Il tentativo di Schmitt è volto inoltre, all'inserimento di tali strumenti all'interno dello studio giuridico, fine raggiunto dal filosofo grazie alla creazione di una giurisprudenza totalmente originale e funzionale al suo scopo. Lo stato d'eccezione di Carl Schmitt è costituito e legittimato nella sua parte formale dallo stato di diritto, mentre è libero di agire al di fuori dei limiti da esso imposti nel momento della legiferazione materiale d'eccezione.

6. Hans Kelsen *legal normativism*

Posizionandosi lato opposto dello spettro politico rispetto al pensiero di Schmitt, la teoria dello stato d'eccezione di Hans Kelsen si basa su presupposti totalmente diversi rispetto a quelli identificati dal teorico dell'eccezione, andando a posizionarsi all'interno della definizione di *normativismo*, in contrapposizione netta con il decisionismo schmittiano. Secondo questo modo di vedere lo stato di diritto, ogni azione o decisione portata avanti dallo Stato è insormontabilmente delimitata dalla costituzione. Altro elemento importante nella razionalità di Kelsen è identificabile nella netta separazione che egli opera tra sfera legale e sfera politica. Partendo da questo presupposto, egli teorizza anche il concetto di imputazione, ovvero la logica, da applicarsi al mondo legale, secondo la quale data una norma ne *dovrebbe* seguire un comportamento. Oltre che dal mondo della politica, questo tipo di ragionamento allontana la sfera legale anche dal mondo scientifico, in quanto la causalità che caratterizza quest'ultimo, viene sostituita appunto, dalla logica dell'imputazione. Altro elemento caratteristico della logica kelseniana è la centralità del concetto di norma all'interno del suo pensiero. Secondo Kelsen, l'unica possibile soluzione al dilemma della legittimità dello Stato e delle azioni da esso portate avanti, può essere trovata nell'affidarsi al valore intrinseco della norma di legge. La legittimazione della norma passa attraverso la razionalità umana che, secondo Kelsen, presuppone l'esistenza di una legittima norma assoluta (*Grundnorm*), legittima in quanto razionale, che a sua volta traferisce legittimità alle singole norme di legge che vanno a costituire lo Stato.

6.1. Kelsen and the Exception

a. Back to Schmitt

Ritornando brevemente sullo Stato d'eccezione di Carl Schmitt, è importante sottolineare alcuni punti del ragionamento, in modo tale da meglio evidenziare la concezione kelseniana dello stesso. Schmitt trova la giustificazione per lo spostamento degli equilibri propri della separazione dei poteri democratici, nella necessità di consentire ad uno degli organi di governo di godere di una fetta maggiore degli stessi, in modo da consentire ad esso di raggiungere la certezza dell'efficace e pronta risposta a qualsiasi minaccia lo Stato dovesse trovarsi ad affrontare.

b. Kelsen responds: the *identity thesis*

La risposta fornita da Hans Kelsen a questo ragionamento, è in perfetto accordo con la sua teoria legale. Ponendo totale fiducia nel valore della norma come unica fonte di legittima autorità dello Stato, Kelsen arriva infatti a definire un legame di identità tra lo Stato stesso e la sua costituzione. Questo ragionamento è noto come teoria dell'identità. Mentre per Schmitt la difesa dei valori Assoluti costituzionali, poteva arrivare al punto di giustificare la violazione dei principi costituzionali stessi, Kelsen rifiuta totalmente questa possibilità. Il rifiuto di Kelsen però, non è tale da negare l'esistenza della questione relativa all'eccezione, tanto che anche e gli si trova nella situazione di dover giustificare la possibilità per lo Stato di poter legiferare più liberamente nel momento in cui la necessità dovesse imporlo. Anche in questo caso si deve trattare di necessità impellenti, che vanno a minacciare la stabilità della costituzione e, potenzialmente, l'esistenza stessa dello Stato. Al fine di poter creare questo tipo di possibilità rimanendo all'interno delle indicazioni contenute nella Costituzione, Kelsen mette in atto una strategia di rielaborazione del concetto di eccezione, che gli consentirà di mantenere l'eccezione all'interno del dominio dello Stato di diritto. Kelsen infatti, arriva a definire le leggi prodotte dal normale procedimento parlamentare come "*lex generalis*", in tutto e per tutto limitate dalla costituzione e atte ad operare e a mantenere validità e forza nel contesto di normale amministrazione della vita pubblica (in tempo di normalità). Successivamente, considerando la potenziale necessità da parte dello Stato poter utilizzare strumenti di maggior efficacia in momenti di crisi, definisce "*lex specialis*" le procedure attuate in tempo di emergenza. Così facendo, Kelsen, fornisce la possibilità di un doppio strumento, dotando le due procedure di legge di un grado di flessibilità diverso rispetto alla costituzione, mantenendo però entrambi i procedimenti sotto l'egida e il controllo dello Stato di diritto.

L'opera di Kelsen viene commentata ampiamente dal professor Zwitter, il quale arriva al punto di definire l'approccio kelseniano, l'unico veramente utile all'analisi dell'eccezione

negli Stati contemporanei. L'accettazione della teoria dell'identità, secondo Zwitter, è ormai elemento distintivo della quasi totalità delle democrazie moderne, che a loro volta compongono la quasi totalità degli stati al mondo. Inoltre Zwitter sostiene che nei casi in cui uno Stato non si identifichi in termini democratici, o in caso in cui, pur identificandosi come tale, nessuno dei principi che giustificerebbero tale pretesa dovessero essere riscontrabili, in questa tipologia di Stato non vi è necessità di discutere riguardo allo stato d'eccezione, in quanto mancando un corpus di leggi legittime, valide e della certezza della loro applicazione, non esiste la necessità da parte dello Stato stesso di dover giustificare le sue azioni in alcun modo.

In conclusione, Zwitter elabora tre domande utili a determinare la posizione di qualsiasi democrazia rispetto alla propria posizione nello spettro che vede da una parte la concezione democratica di Schmitt e dall'altra quella di Kelsen. Le domande sono le seguenti: (1) può l'organo esecutivo decidere riguardo l'esistenza di un'emergenza senza il controllo parlamentare? (2) può l'esecutivo promulgare leggi materiali d'eccezione senza porre una limitazione temporale alle stesse in periodo d'emergenza? (3) può l'esecutivo modificare le leggi formali relative ai poteri eccezionali?

Il maggior numero di risposte negative a queste domande, sposta la definizione di democrazia più vicino alla concezione di Kelsen, più risposte affermative delineano invece una concezione democratica di chiaro stampo schmittiano.

7. Bonnie Honig: Emergency Politics and beyond

Interessante contributo alla teoria liberale sullo Stato d'Eccezione è presente nel lavoro della politologa canadese Bonnie Honig. La sua teoria presenta spunti interessanti, in quanto si pone in netta opposizione al pensiero di Schmitt e presenta al contempo diversi elementi contrapposti anche alla teoria di stampo kelseniano, pur appartenendo alla stessa tradizione liberale. Il lavoro di Honig parte da una critica all'approccio tenuto dalla maggioranza degli studiosi che si sono occupati di teoria dello Stato d'Eccezione. La critica mossa dalla studiosa canadese verte sul fatto che, secondo il suo pensiero, il tentare di inserire l'eccezione all'interno della legge è uno sforzo inutile. Allo stesso modo critica un concetto fondamentale di Kelsen, ovvero la separazione netta tra sfera politica e sfera legale, con la conseguente implicazione della necessità di inserire l'eccezione nell'ambito del legale.

a. Bringing Politics back into the equation

Honig risponde a questo tipo di ragionamento difendendo l'importanza che la necessità del coinvolgimento della popolazione (democratizzazione dell'eccezione), può assumere per una

efficace gestione delle situazioni di emergenza o crisi. Stando al suo ragionamento, la politica è il territorio in cui, per eccellenza, va inserita l'eccezione. Solo attuando un'operazione di sensibilizzazione popolare e campagne di informazione trasparenti e affidabili, la necessaria legittimazione popolare può essere ottenuta affinché la questione relativa all'eccezione possa essere gestita correttamente. Per Honig, ottenere controllo democratico sulla decisione riguardo l'eccezione significa ottenere il massimo grado di sovranità, che, in democrazia, deve appartenere al popolo.

b. Is Politics able to handle the Emergency?

La critica che va evidenziata in questo caso nei confronti del ragionamento della Honig riguarda le premesse relative all'eccezione. Tutto il discorso di stampo schmittiano, evidenzia la necessità da parte dello Stato di avere la possibilità di agire in modo più rapido ed efficace in caso di bisogno. Come si pone di fronte a questa necessità una posizione caratterizzata dalla volontà di democraticizzare l'eccezione? La risposta di Honig a questa critica si divide in due parti. Inizialmente Honig giustifica il ruolo centrale della politica definendo questa sfera come l'unica in grado di generare decisioni da un contesto di discussione spesso caotico, che normalmente avviene in contesto di rivalità ideologica e competizione. Proprio questa abitudine al "caos organizzato" porta la decisione politica ad essere più adatta alla gestione dell'emergenza, rispetto all'ambito legale, troppo limitato dalle norme che ne compongono la struttura. La seconda motivazione si rifà al pensiero di Elaine Scarry sull'argomento.

c. Elaine Scarry and the democratic Exception

Il ragionamento di Bonnie Honig volto a dimostrare la necessità di un approccio politico allo stato d'Eccezione, è perfettamente supportato e completato dalle tesi di Elaine Scarry. Nel suo libro *Thinking in an Emergency* del 2011, Scarry propone la tesi secondo la quale l'unico modo per poter affrontare con successo un'emergenza che vada a colpire la popolazione di uno Stato, risiede nella preparazione della popolazione. In questo senso Scarry fornisce alcuni esempi, tra i quali stati come la Svezia, dove la popolazione viene addestrata ad effettuare manovre di rianimazione cardiopolmonare, o la Svizzera, paese in cui sono presenti rifugi antiatomici pubblici e sufficientemente capienti da poter ospitare l'intera popolazione. Grazie a questo tipo di approccio, che andrebbe esteso al maggior numero di nozioni possibili, la società ha i mezzi per auto-aiutarsi anche in caso di emergenza. Questo argomento, valido certamente per emergenze di tipo naturale o per situazioni di guerra, trascurava quasi del tutto la questione relativa alla gestione delle emergenze sociali e politiche. Proprio per questo fornisce un elemento di complementarità con le tesi di Honig. Unendo questi due approcci

si può ottenere una tesi sullo Stato d'Eccezione che risulti legittimata democraticamente essendo al contempo potenzialmente efficace nella prevenzione e reazione a crisi, emergenze e catastrofi.