The Ethical and Political Implications of Suspending Civil Liberties in Times of Crisis: A Response to “State of Exception” by Giorgio Agamben (2003)

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Introduction

This research project aims to explore the ethical and political implications of suspending civil liberties during times of crisis, utilizing Giorgio Agamben's book "State of Exception" as a foundational framework. Specifically, this project aims to contextualize Agamben's theories within a broader discourse by engaging with relevant literature. This includes incorporating insights from Judith Butler's exploration of governmentality and considering perspectives on civil liberties from analytic philosophers like David Dyzenhaus, whose work is not typically put in conversation with Agamben's. Together, they help show how governments that use their discretionary judgment that there is a moment of crisis in order to try and justify measures taken beyond the scope of the law pose a danger not only to their citizens but to humanity at large.

Defining The State of Exception

For **Agamben**, the State of Exception (SOE) involves the suspension of the rule of law in response to an alleged crisis, creating a legal vacuum where extra or anti juridical government measures are enacted *as if* they had the force of law (State of Exception, p.39). He attributes the concept to the legal theorist **Carl Schmitt**, who introduced it while attempting to justify the Nazi suspension of the Weimar Constitution. Schmitt believed that the law was composed of two antagonistic forces - authority (granting legal validity) and power (making decrees) - which required a unifying force (Political Theology, p.22). This was the sovereign, whom Schmitt claims wields both the power granted by the juridical context but also a higher, personal power with an independent authority that allowed him to create a sphere of extralegal activity that could help preserve the legal order when necessary (Political Theology, p.18). Agamben invokes **Walter Benjamin**, a critic of the Nazi regime. Benjamin believed that the sovereign was a legal construct and could not suspend the law without annihilating the legal order and therefore itself in the process. He called the imposition of unofficial norms “Pure Violence” and asked that people rebel against it since it bore no relation to the rule of law (Selected Writings, p.392). Agamben calls this violence the Force-of-Law and argues that the belief in some kind of extra-legal force of law is a mistake caused by the government’s attempt to incorporate its extralegal activities into a juridical order (State of Exception, p. 86). He argues that since the state of exception is a juridical void, no actions taken during it will fit into any legal framework for as long as such a state lasts.

Governmentality and Sovereign Power

Drawing inspiration from the work of **Michel Foucault** (Governmentality, p.103), **Judith Butler** discusses the concept of “Governmentality” as it relates to the suspension of the law. She uses it to refer to the sphere of action wherein the operation of power is returned from a set of laws that have undergone official modes of legitimation to a set of discretionary governmental rules that are subject to unilateral interpretation (Precarious Life, p.52). This involves the government losing the form of legitimate unified power that guarantees its institution’s representative status. For Butler, the suspension of the law during the State of Exception allows governmentality to emerge. Butler refers to the kind of power wielded in Governmentality as “Sovereign Power”, an extra-legal authority with the capacity to enforce its own unofficial law which (rather than being “binding” by virtue of its status as a law) is effective merely because of its instrumental value as a "tactic". Butler’s approach towards the law makes it seem akin to a form of “performative utterance”, a concept developed by the speech act theorist **J.L. Austin** to describe a kind of statement that shapes the social reality of the environment in which they occur (How To Do Things With Words, p.85). In this sense, the suspension of the law by Sovereign Power can be seen as an attempt to reject any constraining conditions which would render such unofficial laws “infelicities”. In this sense, such laws stem from the attempt to set up a rival form of political legitimacy without any structures of accountability. She describes “Sovereign Power” as the resurrection of a concept of government wherein the judgment of a sovereign (or a diffused collection of officials working as petty sovereigns) provides a self-grounding basis for its decisions (Precarious Life, p.63). Like Benjamin and Agamben, Butler denies that the law can be legitimate once it is separated from its juridical context.

Further Analysis

In “The State of Emergency in Legal Theory”, **David Dyzenhaus** draws from British jurist **Albert Venn Dicey** in order to weigh the advantages and disadvantages of different models for the government’s response to emergencies (Global Anti-Terrorism Law and Policy, p. 73). Although Dicey predates Schmitt and thus the concept of the SOE, he recognized that it was often possible for an emergency to force government officials to take actions that are outside of the law. Dicey argued that, while retrospectively granting such actions legal validity was impossible, giving officials the resources they needed prior to the emergency would help avoid extra-legality (Introduction to the Study of the Law of the Constitution, p.412). Dyzenhaus accepts that officials often lack the resources to respond to crises but rejects the Schmittian model, which he believes lacks normative soundness and descriptive validity. He also rejects the Accommodation and the Business-as-Usual models, two popular alternatives. The Business-as-Usual model holds that the legal order requires no substantive changes in order to deal with the state of emergency whereas the Accommodation model attempts to restructure the legal order to better account for security considerations. Dyzenhaus rejects the first because it ignores that emergencies often require expanded government power and the second because it compromises the rule of law and therefore risks undermining legality. Dyzenhaus also rejects philosopher **Oren Gross**’s Extra-legal Model, which grants officials permission to respond extra-legally during an emergency (provided that they are honest about doing so) but demands thorough consideration before acting by subjecting them to a process of ‘ex-post ratification’ (Chaos and Rules, p.1011). Dyzenhaus believes this model is too similar to the Accommodation model and instead suggests that governments should develop emergency response strategies that do not compromise the rule of law (Global Anti-Terrorism Law and Policy, p. 78). This could involve forgoing the formal doctrine of the separation of powers and reimagining institutional design through democratic and regulated experiments that provided officials with the resources they needed without suspending the law.

Conclusion

The degree to which we can forgo the formal doctrine of the separation of powers as Dyzenhaus suggests without risking significant disruption to the rule of law remains an open question, but it offers an interesting new direction through which the debate regarding the state of exception could progress. As Agamben notes, governments are often caught in a complex situation where both the suspension of the law and the failure to suspend it seem to imperil the juridical order. However, I would argue that the kind of Sovereign Power that Butler discusses is so difficult to restrain that the risks involved in establishing a state of exception seem to far outweigh any potential benefits. In light of this, Dyzenhaus’s approach could be the most sensible option and further debate about its implementation might help further elucidate the matter. Regardless of what conclusions we reach, it is imperative that the decision-makers involved in today’s ongoing conflicts do not forget the lessons of history and do their utmost to preserve civil liberties while attempting to find suitable ways of handling any emergencies that we may currently face.

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