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State of Exception as Matrix of Modernity:

Case of Chile, Croatia and USA

1. Introduction

Carl Schmitt famously asserted that the sovereign's monopoly on declaration of the state of exception (state of emergency) in the situation of necessity [*Notstand*] represents the very essence of modern state. Based on this groundbreaking idea, many political philosophers have tried to retell the history of the modern state presenting it as a history of permanent occurance of various states of exception thorugh which state was able to control populations (biopolitics), eliminate enemies of the state (sovereign power), neutralize their negative affects (disciplinary power), and not recognize the existence of some beings as political beings, transforming them in „bare life" instead. One of the first philosophers who responded to Schmitt's genealogy of modern state was Walter Benjamin who claimed that inherent mechanisms of exclusion embedded in the modern state should become the starting point for the new conceptualization of history which will prove „that the state of emergency in which we live is not the exception but the rule" (Benjamin, 1968: 257). But even though this argument was already developed in 1920s and 1930s, the state of exception was completely out of focus of political theory for decades. Only with the emergence of new theorists, who returned to Schmitt's work, state of exception suddenly, in the aftermath of 11/9 terrorist attacks and subsequent proclamation of „war on terror", became the central concept for the analysis of juxtaposition between human rights and the modern state.

Giorgio Agamben gave probably the most important contribution to this „revival", inserting the concept of *homo sacer* („bare life") in conceptual framework, and introducing the idea that the exclusion of *homo sacer* was not exception, but rather a rule in the entire history of Western political ideas (Agamben, 2006). Quite concretely, Agamben argued that the entire tradition of Western political thinking was based on dichotomy of *zoe* (political life) and *bios* (non-political „bare" life), meaning that citizens as the members of certain entity (state) were conceived as political beings (and as such, persons with their citizen's rights), but on the other hand, persons who were not recognized as political beings were nothing more than bare life: a type of existence stripped off any rights that could be at any time excluded in a specific space of exception where it could be killed. Exactly on this trajectory, in the second wave of „revival", many post-colonial thinkers and theorists writing from the viewpoint of the periphery of the world system revaluated Agamben's theory, supplementing it with the idea that the entire age of colonialism has to be perceived as the state of exception, due to the fact that exception was the exclusive technique of governance in European colonies where beings were exclusively perceived as non-political beings without rights (because they were outside of „civilization"). In addition, this revival of state of exception in social sciences and philosophy, opened new space for the emergence of studies which emphasized the idea that state of exception is a part of our everyday lives and daily routines, and that some new types of spaces (airports, parks, refugee camps) and some new types of objects of power (unskilled workers, low-paid migrants, refugees) must be taken into consideration if we want to fully grasp the complexity of state of exception in the age of „supermodernity" as Augé would call it. Namely, in the 20th Century, emergence of human rights and transnational political regimes took place, apparently signifying the end of modern sovereign power, but this was just a delusion, because state of emergency was still deeply rooted in imaginarium and concrete practices of national states (and even transnational actors). In fact, it seems that state(s) of exception have multiplied more than ever before, infiltrating in almost all aspects of human life.

So, in context of all those theoretical developments, I believe it is important, for every scholar interested in the topic of relations between human rights and the state, to develop a clear understanding of the essence of state of exception prior to concrete empirical study. Therefore, my essay will be structured as follows: first of all, I will give a more theoretical outline of the problem of state of exception, mainly using the already developed concepts by prominent

scholars in this field, but also enriching them with my own understanding of the development of state of exception within the genealogy of the modern state; secondy, after clearly defining my subject of inquiry, I will focus on three concrete examples of states of exception extracted from completely different contexts in order to present the essential features of state of exception. Namely, I have decided to focus on three case studies: Croatia during Tuđman, Chile during Pinochet, and USA during the George W. Bush presidency. Each of those cases will unveil one essential characteristic of the state of exception. Croatian example will show how „legal lacunas" are integral part of exception and how sovereign decision becomes omnipotent even in the frameworks of formal parliamentary democracy with a clearly developed set of regulations concerning the implementation and execution of state of exception. Chilean case will show how state of exception relies on the Schmittian friend–enemy distinction and how it can easily transform political life in bare life, so that in fact all citizens can become potential threat to the order and stability. American case will unvail tendency of state of exception to become permanent mechanism of governance in the context in which enemy can be everyone and everywhere, because „terrorist" is seen as a transnational, global figure of threat which endangers not only a concrete state, but also the imaginary „free world" (which is again the reproduction of colonial notion of „civilization" that has to be defended through imposition of violence in colonies). Due to the fact that those three countries are completely different types of political system (presidential and semi-presidential democracy and military dictatorship) from different historical periods (1970s-80s, 1990s and 2000s), this clearly shows that in the age of „the end of history" and „the end of political" (or quite specifically, in the age of neoliberal state) state is not dead, but quite the opposite, it becomes stronger than in period of the domination of welfare state paradigm, which opens the possibility for a new understanding of position of human rights in the global neoliberal age.

2. Modern State and the Birth of the State of Exception

State of exception is a typically modern phenomenon which can not be undestood if it is not presented within the framework of the genealogy of modern state, because only with the birth of modern state, state of exception becomes a method of governance. But one of the main problems in regard to understanding of state of exception was that it was almost exclusively perceived either as a legal or a political problem. According to Giorgio Agamben, this is the main reason why prior to Carl Schmitt neither political science nor law were able to fully understand the essence of state of exception. Namely, state of exception is something which finds itself „on the border between politics and law", due to the fact that it is at the same time embedded in the legal (normative) framework of the modern state (and which can therefore be triggered and excecuted in the period of necessity when the survival of legal and political order is in question), but on the other hand, state of exception is a specifically modern „technique of government" which suspends the very same legal order and opens a space for sovereign, who rises above the norm, to decide over life (Agamben, 2008: 9-11). Namely, state of exception is, as a legal possibility, inscribed in Constitution (legal order) even though its central tendency is to create a space of exception which will be put beyond the law and where legal norms would be submitted to sovereign's decision, due to the exceptional circumstances. Exactly because of this ambiguity Agamben defines state of exception as a certain grey zone between norm and decision: „In fact, state of exception is neither inside nor outside of the juridical order and thus the problem of its definition is centered around the treshold, or the zone of indistinction, where inside and outside do not exclude itself, but rather indeterminate" (Ibid: 35-36). As we will see later on, concepts of „grey zones" and „legal lacunas" are at the same time both apotheosis of

modern understanding sovereignty and, on the other hand, affirmation of something essentially anti-normative (or beyond law). Exactly this duality is the core of state of exception.

Secondly, it is important to emphasize the fact that state of exception is a characteristically modern notion, which means that it has to be understood as related to the modern state which was, at least on the level of political philosophy, constructed in classical-modern 17th Century in the works of Hobbes, Grotius and Pufendorf. Moreover, according to Carl Schmitt, 16th and 17th Century represent the beginning of the epoch of modernity, exactly because in that age „from the bloody feasts of factious wars European state was born […] as a masterpiece of human reason" (Schmitt, 2011: 163). Modern state emerged as a new spatial organization which was, following Schmitt's line or argument, able to overcome devastating religious civil wars through creation of limited international warfare between sovereign states that recognized each others right on sovereign monopoly on proclamation of the „enemy" (Schmitt, 2008). From that point on, enemy was seen as something comming from outside of the state. Also, the new conception of enemy opened the possibility for homogenization of all „friends" under the rule of sovereign who has exclusive right on proclamation of both the enemy and the state of exception:

> Thereby state sovereign becomes the carrier of new spatial order within his own closed, limited territory, which allows him to prevail the civil war through the sovereign decision. Within the state enemies cease to exist… (Schmitt, 2011: 170)

The outcome of this epochal shift in conceptualization of territorialization of power was the idea that sovereign is the sole center of power which can proclaim the war. At the same time sovereign is also the embodiment of the principle of decision, due to the fact that he is the power that guarantees the existence of the state imagined as order. So the idea of modern state, from the very beginning, was concerned with the idea of exception as a temporary abandonment of the normative framework in the case when „reason of state" [*raison d'état*] prevails over the necessity of strict implementation of law. According to Schmitt's interpretation of Hobbes (who can be called the father of the modern state), the central aim behind the construction of the sovereignty was to get out of „the state of war" [perpetual civil war] and create a mechanism which will preserve the lives of citizens within the defined territory, but in order to maintain order and preserve it from vital threats, the institution of exception must be incorporated in state (Schmitt, 2014, 16-17). This practically means that in order to maintain „normality" (as the state when defined norms can be implemented), state needs the exception, because only in exception state can confirm itself as a state, and not as a shapeless „state of war".

> The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element – the decision in absolute purity. The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. […] There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. (Schmitt, 2005: 13)

According to Schmitt, the essence of statehood is affirmed not in the „normal situation" but rather in the state of exception, because only in that particular moment the modern idea of power and governance can be unveiled, due to the fact that only then the decision can constitute order in the space in which norms do not apply no longer. Thus, notion of sovereignty, if we follow Schmitt's decisionist theory, has to be understood in association with the construction of monopoly on decision (concerning both the validity of normal situation and *jus belli*), and this

is the trajectory which finally leads us to famous assertion that „sovereign is he who decides on the exception“ (Schmitt, 2005: 5).

Therefore, for modern state one of the crucial notions is the notion of „necessity“ which serves as the justification for the temporary suspension of rights and creation of new spaces of exception in which sovereign, having monopolized power in his arms, preserves order (and lives of „friends“ or citizens) by punishing „enemies“, detaining potentially dangerous beings, and establishing his own set of norms. Following Schmitt's and Agamben's trail, it can be argued that exactly through the concept of „necessity“ the ambigous, Janus-like nature of state of exception can be described, due to the fact that necessity presupposes affirmation of arbitrary decision in spaces of exception. This leads to suspension of normative order in this particular space, but at the same time this space becomes the apotheosis of the same order, because at that splace society is defended against the enemies of the state or state's reason. Therefore, as Agamben asserts, in such a space legal norm is not completely abolished; rather, it is temporary inapplicable, and deriving from that it can be argued that „necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm“ (Agamben, 2008: 38). The reason for permanent occurance of state(s) of exception throughout the European history should, thus, not be searched in anti-normative and anti-constitutional gaps in existing laws and constitutions, but rather, it should be sought after in the establishment of modern state. According to Agamben, Western state was characterized by incorporation of the mechanism of state of exception in its constitutional framework:

> The modern state of exception is instead an attempt to include the exception itself within the juridical order by creating a zone of indistinction in which fact and law coincide. […] It is only with the moderns that the state of necessity tends to be included within the juridical order and to appear as a true and proper „state“ of the law. (Agamben, 2008: 39)

Therefore something that was essentially „outside of law“ becomes the part of law. So, one of the central notions in theory of state of exception seems to be Agamben's concept of zone of indistinction as „an ambigous and uncertain zone in which de facto proceedings, which are in themselves extra- or antijuridical, pass over into law“ (Agamben, 2008: 42). So, creation of such a zone can be seen as creation of a certain enclave within the state (concentration camp, detainment center…) or even beyond the line of „civilization“ (colonies) which paradoxically becomes apotheosis of the juridical order of state (due to the fact that on this place enemies are destroyed and that soceity is thus defended), even though it is a „lawless“ space where norms, in the state of exception, do not apply. As a consequence, as Agamben shows, in this particular space being is conceived exclusively as „a bare life“, as a being without political existence, which consequently deprives the person his or hers citizens' rights (Agamben, 2006). In a way, in such a situation, person has only rights as a human being, but those rights are not perceived as „valuable“ rights, because this person can not be included in the entity of „friends“ [citizens] and thereupon demand to be protected by the soverign, due to fact that he or she is not a political being or a being who constitutes the state. The non-political being (being as being, „bare life“) is not recognized as a being with a political voice (undocumented migrants, refugees), due to that it has no rights because it does not belong to the community of equals (citizens). But on the other hand, citizen can also become stripped off his or hers rights in the situation when he or she becomes excluded from the definition of „friends“. In both cases, state of exception proves to be the plaftorm for this exclusion. As a consequence, in state of exception, the dichotomy between citizens and beings as beings seems to be blurred, due to the fact that everyone can be proclaimed „enemy“ or threat to order and stability which have to be defended.

In a strange way, human rights, at least on a conceptual level, affirm dichotomy between „bare life“ and citizen's life, thereby confirming the state of exception as a modern technique

of reign over bodies, because they perceive individual as „a bare life". Humanity is in general, according to human rights idea, seen as community of equals, but on the other hand, this concept is sharply juxtaposed to the idea that only citizens (defined by Schmitt as entity with „existential being" based on which their homogenization as real community of equals, or „friends", is possible) are carriers of certain rights becaus they are part of a state which was, in the first place, constructed to defend their lives.

Moreover, this raises the question whether it is possible to escape the logic of state of exception at all, due to the fact that exception reveals itself not as a exception, but rather as a normal modality of governance in modernity, or as Biswas & Nair argue: state of exception is not an exception at all, but rather the „routinization of the logic of sovereign exceptionalization through governmentality" (Biswas et al., 2010: 15). In this regard, Biswas & Nair also emphasize the problem with the human rights discourse, claiming that concept of human rights (especially from the point of view of „periphery" or „Third world") reveals itself as a „form of charitable depoliticized gifts delivered to rightless bare life", which at the same time opens the possibility of humanitarian intervention in the case when those rights, as a gift, are not properly practiced (Ibid: 21). But this is exactly the problem: the concept of human rights conceivs person as a being as being, as a bare life, which only enables the perpetuation of the techniques of state of exception on the body of this being (easily defined as „enemy"). This is not my main focus, but it should be mantioned that even in some aspects the human rights discourse stands in the same line with the logic of exceptionality. Biswas & Nair offer the examples of „war on terror" and humanitarian interventionism which both are conducted in the name of protection of human rights and freedom, constructing the „enemy" as a being as a „bare life":

> Humanitarian wars deprive the enemy of her very humanity, making the enemy the embodiment of the non or inhuman, as "so many mute bearers of bare life," thus in effect, reactivating "a colonial past in a colonial present" […]. Hence, in the war on terror that combines the military and the humanitarian – "(t)he ultimate image of the treatment of the local population" as homo sacer is that of the American war plane flying above Afghanistan – one is never sure what it will drop, bombs or food parcels"… (Biswas et al, 2010: 22)

It this regard it is also interesting to emphasize the coexistence of human rights and state of exception in the late age of colonialism, in the aftermath of the Second world war. This is the reason why Klose raises the question: „how could Britain and France […] on the one hand participate actively in international human rights discourse, while on the other hand conduct wars in their overseas possessions that flagrantly violated human rights…" (Klose in: Hoffman, 2011: 238). But the Janus-like coexistence of human rights universalism on the one side, and the non-recognition of beings as political beings on the other side, only serves as the depiction of logic of modern state of exception which was embedded in „the nature of colonial domination itself" (Ibid: 246). Namely, colony was at the same time part of empire, but it was also a space which was perceived as a threat, because it was seen as beyond the lines of civilized world. Thus, the colonized were incorporated in the logic of empire as beings as beings (only as a bare life which can be exploited), but on the other hand, they were not perceived as political beings with a clear voice which demands equality and acceptance in the community of equals with guaranteed rights. In the moment when „bare life" revolted against the sovereign, the sovereign power was able to proclaim state of emergency and classify the entire population as the enemy. Writing about the Algerian war, Klose claims that „in a theater of war where every Arab was considered a potential enemy, this led to French troops […] making use of their weapons randomly against the Arab civilian population" (Ibid: 254). Of course, this eventually led to transformation of the entire Algeria „into a kind of military province" (Ibid: 255). In other words, the entire colony became the space of exception, where order and stability of France had

to be defended through neutralization of enemies of the state (in the form of „terrorists“) – and this enemy was the population in general.

So, modern state was essentially associated with the state of exception as the mechanism of its own defense in the moments of necessity. Construction of enemies, creation of special spaces of exception and reducing beings on the level of beings without citizens' rights were only a couple of techniques of governing practiced by modern state. But in the neoliberal age (from 1980s onwards, even though in Latin America it starts one decade earlier), which was also characterized in social sciences as the age of depoliticization and withering away of the state, some authors have argued that the nature of sovereign power and state of exception was changed due to the weakening of the role played by a state as an actor in a transnational context. But even though it is certainly true that some completely new spaces of exception were developed (airports, refugee camps, shopping malls etc.), and also, even though it is certainly true that in the field of neoliberal economy state has lost its classical role, neoliberal state (seen as a technique of governance) did in fact become much more associated with the logic of state of exception, utilizing mechanisms of state of exception in order to preserve the political order and economic system.[1] Neocleous therefore asserts that: „it becomes very clear that emergency rule has been crucial to the consolidation of capitalist modernity“ (Neocleous, 2006: 206).

3. Disappearance of Citizen: State of Exception in Pinochet's Chile

The association between neoliberalism and permanent state of exception as a modality of governance leads us logically to Chile during the Pinochet dictatorship as first case study. Namely, Chilean autocratic state can be seen as a Janus-faced state which was both weak and strong, both absent and omnipotent. On the one side, economic sphere became the space of guaranteed economic liberties (in which state did not intervene), but on the other side, state was turned into a brutal dictatorship with an absolute monopoly on power in the hands of military junta. But one of the most interesting aspects of neoliberal dictatorship in Chile is the fact that state of exception was proclaimed (in the aftermath of 1973 *coup*) so that Chile can return to democracy, stability and socio-political order. Namely, according to Javier Couso, Pinochet developed the concept of *partidocracia* which he used as the basis for his critique of Allende's social state, arguing that before the *coup*, Chile was not a proper democracy, but rather a distorted democracy or *partidocracia*: the rule of populist political parties that almost drove country into the civil war (Couso, 2012: 411). In other words, Chile found itself on the verge of a civil war [state of war] which can therefore be described as the Schmittian situation of chaos where „there exist no applicable norms“. Military junta presented itself as the saviour from the civil war and disfunctional democracy. Therefore, immediately after the successful execution of the *coup*, state of siege was proclamed, opening the space for the rule by decrees, but, as Snyder notices, „a week later this state of constitutional exception was reinforced by a state of emergency which was to last until 1988“, and which will become the governing matrix

[1] Neoliberal state is conceived as the fortress of liberties and barrier against the possibility of emergence of welfare state. Although on the discursive level neoliberalism develops the idea of minimal („night-watchman“) state, in reality, neoliberalism needs a strong, decisionist state with a clear center of sovereign power, so that in the case of the intimidation of liberty [state of necessity] sovereign can intervene and protect liberties from threats. In this concrete case, there is also a specific enemy which threatens the system: „the enemy of freedom“. According to Hilgers, core concept of neoliberalism is Hayek's notion of catallaxy which implies that „market order is not a natural order“, but rather a spontaneous order based on the interaction between multiple actors who constitute this environment (Hilgers, 2012: 81). Neoliberal project can therefore be seen as the re-affirmation of the principle of modern statehood, due to the fact that it aims to consolidate a new type of state which will preserve the catallaxy from „enemies of freedom“. This means that behind the survival of catallaxy (or behind the „normal functioning“ of catallaxy) there must be a sovereign who will intervene in the state of exception when liberties are threatened.

(„norm“) for the entire period of Pinochet's dictatorship (Snyder, 1994: 259). After 1975 authrities have gained rights to „detain citizens *incommunicado* for five days without charging them with a crime“, and during the entire permanent state of exception „disappearances“ of many people (who were classified as „enemies of the state“) happened in Chile (Ibid: 260).

> Under the guise of unrelenting states of emergency, the military and other counter-subversive agencies weeded out suspected leftists and sympathizers through a campaign of abductions, torture, and executions… (Snyder, 1994: 259)

Chilean case shows how state of exception relies on the Schmittian friend–enemy distinction and how it can easily transform political life in bare life, so that in fact all citizens can become potential threat to the order and stability. Namely, for military junta Marxism was seen not only as a threat to political order but also as the potential threat to economic system based on neoliberal doctrine; thus, supporters of Marxism and Allende became the enemies of the state who were stripped off their rights as citizens and were, as a consequence, constituted as beings as beings („bare life“). Of course, following the logic of general state of exception, Chilean state of exception was also complemented with the creation of „zones of indistinctions“ or spaces of exceptions which were at the same time inside and outside of juridical order. According to Rojas Corral the most notorious toponym in this geography of power was Villa Grimaldi which was in essence a concentration camp and detention center for torture and execution of enemies (Rojas Corral, 2015: 258). As Rojas Corral observes, even the symbolical entrance of prisoners in Villa Grimaldi is constructed in such a way that individuals entering in the space of exception become aware that now, beyond law (but inside of order protected by sovereign power), they are no longer citizens, but enemies of the state and destructable bodies in sovereign power (Ibid: 264). Namely, all detainees were first kidnapped by DINA (secret police) and thereupon driven to center where they existed as bodies whose existence was confirmed only in the relation with sovereign power which tortures them (Ibid).

In fact the act of „disappearance“ is the act thorugh which they cease to exist as citizens with their rights (one of them being the right to be protected by the state). But on the other hand, although „disappeared“ persons have been removed from the political and private sphere, they were included in the sphere of exceptionality – in the space of exception where their existence was confirmed as a „bare“ existence without rights. Therefore, „disappearance“ serves as the embodiment of the state of exception: proclaimed „enemy“ suddenly finds himself erased from the political life [citizenship] in a limbo between law and lawlessness where security of „law and order“ is confirmed through the sovereign absolute control over prisoner's body. This is the logic of state of exception: state needs a semi-hidden, semi-secret space where security of the state (and the law) would be defended through the implementation of „lawless“ practices.

The wave of „disappearances“ began immediately during and after the military coup in 1973 when military junta practiced the policy of „detentions, kidnappings, interogations and executions of internal enemies“ (Ibid: 262). Those internal enemies were mostly supporters of *Unidad Popular* (Allende's party) and ideologically simmilar enemies of the regime who were, even on the day of coup, detained on various locations (most notably, football stadions), as it was famously described in Costa-Gavras' film *Missing*. From 1974 onwards, the secret police DINA (or autonomous intelligence agency) was established as a agency focused exclusively on the processes of locating, controlling, kidnapping, torturing and ultimately executing of the enemies (Snyder, 1994: 261). Only on the basis of ideological affiliation, a person could be a victim of the junta, due to the fact that from the very beginning of the Pinochet's regime, internal enemies were conceptually linked with anti-state and terrorist elements who were presented as catalysts of civil war and social unrest. This is the reason why – in the context of constant threat to the security of „friends“ homogenized under the dictatorship – state of exception had to be constantly renewed. As Snyder claims: „in March 1978, the state of siege in existence since

September 11, 1973, was lifted, but the state of emergency remained in force“ (Ibid: 262). In addition to this, Pinochet has one again, in 1984, proclaimed state of siege during the strikes (which means that state of siege and state of emergency have coexisted during one period of time), but most importantly, 1984 was the year when Anti-Terrorist Law was finally confirmed, which opened the possibility of murder of the internal enemy (Ibid: 263).

According to Soto Moreno, the friend-enemy logic of Pinochet's regime was initially based on criminalization of leftist groups that were identified as „terrorists“, but eventually this mechanism – affirmed with the Anti-Terrorist Law and 1980 Constitution which served as the basis for acceptance of permanent state of exception – was used in order to criminalize and exclude other groups, most notably students and Mapuche community (Soto Moreno, 2013). This only shows that beneath the discourse of „security“ and „maintainance of order“, the state utilized political violence and coersion in order to neutralize those characterized as enemies. Also, this only shows how easily „normal“ can transform in „exceptional“ during the state of exception and how even citizens can become enemies. According to Soto Moreno, Anti-Terrorist Law has cemented the possibility of legal exclusion form the juridical order; the entire population was absorbed by the system of power and control because „terrorism in this case is characterized by being an indeterminate, abstract enemy, without an exact location, or by a single way of functioning…“ (Ibid: 3). Essentially, everyone can be a terrorist and exactly in this grey zone of indistinction „normality“ turns into „exception“ and state becomes the force which defends the society by destruction of its own citizens („friends“ who have the right to be protected by the state). In this sense, state becomes anti-state, because the very essence of idea of modern state is the preservation of lives of its citizens. But at the same time, by incorporating the logic of exceptionality in the law, modernity opens the space for transformation of state into anti-state in which the entire population(s) can be controled, excluded and even annihilated.

> The life devoid of any type of qualification becomes the center od the intervention of the Law and government. All persons who dissent from the democratic system represent a danger for the security of „good citizens“. (Soto Moreno, 2013: 5)

One of the most important aspect of Pinochet's Anti-Terrorist Law is the fact that it was used as a basis for biopolitical intervention even in the period of Chile's transition to democracy which only shows the permanent character of state of exception. Secondly, this shows that state of exception is not only a feature of autocratic regimes, but also a modality of governance in democracies (even though, theoretically speaking, there is no necessary structural difference between democracy nad autocracy due to the fact that demoacracy can be autocratic). Namely, as Soto Moreno argues, even after the Pinochet's dictatorship, Anti-Terrorist Law was used in order to proclaim Mapuche communities as security threats (Soto Moreno, 2013). For instance, in 2017 UN issued a statement condemning Chile's policy of detainment of Mapuche people that was directly based on anti-terrorist laws, which opened the possibility for the state to keep „enemies“ in detention for 16 months.

This concrete example unveils central characteristic of state of exception which was theoretically explained in previous chapter. Namely, it unveils its Janus-like ambiguity, the coexistence of law and lawlessness within the very same concept. The apotheosis of this, on the example of Chile, was 1980 Constitution which included provisions that enabled exceptional powers of the president in several cases of state of „constitutional exception“. The very idea of suspension of rights and norms was embedded in the juridical order so that president can defend them in the moment of necessity by abolishing them – this is paradox of state of exception that was for many years unforeseen in political and legal studies.

First of all, according to the article 39, there are several instances of state of exception: external or internal war, internal commotion, public emergency and public calamity „when the normal course of the institutions of the State are gravely affected“ (*Chile's Constitution of 1980*,

ar. 39). Even though in the article 40 it is clearly stated that state of exception (here called „state of siege“) „shall be declared by the President of the Republic, with the consent of the National Congress“, later on the same articles opens the possibility for President's declaration of state of exception without the Congress, because if Congress does not accept or reject the proposal (declaration) within five days, „it will be understood that it approves the proposal“ (*Chile's Constitution of 1980*, ar. 40). Additionaly, the same article strengthens presidential (sovereign) power furthermore by declaring that „the President of the Republic can apply the state of assebly or state of siege immediately while Congress decides concerning the declaration“, which practically opens the way for putting into place of state of exception without receiving consent of Congress prior to declaration. But more interesting for this essay is the article 42 which defines the state of emergency as a state declared „in case of grave alteration of the public order or damage to the security of the Nation“ by President who has the right to determine „the zones affected by these circumstances“ (*Chile's Constitution of 1980*, art. 42). Those „zones“ are nothing more than spaces of exception that can be perceived as territorial concretization of sovereign power over bodies without rights. Zones are located within the state, but they are spaces with their inherent and independent logic of power. Moreover, citizens' rights are not part of this space, due to the fact that they can be suspended or restricted (according to article 43), and bodies can find themselves under the rule of National Defense:

> The state of emergency [being] declared, the respective zones will be [placed] under the immediate dependency of the Head of the National Defense that the President of the Republic appoints. He will assume the direction and supervision of its jurisdiction with the attributions and duties that the law specifies. (*Chile's Constitution of 1980*, art. 42)

Thus, according to Snyder, central characteristic of Pinochet's state of exception was the fact that political violence appeared within the legal framework. Namely, immediately after the coup, military junta proclaimed state of exception (in this concrete case: siege of siege) using the legal framework of 1925 Constitution, even though the latter clearly stipulated that state of siege can not last longer than six months, but military junta managed to transform this legal possibility in the case of necessity in permanent exception (Snyder, 1994: 264). In fact, from 1973 to 1988, political situation was characterized by constant renewal of state of exception. So, it can even be argued that in Chile in that period multiple states of exception coexisted. Namely, state of emergency lasted throughout the mentioned period, but the state of siege (a much severe form of exceptionality in which it was possible to detain and kill enemies) was only proclaimed in situations when the regime wanted to deal with its enemies (Ibid: 265). Additionally, 1980 Constitution, as Snyder rightfully observes, broadened possible states of exception by adding the „internal commotion“ to already existing provisions of exception, but far more importantly, 1980 Constitution enabled ciriminalization of „doctrines considered to attack the family, or propagate… a conception of the society […] based on the class strugle“ (Ibid: 270).

This only shows how project of neoliberalism was also associated with the presumption of state of exception, due to the fact that Marxist ideas and ideas opposing the idea of private ownership (which was also embedded in the Constitution) were defined as threat to internal order and state in general. Persons propagating or advocating them were by default considered enemies of the state (or in neoliberal terms: „enemies of freedom“). This possibility was concretized in the institution of the Sate of Danger of Disturbance to Internal Peace. So, it can be concluded that in Pinochet's Chile state of exception was constant. Moreover, there existed a multiplicity of simultaneous types of states of exception which corresponded to the multiplicity of spaces of exception (detainment centers, Villa Grimaldi, „zones“ etc.).

4. State of Exception as Legal Lacuna: Case of Croatia

State of exception happened in Croatia (in the period between 1991 and 1996), even though it was never declared. Namely, although Croatian 1990 Constitution mentioned three very clear instances in which state of exception can be declared (in the case of war, in the case when state institutions are not able to fullfill their constitutional tasks, and finally, in the case when „independence and unity of Republic of Croatia are in direct danger"), the president Tuđman did not declare the clear beginning of the state exception, but nevertheless, obtaining sovereign power, he did declare „decrees with force of law" through which certain aspects of political life in Croatia were regulated, especially during the years of direct war confrontations (1991-1992). Exactly because of this, many Croatian law experts from opposition asserted that presidential decrees, in the case when they were regulating the sphere of human rights and freedom, were non constitutional (Budak, 1997). But as I argue, this type of argumentation does not recognize the essential aspect of state of expection – namely, the fact that state of exception is in itself anti-normative (and thus „outside of law"), but at the same time, it is also apotheoisis of law and state (through the affirmation of the concept of sovereignty). So, in this brief outline of state of exception in Tuđman's Croatia, I argue, following Agamben, that „legal lacunas" are integral part of exception which open the way for direct intervention of sovereign power in political sphere, regardless of existing legal norms concerning human rights and freedom.

According to 1990 Constitution, president of the state declares state of exception in the case of direct threat to „independence and unity" and in the situation when other branches of government are unable to function, but at the same time, president is not obliged to declare the beginning of state of exception with any other previous declaration (Omejec in: Budak, 1997: 86). This is the reason why it is possible that state of exception happens, without being declared. But in order to understand the logic of sovereign power in Croatia during the 1990s, it is important to emphasize that concept of „direct danger to independence and unity" was used exactly as the basis for this specific legal state in which exception was not declared, but Tuđman nevertheless issued „decrees with force of law". For instance, eighteen decrees declared on 25.10.1991. were all declared for the case of „war situation or situation when independence and unity of the Republic of Croatia are threatened". Thus, from the very beginning of the period of „legal lacunas" in Croatian political history, it was not clear whether the state was in state of war or in the state of emergency associated with direct threats to order. But de facto, with first presidential decrees (from 9th September 1991), Croatia was in state of exception.

State of exception was, of course, followed by the creation of various spaces of exceptions or „zones of indistinction" where law and lawlessness were not clearly separated. According to Petković, there are several main areas where sovereing power confirmed itself as the carrier of exceptionality: first of all, through the constitutional possibility of giving pardon, secondly, through political violence, thirdly, through creation of networks of war, police and criminal structures that also catalyzed violence, and finally, through deconstruction of judiciary (Petković, 2013: 87). In all of those cases, through exceptional instances, norms and human rights were suspended and prevailed by principle of decision, in the name of reason of the state, even in those cases when there was already existing juridical system regulating the practices in the state of exception. The best example of this confrontation between logic of exceptionality and juridical order is the article 17 of Croatian Constitution which clearly stipulates that in the state of exception „liberties and rights can be restricted", but with very liberal addition:

> Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or unusual treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion. (*Constitution of The Republic of Croatia,* art. 17)

In addition to this, Constitution stipulates that any possible restriction of liberties and rights has to be approved by parliament with two-thirds majority, and only in the case when parliament is unable to assembly, president has the right to declare restrictions. Exactly because of this provision, according to Josipović, Tuđman „did not have the right to restrict rights and liberties guaranteed by Constitution with his decrees; rather, he was only authorized to regulate those questions that do not interfere in constitutional rights and liberties“ (Josipović in: Budak, 1997: 110). But this viewpoint, deriving from legal normativism, completely fails to recognize the true nature of state of exception. In other words, this viewpoint understands state of exception only within the framework of law, but as Agamben argued: state of exception is a ambiguous concept in between law and politics, constitution and decision, rights and power. Tuđman's „decrees with force of law“ created exactly a legally „grey“ situation in which law and being outside of law coexisted. In such a grey zone, decree (as the apotheosis of decision and thus sovreignty) has the power to decide whether existing norm, because of the nature of „necessity“, will apply to the degree itself. In other words, as Agamben asserted, in the state of exception legal norm (in our case this is article 17) still exists: it is not completely annihilated, but on the other hand, exactly because of the „necessity“ (reason of the state in danger), the very same norm does not apply to a certain situation in one part or completely, until the situation is „normalized“ again. As a result of this logic, spaces of exception are created within the very juridical order: those spaces become the places where „independence and unity“ of the state are defended. In those „zones of indistinction“ executive branch becomes the center of decision-making. Thereby, executive puts itself essentially above the law (or outside of law), utilizing the necessity as the legitimation for the temporary suspension of the norm. Ultimately, in state of exception norms are not so important as „legal lacunas“ which leave free, undefined place for the creation of „zones of indistinction“ where soverign power can gain all control. Thus, Josipović rightfully claims that in Croatia, at the beginning of 1990s, in the area of judiciary ordinary laws and decrees coexisted. Namely, even though a concrete law defining the work of courts of justice was passed in 1993, one decree with force of law was still at practice, and instead of derogating the latter, the newly created law was the one which was subordinated to the decree, and through this act „supra-juridical power of decree was affirmed“ (Josipović in: Budak, 1997: 119). The same thing is evident, as Josipović notices further on, in the case of military courts (which were established by decree); namely, although the new law about courts was accepted, military courts have continued to work based on the procedure declared in one of the decrees concerning military courts (Ibid). So, the law which supposed to present the affirmation of the „normalization“ (which, of course, implied that decrees should be derogated) coexisted for three years parallelly with presidential decrees which were still above the law.

This situation of legal ambiguity was possible due to the existance of space of exception in which the line between „normal state“ and „exceptional state“ was completely blurred from the very beginning (with the declaration of decrees, without declaration of emergency). Due to the fact that state of exception (in the sense of state of emergency, not as state of war) was never formally declared, alongside with fact that definition of state of exception in the Constitution was blurred (because of the „threat to independence and unity“ clause), preconditions for the extention of mechanisms of exceptionality were created. Within this grey zone of law, spaces of exception were easily multiplied on various level: from education to military and courts.

In this regard, one example from the domain of judiciary – dismissal of judges at the beginning of 1990s – helps us to better understand the logic of „legal lacunas“ as means of introducing and even perpetuating exceptionality within the law. According to Agamben, „legal lacunas“ represent gaps in constitutional framework through which exceptionality can be included in the law, thus creating a possibility of inclusion of something outside of law in the legal order (Agamben, 2008: 42). In addition to this it is important o mention that legal lacunas

are not inscribed in Constitution because of incompleteness or vagueness of Constitution, but rather because they are conceived as possibilities and potential spaces of decision in the period of necessity, when sovereign can use them in order to preserve order and the state as entity of „friends". Legal lacunas allow sovereign to arrogate exceptional power and to set principle of decision above principle of norm in order to save the state from „enemies": both external and internal. In Croatia, decrees concerning the regulation of judiciary were proclaimed in 1991 and have remained in effect until 1996 when court-martials (military courts) were finally abolished. Although the law regulating the functioning of regular courts was adopted in 1993, military courts remained active for three more years, thus proving the very essence of state of exception, because military courts were the concrete space of exception (or a „zone") put outside of the juridical order and „normalized procedure". As Židek shows, decree which established military courts (declared on 7th December 1991) was a direct attack on the independence of judiciary, because the possibilities of intervention of executive branch ware furthermore proliferated; also, through this decree Ministry of Defense was defined as authority which will name judges of court-martial (Židek in: Dubljević, 2014: 122).

Second legal lacuna in this period can be found in the practice of dismissal of judges that were perceived as unsuitable for the new democratic political regime. This lacuna was evident in the situation between 1990 and 1993, because during this period new law on courts was not adopted and thus Croatia found itself in the situation of legal „emptiness" which was fulfilled through decree and policy of dismissal. In this period existing legal norms concerning judiciary (Constitution and old law on courts inherited from socialist period and only upgraded with several legal novelties) were prevailed through the very existance of legal lacuna which ultimately opened space for the affirmation of sovereign decision. As I have already said, constitutional provision about independence of judiciary was not completely abolished, but it was rather – in a concrete space (e.g. space of military courts) – proclaimed as unapplicable, due to the necessity. Thus, in this period, level of arbitrariness in decision-making increased, which in the concrete case of judiciary resulted with a significant wave of dismissal of judges considered „unsuitable" on the basis of „unknown reasons". As Židek clearly shows:

> …in the period from 1990 to 1996, totally 1263 judges were appointed and 559 judges were dismissed […] the vast majority of judges (784 or 62%) were appointed only in 1996 […] regarding the number of dismissal, most of them took place in the first period, until 1993 (65%), prior to the adoption of the Law on Courts. Hence, 30% of the total number of judges has been dismissed, and it is especially interesting to notice that from this number, 30% of judges was dismissed for „unknown (unmentioned) reason". (Židek in Dubljević, 2014: 126)

Dismissals based on „unknown reasons" only show that each state of exception is accompanied by a variety of spaces of exception where arbitrariness and sovereign power can implement their emergency policy regardless of the existence of norms which supposed to regulate this power. In case of Croatia, non-existence of new Law on Courts created a situation of legal vacuum in which entire „population" of judges was not recogized as population of neutral and independent experts, but rather as an entity which also has to be submitted to the friend-enemy dichotomy. In matter of fact, state of exception poured into the sphere of judiciary symbolizing that state of exception is at the same time part of the law, and an omnipotent force which is able to create spaces of exception to which some norms will not apply. In this regard, dismissal of some judges in Croatia during the 1990-1993 period can also be interpreted as the neutralization of potential „internal enemies" from the public sphere in context of preservation of „independence and unity" of state. That means that lacunas and other types of spaces of exception necessarily have the possibility (inscribed in themselves) to proclaim the enemy. Legal lacuna thus becomes the modality of governance through exceptionality.

5. Exception in Hypermodernity: American „War Against Terrorism“

Although legal normativism (liberalism) conceives juridical order as the situation of „normality“ in which „rule of law“ functions as an autonomous mechanism based on execution of already perfectlly defined constitutional and legal norms, where exceptions are areas outside of law and norm, in the aftermath of 11/9 terrorist attacks, after George W. Bush's proclamation of „national emergency“ (14/9/2001), exceptionality became the normality in USA. Namely, USA is even now, 17 years after the attack, in the same state of „national emergency“ that was proclaimed on 14th September 2001 and re-affirmed both by Obama and Trump administration each year, which shows that state of emergency became normal governing principle in USA. The latest continuation of emergency came with Donald Trump who prolonged it for one year „because the terrorist threat continues“ and therefore „the powers and authorities adopted to deal with that emergency must continue in effect beyond September 14, 2017“ (*Notice of September 11, 2017*). It is interesting to notice that Trump did not refer to a concrete source of threat that was jeopardizing the state, but rather used the term „certain terrorist attacks“. In this regard, it is important to rethink the very idea of „enemy“ in the age of hypermodernity, because it seems that now the figure of a-national (global) „terrorist“ serves as the legitimizing principle for the consolidation of state of exception as „normal“ modality of governance. Of course, this normalization of exception is followed by normalization of spaces of exception which today become manifold like never before, especially in the context of radicalization of technology.

But it would be missleading to analyze American permanent state of exception solely as an acute contemporary phenomenon; quite the opposite, it is important to see that this concrete permanent exceptionality is only a part of a long history of governance through exception which is essentially embedded in the mechanisms of modern statehood. For instance, in the period from 1933 to 1939 Franklin D. Roosevelt declated totally 39 states of emergency, and only in 1979 over 30 emergencies were proclaimed in America, and it goes without saying that war periods (Korean war, Vietnam War) were fertile soil for multiplication of emergencies (Neocleous, 2006: 198). Therefore, as Neocleous argues, it can be said that the United States „spent most of the twentieth century and, so far, all of the twenty-first century, in a state of [permanent] emergency“ (Ibid: 191). But emergencies in the wake of „war against terrorism“ discourse seem to be specific exactly because of the „terrorist“ as the new figure of enemy.

In their sociological study focused on „culture of exception“ Diken & Laustsen argue that the logic of concentration camp now, in the era of „hypermodernity“, becomes the matrix of our everyday life, due to the multiplication of spaces of exception in which human being is conceived as „a bare life“: airports, refugee and detention centers, and even public spaces all become potential spaces of exception (Diken & Laustsen, 2005). In hypermodernity the very same blurred line between „friend“ and „enemy“ or „inside“ and „outside“ (of the law), which was the matrix of modernity, now becomes completely non-existent. Space that was in earlier periods perceived as the space outside of law (colony, concentration camp) now becomes, as Diken & Laustsen argue, an integral part of living in the age of „displacement“ (Ibid: 8).

> [T]he state starts treating its own citizens as potential enemies, as outsiders. The distinction is blurred in that suddenly one's status as a citizen ceases to remain taken for granted and becomes something to be decided upon. (Diken & Laustsen, 2005: 19)

Thus, in the age of hypermodernity, the exceptionality is brought to such a level that even status of the citizen „becomes something to be decided upon“ through decrees, special provisions and within certain zones of indistinction. In other words, due to the normalization of exception and complete erasing of the clear line of differentiation between friend and enemy, citizen and bare life, something inside and outside of law, even those spaces that are considered non-political, neutral and independent from the power structures can now become spaces of

exception. In this regard we can even talk about the creation of new type of space: non-place which occurs, as Augé argued, in the age of supermodernity (Augé, 1995). In addition to this, it can be said that the utopia which stands on the very beginning of modern thinking (Thomas More) is now reversed in a non-place. Utopia (also a „non-place“) was – at least in the work of Thomas More, Johann Valentinus, Tommasso Campanella – always associated with a clear differentiation between „inside“ and „outside“, between the unity of friends (who live in perfect social haromny) and people living outside of utopia, and who, in the state of exception, can be seen as enemies. All of those utopias of classical imagination were conceived as city-states which only through creation of a clearly defined space (with its barriers and walls) become places. According to Lewis Mumford, above mentioned classical utopias followed Platonic logic of utopia, understanding utopian state as „a clearly bordered piece of land whose borders could have probably been seen from each hill“ (Mumford, 2008: 31). But contemporary utopia (non-place) is not a space of dlear differences, a space of belonging or identification, but rather a grey zone of indistinction which does not grant guarantees to being that within the borders of such an hypermodern „utopia“ he will stay alive. Istead, those non-places become closely associated with exceptionality as technique of governance, or as Hardt & Negri argue:

> Modern discipline had played upon the distinction between inside and outside; post-modern control, in contrast, constitutes an ou-topia, a non-place. When there is no outside left, the zone of indistinction opened up by the camp becomes the smooth space of control, a generalized space of indistinction. (quoted in Diken & Laustsen, 2005: 65)

The proclamation of „war against terrorism“ only cemented the disappearance of clear line between „friend“ and „enemy“, „inside“and „outside“, because it used the figure of terrorist as an enemy. But terrorist as an enemy does not come from a specific country, he is global, omnipresent, and everyone can be identified as one, which creates situation in which bare life is multiplied in various non-places (new spaces of exception). According to Diken & Laustsen, underneath the neoliberal discourse of „securitization“ in the wake of global terrorism lies one very important feature of hypermodern exceptionality: namely, due to the complete erasing of line between friend and enemy, all citizens became bare life. While classical modern state was based on the idea that the space of state (inside) was clearly differentiated from state of war (outside) – which was the foundation for differentiation between „subjects“ and „outlaws“ – „in transpolitical war against terror, the state extends exception as a permanent state along a totalitarian line“ (Diken & Laustsen, 2005: 74).

According to Pilar Calveiro, Guantanamo can be defined exactly as a „non-place“, due to the fact that, because of permanent state of emergency in the USA, suspects can be held without a trial in „indefinite military custody“, just like they were drawn into a physical loophole in which they exist only as a bare life (Calveiro in: Schindel et al, 2014: 214). But one of the most important, and very often neglected, aspects of spatiality of Guantanamo lies in the fact that Guantanamo is not a space inside the USA, but rather „a universe of exceptionality on the margins of national and international rules and of the global laws of war because of both its location and the powers that support it: a repressive mechanism on a planetary scale which means that there is no external space in which to be safe“ (Ibid). But this transnational aspect of Guantanamo stems directy from the very nature of „war against terrorism“ which emphasized an abstract, global „terrorist“ (transnational guerrilla warrior) who has to be destroyed so that „free world“ can maintain its liberties and return to the state of „normality“. War against terrorism is legitimized as the war for makinging the „humanity“ safe against global threat. But if the sovereign power has to defend „humanity“, according to this logic, than it should perceive the entire world as a potential space of intervention, so that it can confirm itself as the saviour of „friends“. American intervention in Afghanistan and Iraq confirmed this logic: the security and safety of Americans (and of the entire „free world“) was thus defended on territories of

sovereign countries which de facto function as spaces of exception. But even though the figure of terrorist is transnational, global and even nomadic, at the same time sovereign power, on the grounds of exceptional powers, constitutes a concrete space (which is in fact „non-place“) where bodies of „enemies“ are tortured.

> Guantánamo Bay, in this sense, can be thought of as the place where this free-floating "terrorism" is fixed, where rituals of the success of sovereign power are performed and "order" is established when the unterritorializable is territorialized. Terrorism as the spatial "other" of the territorial state is fixed in Guantánamo Bay in a ritualistic performance. (Tagma in: Biswas et al, 2010: 168)

6. Summary

State of exception is a typically modern phenomenon which can not be undestood if it is not presented within the framework of the genealogy of modern state, because only with the birth of modern state, state of exception becomes a method of governance. Secondly, state of exception is based on the notion of „necessity“ which serves as the justification for the temporary suspension of rights and creation of new spaces of exception in which sovereign, having monopolized power in his arms, preserves order (and lives of „friends“ or citizens) by punishing „enemies“, detaining potentially dangerous beings, and establishing his own set of norms. Thirdly, state of exception is something which finds itself „on the border between politics and law“, as Agamben argues, due to the fact that it is at the same time embedded in the legal (normative) framework of the modern state (and which can therefore be triggered and excecuted in the period of necessity when the survival of legal and political order is in question), but on the other hand, state of exception is a specifically modern „technique of government“ which suspends the very same legal order and opens a space for sovereign, who rises above the norm, to decide over life. Namely, state of exception is, as a legal possibility, inscribed in Constitution (legal order) even though its central tendency is to create a space of exception which will be put beyond the law and where legal norms would be submitted to sovereign's decision, due to the exceptional circumstances. Exactly because of this ambiguity Agamben defines state of exception as a certain grey zone of indistinction between norm and decision.

In this essay three concrete case studies of state of exception were presented: case of Chile, Croatia and USA, showing that state of exception occurs in various political systems, regardless whether they are more democratic or autocratic. First of all, Chilean case shows us how state of exception relies on the Schmittian friend–enemy distinction and how it can easily transform political life in bare life, so that in fact all citizens can become potential threat to the order and stability. On the other hand, Croatian example shows us how „legal lacunas“ are integral part of exception and how sovereign decision becomes omnipotent even in the frameworks of formal parliamentary democracy with a clearly developed set of regulations concerning the implementation and execution of state of exception. Finally, the American case unvails tendency of state of exception to become permanent mechanism of governance in the context in which enemy can be everyone and everywhere, because „terrorist“ is seen as a transnational, global figure of threat which endangers not only a concrete state, but also the imaginary „free world“, which can, of course, be interpreted as reproduction of colonial notion of „civilization“ that has to be defended through imposition of violence in colonies.

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