Bart van Klink, Tilburg

Does Necessity Know No Laws?
Application of Law in a State of Exception

Abstract

In their fight against terrorism, modern states seem to install a state of exception on a permanent basis. Special competencies are created that allow the authorities involved to suspend the legal order for an unspecified period of time. In this paper, the role of law in a state of exception will be examined. Can there still be room for application of law after law’s suspension? To begin with, the concept of ‘state of exception’ in the works of Schmitt and Agamben will be clarified. Subsequently, their view of the state of normalcy will be reconstructed and contrasted to that of Gadamer. Next, recent examples of Dutch anti-terrorism measures and legislation will be discussed. Finally, the question will be addressed as to whether decisions taken out of necessity know no law. In my view, necessity does know, by necessity, some laws, but one can never be sure which laws and how they are applied.

Introduction: Law and Order

In the 1920s, ‘state of exception’ became a fashionable concept in legal and political thinking in Germany and the rest of Europe.¹ A key role was played by Carl Schmitt’s exploration of the subject in *Political Theology.*² Schmitt defines the state of exception as the suspension of the whole existing legal order. By suspending the legal order, the state of exception gives way to ‘pure’ decisions that, though not based on positive law, still count as law in a different sense. Its aim is to restore order and thereby, ultimately, to re-establish the *legal* order. After decades of slumber, the concept has recently made a powerful reappearance in the work of Giorgio Agamben. In his *Homo Sacer* trilogy, Agamben follows Schmitt in defining the state of exception as the suspension of law. Explicitly against Schmitt, however, he denies that it is a “state of law”; it rather is an “emptiness of law,” a space “without” or “devoid of law,” in which nothing but a fictitious relation with the previously existing legal order can be established.³ Whereas, in the old days, the state of exception aimed at restoring normalcy, governments seem nowadays to maintain a state of exception on a permanent basis, according to Agamben: “Faced with the unstoppable progression of what has been called a ‘global civil war,’ the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics.”⁴

In my paper, I want to examine in more detail the role of law in a state of exception to which modern states seem to be moving in their fight against terrorism. What does it mean that the legal order has been “suspended”? And how to conceptualize a ‘space without law’? If there still exists some kind of connection to the law and the legal order, as Schmitt suggests, can there be room for application of law in some meaningful sense? In which respects does application in extraordinary situations differ from application

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⁴ Agamben 2005, p. 2.
in ordinary cases that, as a rule, have to deal with exceptions anyhow? Or, if there cannot be any real connection to the law, as Agamben seems to argue (he is not always clear on this point), must the state of exception be thought of as a free space totally devoid of any legal, moral, or other normative constraints?

To begin with, I will briefly describe Schmitt’s view on the state of exception and Agamben’s revision of it (section 1). Subsequently, I will reconstruct the conception of normalcy that underlies both views (section 2). What is the ‘normal state’ to which the state of exception is supposed to constitute the exception? By means of the hermeneutic notion of ‘application’, as developed by Hans-Georg Gadamer,⁵ this state of normalcy will be clarified further (section 3). To investigate to what extent the ‘global civil war’ brings about a more or less permanent state of exception, and which part – if any – law plays in this process, I will discuss some recent examples of anti-terror legislation in the Netherlands (section 4). Finally, the possibility of regulating necessity will be addressed (section 5). Do decisions taken out of necessity, by necessity, know no law?

1 The State of Exception

1.1 Suspension of the Legal Order

A state of exception is defined, in Schmitt’s view, by a “principally unlimited authority,”⁶ that amounts to the suspension of the whole existing legal order. As a result, all the law that existed before does not apply anymore. “[I]t is clear,” writes Schmitt without further explanation, that “the state remains, whereas law recedes.” Moreover, “order in the juristic sense still prevails even if it is not of the ordinary kind,”⁷ “because the exception is different from anarchy and chaos.” The ‘authority’ that decides on the state of exception – both on the question of its being there and on the appropriate measures to overcome it – is the sovereign. The decisions taken by the sovereign in extraordinary circumstances are supposed to be free from “all normative ties.” As Schmitt states, “[u]nlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception.” However, the decision still counts as law in some, though not positivist, sense of the word. According to Schmitt, the ‘authority’ “proves that to produce law it need not be based on law.”⁸ Although this law production is – if “looked at normatively”⁹ – a creatio ex nihilo, it does stem from somewhere, namely, from the state’s right to self-preservation.

Efforts to regulate the state of exception, undertaken by rule of law approaches, are unavailing in Schmitt’s opinion. An “absolute” exception cannot be captured or subsumed under a general norm. One can only speak in broad terms of ‘acute emergency’ or ‘danger to the state’s existence’, but it is impossible to specify its properties. The existence of a “truly” exceptional case cannot be justified fully on the basis of

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⁶ Schmitt 1988, p. 12. The next five quotations are taken from the same page.
⁸ Schmitt 1988, p. 13. The original German text contains a terrible pun on ‘need to have law’ (or ‘the right’) and ‘to be right’, which gets lost in translation: “[D]ie Autorität beweist, dass sie, um Recht zu schaffen, nicht Recht zu haben braucht” (Schmitt 1996, p. 19).
⁹ Schmitt 1988, p. 31.
positive law. From a rule of law perspective, there is no competence, because its content “must necessarily be unlimited.” In Schmitt’s opinion, the constitution can at most declare who in extraordinary circumstances may act, not what this ‘authority’ has to do. It is up to the sovereign to decide when the state of exception can be rescinded and a return to the legal ‘business as usual’ is possible. Positive law can only be applied to a normal situation; it does not apply to chaos. Against Kelsen, Schmitt argues that a personal decision, and not a norm, is the precondition of every order, including the legal order. In this sense, it can be said that the rule owes its existence to the exception. Ultimately, it is the goal of the state of exception to abolish itself and, by restoring order, to re-establish the legal order; otherwise, it would not constitute an exception to the rule but a new state of affairs without any relation to the former legal order whatsoever.

What is far from clear in Schmitt’s account, however, is how we can still speak meaningfully, and not only polemically, of ‘competence’, ‘authority’, ‘state’, ‘order in the juristic sense,’ and so on, after the legal order has been suspended. It seems that behind his criticism of legal positivism, especially in Kelsenian style, lies hidden a natural law conception of law, which he is reluctant to articulate. Schmitt identifies and justifies law not by its descent, or its deducibility from a higher norm and, finally, the basic norm, but by its capacity to establish, restore, or maintain order. And this capacity alone, presumably, has to account for the fact that, even or in particular in a space without positive law, there is room for traditional jurisprudential concepts, albeit in a different, though not clarified, sense.

1.2 A Space without Law

In Homo Sacer, Part One, Agamben characterizes the state of exception, following Schmitt, as the suspension of the legal order, and in particular its constitution. The rule excludes the exception as the case to which it does not or cannot apply. However, it is the peculiar force of law to be able to maintain itself in relation to that which it has excluded. “The rule applies to the exception in no longer applying, in withdrawing from it.” This is what Agamben calls the “relation of exception,” that is, “the extreme form of relation by which something is included solely through its exclusion.” The state of exception is neither a situation of fact nor a situation of law but a curious blend, a “paradoxical threshold of indistinction between the two.” Moreover, the distinction between inside and outside the legal order, and between rule and exception itself, is blurred. Because the state of exception stems from the suspension of law, it is not a fact. Exactly for the same reason, it cannot be law either. In this way, Agamben understands Schmitt’s dictum, quoted earlier, that the authority in a state of exception “proves not to need law to create law.” In bringing forth the exception by an act of inclusion-by-exclusion, the rule constitutes itself as a rule. In this sense, the state of exception makes the validity of law possible. It is the effort, as Agamben would later say, to save the “existence” of the rule as well as its “applicability to the normal situation”.

Agamben moves beyond Schmitt when, building on Foucault, he interprets the relation of exception in bio-political terms as a “relation of ban”. In his view, the ori-
ginary relation of law to life is not application — as, for instance, a positivist theory of law would claim — but abandonment. This act of exclusion founds sovereign power and produces its victims at the same time. In a state of exception, certain people are, by sovereign decision, excluded from the legal order, and thereby, in the same movement, included. They are the _hominis sacri_ who, living in the “twilight zone” between law and fact, may be killed with impunity. Reduced to bare life or naked existence, they can be disposed of in every way by everybody, not hindered by the law. In this situation, transgression of the law and execution of the law can no longer be distinguished clearly. The paradigmatic example is the concentration camp. In our times, especially with the institutionalization of abortion and euthanasia and the declaration of a global war on terrorism, the “juridically empty” space of the state of exception threatens to “coincide with the normal order.” The state of exception is institutionalized on a permanent basis; the exception becomes the rule. As a result, according to Agamben, “everything again becomes possible.”

In the second part of _Homo Sacer_, Agamben distances himself even further, or more explicitly, from Schmitt when he accuses him of still trying to establish some kind of connection between law and reality in a state of exception. Agamben deems that effort now to be in vain:

Thus, all those theories that seek to annex the state of exception immediately to the law are false; and so too are both the theory of necessity as the originary source of law and the theory that sees the exercise of a state’s right to its own defence or as the restoration of an originary pleomorphic state of the law (“full powers”). But fallaciously too are those theories, like Schmitt’s, that seek to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of the realization, between constituent power and constituted power, between norm and decision. The state of necessity is not a “state of law,” but a space without law (even though it is not a state of nature, but presents itself as the anomie that results from the suspension of law).

In a state of exception, being a “space without law,” no real connection between law and reality can be established. Confronted with its non-existence, the law sets up fictitious constructions that seek to secure, desperately but futilely, its survival during and after its suspension. According to Agamben, the defining feature of the state is not so much that the division of power and individual freedom rights are abolished temporarily (although that happens too), but that law presents itself to be, though no longer applicable, still valid. “The state of exception is an anomie space in which what is at stake is a force of law without law.” By dismissing this force-of-law (with a cross through law) as a _fictio_, Agamben seems to conceive the state of exception essentially as a legal free zone, that is, a zone in which sovereign power, without any legal restrictions, can dispose of other people’s lives.

However, it remains unclear how this position is compatible with Agamben’s view, mentioned earlier, that a state of exception is a “threshold or zone of indifference where inside and outside do not exclude each other but rather blur with each other” and that the “suspension of the norm does not mean its abolition.” If the distinction between law and non-law is blurred and law has not been abolished completely, law still has some — perhaps not, or not always, a clearly identifiable — role to play. To make the difference between law and non-law undecidable in a state of exception is not the same as to banish law from the state of exception altogether. Moreover, it is very hard to find out in Agamben’s account, even more than in Schmitt’s, what has to

14 Agamben 1998, p. 36.
15 Agamben 2005, pp. 50–51.
17 Agamben 2005, p. 23.
count as law, and on which grounds, in ordinary and extraordinary circumstances. By separating strictly law from justice in *Homo Sacer*, Part Three, he seems to succumb to a positivist conception of law, which he does not clarify further. Though frequently used, ‘law’ is an undeveloped concept, as counts for related concepts such as ‘state’, ‘authority,’ and ‘order’. It may be suspected that Agamben deliberately remains silent on this point for strategic reasons to illustrate the blurring of law and fact that is supposed to takes place in a state of exception. Apparently, since he does not dismiss the notion, he still deems it possible to distinguish, at least conceptually, a situation where the exception rules from a so-called ‘normal situation’ in which rules and exceptions are neatly separable. What does this state of normalcy exactly consist of?

2 The State of Normalcy

2.1 Law’s Repetitive Mechanism

Preoccupied as they were with the state of exception, both Schmitt and Agamben did not pay too much attention to the ‘normal’ situation. However, both authors did give some clues, and if their statements on the state of exception are reversed and, subsequently, applied to the allegedly normal situation, a rough picture emerges of how they conceive the state of normalcy in the texts discussed above. As Hans Boldt notes, the state of exception originated in German political theory as the “counter-image” (*Gegenvorstellung*) to the *Rechtsstaat*, which was generally taken to be the state of normalcy. In many of Schmitt’s writings, the liberal rule of law figures as the ‘normal’ condition of the state, against which he often took a critical stance. In its classical conception, the *Rechtsstaat* is a political system that seeks to set limits to the exercise of power by the state in order to protect civil liberties. As it is commonly understood, it meets at least the following four requirements: (i) the state’s actions are based on previously enacted laws (legality); (ii) the laws are as clear and precise as possible (legal certainty); (iii) the state’s power does not emanate from one central point above society but is exercised by different governmental institutions (division of powers); and (iv) there is a constitution, written or not, that guarantees political and individual freedom rights. In Schmitt’s account, the state of exception is almost exactly the opposite. Since the legal order has been suspended in its totality, there are no longer any laws on which the state’s actions may be founded. On that ground, Schmitt can argue that “from the liberal constitutional point of view, there would be no jurisdictional competence at all.”

The effort to capture the exception under the rule of law boils down, he remarks ironically, “to spell out in detail the case in which law suspends itself.” As a consequence, the complete catalogue of fundamental rights is switched into a slumber position as well. Finally, the division of powers is abolished temporarily; only the sovereign remains. Freed from annoying legal restrictions, he can take his decisions in any way and as long as he deems necessary in order to restore order.

With the loss of law, the regularity, predictability, and certainty that is supposed to characterize life under the rule of law disappears. In an existentialist vein, Schmitt writes that “[I]n the exception the power of real life bursts through the crust of a me-

chanism that has become torpid by repetition." By comparing the rule of law to a repetitive mechanism, he shows he supports a view of law application that is quite mechanical itself: in the ordinary case, the facts can be subsumed easily under the applicable rules. He grants that a personal element can never be fully excluded and even criticizes the rule of law tradition for having ignored this fact. However, according to Schmitt, "the autonomous moment of the decision recedes to a minimum" when legal business is as usual. On the contrary, in the exceptional case there can be no subsumption for the simple reason that "the norm is destroyed." Everything, then, becomes a matter of "pure" and personal decision and — from a rule of law perspective — a *creatio ex nihilo.* The decision is supposed to "free itself from all normative ties." Ultimately, the picture Schmitt offers is rather digital: either there is, in the 'normal' situation under the rule of law, a relatively automatic application and continuation of the existing positive law (with a minimum of personal interference); or there is, in a state of exception, all positive law being destroyed, the sheer creation of a new kind of law — "the good law of the correctly recognized political situation" — out of nowhere (with personal interference only), and not much in between.

2.2 Law and Bare Life

In Agamben's writings, 'normalcy' acquires two opposite meanings. It means either the state of exception that nowadays has become the rule, or the rule of law that, though made possible through the exception, can still be differentiated from it in some way. In the first sense, the abandonment of people that founds sovereign power increasingly tends to become "the dominant paradigm of government in contemporary politics." Originally, the exception was a "temporary suspension of the rule of law on the basis of a factual state of danger." Under Nazi rule, the concentration camp transformed the state of exception into a state of normalcy. The camp is "*the space that is opened when the state of exception begins to become the rule.*" Thereby, the state of exception is "realized normally." Referring to examples such as medical decisions on life and death, and the imprisonment of detainees at Guantanamo Bay, Agamben claims this is becoming standard practice now. Although he shrinks back from passing evaluative judgments explicitly, there can be no misunderstanding that, by linking these examples to the paradigm case of 'the camp,' he is highly critical of the current developments. As said before, Schmitt welcomes the exception as a possibility to liberate real life, in the shape of 'pure' power, from the chains of monotonous repetition that qualifies ordinary law application. On the contrary, Agamben points to the danger that a normalization of the exception makes possible the exercise of unmediated power by politics over real life, in the sense of bare life. "When life and politics — originally divided, and linked together by means of the no man's land of the state of exception that is inhabited by bare life — begin to become one, all life becomes sacred.

22 Schmitt 1988, p. 15.
23 Schmitt 1988, p. 12. On p. 19, Schmitt writes: "The exception is that which cannot be subsumed (...)."
25 Schmitt 1988, p. 3.
and all politics becomes the exception."\(^{30}\) That means, in Agambens view, that all citizens are threatened to become *hominis sacrī* lives that can be killed with impunity.

To make sense of normalcy in the first sense, which presupposes the rule/exception division and obliterates it at the same time, it has to be assumed that the process of fusing and confusing rule and exception has not yet taken place completely and/or could be reversed somehow. There still remains a "normal order," in contrast to and outside the places in which the exception is normalized, such as hospital rooms and prison camps. In this second sense, normalcy presupposes the division, and divisibility, of rule and exception and, therefore, of politics and life. By reversing the qualities attributed to the state of exception and ascribing these, in turn, to the state of normalcy, it can be inferred that Agamben associates the rule of law with (not further clarified) notions of democracy, division of powers, constitutionally guaranteed freedom rights and, above all, law application. Under the rule of law, the relation between law and life is mediated through application. That is precisely what is not possible in a state of exception: vis-à-vis the exception, the rule can no longer be applied or, more precisely, it applies to the exception "*in no longer applying, in withdrawing from it.*"\(^{31}\) In order to safeguard the existence of the norm and its applicability to the normal situation,\(^{32}\) legal doctrine construes the fiction of the law that is not applicable but is still valid. According to Agamben, law's capacity to be applied derives from a previous act of banishing. He follows Schmitt that the rule of law is not founded on law — as Kelsen would claim — but on the factual decision that settles, in an authoritative and authoritarian way, who is inside the 'normal' legal order and who is outside, or excluded, from it. Therefore, Agamben concludes, "[t]he originary relation of law to life is not application but abandonment."\(^{33}\)

Clearly, in Agamben's as well Schmitt's view on the state of normalcy, law application plays a central role. It is this capacity that the state of exception both enables (by establishing or re-establishing order through the simultaneous act of inclusion and exclusion) and disables (by suspending the existing legal order). However, neither author has a very elaborated conception of law application under the rule of law; in fact, Agamben does not seem to have any conception at all.

### 3 Law Application and Normalcy

#### 3.1 Understanding as Application

For a more refined conception of law application and, by implication, the state of normalcy, it may be helpful to turn to Gadamer's hermeneutic theory of understanding.\(^{34}\) Hermeneutics does not deal with the development of a specific method or procedure for understanding but, according to Gadamer, with the uncovering of the conditions under which understanding in general is possible. In his view, if someone wants to understand a philosophical, literary, legal, or other text, he is always


\(^{31}\) Agamben 1998, p. 18 (original italics).

\(^{32}\) Agamben 1998, p. 31.

\(^{33}\) Agamben 1998, p. 29.

\(^{34}\) This section is partially based on Bart van Klink, 'An Effective-Historical View on the Symbolic Working of Law', in: Nicolle Zeegers, Willem Witteveen and Bart van Klink (eds.), *Social and Symbolic Effects of Legislation under the Rule of Law*, The Edwin Mellen Press: Lewiston 2005, pp. 113–145, pp. 130–134. As explained there (p. 135ff.), I subscribe to Gadamer's hermeneutics in many, but not all, respects.
performing an act of projecting: he projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. In turn, this will happen only if he already expects to find a particular meaning in the text. Understanding consists of working out such a "fore-project", which will be revised in the course of the interpretive process.

It is not primarily someone else's opinion that has to be understood, but the content that is presented by the text. A person trying to understand a text should not try to be neutral or to efface himself; understanding is not possible without playing off one's own fore-meanings and prejudices. Prejudices are to be conceived not so much as a hindrance but as a necessary condition to understanding: without them, a text cannot open itself to its reader. Although every understanding inevitably involves the reader's prejudices, it is, in Gadamer's view, not a subjective activity. Understanding is the process of being caught in a living or continuing tradition in which past and present are constantly fused. As Heidegger already showed, understanding passes through a hermeneutic circle: it continually moves from the parts to the whole and, vice versa, from the whole to the parts. This circular movement comes to an end as soon as every part fits the whole, so that "a unity of the understood meaning"35 is reached. The hermeneutic circle of the whole and the part is neither subjective nor objective; it describes understanding as an interplay between the "movement of tradition" and the "movement of the interpreter." The interpreter is connected to or has to find, on the basis of shared prejudices, a connection to the tradition from which the text speaks, however strange it may seem at first glance. Every interpretation not only reproduces a pre-given meaning, but also adds something to the sense that has been attached to a text within a tradition.

Elaborating the hermeneutic situation means to acquire the right horizon that fits the questions that confront us with regard to tradition. Man does not have a fixed or closed horizon from which he conceives his world. To accommodate the text's otherness, his horizon has to develop itself. A truly historical consciousness is aware of its otherness when it confronts a historically transmitted text. However, understanding involves a fusion of horizons – the 'familiar' horizon of the present in which the interpreter is situated and the 'strange' horizon of the continuing tradition from which the text speaks. Both horizons are never completely present to themselves ("für sich"), but are constituted, over and over again, in the act of understanding which brings them together. This means that not only the temporary horizon widens by accommodating 'new' transmitted meanings, but the past horizon is also changed when approached from a contemporary point of view: "In as much as the tradition is newly expressed in language, something comes into being that had not existed before and that exists from now on."36 This living or working on the past in the present, and the present in the past, constitutes the text's "effective-history."

In Gadamer's view, understanding entails the application of something general to a concrete and particular situation. Legal interpretation here serves as the paradigm for other kinds of interpretation. It is not the purpose of law to be understood historically, but to be made concrete in the act of interpretation (which, of course, presupposes the historicity of all understanding). This means that a – legal or other – text, in every concrete situation, is understood in a new way, different from before. What law is cannot be determined independently of the situation that requires that justice be done. A simple application, in the sense of a relatively mechanical repetition of a pre-given meaning, is never possible, not even in so-called standard cases: "[The application] is not the subsequent applying to a concrete case of a given universal that we

understand first by itself, but it is the actual understanding of the universal itself that
the given text constitutes for us."\textsuperscript{37} Law is always imperfect, because of its general
character: not until it is applied to a concrete situation does it acquire – albeit always
temporarily – its full sense. This creative supplementing is the task of the judge. The
judge is not completely free to supplement in any way he chooses; he is, like every
member of the legal community, subject to the law.

3.2 A Hermeneutics of the Exception

Gadamer's theory of understanding refutes convincingly the subsumption model of
legal interpretation that Schmitt ascribes to the 'normal' situation. Legal interpretation
is never a simple matter of bringing the concrete facts of a 'given' case under a pre-
existing general provision. In every act of application, the law, supplemented by the
facts of the case, acquires a new meaning, even in apparently simple cases. As the
Dutch hermeneutic scholar Paul Scholten once said, the law changes every day.\textsuperscript{38}
The meaning of a text, legal or otherwise, cannot be fixed in advance by its creator.
According to Gadamer, any text has a meaning that transcends the author's intentions.
"Not occasionally only, but always the meaning of a text goes beyond its author. That
is why understanding is not merely a reproductive, but always a productive attitude as
well." It is not that future interpreters understand the law better than its creator; rather
they understand it differently: "It is enough to say that we understand in a different
way, if we understand at all."\textsuperscript{39} Here, time plays a positive and productive role: the
temporal distance between the production and the reception of a text makes it possible
that the hermeneutic riches of a text are unfolded. Because of differences in time
and circumstances, understanding always involves a transformative repetition of the
continuing legal tradition. Therefore, law application in the state of normalcy cannot
be, as Schmitt claims, a monotonous affair of sheer repetition. Of course, there is
always a moment of repetition involved, since a legal interpretation has to link up with
former interpretations, but, in doing so, it necessarily also changes the traditional
canon. Once more against Schmitt, personal involvement is not reduced to a minimum
in the 'normal' situation; as Gadamer shows, understanding can never be carried
without a full engagement on the part of the interpreter and his willingness and ability
to 'play off' his prejudices. As said before, this view does not reduce law application to
a fully subjective activity, but acknowledges subjectivity to be one of its constitutive
moments.

More significantly, Gadamer's hermeneutics sheds serious doubts on Schmitt's
assertion that, in the state of exception, law is created \textit{ex nihilo} through 'pure' deci-
sions. Although, in an emergency situation, the existing legal tradition may seem to be
abolished completely, at least for the time being, this abolition has to start from some-
where, from some components of the tradition itself and, therefore, it is never, 'nor-
matively speaking,' a creation out of the blue. Security, in whose name the rule of law
is seriously challenged nowadays, is anything but a value foreign to the existing legal
order. Under the rule of law, many 'ordinary' provisions, in criminal law and other
branches, aim exactly at maintaining a safe and secure society, for example, by
obligating car drivers to drive on one side of the road, either left or right. The ordinary

\textsuperscript{37} Gadamer 1981, p. 305.
\textsuperscript{38} Paul Scholten, \textit{Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht.}
\textsuperscript{39} Gadamer 1981, pp. 263–264.
understanding of how to deal with issues of safety and security, practically as well as normatively, will inevitably work through in one way or another in the execution of power in extraordinary circumstances. So the decisions taken out of necessity are therefore less 'pure', i.e., less 'normatively free', than Schmitt claims them to be.

It can even be argued that, in a revolutionary situation, when the existing order is not so much suspended as utterly destroyed, besides and in the production of new norms, a reproduction of old norms — i.e., norms originated from morality, custom, the abolished law or other normative sources — necessarily takes place. As Jacques Derrida puts forward in his discussion with Walter Benjamin: "the very violence of the foundation or position of law (rechtsetzende Gewalt) must envelop the violence of conservation (rechtserhaltende Gewalt) and cannot break with it."40 In our times, dictators are often overthrown in the name of the will of the people. By appealing to the people’s will and thus to democracy, rebels invoke a normative standard that was already contained in the order to be subverted. Firstly, any dictator will claim — perverse as it may seem — to be the incarnation of the people’s will. Secondly, in order to legitimize their destructive activities, the rebels must assume that democracy is a standard shared by the people. In this sense, there are not so many rebels without a cause. This cause has to be derived from the existing horizon of normative motives, and democracy is currently a very powerful one.41 Of course, the rebels’ view on democracy will probably differ from the dictator’s and possibly from some or most of the people’s as well, but it necessarily has to work from standard meanings already attached to this standard. Therefore, even in this extremely exceptional situation, it is very hard to imagine a ‘free zone’ without any normative bindings.

Similar objections could be raised against Agamben’s description of the state of exception in terms of a “space without law.” A decision to suspend the legal order is, by necessity, taken in order to preserve this order and on the basis of its values. Otherwise, it would constitute its complete abandonment. Moreover, it may be expected that states committed seriously, and not only rhetorically, to the rule of law, will exercise their power, while the legal order has supposedly been suspended, as much as possible in accordance with its norms and standards; there is still enough applicable law available to a responsible authority. In connection with this point, the question arises whether suspension of the whole legal order really is the defining characteristic of the state of exception. Usually, if confronted with an emergency situation, a state will take all the measures it deems necessary without having to suspend all constitutional rights, or ‘only’ for a limited class of cases and even then mostly in a limited way. Outside and also, to a certain extent, within these cases, law is still valid and applicable in the way Gadamer describes.

However, it may be asked in return, whether Gadamer’s good-hearted hermeneutics is equipped for these evil times. Is it capable of coping with the radical threats to today’s legal orders that are posed by terrorism no less than by the global ‘war on terror’ itself? Can terrorism be fought from within a rule of law perspective? Or must the legal order, including its canons of interpretation, be sacrificed temporarily in order to safeguard itself? To situate these seemingly abstract questions in a more concrete context, I will discuss some recent examples of Dutch legislation against terrorism.

4 The Paradigm of Security

As Agamben notices, "in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government." In this view, instead of declaring the state of exception explicitly, democratic governments have taken measures that seem to bring about, in effect, a suspension of the rule of law. Always eager to be in the front line of world history, the Dutch Government has contributed generously to this development, and still continues to do so. After 9/11, it has issued, at a staggering rate, a large number of plans, statutes and Bills to guarantee security in Dutch society. The most important statute so far is the Dutch Crimes of Terrorism Act 2004. In this Act, based on the European Framework Decision on Combating Terrorism 2002, specific, already punishable offences, such as homicide, hostage-taking, or hijacking, are qualified as 'terrorist offences' if they are committed with a 'terrorist intent'. The maximum penalty for this kind of offence has been increased substantially, in most cases even doubled. In connection to the European Framework Decision, and therefore also to the American PATRIOT Act, 'terrorist intent' is defined as "the intent to cause grave fear in the population or a part of the population, or to unlawfully force a public body or an international organisation to do something, to stop doing something or to endure, or to subvert gravely or to destroy the fundamental political, constitutional, economic, or social structures of a country." Beside the amendments required by Brussels, the Act contains two significant supplements. To begin with, the recruitment for foreign military service is made punishable. Before Parliament, the Dutch Minister of Justice indicated that he was thinking in particular of the Islamic jihad. Subsequently, the punishability of conspiracy has been increased. Under this Act, a person is already punishable for conspiracy if two or more persons, among whom is the suspect, have planned to commit a grave terrorist offence. Evidence for such a plan or agreement may be derived from statements of the parties involved and also from testimonies or telephone taps. It is not necessary that the plan has in fact been carried out.

Moreover, a Bill was presented to the Dutch Parliament regarding the use of secret information in criminal proceedings. Following this Bill, it will become easier to bring in information from the Dutch secret and intelligence services and to use it, under certain conditions, as evidence. If necessary, the examining judge is allowed to question employees of this service anonymously, without the defense or someone else being present or informed later. Anonymous witnesses decide themselves whether their statements will be set down in the dossier. If so, the court will ultimately decide whether it will use them as evidence or not. Recently, another Bill has been proposed with respect to techniques of criminal investigation. On the basis of general 'indications' only, all sorts of special techniques, such as observation, infiltration, and wire-tapping, may be applied. Employees from a foreign state can take part in investigations, equipped with the same competencies as 'domestic' employees; spies may also be brought into action. In a very early stage of the criminal inquiry, it is allowed to connect data-banks. In case of an acute threat, a temporary 'risk area' can be preemptive-

44 Section 83 of the Dutch Penal Code (my translation).
45 Amendment of the Dutch Code of Criminal Procedure with respect to anonymous witnesses and some other subjects.
46 Ties Prakken, 'Naar een cycloïspisch (straf)recht' (cf. strafrecht. htm" www.xs4all.nl/~respub/artikelen/cycloipsch.strafrecht.htm).
ly searched, if ordered by the Crown Prosecutor. Even without such an order, the police may search areas that are always at risk because of their very nature, such as airports and railway stations. The Dutch Extended Compulsory Identification Act 2005 has been in force since the beginning of this year.\textsuperscript{47} In the Netherlands, citizens aged 14 years or older are obliged to show on request an identification card to the police or another supervisory official. To distinguish this duty from a general duty to identify, the Act requires that this competence is used “insofar as it is reasonably necessary for the exercise of the police task.”\textsuperscript{48}

What these examples from the steadily growing pile of anti-terror legislation indicate, in my view, is not so much, or not necessarily, a development towards the suspension of the whole legal order but a radical reordering of that order. To be sure, I do not deny that the existing and proposed legislation may infringe, to a greater or lesser extent, basic legal rights and standards, such as legal security, due process, and privacy rights. I do not deny either that it is highly questionable, as many critics have pointed out,\textsuperscript{49} whether these infringements are necessary or even helpful to guarantee security in our society. In the example given, however, the Constitution is not abolished fully, the division of powers still exists, and there is plenty of law left to be applied. It is true that the legislation referred to operates with rather general, ill-defined clauses such as ‘terrorist intent’ or a competence that is ‘reasonably necessary’. Independent of how one thinks of this legislative technique, it has to be agreed that general clauses are not something out of the ordinary under the rule of law. In the ‘normal’ situation, it is the court’s job to give meaning to them and to concretize them in the application to individual cases. As Gadamer points out, law is always in need of being supplemented. This means that an independent court is still able to evaluate whether an action is committed with criminal intent, whether an agreement between two persons can count as conspiracy, whether the police has abused its competencies, whether information from an anonymous witness is permissible as evidence in court, and so on. Parliament has not been abolished either and can still – sometimes more, sometimes less – fulfill its normal controlling function. Moreover, if limited to a restricted class of cases under pre-defined conditions, an infringement of basic rights does not in itself amount to their complete suspension. In the state of normalcy, basic rights never apply unconditionally, but are always subject to limitations and exceptions. Privacy rights do not, for example, give a husband the right to beat his wife in the privacy of the family home, nor do they allow terrorists to秘密ly prepare the destruction of society. The law at hand may be dismissed as bad law, but that does not, by implication, deprive it, under the current conditions of the rule of law, of its legal character. Therefore, the situation up to now does not, in my opinion, equal the state of exception, either in Schmitt’s description as the suspension of the whole legal order or in Agamben’s sense of a ‘space without law’.

A really fundamental challenge to the Dutch legal order is posed by the so-called ‘enforcement power’ (doorzettingsbevoegdheid) that the Dutch Minister of Justice Piet Hein Donner has been granted or, perhaps more correctly, he has granted to himself. In a letter sent to Parliament on 10 September 2004,\textsuperscript{50} Donner announced, also on behalf of the Minister of Internal Affairs, that, from then on, he had the competence “in

\textsuperscript{47} Wei op de uitgebreide identificatieplicht, Staatsblad 2004, 300.
\textsuperscript{48} Section 8a (my translation).
\textsuperscript{49} See, among others, Herman van Gunsteren, Gevaarlijk veilig, Terreurbestrijding in de democratie, Van Gennep: Amsterdam 2004; and Britta Böhler, Crisis in de rechtsstaat, Arbeiderspers: Amsterdam 2004.
\textsuperscript{50} Subject: Fight against Terrorism, number 5306302/504. Recently, Donner has announced he will present a Bill to Dutch Parliament that will regulate his special competence.
case of acute threats of terror to take all the measures he deems necessary, also in other Ministers’ domains.” Examples of measures to be taken in such an emergency situation are evacuations, roadblocks, and interruptions of train, air and telephone traffic. Moreover, the Minister of Justice has the competence, within the framework of so-called ‘disturbance actions’, to bring governmental agencies for which the other Ministers are responsible ‘purposively’ into action against certain ‘potential’ terrorists. This competence comes dangerously close to creating a state of exception that both Schmitt and Agamben describe. To begin with, this so-called competence does not have a clear legal basis, except for the fact that a competent authority has authorized itself in a letter with the approval of its fellow-authorities united in the Dutch Council of Ministers. A statutory act that would validate this enforcement power does not exist. At the same time, it cannot be said either that a legal basis is entirely lacking, since it is still a competent authority that has created this competence, albeit apparently out of nowhere. It seems, therefore, that we are entering the zone that Agamben qualifies as the “threshold of indistinction” between law and fact. Secondly, in this emergency situation, the Minister of Justice may act on his own, as a sovereign power, without having to consult his colleagues or to ask for their approval. The decision that there is an ‘acute threat of terror’ and the further decisions he takes out of necessity will be necessarily as pure as Schmitt likes them to be, restricted only by his own individual assessment of what has to be done under the given circumstances. It is unclear if the Minister of Justice in his capacity of sovereign is accountable afterwards, when normalcy has been reinstalled, for the decisions taken before the court or before Parliament. Referring to the catholic political philosopher de Maistre, Schmitt notes that “as far as the most essential issues are concerned, making a decision is more important than how a decision is made.” Finally, it seems unavoidable that, for an uncertain period of time, the whole catalogue of basic rights will have to be suspended. Who cares for freedom of expression and any other freedom anyway, when the state’s existence is at stake?

The question remains whether this enforcement power is an accidental error that could have been avoided with better legal draftsmanship, or whether it is, as Schmitt and Agamben would argue, a necessary pre-condition for the legal order to exist. Does a legal order need such an external ‘safety valve’ or can the competence leak be stopped from within the legal order itself? Can it be true, after all, that every legal order presupposes a power like Donner’s, that makes law by breaking it?

5 The Law of Necessity

Good legal draftsmanship would entail, in the state of normalcy, a constitutional arrangement of the state of exception that prescribes, in as much detail as possible, which authority has to act in which way under what circumstances. However, the law, no matter how precise and clear, can never determine beforehand that a certain state of affairs constitutes an emergency situation and foresee what has to be done in that situation. That remains, by its very nature, a matter of personal assessment by the authority involved. Here, as Boldt says, law can offer, nothing but “a constitutional fig leaf for a competence to act that is in fact no longer regulated.” Basically, the law of necessity boils down to the prescript ‘to do whatever you have to do,’ regardless of other prescripts. Therefore, Schmitt is right when he notes that a constitutional framing

of the state of exception equals the futile endeavour to specify in detail the conditions under which the law suspends itself. For conceptual clarity, I would prefer not to call the decisions taken in a state of exception 'law', as Schmitt does. I do not consider them to be law by any current definition, since they are not subject to the formal and substantive requirements connected to ordinary law-making under the rule of law. To call these decisions 'law' in some other, non-positive sense would be fully misleading, since they – by necessity and out of necessity – break the law, albeit apparently on the authority of the same law. Since the law is completely suspended in a state of exception, there can, stricto sensu, be no application of law.

At the same time, not all ties to the suspended legal order are severed because the decisions are taken on behalf of and in order to preserve this order. Otherwise, the suspension of the law could not be distinguished from its complete abolishment. Ultimately, the state of exception aims at reinstalling the legal order, so it has to recognize its norms to be still valid though temporarily not applicable. By debunking this force-of-law (with a cross through law) as a fictic, Agamben turns the state of exception into a normative free zone in which indeed "everything (...) becomes possible." If it is a fiction, it is a fiction worth believing in, since it is our only hope that some form of accountability and responsibility will continue to exist during and after the law's suspension. Restoring order should not be the only goal; it is important that it is done in an orderly and proper way as well.

I do not believe this construction to be entirely fictitious, though. To begin with, the rule of law may have been suspended by the letter but its spirit lives on somehow, albeit in a non-enforceable way. As argued above, the law's suspension, in hermeneutic terms, has started from somewhere, from some components of the legal tradition itself and, therefore, it is never, 'normatively speaking,' a creation out of nowhere. The ordinary understanding of how to deal with issues of safety and security, practically as well normatively, will inevitably work through in one way or another in the execution of power in extraordinary circumstances. Moreover, since it remains unclear where such concepts as 'authority', 'competence,' and 'state' derive their meaning from in the order-to-be-established, it has to be assumed that at least some of the normative structures of the old legal-political order are saved in the new order. Finally, necessity can be considered to be a source of normativity in itself. If a given authority 'has to do whatever it has do,' it is still some form of having we are dealing with, a having that is informed by a personal, though not subjective, assessment of what is necessary to do in order to restore the legal order, and not the sheer facticity of 'pure' power.

For these reasons, decisions taken out of necessity will be less normatively empty as both Agamben and Schmitt claim them to be. Necessity does know, by necessity, some laws, but one can never be sure which laws and how they are applied.