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Abstract:

According to political philosopher Carl Schmitt (1888 – 1985) the emergency or State of Exception (*Ausnahmezustand*) is the ultimate test of political power and reveals in whom that power is vested. The State of Exception determines who is truly sovereign in a given state. Schmitt defines the sovereign act as a decision on the question of the exception, and further classifies sovereignty as a liminal term, a borderline concept (*Grenzbegriff*), suggesting a geometric metaphoricity underlying his conceptualization. On this theoretical basis, he develops the concept of decisionism, whereby the actual content or 'what' of a decision is not the germane element, but rather the 'who' of the decision and whether a given 'who' (or decider) is the proper authority and possessor of the necessary sovereignty. This political philosophy is usually read in (and arguably tainted) by the immediate historical context in which it was conceived, namely 1930s Germany and the rise of National Socialirm. Nevertheless, it has been reinvigorated recently as a paradigm used to explain government decisions taken under evolving COVID-19 pandemic conditions. The current use of Schmitt to understand the suspension of the normal order of things coincides with intense controversy about the work of one of his arch-critics--the surprising hero of the anti-lockdown anti vaccination movement, Italian philosopher, Giorgio Agamben (1942 –). The COVID State of Exception will be situated here between the competing philosopies of Schmitt and Agamben, with illustrative examples from, amongst other things, challenges to the Irish Constitution under pandemic conditions, in an attempt to reveal the rhetorical constructions of exceptionalism at work in political theory.

The "State of Exception", first articulated as a political concept in the interwar period, remains in use today, even as an official term. For example, the "new" Spanish Constitution of 1978, which marks the nation's transition from dictatorship to constitutional democracy, recognizes three potential levels of increasing exceptionality: emergency (15 days) , exception (30) and siege.[1] It also remains in use as a popular collocation in, for example, recent editorials about the COVID pandemic and the extraordinary measures governments have taken in response to the virus. For example: "Ecuador declares State of Exception in eight provinces as COVID-19

[1] George E. Glos, "The New Spanish Constitution: Comments and Full Text", *Hastings Constitutional Law Quarterly* 7.1 (1979): 47-128, here 66.

infections spike."[2] Despite its rootedness in Weimar politics, the "State of Exception"[3] remains a crucial concept for us today, as the pandemic has demonstrated. In the original German, *Ausnahmezustand* is a compound noun which Heidegger scrutinized in his 1927 *Being and Time*, linking it to *herausnehmen* in the literal sense of bringing something out of hiddenness, its *emergence* into openness, which is, in fact, how he conceptualizes truth. The concept's peculiarity is undiminished in English translation where it becomes a genitive metaphor. "State of Exception" conjures a differentially constructed space, delineated by normal operating conditions on the one hand (State), and emergency interruptions and suspensions of those conditions on the other (Exception). However, the "of" in this English rendition is a complex preposition, able to denote both separation and possession (as in 'he collapsed within feet of the hospital' and 'the story of his life' respectively). What emerges from this 'of' is a non-Euclidean space, therefore, in which inside and outside are no longer easily placed over and against one another because belonging and separation are no longer clearly distinct. So, on the one hand, the collocation invokes the general rule of law and order (State), and on the other hand, the exceptions to those rules made necessary by *forces majeurs* (Exceptions), leaving the details of the relationship between the two fields to the ambivalent preposition *of*. Whether the State encompasses the exceptions referred to in the second half of the phrase or is to be understood as separate and apart from it is indiscernible. Yet the relationship between the State and Exception is the heart of the matter and metaphor. It is into these muddy waters that the following article dives. (Here Heidegger might note that both emergency and emerge are related to *mergere*, to delve or dip.)

The "State of Exception" was articulated systematically first as a political-philosophical concept in the work of a deeply contentious figure, Carl Schmitt (1888 – 1985), so-called "crown jurist of the Third Reich",[4] and party member number 2,098,860. So, wherever we

[2] Reuters report, April 2, 2021. https://www.reuters.com/article/us-health-coronavirus-ecuador-idUSKBN2BP14Y Accessed August 23, 2022.

[3] The searchable database of world constitutions, https://constituteproject.org/, for instance, lists 13 in force or draft constitutions in which "State of Exception" occurs, while "state of emergency" occurs in 193. Accessed August 23, 2022. The more common phrase "state of emergency" (German *Notstand*) is often conflated with the "State of Exception", further obscuring the latter's specific historical context and intent in the Weimar Republic. For historical disambiguation, I recommend a review article by Ellen Kennedy, "Emergency and Exception", *Political Theory* 39.4 (2011): 535-50.

[4] As Alfons Motschenbacher notes, the *Kronjurist* epithet given to Schmitt is usually cited without reference to its earliest use. He notes that it was Schmitt's former student, Waldemar Gurian, in Swiss exile from 1934, who first used the term in his *Deutsche Briefe 1934-1938*,

employ the phrase, we deal per force with its problematic and deep-running associations with National Socialism and dictatorship. Indeed, on these grounds alone some scholars have suggested Schmitt should be anathematized altogether.[5] Nevertheless, Schmitt's work on the "State of Exception" appears uniquely capable of revealing the working contradictions inherent in modern liberal democracy.

The circular (or rather Möbius-shaped) logic of Schmitt's State of Exception became particularly evident during the COVID-19 pandemic when the metaphor's inherent contradictions emerged. Is dealingwith exceptional situations using exceptional measures to be understood as part of the normal operations of the State, or are exceptional measures and normal circumstances to be thought of as in opposition to one another, or both? Is it to this productively obscure and complex point of Fascist jurisprudence that we are forced to trace back the arguments relied upon by liberal democracies--most recently and pointedly during the COVID-19pandemic--in defence of the full or partial suspension of certain core democratic liberties in the name of the greater social good, in this case public health?

There is a clear and troubling irony to exploring the workings in extremis of liberal democracy through Schmitt, who was an ardent critic of parliamentary democracy and liberalism. Between 1933 and 1945,Schmitt wrote prolifically in support of the dictatorship,[6] including a legal opinion that justified Hitler's suspension of democracy and declaration of a State of Emergency (the *Ermächtigungsgesetz*) after the burning of the Reichstag. Notwithstanding this legacy, and the understandable suggestions that Schmitt should be cancelled for a Nazism for which he never subsequently apologised,[7] Schmitt had already started to experience a redemptive

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in a piece dated 12 October 1934 in which he describes Schmitt as the "constitutional lawyer now functioning as the crown jurist of the Nazis". Alfons Motschbacher, *Katechon oder Grossinquisitor? Eine Studie zu Inhalt und Struktur der Politischen Theologie Carl Schmitts* (Marbach: Techtum Verlag, 2000) 157n148.

[5] Joseph Weiler, "Cancelling Carl Schmitt?" *The European Journal of International Law* 32.2 (2021): 393-95.

[6] For a concise account of Schmitt's active involvement with the Nazi party and its despotic absolutism, despite revisionist claims to the contrary, including (rather preposterously) suggestions of an inner exile, see Bill Scheuermann's review of Bernd Rüthers, *Carl Schmitt im Dritten Reich*: "Carl Schmitt and the Nazis", *German Politics and Society* 23 (1991): 71-79, including details of his many enthusiastic anti-Semitic and pro-dictatorship publications.

[7] In a post-war reflection, drawing on his experiences of Allied incarceration, he portrays himself self-pityingly as a victim, a lawyer cast outside the law (60), and explicitly states that these confessions are not to be understood as an apology (77). Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Cologne: Greven Verlag, 1950).

renaissance even before his death in 1985, and long before the exigencies of the COVID pandemic seemed to require his resurrection.[8]

The same pandemic which has taken an unashamedly Schmittian turn in its deployment of a rhetoric of the exception has very possibly irreparably damaged contemporary Italian philosopher Giorgio Agamben's popular reputation as an insightful and erudite Foucauldian critic of the often hidden violent biopolitics of liberal democracy. Whereas Schmitt is now popularly cited (although possibly without being read closely) in pandemic articles asking just how much state interference is proper,[9] Agamben's descent into conspiratorialist online rants in early 2020 is popularly seen as proof of the dangers of excessive left-wing philosophising at the point of its veering into alt-right, anti-democratic sceptical extremism. That Schmitt, the one-time Nazi, seems to enjoy greater favour is initially surprising. But if we imaginatively position Agamben and Schmitt at opposite ends of a political philosophical spectrum, a polarity that is in no small part attributable to Agamben for whom it was a generative force in his work, the rise of one in conjunction with fall of the other should makes sense.[10] While Schmitt is now

[8] This Schmittian resurgence has often involved a dehistoricized appropriation of Schmitt, as Peter Hohendahl has correctly pointed out, for the purposes of the present. Peter Uwe Hohendahl, "Reflections on War and Peace After 1940: Ernst Jünger and Carl Schmitt", *Cultural Critique* 69 (2008): 22-51, esp. 22. It is, however, hard to imagine any political philosophy that is not constantly transmogrified in the present for the present. Moreover, this is the crucial point: Schmitt can be and is 'misapplied' in this way.

[9] Example of the popular referencing of Schmitt include the editorial on deutschlandfunk.de, Matthias Buth "Wie viel Staat wollen wir? Pandemie und Staatlichkeit", 08.04.2020 https://www.deutschlandfunkkultur.de/pandemie-und-staatlichkeit-wie-viel-staat-wollen-wir-100.html Accessed 23 August, 2022. Here the author asks "wie viel Staat wir wollen, wie wir zwischen Freiheit und Leben abwägen. Dass 'der Staat' als Begriff nun ein Revival erfährt, darf nämlich nicht dazu führen, der Idee 'des Politischen' à la Carl Schmitt Vorschub zu geben." [How much State intervention do we want, as we decide between freedom and staying alive. The fact that "the State" is experiencing something of a revival [during the pandemic] should not foster a Carl-Schmitt-style theory of politics.] Around the same time, writing in *Le Monde,* Vincent Delhomme begins his think-piece with "L'idée de souveraineté opère un retour en force à la faveur de la crise du Covid-19. Après tout, Carl Schmitt (1888-1985) n'avait-il pas énoncé un siècle auparavant qu' 'est souverain celui qui décide de la situation d'exception'?" [The idea of sovereignty is making a major comeback due to the Covid-19 crisis. After all, did Carl Schmitt (1888-1985) not state a century ago that "he who decides on the exceptional situation is sovereign"?] Vincent Delhomme, "La crise sanitaire n'a pas été causée par un manque de souveraineté, mais plutôt par un trop-plein", *Le Monde* 29.05.2020 https://www.lemonde.fr/idees/article/2020/05/29/la-crise-sanitaire-n-a-pas-ete-causee-par-un-manque-de-souverainete-mais-plutot-par-un-trop-plein_6041136_3232.html Accessed August 23, 2022.

[10] Many of Agamben's works would be unthinkable without Schmitt as a foil. It is against Schmitt that he writes back not just in his *State of Exception*, but also in *Homo Sacer*. While

invoked respectfully in editorials on COVID measures to provide a seemingly supraideological working definition of governmental operations in crisis, Agamben has been construed by critics as the voice of politicised reaction at the far-left-wing end of Jean-Pierre Faye's inwardly curving, non-linear horseshoe political spectrum, which sees both extremities meeting in mutual delusion (a metaphor Faye coined precisely to describe the situation of German politics in 1932).[11] Agamben has – shockingly to those who understood him as a political philosopher of the Left – emerged as the philosopher of the anti-lockdown, anti-vaccination reactionism.

Why raise the spectre of Schmitt and his State of Exception at all again given his unapologetic Fascism? In 2003 in his own *State of Exception*, Agamben summoned Schmitt in order to reject wholesale the central precept set out in Schmitt's *Political Theology* of 1922. Schmitt had situated State of Exception *within* the law, whereby "of" appeared to denote belonging. What Schmitt had seen as an intrinsicand acceptable part of the functioning of constitutional democracy (its possible need to take exception to itself), Agamben situates categorically outside the law, understanding that crucial "of" to mean away from. Of "exceptional measures [which] are the result of periods of political crisis," Agamben judges, "the State of Exception […] cannot have legal form."[12] Agamben makes it clear that the primary State of Exception (his genealogising back to Aristotle notwithstanding) which he has in mind is the "Decree for the Protection of the People and State, which had suspended the articles of the Weimar Constitution concerning personal liberties."[13] His then is a rejection of Schmitt as a Nazi jurist who used "the State of Exception as the original structure in which law encompasses living beings by means of its own suspension" (Agamben *SE*, 3). Thus, Agamben, positioning himself against Fascism, stood as a defender of "ways of life" (what he calls *zoē*) rather than mere reduced-to-biological-fact existence (which he dubs *bios*). By this move against Schmitt, Agamben constructs himself as a champion of human beings conceived as freely living, self-

he does not call himself this explicitly, it is clear that Agamben sees himself as the Anti-Schmitt. He uses Schmitt so extensively in his critiques of political power that his work would be unimaginable without this forerunner.

[11] Jean-Pierre Faye, *Langages totalitaires* (Paris: Hermann, 2004) 407.

[12] Giorgio Agamben, *The State of Exception* (2003), trans. Kevin Attell (Chicago: University of Chicago Press, 2005) 1.

[13] Ibid. 2.

determining entities as opposed to mere governed lumps of moving meat, and offers the Nazi State as the ultimate instance of human life experienced as "bare life".[14]

Despite Agamben's rejection of a Schmittian State of Exception whereby the law can and must legally be able to suspend itself, paradoxically it is Agamben's own stance on biopower that leads him ultimately to a rhetoric on COVID that shares a paranoia and anti-statism with various extremist anti-vax and anti-lockdown movements. Agamben's hypothesis is that sovereign power brings forth a "biopolitical body" in order to establish, enact and reproduce itself.[15] By logical extension, his posts of 2020, published on the website of his publisher Quodlibet, evince a scepticism so extreme that the virus is reduced to "una spezie di influenza", a sort of flu, and "una supposta epidemia",[16] an alleged pandemic, engineered purely to allow sovereign power to produce bare life, and thereby reproduce itself. Fundamental to this is his concept of a purely biological existence (the ultimate object of biopower) which he sets over and against a deeper kind of supposedly meaningful *living*. His position – perplexingly, for a critic of fascist biopower – shares basic premises with various pandemic protest movements against government lockdown measures, mask-wearing and other restrictions or perceived incursions into bodily integrity such as mass immunization. Agamben, like the various COVID-sceptical movements, evinces that "paranoid style" of thought that historian Richard

[14] On Agamben's central distinction between "bare life" and "ways of life", which he claims he can trace back to Aristotle, a great deal has been written. Bare life Agamben defines as a "life stripped of every right by virtue of the fact that anyone can kill him without committing homicide." Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) 183. One of the clearest formulation of the two opposing concepts of *bios* and *zoē* can be found in a critique of Agamben's interpretation of Aristotle. James Gordon Finlayson, "'Bare Life' and Politics in Agamben's Reading of Aristotle", *The Review of Politics* 72.1 (2010): 97-126.

However, no one has yet noted, as far as I can see, the reliance of Agamben on Schmitt for this central idea of bare (and barely lived) life. In his prison reflexions of 1950, Schmitt describes his prison clothing as merely the emphasis of his fundamental nakedness: "In den wüsten Weiten einer engen Zelle. Die Kleidungsstücke, die man mir gelassen hat, bestätigen nur die objective Nacktheit. Sie unterstreichen sie sogar auf eine höchst ironische, unangenehm betont Weise. Du siehst dich ganz auf dich selbst und auf deine letzten Reserven zurückgeworfen" (*Ex Captivitate*, 80). [In the deserted expanses of a narrow cell. The clothes I was left with only serve to confirm an objective nakedness, almost emphasizing it in some profoundly ironic and deeply unsettling way. You find yourself cast back on yourself and onto your last reserves.]

[15] "The production of a bio-political body is the original activity of sovereign power." Giorgio Agamben, *Homo Sacer* (Stanford: Stanford University Press, 1995) 6.

[16] Giorgio Agamben, "L'invenzione di un'epidemia", 26.02.2020 https://www.quodlibet.it/giorgio-agamben-l-invenzione-di-un-epidemia Accessed 23 August, 2022.

Hofstadter had identified in 1964, and which he saw as a hallmark of those ways of thinking that "have a greater affinity for bad causes than good".[17] Most of the legal objections cite the unconstitutionality of governmental interventions, despite the clear and present threat to bare biological life if these interventions are not in place. This willingness to sacrifice "bare life" (*bios*) in an act of opposition to COVID lockdown and other allegedly fascist biopolitical measures has led some to describe Agamben's position (one shared by right-wing movements across the world such as Germany's anti-lockdown "lateral thinking" *Querdenker*; Vox, the far-right Spanish party that took a constitutional case against lockdown in November 2020; and Anti-Corruption Ireland/ACI) as a "death cult" because, in its rejection of "bare life", it appears to choose death. As Brad Evans puts it, Agamben's consistently "anti-biological position" has meant "those who wanted to condemn Agamben as belonging to some anti-bios death cult […] could now read him as either a nihilistic philosopher who was putting himself on the side of the virus, or as simply engaging in inhumane theoretical semantics, which he couldn't possibly believe in."[18]

Of course, none of those who have resisted lockdown and vaccines have explicitly articulated their position as being that of a death-cult. In fact, a rhetoric of 'quality of life' permeates their arguments. Anti-Corruption Ireland's constitutional case against Irish national lockdown measures hinged on a vague sense of their unconstitutionality, but also on a perceived diminution of lived life which relies on Agamben's distinction between *bios* and *zoē*--basic existence versus some allegedly deeper form of being that is supposedly incompatible with the first. In May 2020, two former journalists and members of ACI, Gemma O'Doherty and John Waters, took a High Court action against the then Irish Minister of Health, arguing that the legislation passed in order to facilitate the COVID lockdown infringed individual rights enshrined in the Irish Constitution. They argued crucially that it was not the pandemic that was an exceptional circumstance requiring legislation within the terms of the Constitution to protect the public, but rather that the exception was *the legislation itself* which they described in distinctly Agambian terms – although not necessarily with any prior knowledge of his work –

[17] Richard Hofstadter, "The Paranoid Style in American Politics", *Harper's Magazine*, November 1964: 77-86. Reprinted in Richard Hofstadter, *The Paranoid Style in American Politics and Other Essays*, ed. Sean Wilentz (New York: Vintage Books, 2008) 3-40, here 5.
[18] Brad Evans, *Ecce Humanitas: Beholding the Pain of Humanity* (New York: Columbia University Press, 2021) 168.

as an incursion into "the most intimate level of human life."[19] The following example which they provided to illustrate the conditions of bare existence to which Irish citizens were thus reduced under the exceptional legislation was ill-chosen in retrospect, and may have made their impassioned defense of an unqualified freedom appear less than convincing. But it does illustrate how difficult it is to articulate that supposedly deeper form of existence that is *zoē*, particularly when there is a real and present threat to *bios*. Of lockdown measures they argued: "The most extraordinary sight. People are told to move along from park benches if they are sitting reading a book. I mean this is an intrusion at the most intimate level of human life. So, I think that in constitutional terms it is literally unprecedented that anything like - - nothing like this ever happened before."[20]

Blake Smith correctly notes recently in a contribution to the online magazine *Tablet*, "[f]or radicals of the left and right, thinking about the problem of emergencies and their possible manipulation often passes through the Nazi jurist Carl Schmitt and the contemporary Italian philosopher Giorgio Agamben, who appropriated many of Schmitt's insights for the sake of his own idiosyncratic leftist politics."[21] Indeed, the two apparently dichotomous positions of Schmitt and Agamben seem to delimit the horizon of a great deal of current argument about states of exeption. Agamben himself has contributed to this imaginary scenario in which he and Schmitt, as pro- and antagonist, form the entire dialectic of the exception by invoking Schmitt in his criticism of government COVID interventions. For instance, in the Quodlibet post "When the House Burns Down", government health measures are cast as unmistakeably Schmittian and therefore dystopian. In a mixed metaphor in which cultures have lives and feelings and can govern, Agamben declares that "[a] culture that feels itself to be at the end, with no life left, does what it can to govern its ruin through a permanent State of Exception."[22]

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[19] "Gemma O'Doherty & John Waters v. The Minister for Health Ireland & Ors" Transcript Part 3: 68. https://gemmaodoherty.com/wp-content/uploads/2020/05/200505-ODoherty-Waters-v-Minister-for-Health-Ors.pdf Accessed August 23, 2022.
[20] Idem.
[21] Blake Smith, "When Should Leaders Break the Law?" *Tablet Magazine*, April 6, 2022, https://www.tabletmag.com/sections/arts-letters/articles/when-should-leaders-break-the-law Accessed August 23, 2022.
[22] Giorgio Agamben, "Quando la casa brucia", *Quodlibet*, October 5, 2020, https://www.quodlibet.it/giorgio-agamben-quando-la-casa-brucia. English translation Kevin Attell, "When the House Burns Down" addendum to *Diacritics* 48.8 (2021). https://www.diacriticsjournal.com/when-the-house-burns-down/ Accessed August 23, 2022.

Even beyond Agamben's ongoing devotion to the embers of Schmitt, who is invoked incessantly if *ex negativo* in Agamben's stock-in-trade anti-biopolitical attacks, Schmitt has experienced a renaissance more recently. (In fact, Schmitt had prophesized his own return from the low point of his *Captivitate*, noting portentously that times change and that from past suffering new generations derive impetus.[23]) He is mined in COVID-era newspaper editorials from the *Washington Post* to the *South China Morning Post*, for quotable hot takes on our exceptional circumstances under the virus. Indeed his *Political Philosophy* does offer much that can provide superficial orientation in times of national and global crisis. Crucially, he had argued that the figure or instance which he calls "the sovereign" "decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, [the sovereign] nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.".[24] This sovereign agent is unarguably an uncanny figure, both above the law and yet belonging to it, constitutionally able to suspend the constitution, a right vouchsafed him by that very constitution.

This is an unacceptable oxymoron in Agamben's view. Such sovereign action, where it has occurred under COVID conditions, is similarly rejected by the *Querdenker* and other agents of protest, who argue against the lockdown, herd-immunization and COVID passes, on the basis that a constitution cannot suspend its enshrined freedoms without becoming unconstitutional. In very basic terms, as Agamben puts it, the error of Schmitt's position is that something can be thought of as "[b]eing-outside, and yet belonging: this is the topological structure of the State of Exception.".[25] This is also, as we have seen, the topological structure of the preposition "of".

On the Medieval Origins of Modern Discourse on Public Health Measures

As concerns exceptional measures for public health, it is worth noting that the first quarantine law was promulgated in Ragusa or modern-day Dubrovnik in the second part of the 14th century, during a period of plague that is estimated to have killed a third of the European population. The forty-day period of exclusion from which quarantine derives its name was

[23] Schmitt, *Captivitate*: 60.
[24] All English quotes are from Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005) here 7. German originals are from Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 9th ed. (Berlin: Duncker & Humblot, 2009).
[25] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005) 35.

informed in all probability not just by emerging ideas about incubation periods; it is also linked to ancient religious traditions of purification (*Leviticus* 12, for example, calls for a 40-day period of purification post-partem) as well as to the Biblical duration of disasters (see *Genesis* 7:4 on the duration of the Flood). The Ragusa law is the earliest recorded legal decision on a pandemic-driven state of emergency,[26] a proclamation including details of how the decision was arrived at collectively, what penalties apply to its breach, and even what exceptions apply to the State of Exception. It provides the basic form of legislation that we are now so familiar with globally from the COVID-19 pandemic: promulgating restrictions on travel and on human interaction, while making exceptions for the provision of such necessities as are deemed vital for bare life like the provision of food, and decreeing fines to punish breaches.

> In *the Great Council of 67 councillors it was balloted by thirty- four* that our own citizen as well as strangers, when they come from plague-carrying areas, should not be admitted into Ragusa, nor into its territory, unless they have first remained in Mercana or in Civita Vecchia to be cleansed for one month. Moreover, it was balloted by forty-four councillors of the same Council that no person from Ragusa or its territory should venture or presume to go to those who come from plague-carrying areas, and are staying in Mercana or Civita Vecchia, under penalty of [themselves] remaining in the same place for one month; and those who bring [the quarantined people] food or other necessities may not go to them without the permission of the officials who have been appointed to this task, with an order given to them by the same officials under the said penalty of remaining in the same place for one month. Moreover, it was decided and confirmed by 29 councillors of this same council, that whoever does not observe the aforesaid [regulations] or any part of the aforesaid should pay as a fine fifty [hyperpyra][27] and should be nonetheless bound to observe the aforesaid [Emphasis mine].[28]

This unilateral action was taken on behalf of the community by an almost equally split Great Council on a majority of just one vote. Who exactly they were, individually and collectively, and with what exact authority they acted, and based on what legal protocols and principles, I leave deliberately blank, as this is the fascinating point, the emergency of a disembodied sovereign voice from the mass at the moment of decision on the exception. The Council acted on advice from Jacob of Padua, chief physician of the city at the time,[29] who advised the erection of a *cordon sanitaire* between the city and the travellers so essential to its continued

[26] See Gian Franco Gensini et al., "The Concept of Quarantine in History from Plague to SARS" in *The Journal of Infection* 49 (2004): 257-261. The article offers a short overview of the main developments in the practice of quarantine from ancient times to the present.
[27] Gold coins or Bezant.
[28] This English translation of the original Latin is taken from Susan Stuard, *A State of Deference: Ragusa/Dubrovnik in the Medieval Centuries* (Berlin: de Gruyter, 1992) 239-40.
[29] Gensini, 258.

functioning as a trading port, and the isolation and treatment of the sick at designated sites outside the city for a period of first 30 to 40 days. This was not the first act of quarantine in that long plague century, but is the first legal edict of the period, giving juridic expression to a State of Exception under infectious conditions, an exceptional moment in the history of the law of states of exception.

Quarantine and Archaic Biopolitical Modernity

For both Schmitt and Agamben, arguing each from their ostensibly opposite positions, 1377 might serve as paradigmatic for all similar states of apparent suspension of the normal legal order in the name of the general public good, not just in terms of disease and contagion, but more broadly in terms of the operations of the body politic. The applicability of health emergency legislation to politics more generally is possible because, according to Agamben (agreeing here with Foucault, who also generalised about the repressed human condition on the basis of quarantine measures in his 1975 *Discipline and Punish*)[30] we have entered a biopolitical modernity in which the "modern state" "places biological life at the centre of its calculations" thereby revealing itself, paradoxically, to be "archaic" in its absolute subjection of bare life to the force majeure of sovereign rule.[31] In other words, for Agamben, there only is biopolitics to which we passively submit, and contagion is merely the condition under which we can see particularly vividly the body's relationship to the political under this modern (and simultaneously ancient) regime. Already in his *Homo Sacer*, Agamben had thereby revealed what would just two decades later become an unacceptable politico-philosophical position under COVID-19. This suggests that his fall from grace under COVID was less precipitous than many had suggested,[32] and follows the logic of his earlier works. If everything is biopolitics, and if by biopolitics we mean all the machinations by which political modernity subjects human life to an allegedly 'despotic' exceptionalism, ruling our bare lives by

[30] Michel Foucault, "Panopticism' from 'Discipline & Punish: The Birth of the Prison'", excerpt reprinted in *Race/Ethnicity: Multidisciplinary Global Contexts*, 2.1 (2008) 1-12: 1. https://www.jstor.org/stable/25594995?refreqid=excelsior%3Af6cd8071c5b7e7f55c4fab44fa356b03 Accessed August 23, 2022.
[31] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Standford University Press, 1998) 6.
[32] In "Giorgio Agamben's Coronavirus Cluelessness", Anastasia Berg wonders if Agamben's comments are, as Jean-Luc Nancy suggested, a mistake, or if "an intellectual habit [has] become a pathological compulsion". See *Chronicle of Higher Education*, March 23, 2020. https://www.chronicle.com/article/giorgio-agambens-coronavirus-cluelessness/ Accessed August 23, 2022.

autocratic decree, then every exceptional measure (even those to prevent contagion and death) becomes a biopolitical act designed only to subjugate us further--another act of "techno-medical despotism".[33] When you look at the world through Agamben's biopolitical eyes, every *argumentum ad bacillum* is just another *argumentum ad baculum*. Accordingly, he recently argued passionately against the introduction of a "Green Pass" COVID vaccination certificate in Italy for access to public spaces: "Most say that the green pass is just a gentle way to induce people to get vaccinated. Instead I would say the contrary. The vaccine is an excuse to oblige the citizens to have this green pass with a QR code and to establish an ever more pervasive system of social control typical of totalitarian regimes."[34] These measures, he suggests, are merely part of a larger dystopian state calculus, operating on the basis of a crude Benthaminian in/felicity algorithm.

In his *Political Theology*, written during the Weimar Republic, when Schmitt was a young professor of constitutional law at the University of Bonn, he had very specifically defined the exception not as something else, something beyond and unrelated to the norm, but rather as the "outermost sphere".[35] What he means by a concept of the outermost sphere – a language which suggest again that a mapping of these juridical spaces is possible – needs to be clarified. He also calls it a borderline concept, not in the sense that it stands over and against that which it encloses (the non-exceptional state or the norm), but rather in the sense that it is the most extreme part of what constitutes the norm. In German, *das Äußerste* partakes of a particular set of meanings: the root *aussen* means outside of something, beyond it, while *das Äußerste* is *not* exterior to the set, but rather the moment of its mostness, its greatest intensity. It is the most intense point or moment of the thing to which it is applied. The word, in other words, means both inside and out, the two faces of the border. It also shares a root with *sich*

[33] This Agambian-sounding phrase is attributed to Agamben by several authors, including Gregory Pence in his *Pandemic Bioethics* (Broadview Press: Peterborough ON, 2021) 145. But the attribution is problematic. Some cite as the source *The Invention of an Epidemic* where, as far as I can see, the locution does not occur in this exact form anywhere. It is offered as a quote in an opinion piece on Agamben in the *New York Times* of August 21, 2020 by Christopher Caldwell, but it seems to be a translation of the slightly different phrase "una dittatura sanitaria", which is not of Agamben's coinage but rather a mantra of the anti-vax populist conspiracist movement of Italy, propagated, for instance, by the extreme right-wing Forza Nuova movement.

[34] Giorgio Agamben quoted in Manfred Manera, "Italy's anti-Green Pass movement has a new figurehead", *The Spectator World*, October 14, 2021. https://spectatorworld.com/topic/nunzia-alessandra-schiliro-italy-anti-green-pass-movement-figurehead/ Accessed August 23, 2022.

[35] Schmitt, *Political Theology*, 5.

äussern, to emerge with something or express oneself. It is this jointed disjointed richness of the term that Schmitt reveals, not purely as a linguistic exercise, but because of an attention and commitment to the fullest implications of the word.

Why Schmitt opens his work on sovereignty and decisions by referring to the borderline or liminal term, *Grenzbegriff*[36] requires further elucidation too, for he does not return to this opening and fundamental idea of a borderline concept in the four subsequent chapters of the work, except to use the related term borderless, limitless, *unbegrenzt* (14), to describe the State of Exception:

> Sovereign is he who decides on the exception. Only this definition can do justice to a borderline concept. Contrary to the imprecise terminology that is found in popular literature, a borderline concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine. It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.[37]

There is a clearly spatial metaphoricity to this argument, if rendered diagrammatically, might appear as follows.

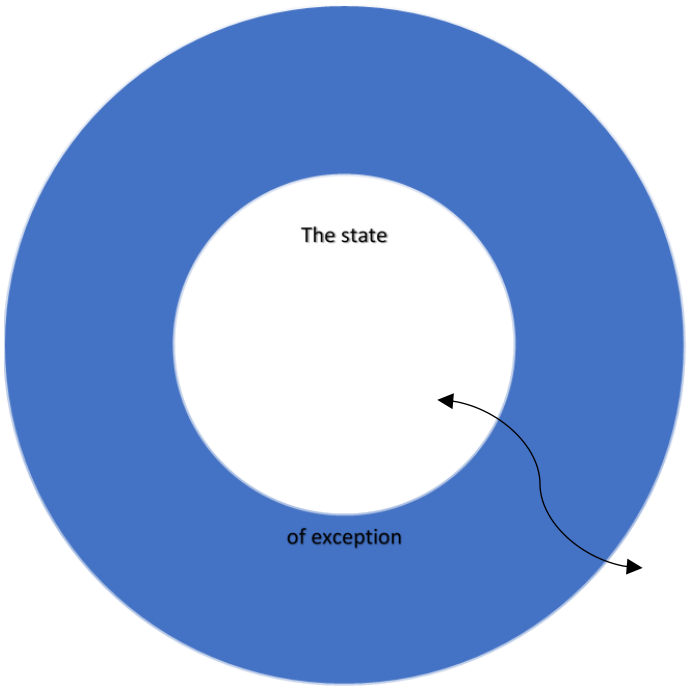


Fig. 1

[36] Schmitt, *Political Theology*, 13.
[37] Idem. 5.

As this graphic representation of Schmitt's state, exception and "outermost sphere" illustrates, the state and its exception reciprocally and constitutively co-determine one another, while simultaneously problematising the precise location and operation of the limit. The state and its exception are not to be placed over and against one another, or to be understood as a set and its simple boundary, but coexist as dynamically and interactively as the walled citadel of Ragusa at its all-important opening to the sea and trade life-blood beyond, and simultaneously the entrypoint of plague and death. (There is room elsewhere for a reconsideration of human boundaries both physical and jurisprudential, and their meaning – or lack thereof – for the rodent population which acted as a vector for that disease.) It is clear that Schmitt's jurisprudential ideas have at their heart both legal and national or natural boundaries in mind, as well as potentially, if we speak biopolitically, the integument of the human skin. Writing as he does in a period which had seen national borders, including those of Germany, redrawn in radical ways, it is difficult not to connect his use of the term *Grenzkonzep*t (borderline concept) to Nazi *Grenzpolitik* (border policy in the geopolitical sense).[38] It is important to recall at this point that Hitler had contrasted Nazi *Raumpolitik* (politics of room/space, in the sense of *Lebensraum*) with "stümperhaften Grenzregulieren" [the clumsy border controls] of bourgeois national foreign policy. "Die Außenpolitik der nationalen bürgerlichen Welt ist in Wahrheit stets nur eine Grenzpolitik gewesen, die der nationalsozialistischen Bewegung wird demgegenüber immer eine Raumpolitik sein." [The foreign policy of bourgeois nations has in fact always been a border policy; that of the Nazi movement, on the other hand will be a policy of room/space.] This interest in the idea of the unlimited and unlimiting border, is crucial to the state of emergency, both in Schmitt's jurisprudential geometry and in Nazi border expansionism. The border must be there, but simultaneously not: an *emerge*ncy needs to be able to emerge (to be Heideggerian about it) from the confines of the norm, and cannot have an ultimate limit or be limited.

To superimpose this upon the state of Ragusa, taken here as the prototypical state under plague conditions, the dilemma is one of walls and their necessary apertures: the city is fortified both against invaders and, in turn, pathogens, but it remains open to the sea.

[38] *Hitlers Zweite Buch: Ein Dokument aus dem Jahr 1928*, ed. Gerhard Weinberg (Stuttgart: Deutsche Verlags-Anstalt, 1961) 78.

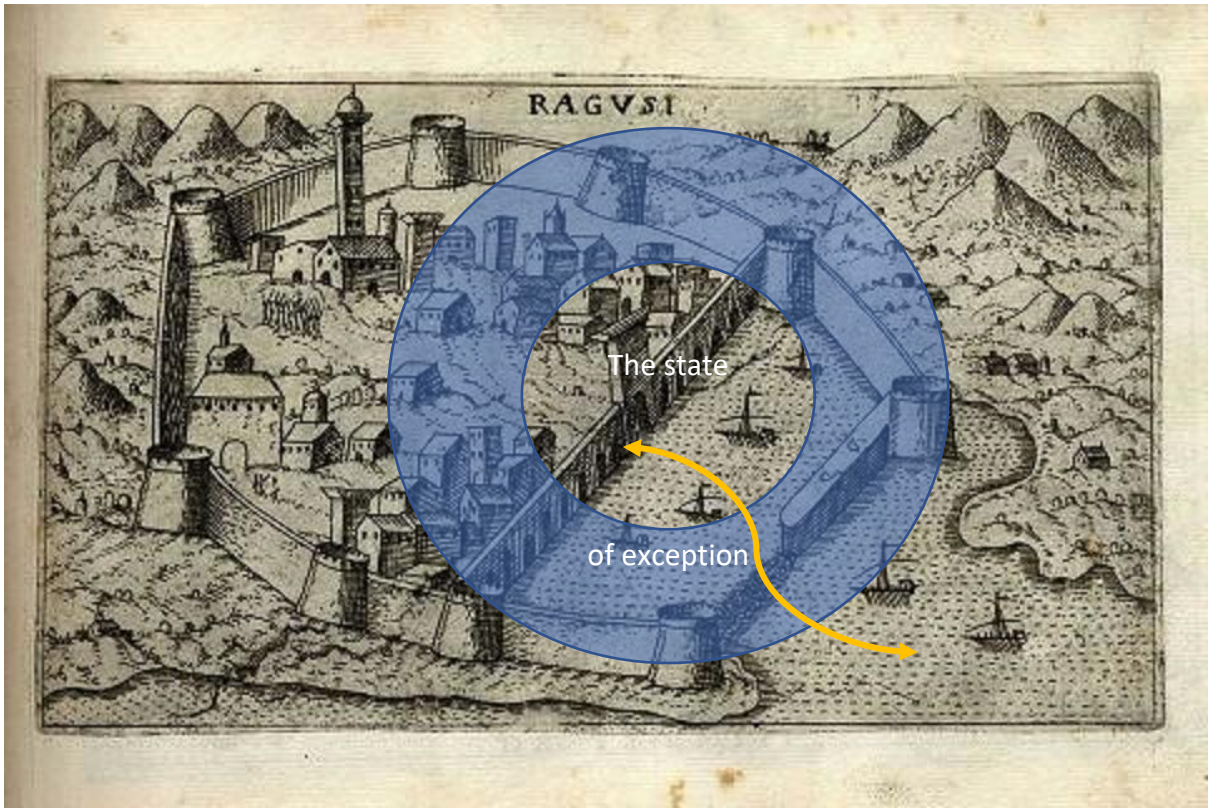


Fig. 2 Image of the Schmittian State of Exception superimposed on a copper engraving *of the citadel of Ragusa by Francesco Valegio (1600)*

As Schmitt goes on to say, it is difficult to define a state of emergency, simply because it is in the nature of such a state that its possibilities must remain unbordered, unlimited:

> Es kann weder mit subsumierbarer Klarheit angegeben werden, wann ein Notfall vorliegt, noch kann inhaltlich aufgezählt werden, was in einem solchen Fall geschehen darf, wenn es sich wirklich um den extremen Notfall und um seine Beseitigung handelt. Voraussetzung wie Inhalt der Kompetenz sind hier notwendig *unbegrenzt*.[39] [Emphasis mine.]

In the English translation[40] the link between the liminal concept of sovereignty (*Grenzbegriff*) and the limitlessness (*unbegrenzt*) of the State of Exception is lost. The central organizing concept of the border, the *Grenze*, between sovereign and ruled, between order and chaos, is

[39] Schmitt, *Politische Theologie*, 14.

[40] "The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited." Schmitt, *Political Theology*, 6-7.

visible here only when we can trace the argument in German from the *Grenzbegriff* to *unbegrenzt*. The borderine term ultimately only delimits the limitlessness of the sovereign delimiter, he seems to say, in a rhetoric that reminds us of Hitler's clumsier attempt to open border policy out into a policy of expansion (room/space policy). Logically (if we momentarily accept Hitler's logic for the purposes of this exploration), such a policy needs borderlands beyond its borders into which to expand, and boundaries to cross on its way to an imagined limitlessness.

Ragusa, to which Schmitt does not refer in his jurisprudential theorisation of decision-making and sovereignty, is not just an interesting case in point because of its own topographical (to borrow Agamben's term) similarity to Schmitt's conception of the relationship between the constitutional norm and its exception, which he sees as a borderline term delimiting borderlessness. Not only must the city's embattled fortifications remain open, if only at one point, in order for the city to exit a Mediterranean trade-based economy, but its situation is similarly ambivalent politically: it is both a vassal state of Hungary while simultaneously a free City State in its own right. This non-orientable relationship between inside and outside, between freedom and limits, is also set in stark and visible relief by the pandemic State of Exception we find in the Ragusa plague law which needed to insist both on borders (laws; cordons) and on their simultaneous if exceptional permeability. Both the fines for breaches of the laws and the exceptions allowed for states of necessity assume that the cordon will be both a limit and a crossing point.

If anything, the plague pandemic of the 14th century and the pandemic now are ultimately incidental to questions of sovereignty, incidental in the true sense of the word, "[o]ccurring or liable to occur in fortuitous . . . conjunction with something else of which it forms no essential part."[41] As Schmitt puts it, any concrete State of Exception merely reintroduces insistently the forgotten or ignored question of sovereignty, where it is and with whom it lies, like a tracer ink marking out pre-existing pathways in the body politic. The sovereignty which is more to our taste as an abstract concept rears its ugly head in the unpalatable person of the sovereign, the

[41] "Incidental", adj. 1. *Oxford English Dictionary Online* https://www-oed-com.ucc.idm.oclc.org/view/Entry/93467?redirectedFrom=incidental#eid Accessed August 23, 2022.

κυρίαρχος (kyriarch) in Greek, the Lord (*κύριος* / kyrios) and origin (*ἀρχός* / arkhos): he who decides.[42]

Also lost in the English translation of Schmitt is the over or "über" of his opening pronouncement: "Souverän ist, wer über den Ausnahmezustand entscheidet" means literally "sovereign is whoever decides *over* the State of Exception". Going to its etymological root, Schmitt's *über* refers to the Latin *super* which gives us (via Old French) our modern *sove*-reign. This idea of above, over, is certainly evident in ideas of monarchical sovereignty, but is deliberately foreclosed in legal expressions of sovereignty in modern constitutional democracies with their apparently flattened hierarchies and distributed decision-making.

A Question of Sovereignty: The Case of the Irish Constitution versus "The People"

A particularly good illustration of the situative question raised by Schmitt's "over" can be found in the Irish Constitution, article one of which offers "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions." It is to the circular logic of such statements that Schmitt draws our attention. To be sovereign onto oneself as a collective, a nation, places no one "over" anyone else. This imagines a collateral (or side-by-side) distribution of a dispersed quality it calls sovereignty which is exercised by no particular sovereign. Ireland is a "sovereign, independent, democratic state" as Article 5 of the document reasserts. The impossibility of standing over and against oneself in such a situation is the core problem of modern liberal constitutional democracy to which Schmitt draws attention with his return to the sur-, over, super-, of sovereignty. Of course, the *sou*- of sovereign (Fr. *souverain*) is bafflingly like French *sous* which means precisely the opposite of over. The sous-vereign would, if anywhere, be under, below, just as below the surface of a distributed authority under liberal constitutional democracy, Schmitt suggests, hides the ever-present sovereign instance which is only finally revealed by the declaration of a State of Exception.

[42] Discourse analysis has revealed that *κυρίαρχος* is one of the most frequent collocates of "the people" in modern Greek pro-populist discourse. See Nikos Nikisianis et al., "Populism Versus Anti-populism in the Greek Press: Post-Structuralist Discourse Theory Meets Corpus Linguistics" in *Discourse, Culture, Organization: Inquiries into Relational Structures of Power*, ed. Tomas Marttila (Cham: Palgrave, 2019) 267-295, here 277.

To return to the precise arguments of his landmark text of 1922[43] on the sovereign and related States of Exception which necessitate a sovereign's decision, Schmitt says "if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general."[44] This is what Schmitt means by a borderline concept. "There are exceptions," he continues with Kierkegaard. "If they cannot be explained, then the general also cannot be explained. […] The exception […] thinks the general with intense passion."[45] Of course, Schmitt is responding primarily not to so-called acts of God, like a disease, but rather to the state of constitutional crisis of the short-lived Weimar Republic, bookended by war and dictatorship, and most particularly its infamous Article 48 which allowed the President to suspend civil rights and operate independently of the legislative bodies in an emergency. This exceptional state of independent rule could be extended indefinitely, without term limit, as necessary,, or, as Schmitt might have it, with "intense passion".

This self-suspending constitution triggers broader discussion of constitutional democracy, which, according to Schmitt, refuses to identify openly the real locus of sovereignty and decision-making, which is now *dessous*, hidden beneath its constitutional surface with its appearance of distributive decision-making. His argument makes a distinction between the law, which operates in a purely theoretical realm beyond the concrete situation, and its conversion by an act of decision-making into an applied law or force in a real situation. This alchemy of converting a principle into an enactment occurs at the moment of decision (hence the classification of Schnitt as decisionist). The fact of this transformation is less important to Schmitt than the question of the subject who decides: who makes the decision and performs that magic. "That a legal idea cannot translate itself independently is evident from the fact that it says nothing about who should apply it. In every transformation there is present an *auctoritatis interpositio*. A distinctive determination of which individual person of which concrete body can assume such an authority cannot be derived from the mere legal quality of a maxim."[46] In other words, "the law does not designate to whom it gives authority. […] The

[43] The same year in which Ireland's first Free State constitution was drafted, a document which described the state in Article 1 as "co-equal" to the other states of the commonwealth, making it free while still British, another disorienting state of affairs in which the location of sovereignty remains in abeyance.
[44] Schmitt, *Political Theology*, 15. Schmitt is citing Kierkegaard. The text does not provide an exact reference. The English translation offers in a footnote: "The quote is from Kierkegaard's *Repetition*."
[45] Idem.
[46] Ibid. 31.

legal prescription […] only designates how decisions should be made, not who should decide."[47] This raises the question of the identity of authority: who is authorised to make the decision that converts the legal (or indeed illegal) maxim into enacted law? As an abstraction cannot enact a law, we must *a fortiori* ask this question of who. Or as Schmitt formulates it "what matters for the reality of legal life is who decides."[48]

Defining the modern state as the continuation of theological concepts (primarily God as the omnipotent lawgiver) in secularized times and by secularized means, Schmitt notes that in the secularized theory of the state, the "exception in jurisprudence is analogous to the miracle in theology."[49] But whereas the prime mover of the miracle is clearly identifiable (God), the prime mover in a secularized democratic state is not similarly clear. The agency of decision is often bureaucratically diffuse, as in the Great Council of 64 which declared quarantine in Ragusa by that anonymous majority of one. It is because of this obscurity, Schmitt suggests, that the modern state often becomes the focus of conspiracy theories, such as those recently promulgated by Agamben who dubbed COVID as "an alleged epidemic of coronavirus".[50] Because of the modern state's failure to identify or reveal where real decision-making and sovereignty lies, we are left with a symptomatically vague sense of some secret prime mover. According to Schmitt, in the absence now of a "graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws", what remains is an "inexplicable identity: lawgiver, executive power, police, pardoner, welfare institution. Thus to an observer […] there appears a huge cloak-and-dagger drama in which the state acts in many disguises but always as the same invisible person."[51] The attempt to resolve this diffuse prime mover back into one manageable person and target can be seen at work in the Soros conspiracies of our time. Just as metaphysicians misuse the name of God to cover the cracks in theological arguments, Schmitt claims, so do intellectually limited jurists introduce the name of the state as a "mental short circuit,"[52] while those without the necessary juridical expertise, introduce the idea of conspiracy.

If, as is the modern tendency, we imagine sovereign power as resting in and with the state, and speak of the "sole supremacy of the state", we are forced to to imagine the "state as an abstract

[47] Ibid. 32-33.
[48] Ibid. 38.
[49] Ibid. 36.
[50] Agamben, "The Invention of an Epidemic", quoted in Bratton, 112.
[51] Schmitt, *Political Theology*, 38.
[52] Ibid. 39.

person […] with a monopoly of power," if not as an actual mysterious person whom we imagine at the heart of a conspiracy. In other words, the "religious fiction is replaced by the juristic fiction."[53] This natural progression from a theocentric world-view to the modern secular reinvention of the state is central to the Schmittian theorisation of sovereignty, and to his reintroduction of the idea of a political theology which emphasizes the role played by religion and religious thinking in politics. Within that transition from a theological world-view to a democratic world view, "the people", understood as a collective, whether mob or electorate, needed to assume the qualities of the deity they have displaced. However, "the unity that a people represents" cannot have the "decisionistic character" of a god or a monarch.[54] How can 5 million Irish people, for instance, decide anything, our randomly selected Citizens Assemblies notwithstanding?[55] Nevertheless, even in modern republics, the "aftereffects of the idea of God remain[s] recognizable. In America this manifested itself in the reasonable and pragmatic belief that the voice of the people is the voice of God"[56] As a result, in this political theological vision of Schmitt's "the people hover above the entire political life of the state, just as God does above the world, as the cause and the end of all things, as the point from which everything emanated and to which everything returns."[57]

Taking Ireland as a case in point, it is precisely this semi-theological, mystical idea of "the people" that has been insistently cited by those groups resisting Irish government legislation during the COVID-19 pandemic (and equally and oppositely by those academics who championed the establishment of a Citizens Assembly in Ireland, whose precursive initiative

[53] Idem.
[54] Ibid. 49.
[55] The Citizens Assembly in Ireland, established in the second part of 2016 as a permanent body, was designed with increased citizen involvement in political decision-making in mind. Responding to a perceived lack of public involvement in political decision-making, its role is to represent the views of "the public" who, its existence suggests, are not already adequately represented by their parliamentary democracy. The body, consisting of 99 citizens and a chair, thus both gives physical form to a perceived lack of representation that it purportedly seeks to overcome. The contradictions and shortcomings notwithstanding, its work in the run-up to the referendum on Article 8 of the Irish Constitution preventing access to abortion cannot be overstated. On its origin, strengths and shortcomings see Naomi O'Leary, "The Myth of the Citizens Assembly", *Politico*, June 18, 2019. https://www.politico.eu/article/the-myth-of-the-citizens-assembly-democracy/ Accessed August 23, 2022.
[56] Schmitt, *Political Theology*, 49.
[57] Idem.

was called "We, the Citizens").[58] Claiming to speak in the name of "the people" is common to all of the sub-groups who have protested against COVID lockdown measures. A group self-designating as "the People's Convention", for instance, led protests against COVID-19 restrictions and mask-wearing in Cork on Mayday 2021. Tellingly perhaps, this group representing "the people" consisted of only 300 protestors: both a small minority yet somehow also representative as the fallacious *argumentum ad populum* always allows.

Since traditional ideas of legitimacy and sovereignty have lost their meaning in the shift from transcendent beliefs to secularism, according to Schmitt, we arrive at the idea "that all power resides in the *pouvoir constituent* of the people, which means that the democratic notion of legitimacy has replaced the monarchical."[59] Unfortunately, as Schmitt points out, vesting collective mankind with all legitimacy is troublingly Janus-faced: both the face of mob rule and of democracy.

The Irish context offers an important example among cognate constitutional democracies because, unusually, it emerged from a forty-year State of Exception only in February 1995, when an IRA ceasefire ended a period of emergency that had begun in 1941. The fact that Ireland has spent longer in a state of emergency than in a state of normalcy is due to the armed conflict in Northern Ireland. The only state of emergency or exception to itself that the Irish Constitution recognizes is war, but that state of war has prevailed for most of its existence; and the only item in the Constitution which cannot be overridden by such a state is the ban on capital punishment. Moreover, the COVID pandemic, not being a state of war in the ordinary sense, is *not* counted as a constitutional state of emergency in Ireland. As such, the measures taken for the sake of public health must remain within the bounds of the Constitution. Two acts responded to the pandemic, the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (the Health Act 2020) and the Emergency Measures in the Public Interest (Covid-19) Act 2020 (the Emergency Act 2020). The Health Act confers wide-ranging powers on the person of the Minister of Health, making him step forward from the generality of the people, and indeed the more particular generality of other ministers of state, to act as sovereign. Social distancing measures which fall within his realm of enforcement

[58] Established by Professor David Farrell of UCD in the immediate aftermath of the financial crisis of 2008, We the Citizens: Speak up for Ireland sought to develop "a more participatory form of democracy could work in Ireland at a time when people felt adrift and disconnected from power". See http://www.wethecitizens.ie/

[59] Schmitt, *Political Theology*, 51.

arguably violate core Article 40.6.1 of the Constitution, the right "to assemble peaceably and without arms". This has been the main leverage of groups during the pandemic who also otherwise dispute the validity of the Irish government, which they dismiss as generally corrupt. Amongst them the so-called People's Convention mentioned above, which, alongside various conspiracies, espouses the idea that our democracy is fundamentally undemocratic because it is unrepresentative. It declares that "the guiding principle of CPPC is that sovereignty in Ireland rests with the people of Ireland and that all affairs of state must be subject to the will of and decision by the people without restriction and furthermore to the supervision of the people."[60] Similarly, members of Anti-Corruption Ireland (ACI) have been at the vanguard of arguments against COVID provisions, also on the grounds of 40.6.1.

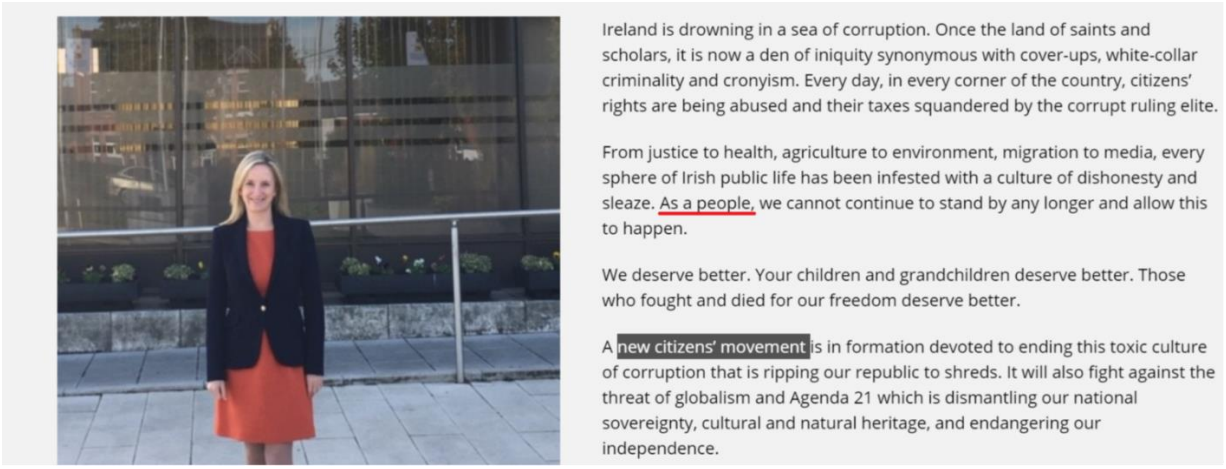


Fig. 3 Screenshot from ACI website[61] *[emphases mine]*

ACI also places its emphasis on "the people" and designates itself as a "citizens' movement", claiming to speak and act on behalf of the people.

According to Schmitt, such ideas are not outliers to the regular business of democracy, but rather are spawned by the very constitutional democracy they set themselves *over* and *against*. They merely remove the "state" as a *tertium quid* between the terms "will" and "the people". The people is the *who* of the decision, but the people cannot stand over and above itself, it cannot be sovereign, standing over its own collective will. It is itself. This problem is fudged in the Constitution which refers not to the people but the state, which is an embodiment, much like Hobbes' Leviathan, that projects the collective into a foreign sovereign body that appears to stand over or around the people. The emergence under COVID conditions of a specific

[60] https://www.cppc.ie/about-cppc/ Accessed August 23, 2022.
[61] Screenshot of https://anti-corruptionireland.com/ Accessed August 23, 2022.

sovereign actor in the form of Simon Harris and then Stephen Donnelly as Irish Health Ministers clearly localises the power of the decision not in "the people", but in one who will stand above and decide. These groups see "the people" as sovereign, and are therefore unable to contest the concept of sovereignty in itself as this would be self-defeating.Therefore, their appeals against COVID legislation in the Irish High Court have had to argue that the laws enacted during COVID were unconstitutional.

The recent High Court decision ("JUDGMENT of Mr. Justice Meenan delivered on the 13th day of May, 2020")[62] against one such legal challenge, cited above, based itself on the following circular premise: "It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty." This *petitio principii* (the circularity of the argument) makes clear the constitutional conundrum facing the challenging parties. As the constitution was still fully in operation during the pandemic because the COVID State of Exception is *not* a state of emergency in Ireland, the only benchmark here by which the Minister's actions could be judged had to be whether the legislation enacted in the name of public health observed "proportionality and necessity" (formulation of the Irish Council of Civil Liberties).[63] In other words, constitutional rights are not understood as being absolute, but rather as subject to this standard which in turn is determined by what is required to serve the common good. As a result, the State can impose limitations on individuals' rights in a pandemic. The limitations must merely be necessary, rational and proportionate to the challenges posed by COVID-19, based on evidence, and implemented by means of the least restrictive measures necessary to protect public health. The court dismissed the action by John Waters and Gemma O'Doherty on the basis that they made an overarching claim of unconstitutionality, rather than arguing what is essentially unarguable: the question of the necessity of the measures and their proportionality. If the State of Exception is, by Schmitt's definition, unlimited, *unbegrenzt*, no valid argument of scale (either for or against measures) can possibly be made. Their action duly failed, and, more recently, by a six-to-one majority, their appeal to the Irish Supreme Court left them with

[62] https://ie.vlex.com/vid/doherty-v-the-minister-844937103 Accessed August 23, 2022.
[63] Mason, Hayes and Curran Law Firm, "Constitutional Challenges to Emergency Legislation in the Time of COVID-19" https://www.mhc.ie/latest/insights/constitutional-challenges-to-emergency-legislation-in-the-time-of-covid-19 Accessed August 23, 2022.

no further legal recourse.[64] (Costs, however, arising from their actions will, appropriately enough, be born by "the people.")

The most worrying thing here is not that it fell to two former journalists John Waters and Gemma O'Doherty of ACI--who are currently exploring the furthest horse-shoe point of right-wing logic--to test the constitutionality of the measures. It is, rather, our failure to admit that the measures *in extremīs* cannot be tested because they are, in fact, illimited by the imponderable question of proportionality. It is this important state of affairs that disease has traced for us: to imagine the state in terms of a straightforward Euclidean geometry is a dangerous metaphor, but one which the topology of lockdowns and social distancing reenforces in the public imaginary. Just as one cannot map the limits of 'proportionality' in a crisis, as crisis is by its nature disproportionate, one cannot delimit the exception, however the insistently spatial logic of our thinking about the ins and outs of pandemics and contagion might otherwise suggest. For this reason, the one dissenting Supreme Court judge, declared that this "hugely important case" deserved "the closest judicial scrutiny".[65]

The author states that there is no conflict of interest.

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[64] The Supreme Court judgement (5.7.2022) dismissing the challenge found that no expert evidence could be brought to bear on the question of proportionality. Presumably because proportionality is not delimitable. See Aodhan O'Faolain, "Supreme Court Dismisses Challenge on 'Hugely Important' Case", *The Irish Times*, July 5, 2022. https://www.irishtimes.com/crime-law/2022/07/05/supreme-court-dismisses-gemma-odoherty-and-john-waters-action-over-covid-19-laws/ Accessed August 23, 2022.
[65] Idem.

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