

State of Exception and Impasse Dynamics

Emanuele Bottazzi
Istituto di Scienze e Tecnologie della Cognizione
Consiglio Nazionale delle Ricerche
Trento, Italia

Thousands of troops are currently being deployed in Italian cities. They patrol alongside state and paramilitary police and guard “sensitive sites”. Military forces are able to stop, search and identify suspects. With the explicit intent to help police fight crime, boost security and curb illegal immigration, these new measures have been enacted through an emergency decree issued in May 2008 by the government and then, after two months, converted into the law (July 25, 2008, n.125). Secure Streets – that is the name of the “temporary” operation inscribed in this legal framework – was renewed on May 2009 and is valid until the end of December 2010.

If we add that some of these troops were previously employed in war zones such as Afghanistan, Iraq and Bosnia¹, it is difficult not to say that we are now moving a step forward towards a full state of exception. As a result it is not a mere accident that nowadays, as it was at the beginning of the past century, political theory is still haunted by the specter of emergency².

Recent literature³ has pointed out that “the jargon of exception” –especially the one adopted by Carl Schmitt and Giorgio Agamben– has, as its drawback, the fact of completely erasing the fundamental role of societal forces into the modern political arena. Thus, if it seems to be unavoidable to use the notion of exception, at the same time the main frameworks provided on it appear to be somewhat lacking. To address this very difficult issue a new theoretical analysis is needed.

I will start by considering an apparently unrelated piece of literature —the one on constitutive rules, developed mainly in analytical philosophy. More specifically, my investigation, to give a contribution to the topic of exception, needs to find an answer to the following question: what happens when something goes wrong while following this kind of rules, viz. when either a mismatch between rules and facts or an internal contradiction among rules causes an *impasse*?

If it is fairly clear that this may endanger the life of institutions, on the other hand, in a lot of other situations, impasses could happen without being fatal to them. To understand this, an analysis of the *dynamic evolution* of impasses in institutional settings will be pro-

¹ Interview with the undersecretary of defense Guido Crosetto, in Brega (2008). In this framework it is interesting to notice that the Italian Ministry of Defense is promoting several initiatives with the aim of transferring knowledge on counterinsurgency from the several international war scenarios in which Italy has been involved into its own national borders (La Rosa, 2009; Coticchia, 2009).

² To this respect, Italy is not, so to speak, an exception in the exception. International military interventions, counter terrorism policies and increasing controls over immigration are just few situations in which the notion of emergency is at stake. The literature that deals with the problem is huge, for a survey, see for example Sheuerman (2006).

³ Huysmans (2008); Kisner (2007).

vided. When a state of exception is declared, we face a similar paradoxical situation, where law is suspended against itself. But, here, this situation is not an unwanted outcome of regulated action, it is something that belongs to a strategy of power. By explaining how this strategy combines with the impasse dynamics, I will try to show how it is possible to find room for societal forces to come democratically into play.

1 A problem in exceptionalism

“Sovereign is he who decides the exception”. This is the always-quoted beginning of Carl Schmitt’s *Political Theology*. In a state of exception law is suspended by those who are the primary decision makers in the State, that is by those who declared the exception. This triggers an entire chain of power that allows the creation of new spaces of decision. These relevant actors, having more influence over decision-making than others, are able to take advantage over these others by forcing the system in a peculiar manner at the level of the institution and/or at the level of its application. That is, because of an emergency situation, when a state of exception is declared, what is ordinarily valid by the law is not valid anymore. New, and to some extent, arbitrary power is given to some figures such as police, army and so on. Potentially this allows the space of decision to be unlimited:

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. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He 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, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety⁴.

A State (or, better, some of its decision makers) in order to save itself from something that threatens its own existence suspends some of its own rules. But there is no one above the primary decision makers of a State. Hence Schmitt conducts his investigation to the disarticulation of the idea that it would be possible to build a way to limit this sovereign power, along the lines of “who controls the controllers?”. At the same time Schmitt wants to give a legal framework for this power: the sovereign who decides on exception is partially subsumed under the law. Here Schmitt’s decisionism fully departs from the normative approach that characterizes liberalism. Exception is not simply discretion. Even if it lies on the same axis for some of its elements, exception has a peculiar relationship with its own limits.

Discretion has been interestingly characterized by Ronald Dworkin as the hole in the doughnut, something that “does not exist except as an area left open by a surrounding belt of restriction⁵”. Thus, discretion is not outside the law but internal to the law. What it has in common with exception is that discretion allows decision-making:

⁴ Schmitt (1985): pp. 6-7.

⁵ Dworkin (1977): p. 31. I am touching very briefly this very complex topic. For the sake of simplicity I choose to point to Dworkin’s characterization that, in contemporary theory of law, is still considered one of the most relevant (see Klatt, 2007).

An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion⁶.

But, has we said, what matters in exception is the scope of what it is possible to do. Here, during the exception, it is the one who has actual power who can go beyond the rules. The striking fact is that Schmitt wants to give a legal justification of it and he does it by saying that the one who suspends the law “nevertheless belongs to it”. But how is it possible to suspend (some or, in principle, all) rules that make an institution and at the very same time to be inside the framework of the very same rules? Under this justification of exception —no mystery— lies an extremely authoritarian philosophy. This is enough to say that in this framework social forces are completely powerless⁷, and what Schmitt wrote about De Maistre also applies for his own account:

[...] we can [...] see a reduction of the state to the moment of the decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness⁸.

For Agamben to accept this conception of law and power is to give a chance to indeterminacy and arbitrariness and, moreover, he correctly emphasizes Schmitt's account as aporetic:

The specific contribution of Schmitt's theory is precisely to have made such an articulation between state of exception and juridical order possible. It is a paradoxical articulation, for what must be inscribed within the law is something that is essentially exterior to it, that is, nothing less than the suspension of the juridical order itself (hence the aporetic formulation: “In a juridical sense, an order still exists... even if it is not a juridical order”)⁹.

Even if one could find a bit strange to say how this aporia could be a *contribution*¹⁰, Agamben point is quite clear: one cannot justify as law something that is completely against it. We could say, pushing further Dworkin's metaphor, that here, at the same time, there is and there is not a doughnut or, saying it in another way, that the hole in the doughnut is the doughnut itself.

To highlight this aporetic “juridicization” of exception is for Agamben essential, and it is what marks his conceptual move as completely opposite with respect to Schmitt's one. If for Schmitt this aporia is somehow hidden (exception is something that he politically endorses), for Agamben exception and its aporetic status culminate in an obscene paradigm that characterize the modern way of understanding the articulation between law and power. Within a state of exception the norm is in force, is *in potentia*, but it is not applied, is not *in actus*; conversely, acts that do not have the value of law acquire the force of law. It is because of this contradictory situation posed by the juridicization of exception that for Agamben our times are *ultima facie* governed by fiction:

⁶ *Ibid.*: p. 33.

⁷ For the sake of brevity we will not enter into further details to support this claim, for more see Huysmans (2008).

⁸ Schmitt (1985): pp. 66.

⁹ Agamben (2005): p. 33.

¹⁰ In fact Agamben in the Italian text uses the word *prestazione* that points more correctly to the less positive semantic field of ‘service’ or ‘performance’, see Agamben (2003): p. 45.

The state of exception is an anomic space in which what is at stake is a force of law without law (which should therefore be written: force of ~~law~~). Such a “force of ~~law~~”, in which potentiality and act are radically separated, is certainly something like a mystical element, or rather a *fictio* by means of which law seeks to annex anomie itself¹¹.

To emphasize the fictitious character of governmentality is not to say that the machine of power is not efficient. On the contrary, it has worked almost without interruption from WWII to Terrorism Act, Guantanamo and today’s emergency decrees, passing through fascism and Nazi Camps:

[...] the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that —while ignoring international law externally and producing a permanent state of exception internally— nevertheless still claims to be applying the law¹².

Intuitively, we can follow Agamben on this¹³: even if we just take into consideration the specific case of the emergency decrees in Italy, we can see this fictional, contradictory character of today’s power. In Italy there is a systematic and increasing recourse to the issuing of emergency decrees in such an extent that now many jurists call this situation, not without complaining, an “ordinary” way of law-making¹⁴. Given such a situation, the span of time between august-september 1999 becomes something really exceptional. And this is because in those two months no decree was in existence. Something similar happened in the fifties; before the fifties there was fascism, where the “normal” policy was made, again, by emergency decrees. It is difficult to say how this daily and endless emergency could not be a fiction.

Our problem is with Agamben’s somewhat lacking treatment of this notion of fiction. There is no explanation on how this fiction exactly works within the social system. I think that this is due to the fact that the role of social forces is not enough considered. If the mechanism of exception works, it is because this mechanism is accepted or not contrasted enough by the actors that are involved into it. I will later try to show how crucial this is in order to find, at least, a theoretical move to put again the social forces into play; for the moment let’s stay on the problem of depoliticization. As Jef Huysmans puts it:

Even if one would argue that Agamben’s framing of the current political conditions are valuable for understanding important changes that have taken place in the twentieth century and that are continuing in the twenty first, they also are to a considerable extent depoliticizing¹⁵.

I believe that the main problem Agamben faces lies in his messianic answer to the question of halting the machine of emergency. That is, his messianic idea, borrowed from Benjamin, of revolution conceived as a moment of real state of emergency. If the ‘emergency situation’ in which we live is the rule, then the point is “to bring about a real state

¹¹ Agamben (2005): p. 38.

¹² *Ibid.*: p. 87.

¹³ Agamben has developed his notion of exception also in Agamben (1998; 2000). We are well aware that a deep study on the merits and appropriateness of analysis of exception in Agamben is needed, but this is certainly out of the limits of this essay. For an overview of the criticisms against Agamben’s position on exception see Neal (2007).

¹⁴ Marazzita (2003); Simoncini (2006).

¹⁵ Huysmans, J. (2008): p. 33.

of emergency, and this will improve our position in the struggle against fascism”¹⁶. Being this a messianic claim, one can imagine how difficult it is to explain how this state of liberation will be reached. Messianism as such prevents the very possibility of thinking about a way to change things. If we do not share Benjamin’s and Agamben’s messianism, but we share the same need to halt the machine, is there any possibility of a rational reconstruction of exceptionalism such as to provide a ‘logical space’ for describing bottom-up social processes able to bring the real state of exception?

2 An analytical view on rules

In order to provide a reliable solution to this problem, I will recur to a completely different field: ‘analytical’ social ontology. One of the pioneers and the prominent figures in this specific debate is certainly John Searle. The analysis of social reality brought about by Searle has as its basis the idea that speaking is acting according to some social rules, these rule have not just a regulatory character, they define linguistic sentences¹⁷. Take for example the case of promising, promising is not a representation of the intention of doing what someone has promised, it is also, in front of other speakers, to undertake the obligation of doing so by following the rules of promising. This led him to investigate what sociality is¹⁸, but his approach is quite different from those of Schmitt or Agamben.

According to Searle the classical approach in political philosophy usually seeks to investigate “the ideal society, the nature of justice, the sources of sovereignty, the origins of political obligation, and the requirements for effective political leadership¹⁹”. The problem with this conception is not that it gives the wrong answer to its questions, the problem is that this approach lacks a rigorous *foundational* analysis:

Prior to answering such questions as “What is a just society?” and “What is the proper exercise of political power?” it seems to me we should answer the more fundamental questions: “What is a society in the first place?” and “What sort of power is political power anyhow?”²⁰.

In his later work he develops a logical analysis of the social realm that at its end touches many topics in political theory. I will not focus on this latter part, rather I will briefly take into consideration two of the main building blocks of his huge philosophical building, the notion of *rule* and the notion of *collective acceptance* and I will try to see the merits and demerits of these two notions for a new conceptual framework of the exception.

The notion of constitutive rule is quite popular²¹, so I will not go into this very much. Moreover, what is needed here is to understand the basic idea behind constitutive rules, and not to develop a theory of them. This basic idea is that constitutive rules create the very conditions of existence of certain social facts. They are the posed, definitional part in a social system²².

Searle distinguishes between what he calls regulative rules and constitutive rules. The former are rules like “drive on the right side of the road” or “do not feed the monkeys”

¹⁶ Benjamin (2003): VII, p. 392.

¹⁷ His famous theory on speech acts was developed primarily in Searle (1969, 1979).

¹⁸ Searle (1995, 2010).

¹⁹ Searle (2008): p. 19.

²⁰ *Ibid.*: p. 20.

²¹ On this see, for example, the recent work by Hindriks (2009).

²² See Searle (1969, 1995). This is neither the only account on constitutive rules nor the first, but it is one of the most discussed in literature. For an historical account on such topic see Conte (1988).

and they regulate an already existing behavior: driving or feeding the monkeys can exist regardless of the rules that apply to them. Constitutive rules instead create new behaviors, to say it a bit more correctly, they specify a *new meaning* associated to a certain behavior and their fundamental structure is the famous count as formula:

X count as Y in context C

For example, the bills (X) printed at the mint count as money (Y) in a certain State (C). Or, what (X) counts as a particular piece in a game of chess (Y), e.g., a king, or a rook, is determined by the rules of chess (C). What a certain piece is, it is determined by the constitutive rules of chess, which prescribe *how* that piece can be used in playing chess. A single constitutive rule can define what a certain piece is just within the broader system of the other constitutive rules, that then play the role of the context (C) in the formula. Without the system of constitutive rules of money those bills in our wallet are just paper and it would be impossible to understand a checkmate without the constitutive rules of chess. In this sense these rules are *definitional* and *creative*: because of them new, institutional facts come into existence, that is a status (Y) is imposed to a certain entity. This imposition is a speech act, a declarative. To be Prime Minister, a citizen or an illegal immigrant in a certain country such as Italy, USA or France is a matter also of status functions and declarations. Without an explicit codification no one of this status can validly be applied.

But how is this status imposed on those entities? Social and institutional facts come into existence through collective intentionality. Pieces of paper function as money because we intend them to do so. Whenever two or more agents share a belief, desire, intention or other intentional state, and when they are aware of such sharing, the agents in question have collective intentionality. Collective acceptance is that part of collective intentionality that allows the social object to have a function within a certain social system. Therefore social facts exist through collective acceptance of a speech act that imposes the status Y over the element X in the count as formula.

In this framework power is essentially a question of collective acceptance of imposition of status functions. Whenever –in the proper context– we impose a status as ‘President of United States of America’ on someone, this person has now new rights, duties, obligation, and, conversely, this holds for people who interact with this very person in his or her role. These are deontic powers that exist because we accept this status assignment.

This approach that I have very brutally sketched out, has, among the others, the advantage of being quite compact and intuitive, but it has also its deficiencies²³. For example Searle is not that much interested in coping with ‘negative’ cases in his philosophy of society. But these cases are quite frequent in the social realm and they acquire much more significance in the context of our study, that is when we deal with exception. Wolfgang Balzer, for instance, claims that “the account provides a too harmonious and thoroughly positive view of, and approach to, social institutions²⁴”, as he does not take into account that the subjects involved in the mechanism of collective acceptance are not peers, but social subjects that experience inequality conditions.

In reality, the creation of some central social facts, the assignment of certain powers is made by a small set of people almost regardless of the will of others. This consideration

²³ As we already noticed in Bottazzi and Ferrario (2010).

²⁴ Balzer (2002): p. 198.

should at least lead to a more neutral notion of collective acceptance. We could then consider acceptance as a term that can sum up in itself a positive vision, as the searlian one, alongside with a negative one, such as that of Jean-Paul Sartre²⁵, where acceptance could be also endurance, that is a kind of internalization of the impossibility of resisting to a certain authority²⁶. Said that, for collective acceptance the question of rules is still open. What happens if something goes wrong with the rules that we established? This leads me to discuss my account of the notion of impasse²⁷.

3 Impasse Dynamics

Intuitively, an impasse is an undesired situation that goes against the rules, which actors who follow the rules may end up in. In a true impasse situation we cannot go on following the rules. Because of an internal or an external problem in the rules we cannot say which further step is the one we should do without going against them. An analysis of this notion can be seen as an effort to analyze what Ludwig Wittgenstein called the *civic status of contradiction*:

[...] we lay down rules, a technique, for playing a game, and that then, when we follow the rules, things don't turn out as we had assumed. So that we are, as it were, entangled in our own rules.

This entanglement in our rules is what we want to understand: that is, to survey.

It throws light on our concept of meaning something. For in those cases, things turn out otherwise than we had meant, foreseen. That is just what we say when, for example, a contradiction appears: "That's not the way I meant it."

The civic status of a contradiction, or its status in civic life – that is the philosophical problem²⁸.

Here we do not want to enter into the meaning of the notion of contradiction –in this case many approaches would be viable in an enormous range that goes from paraconsistent logic to marxism– but to see its effect within a social domain. What strikes the most is the fact that this phenomenon, although being so central in Wittgenstein's words, seems almost ignored, at least in literature of analytical heritage that deals with social ontology.

The strategy adopted is firstly to isolate two main kinds of impasses depending on the fact that they are caused by a mismatch between rules and facts or by an internal contradiction among rules. Then, given the definitional character of constitutive rules, one could say that they set a new 'logical space' for action, and that impasses push the action out of such space, thus threatening the identity of the regulated interaction and coordination. I will show then –by illustrating what I called the dynamics or propagation of impasses– how we can accommodate this intuition with the opposite one that in a lot of situations similar issues can arise in systems of constitutive rules that are not fatal to them.

We can isolate then the two main kinds of impasses:

²⁵ Sartre (1982).

²⁶ A similar criticism has been developed by Jennifer Hudin (2007). Recently, Searle himself recognized the existence of this problem, and remarked that his position (2010), is actually more neutral than the one appeared in Searle (1995), but according to Hudin (2010) the question is far from being resolved.

²⁷ Introduced in Bottazzi and Ferrario (2009); Bottazzi (2010).

²⁸ Wittgenstein (1953): sect. 125.

1. *Nomic impasse*. (gr. *nomos*, “law”). It occurs even in cases where rules of a certain institution are perfectly followed. It is thus due to a lack in the design of the rules; there is an ‘internal’ incoherence such that, even in a perfect execution of institutional activities in accordance with the rules, the result would nevertheless be an impasse situation; it is definitionally necessary. This means that the necessity of the impasse depends on what the rules prescribe, on the fact that they are entangled.
2. *Anti-nomic impasse*. (gr. *anti*, “against” and *nomos*, “law”). It can be due to a bad execution of the regulated activities or to an execution that goes against the rules of the institution (nothing to do with Kantian antinomy). The lack at its basis is a lack of capability of foreseeing all the possible ways the agents have at their disposal to go against the rules. In this sense we could say that it is the result of a sort of “external” incoherence.

I will characterize better these two kinds by enriching them with examples: I will describe the case of cheating and the case of rule entanglement in voting, linked respectively with the notions of anti-nomic and nomic impasse and we will see, at the same time, their dynamical character.

Cheating. An interesting account of cheating has been given by Stuart Green²⁹, where cheating is defined as a violation of a certain rule with the intent to obtain an advantage over a party with whom we are in a cooperative, rule-bound relationship. Green considers a huge spectrum of phenomena labeled as cheating. I will not enter into details about this³⁰, for the purpose of this paper, I would like to restrict the case of cheating where constitutive rules are involved and to emphasize that:

- cheating involves rule breaking;
- cheating is often (if not always, when it involves constitutive rules) a practice that needs a kind of covertness.

Let’s take into consideration the first part of the problem. Cheating involves rule breaking. When we cheat we break something we previously agreed upon, e.g. a rule, in this case a constitutive one –we drive, antinomically, the system to a strange situation. On one hand, it seems that breaking a constitutive rule implies going outside the logical space of the considered activity: moving a pawn of three positions is not playing chess badly, it is not playing chess at all: “omitting to do something which one has formally acknowledged as required of one is rather like contradicting oneself³¹”. On the other hand, we have an opposite intuition. Michael Sean Quinn, in his paper *Practice-Defining Rules*, says :

I think that we should allow that (at least) some people who cheats in games are nevertheless playing the game. Otherwise, whenever we say of a person that he plays but cheats every chance he gets, we are contradicting ourselves (unless what we mean is that he is playing whenever he is ostensibly playing and not cheating)³².

We are thus faced with a dilemma: if constitutive rules create the meaning of an institution, how is it possible that many institutions survive even though experiencing violations

²⁹ Green (2004).

³⁰ For more about impasse dynamics and cheating see Bottazzi and Ferrario (2010).

³¹ Cameron (1972): p. 319.

³² Quinn (1975): p. 78.

of their constitutive rules? To have some understanding of this situation we should go a bit deeper into the coartness of cheating.

Let's consider firstly the case of effective cheating. Everything it's fine –surely for me, the cheater, not at all for my opponent and ambiguously for the game– if no one spots me. The destiny of my strategy in the game is somehow linked to an epistemic feature. But not just of my strategy. As we saw in the case of Searle's collective acceptance, a social fact holds if, collectively, it is accepted as valid. If they don't spot me, even if I'm doing something that is outside the logical space of the game, the game is still valid, even from an ontological standpoint, because it is accepted as valid. It is true, at the same time, that from the standpoint of the rules of the game, by definition, the game is in a sort of impasse. No other move is allowed and we do not have a clear way to overcome the dead-lock.

Let's try to fit a cheating situation into a scheme, provided in table 1, where it is shown a dynamical view on impasse. First of all it must be said that that the passage from one phase to another, numbered in the table from 1 to 5, is not strictly necessary, but it explains a relevant mechanism in the dynamics of institutions, thus the symbol “↓”, that has no formal meaning here, should be read as “may lead to”. It indicates the direction of a path that leads from an initial impasse (1) to its institutional effects (5).

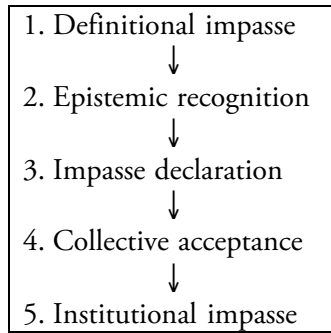


Table 1: Impasse propagation

At the *definitional level* (1), what could happen is that, with respect to how the institution is designed and constituted, this very activity is logically stuck in a deadlock. If it happens, then this holds by definition, independently from the minds of the actors involved. Therefore, in this restricted sense, we can say that here there is an actual impasse. Whenever we establish the rules, if something wrong occurs to them, this harms the meaning of the regulated activity and it does it by definition. This may lead to the *recognition* (2), by one of the actors involved, of what is happening as an impasse. To make this step is something *epistemic*, because it depends on the cognitive capabilities of the actors. Now, the one who recognizes the impasse situation has to choose whether to *declare* (3) or not the definitional impasse. This step is not necessary at all, it could be done, but it could equally well not be done. Depending, maybe, on the strategic interests of the actor, we can imagine that she could have some advantage in declaring (or not) that an impasse occurred. If this declaration occurs now it is up to the other actor(s) to *collectively accept* (4) that this was actually the case. Obviously this level presupposes that each actor involved *recognizes* the impasse or trusts the declarer. Moreover it can involve also additional declaration(s). Again, also at this level strategic considerations may occur. In any case if definitional impasse is collectively accepted this leads to the *institutional impasse*. This is the

effective deadlock in interaction that can lead either to the death of the institutional activity or to a transformation of the system by changing its rules³³.

Now let's consider the simple and often used example of the game of chess. Suppose I move, to take advantage, a tower as if it were a bishop, thus I break the rules: by definition, I am not playing chess anymore, there is no possible further move. But I am smart or lucky enough: no one spots me, neither my opponent, nor the referee. If no one sees me, it seems likely that no one would say anything to protest against my move. This means that they (implicitly) accept it. Actually, they don't accept my move as irregular. I made them believe that this was regular. This is the coyness of cheating: the move appears regular, but it is not. Then the game goes on, there is no impasse at the institutional level. And this level is the level that counts. Therefore, the game is *definitionally* invalid but *institutionally* valid.

If cheating is ineffective these two logical levels coincide, in a sense. Again, I break the rules. I move, to take advantage, a tower as if it were a bishop: by definition, I am not playing chess anymore, there is no possible further move. But now I am neither smart nor lucky enough: they spot me. Because of this, someone protests against the move I made. This convinces the other players and/or the referee not to accept the move. I was a bit rough here, because we should say that we have two steps in one: recognition of the invalid move by the other participants, and their collective acceptance of the fact that the move is invalid. This phase opens the possibility of "protesting" the game, it offers good reasons to declare the impossibility of acting further and opposing a part or the whole institution. At the final step, the game faces the impasse. The definitional impasse has propagated its effects to the institutional layer: depending on its rules, it can be halted, it can lead to a penalty, and so on. The complete deadlock happens when there are no rules to manage this situation: we could call this a strict institutional impasse.

Rule entanglement in voting. An interesting case of nomic impasse is discursive dilemma. This dilemma –firstly proposed and analyzed by Philip Pettit³⁴– is relative to a decision that has to be taken on the basis of the opinions of a number of agents who have to express a majority voting on a certain set of problems, which are logically connected. Pettit has mathematically shown³⁵ that it is always possible that, though each agent gives her own vote coherently, an incoherent majority is nonetheless generated.

Let's suppose to have a group composed by three agents A, B, and C that should express their opinions on each of the following points:

- *First Premise*: "increase expenses for defense";
- *Second Premise*: "increase other expenses";
- *Conclusion*: "increase taxes"

Let's further suppose that it is not possible to increase all expenses (by voting "Yes" to both premises) without also increasing taxes (without also voting "Yes" to the conclusion). Votes that are individually coherent generate a contradiction. It is not possible to vote "Yes" to both premises and "No" to the conclusion; even though voters respect such a

³³ By introducing what we called (in Bottazzi and Ferrario, 2009) rules with an arbitral function, viz. rules that preserve the institution from its own destruction.

³⁴ Pettit (2001).

³⁵ List and Pettit (2002, 2004).

rule, the result of the majority voting is not to increase taxes (“No” to the conclusion) and, at the same time, increase expenses for defense (“Yes” to the first premise) and the other expenses (“Yes” to the second premise). But this, as already noted, ends up in a contradiction.

The problem is that every method for voting which treats equally every point and every voter has been shown to suffer from this contradiction. There is a form of democratic voting that, for its very nature, brings to a situation of impasse. We have to emphasize this: it was discovered that it is impossible to escape from these situations in majority voting. This means that even in this case we have an impasse dynamics. At the definitional level the system is flawed. We can have an actual voting that encounters this incoherence. At the epistemic level this can be recognized or not. If it is not recognized—because people in charge of checking the voting are far away or stupid—this leads to considering institutionally valid a completely crazy result. Which effect does this produce on the institutional situation at stake? We can imagine that this incoherent voting could affect other decisions, a sort of chain effect that makes them definitionally invalid but institutionally valid too. Everything appears to be valid, but is flawed in its fundamentals, nonetheless it is accepted.

4 Conclusion: the Dynamics of Exception.

Let’s now come back to the main issue of this paper: how to save the intuitions we have on Agamben’s account on exceptionalism and to find room, at the same time, for the essential bottom-up social processes that make up a society.

First of all we must come back to Agamben’s treatment of the aporetic character of today’s exceptionalism. Before introducing the dynamic characterization of impasse I supported Agamben in his claim³⁶. But now, after introducing my approach, I urge to make more precise the level of agreement I have with him. I do agree on the fact that the concept of exception is suspicious from a logical point of view. My disagreement shows up in some essential details. If we go into it and try to solve some of the hidden issues, we will see that a different framework for exception emerges.

In his account the state of exception is an *anomic space*. There is no clear explanation of what Agamben exactly means for anomie. Here we fully support Searle’s need for a foundational analysis of the basic elements in political philosophy. Given this, we can just rely on etymology. The word ‘anomie’ comes from Greek, namely the alpha privativum ‘a’ that could be interpreted here as ‘without’ and the word *nomos* that can be interpreted as ‘law’. Therefore we could say that, for Agamben, exception produces *normlessness*. If this is Agamben’s intended meaning of anomie I have to disagree with him on this point. On the contrary, to me *the state of exception puts a social system into a nomic and an antinomic impasse*.

Nomic impasse caused by the state of exception. A legal system that provides the possibility of exception is flawed at its fundamentals. For example, take article 77 of the Italian constitution that provides some limitation to exception³⁷. By giving limitation to emer-

³⁶ Sect. 1, p. 3.

³⁷ “(1) The government may not issue decrees with the force of law unless empowered by a proper delegation of the chambers. (2) As an exception by necessity and urgency, government may issue provisional measures with the force of law and submits them on the same day to the chambers for confirmation; if the chambers are not in session, they have to be summoned for that purpose within five days. (3) Legal decrees lose effect at the date of issue if they are not confirmed within sixty days of their publication. However, chambers may

gency, exception was put inside the very core of the Italian law. It is interesting to notice that those limitations –that in many respects are quite similar to those posed during fascism³⁸ – were put with the intent to “prevent and sanction abuses” as was said by one of the ratifiers at the constitutional convention in 1946. But even if limited, it was already stated that it is impossible to really give some limits if we are still in the paradigm of exception “by necessity and urgency”. Also jurists cannot guarantee that such an article can avoid the suspension of law in its entirety³⁹.

Likewise, to allow for a piece of law to range on the entirety of a normative system creates a *logical impossibility*: that is, a collapse of the *meta-level* (a rule that states the possibility of emergency) and the *object level* (the law). A logically impossible system is much worse than an anomic one. Being without law is anarchy, being under a logically impossible law is being under the heel of complete arbitrariness. And it is worse than simple contradiction, as it is in the voting paradox we cited in the previous section, where in *some* of the possible patterns of voting we have, at the definitional level, a contradiction. The discursive dilemma says that in all systems with majority voting on interconnected issues there will be at least one contradictory outcome. This means that there are also some outcomes free from contradiction. On the contrary, in a system that embeds exception, we have a logical impossibility that automatically produces an impasse at the definitional level.

Antinomic impasse caused by the state of exception. Now let’s consider the second impasse created by exception, the antinomic one. When we talked about cheating we saw it as a way of taking advantage from deception. There is a behavior that goes against the system in such a way that at the definitional level the system is in an impasse; in order to take advantage, the cheater acts at the level of recognition to avoid his or her irregular move to be spotted. In exception some relevant actors, having more influence over decision-making than others, are able to take an advantage over these others by forcing the system in a peculiar manner at the level of the institution and/or at the level of its application.

This antinomic impasse starts at the declarative level. A state of exception is justified by emergency, that is by something that endangers the system. A specific disposition is enacted arbitrarily because exception is declared, and this happens in order to save the commonwealth. In a sense exception would be the remedy to avoid impasse. But here we see a sort of distortion with respect to the schema of impasse propagation proposed in the previous section. Here there is not an actual impasse by definition, there is a *perception of risk* of impasse, something that is at the level of recognition and exception is declared because of it. This leads to the fact that it is necessary for the one who declared it, to act at the level of recognition of the other actors involved –e.g. by using propaganda and so on– to convince them that the commonwealth is on the verge of a catastrophe and that the exception was needed, asking ultimately for acceptance. But the state of exception is, as we saw, intrinsically a state of impasse. This means that, paradoxically, *we have at this point a real, actual impasse that has been expressly caused to avoid a possible one*. The ones in control enact an impasse on the void of pure possibility that destroys the meaning of the institution. Then, here it goes the further fiction, that is the attempt to maintain an apparent coherence of the system in front of this complete failure.

sanction rights and obligations arising out of decrees are not confirmed”. Italian Const. Art. 77 (1-3), translated in A. Tschemtscher (ed.), *International Constitutional Law* (last modified May 23th, 2003) (F.R.G.).

³⁸ As pointed out by many, beside Agamben (2003): for more on this, see Marazzita (2003); Simoncini (2006).

³⁹ Marazzita (2003).

If a system is pervasively in a situation of impasse this obviously means that it is weak. How would this be possible? How this machine is not in a state of institutional impasse? Because of the level of acceptance. Actual political systems are strongly based on consensus. An institutional system that embeds exception needs fiction, we can show now how the fiction works by showing what needs to be hidden, that is that the system is flawed both at declarative and at definitional level.

Acceptance and power. Now there is room –at the level of recognition and acceptance– for societal forces to be in the framework of a philosophy of exception. Ultimately, if, though the system is so deeply flawed but yet not collapsed, this is because at its bottom it is somehow accepted.

In the last fifty years there has been a strong emphasis on studying the level of recognition and ideology, by for example trying to ‘deconstruct’ the strategies of propaganda; the problem that we face now is that it is necessary to work deeper on other levels: that is, the level of collective acceptance and that of declaration. This latter level may be seen as the level of political action, where we do things with words. I don’t want to say anything about it, because it is far beyond the scope of this paper, I just want to emphasize how crucial this level is. At this level the first move that should be done is going further in translating what has been done in the description of the dynamics of exception in terms of who exerts more controls on others in a social system. Whenever the majority of social forces are not able to have the control on the coherence of the social system which they are part of and, moreover, to intervene in it by taking decisions, whenever they just exert their power by mere pressure or passive acceptance, it is impossible to halt the machine of exception. To create a new strategy to make this possible is a hard task that political philosophy should not abdicate to.

Less ambitiously, I would like to conclude with a remark on acceptance. Acceptance is what brings exception into being. Therefore, we came back to one of the main themes of analytical social ontology, that is, collective intentionality. It is by some form of collective acceptance that we give some functions to some individuals. It is also true, as we stated about Searle, that it is not possible to consider social acceptance as such, as something positive. If revolution is not a cocktail party, it is also true that governmentality is not a tennis match between noble and a bit decadent peers, where fair play is the basis for a tranquil acceptance of each action.

That is the reason why I tried to introduce a more general notion of acceptance as something very neutral that can comprehend each degree of disposition in the phenomenon of being subject to a chain of power. We should call this kind of acceptance “acceptance*”, with the “*” symbol that indicates the fact that this notion is the general, neutral one that includes phenomena that span from enthusiastic approval to mere endurance. In this sense we all accept* the impossible system we live in: at the end of the day “one man is king only because other men stand in the relation of subjects to him. They, on the contrary, imagine that they are subjects because he is king”⁴⁰.

Acknowledgments

I would like to thank very much Roberta Ferrario for comments and discussions on the work here presented.

⁴⁰ Marx and Engels (1967):p. 66.

References

- AGAMBEN, G. (1998). *Homo sacer*. Meridian. Stanford University Press, Stanford.
- AGAMBEN, G. (2000). *Means without end: notes on politics*, University of Minnesota Press, Minneapolis.
- AGAMBEN, G. (2003). *Stato di eccezione*. Bollati Boringhieri, Torino.
- AGAMBEN, G. (2005). *State of exception*. University of Chicago Press, Chicago.
- BALZER, W. (2002). Searle on social institutions. *Dialectica*, 56(3), 195–211.
- BENJAMIN, W. (2003). On the concept of history. In M. P. Bullock and M. W. Jennings, editors, *Selected Writings, 1938-1940*, volume 4. Harvard University Press.
- BOTTAZZI, E. (2010). *Criteri filosofici per l'analisi delle organizzazioni sociali*. Ph.D. thesis, Università degli Studi di Torino, Dipartimento di Filosofia, Torino, Italia.
- BOTTAZZI, E. and FERRARIO, R. (2009). Arbitral functions and constitutive rules. In *Inaugural Meeting of the European Network on Social Ontology*, October 16-17, Konstanz (Germany).
- BOTTAZZI, E. and FERRARIO, R. (2010). Facing the inevitable? The dynamics of impasse in collective contexts. In *Proc. of Collective Intentionality 2010* (to appear), Basel, Switzerland.
- BREGA, J. (2008). *Esperimento 'strade sicure', ne parliamo con il Sottosegretario Guido Crosetto*. <http://www.difesa.it/Ministro/Sottosegretari/Crosetto/Interviste.htm>, (September 2008, last checked on September, 12th, 2010).
- CAMERON, J. (1972). The nature of institutional obligation. *The Philosophical Quarterly*, 22(89), 318–332.
- CONTE, A. G. (1988). *Eidos. An Essay on Constitutive Rules*. Poznan Studies in the Philosophy of the Sciences and the Humanities.
- COTICCHIA, F. (2009). *Nuove minacce ed esigenze di protezione per uomini e mezzi: L'approccio italiano alle PSO e l'elaborazione di una futura strategia nazionale di counter insurgency*. Technical report, Centro Militare di Studi Strategici (CeMiSS).
- DWORKIN, R. (1977). *Taking Rights Seriously*. Harvard University Press, Cambridge (MA).
- GREEN, S. (2004). Cheating. *Law and Philosophy*, 23(2), 137–185.
- HINDRINKS, F. (2009). Constitutive rules, language, and ontology. *Erkenntnis*, 71, 253–275.
- HUDIN, J. (2007). Can social statuses be discovered. *The Journal for the Theory of Social Behavior*, (submitted).
- HUDIN, J. (2010). The logical form of totalitarianism. In *Proc. of Collective Intentionality 2010* (to appear), Basel, Switzerland.
- HUYSMANS, J. (2008). The jargon of exception—on Schmitt, Agamben and the absence of political society. *International Political Sociology*, (2), 165–183.
- KISNER, W. (2007). Agamben, Hegel, and the state of exception. *Cosmos and History*, 3(2-3), 222–253.
- KLATT, M. (2007). A Structural Analysis of Judicial Discretion. *Ratio Juris*, 20(4).
- La Rosa, A., editor (2009). *Sicurezza nazionale: sinergie operative*. Centro Militare di Studi Strategici (Ce- MiSS).
- LIST, C. and PETTIT, P. (2002). Aggregating sets of judgements: An impossibility result. *Economics and Philosophy*, 18, 89–110.
- LIST, C. and PETTIT, P. (2004). Aggregating sets of judgements: Two results compared. *Synthese*, 140, 207–235.
- MARAZZITA, G. (2003). *L'emergenza costituzionale*. Giuffrè, Milano.
- MARX, K. and ENGELS, F. (1967). *Capital: a critique of political economy*. New World paperbacks. International Publishers, New York.
- NEAL, A. (2007). Giorgio Agamben and the politics of the exception. In *Sixth Pan-European International Relations Conference of the SGIR*.
- PETTIT, P. (2001). Deliberative democracy and the discursive dilemma. *Philosophical Issues*, 11, 268–299.
- QUINN, M. S. (1975). Practice defining rules. *Ethics*, (86), 76–86.
- SARTRE, J. P. (1982). *Critique of dialectical reason*. Verso, NYC.
- SCHMITT, C. (1985). *Political theology: four chapters on the concept of sovereignty*. MIT Press, Cambridge, Mass.
- SEARLE, J. R. (1969). *Speech Acts: An Essay on the Philosophy of Language*. Cambridge University Press, Cambridge.

- SEARLE, J. R. (1979). *Expression and Meaning. Studies in the Theory of Speech Acts*. Cambridge University Press, Cambridge, Massachusetts.
- SEARLE, J. R. (1995). *The Construction of Social Reality*. The Free Press, New York.
- SEARLE, J. R. (2008). Social ontology and political power. In B. Smith, D. M. Mark, and I. Ehrlich, editors, *The Mystery of Capital and the Construction of Social Reality*, pages 19–34. Open Court, Chicago and La Salle, Illinois.
- SEARLE, J. R. (2010). *Making the Social World: The Structure of Human Civilization*. Oxford University Press, Oxford.
- SHEUERMANN, W. E. (2006). Survey article: Emergency powers and the rule of law after 9/11. *The Journal of Political Philosophy*, 14(1), 61–84.
- SIMONCINI, A. (2006). Tendenze recenti della decretazione d’urgenza in Italia e linee per una nuova riflessione. In A. Simoncini, editor, *L’emergenza infinita. La decretazione d’urgenza in Italia*. EUM, Macerata.
- WITTGENSTEIN, L. (1953). *Philosophical Investigations*. Basil Blackwell, Oxford.