Abstract: In this paper, I explore the modernist assumption inherent in discussions of emergency powers, or, the state of exception. I dwell on some of the modern aspects of the state of exception through an overview of some examples from both pre-modern and modern political theory. More specifically, I examine the history of the political language of the state of exception. I do so in the context of three influencing and interconnected developments: the rise of the state, changes in perceptions of authority, and developments in conceptions of law. In essence, for the Hobbesian modern state, the potential temporary constitutional dictatorship is part of the regular sovereign power. Within this power, I distinguish between the exception outside the law and the exception within the law, which are in a dialectical relationship. The exception outside the law, which was the state of exception on which Carl Schmitt wrote, was unimaginable prior to modern times, since it was tied to the modern positivist understanding of law.

I. Introduction
For the past several decades, scholars have discussed at length the issue of emergency powers. They have done so in many aspects: juristic, philosophical, sociological, cultural, and historical, to name just a few. Emergency powers hold a fascination for many scholars because of the contradiction inherent in them: free people willing to adopt temporary institutions and norms of an authoritarian nature, in order to protect their democratic institutions and their freedom (i.e. the ‘constitutional dictatorship’).

An implicit or explicit assumption of most of these discussions on emergency powers

*I thank Eli Salzberger for comments on drafts.*
is their modern inception. This modernist assumption has been especially manifested in discussing the legal and theoretical construct of ‘the state of exception’. Georgio Agamben, for instance, argues that only nineteenth and twentieth centuries jurists turned the state of exception into a part of the law (Agamben 2005: 24-26). For many scholars, including Agamben, the only relevant pre-modern state of exception is Republican Rome’s dictator model. According to the modernist assumption, the Roman dictator model was forgotten in the Middle-Ages and was only rediscovered by Renaissance writers, such as Machiavelli. Thus discussions of the history of emergency powers and the state of exception focus almost exclusively on early modern and modern times (Wright 2012; Zreik 2008; Lazar 2006; Neocleous 2006; Scheuerman 2006 and 2000; Gross and Aolán 2006; Ackerman 2004; Ferejohn and Pasquino 2004; Vladeck 2004; Gross 2003; Rossiter 1948).

In a positivist legal sense, the modernist assumption with regard to the inception of the state of exception is simply wrong. Medieval Europe, for instance, had various legal constructs dealing with emergencies, which granted emergency powers to political leaders and regulated them (Lurie 2015). Yet in a deeper jurisprudential sense, the state of exception does have distinctly modern features. For instance, it is difficult to imagine constitutionally based emergency powers before the modern constitutions of the eighteenth and nineteenth centuries, or at least before the fundamental laws of the sixteenth century and the instruments of government of the seventeenth century (see, e.g., Oestreich 1982: 169-186). It is equally difficult to imagine Carl Schmitt’s notion that the sovereign is he who decides upon the state of exception, before Jean Bodin’s legislative conception of sovereignty in the 1570s (see, e.g., Keohane 1980). Finally, the state of exception is unimaginable without the modern positivist understanding of law.
In this paper, I explore the modernist assumption. I dwell on some of the modern aspects of the state of exception (or, of legal emergency powers) through an overview of some examples from both pre-modern and modern political theory. More specifically, I examine the history of the political language of the state of exception. I do so in the context of three influencing and interconnected developments: the rise of the modern state, changes in perceptions of sovereignty and authority (i.e. changes in political ideologies in general), and developments in conceptions of law. As I show in this paper, the modern understanding of the state of exception relies on these interconnected developments and to a large degree is based on them.

I emphasize several aspects in the development of modern conceptions of the state of exception. During the late Middle-Ages, as central authorities developed, so did conceptions that distinguished powers in regular times from powers in times of necessity. Until then stepping outside the law was not deemed possible, except in cases in which enforcing the letter of the law would bring injustice. As the state grew stronger in the early modern period, so did conceptions of raison d’État. This idea was considered a necessary decision for the preservation of the state and the law; a decision which was itself outside the law. The rise of the bureaucratic state in the seventeenth and eighteenth centuries was important, because it brought about greater emphasis on security and order, for which the ruler may act outside the law.

In essence, for the Hobbesian modern state, the potential temporary constitutional dictatorship is part of the regular sovereign power. Within this power, I distinguish between the exception outside the law and the exception within the law, which are in a dialectical relationship. The exception outside the law was the state of exception on which Carl Schmitt wrote, i.e. the element of decision in sovereign
power. This conception of the state of exception was unimaginable prior to modern times, since it was tied to the modern positivist understanding of law.

II. Contributing Developments
Before surveying some examples of historical conceptions of emergency powers, some preliminary remarks are in order on three factors, which have influenced these conceptions: the institutional context (namely, the rise of the modern state), the wider political theory context, and general jurisprudential conceptions. These three factors are themselves interconnected.

It is extremely important to understand institutional and political structures and capacities when contextualizing conceptions of emergency powers. Medieval monarchies lacked almost any administration, not to mention a fully-fledged bureaucratic apparatus. Even in late medieval times, France, for example, had a very small permanent number of legal and financial officers. A permanent military began to develop there only in the middle of the fifteenth century (after an aborted start in the mid-fourteenth century) (Guillot, Rigaudière and Sassier 1998: 196-306). That kind of institutional structure and weak administrative capacity cannot compare with the modern state, or even with the early modern state, with its much larger military, legal and fiscal administration (Collins 1995: 14-17).

Conceptions of emergency powers, and especially conceptions of how to regulate or limit emergency powers, grew in the context of a gradual rise and centralization of political power. The first example of this reciprocal process is the gradual growth of military and fiscal powers of the late medieval monarchy, which saw a corresponding process in the growth of legal constructs dealing with
emergencies, such as the laws governing ‘necessity’ and ‘defense of the realm’ (Post 1964: 8-22; Strayer 1971: 292-298; Rigaudière 2003: 537-545).

The new and growing bureaucracies of the early modern age prompted a change. The centralization of power which they entailed, especially in emergencies, called for new legal ways to regulate them, through instruments of government and constitutions in the seventeenth and eighteenth centuries (Oestreich 1982: 186), and in the nineteenth century also through constitutional instruments governing emergency powers (e.g. the French constitutional état de siège).

The second connected influencing factor is the rise of the state in political theory and in political language. The issue of the medieval/modern divide has plagued historians for decades (Nederman 2005). On the one hand we find historians who see continuity between ideas of government and law in medieval times and in modern times, one historian even arguing for a continuous Hegelian dialectic in political theory between ideas of ‘ascending authority’ from the people and ideas of ‘descending authority’ from one ‘supreme organ’ (Ullmann 1961, 1970). Even if one does not accept this version of the continuity thesis, it is apparent that important constitutional ideas of power in modern times, such as popular sovereignty, consent, and constitutionalism, have origins in twelfth century political and ecclesiastical thought on the legitimacy of authority and the origins of jurisdiction (Tierney 1982). As shown, most notably, by Quentin Skinner, the most important elements of the modern state came to existence only between the thirteenth and sixteenth centuries (Skinner 1978).

On the other hand, we find historians who emphasize a clear break between medieval and modern times. Most influentially, John Pocock who argues that
something unique happened in the Florentine Renaissance of the fifteenth and early sixteenth centuries. The ‘Machiavellian moment’, which occurred around the turn of the century, was a paradigmatic change in forms of thought. The medieval set of mind had a limited language to deal with the particular, the temporal; it therefore tended to think that man should strive for universals, since the particular was uncontrollable by man, calling it either fortune or providence. Pocock argues that Machiavelli and his peers began to look at the particular as controllable through political institutions. Pocock traces this new paradigm of thought from the fifteenth century onwards (Pocock 2003A). This change from the medieval to the modern form of thought had a corresponding change in the conception of political authority, from the universal unchanging empire and church, to the specific unstable republic (Pocock 2003B).

We do not need to ascribe to a particular side in this historiographic debate, since both sides accept that a transformation occurred. The debate is mostly on the issue of how gradual it was, when it occurred, and so forth. For our purposes, it is enough to accept that at some point in the late medieval period (or gradually over that period), a paradigmatic transformation occurred in the views of political authority. The perceptions of medieval times, which tended to focus on universal all-encompassing political hierarchies (the Roman Empire, the Church and the Christian commonwealth), were replaced by modern perceptions focused on particular republics or states.

The modern state with its autonomous (or absolute) conception of sovereignty had made enormous strides by the end of the sixteenth century, though it is important to remember that the process was not completed even in the eighteenth century. Theories of natural law, for instance, flourished also in modern times. Furthermore,
the Atlantic European empires of the sixteenth, seventeenth and eighteenth centuries were at first, at least, still largely based on various different, at times universal, ideologies of empire (Seed 2005; Pagden 2005). In the seventeenth century, as the former international legal regime unraveled, and as Spain, for instance, relinquished its claims to imperial exclusiveness, conflicting claims to universality of empire were replaced by the idea of European states controlling wide expanses of the Atlantic (MacMillan 2006; Mancke 2002: 175-195; Seed 2005).

The relevance of the paradigmatic change in conceptions of authority and sovereignty to the issue of emergency powers becomes apparent when we focus on its influence on the third factor: conceptions of the law. Medieval ideas of law were distinctly different from the modern positivist paradigm. States only gradually monopolized the authority to make law. Two issues are important in this context. First, medieval polities and the early modern states practiced legal pluralism. Legal systems co-existed and overlapped within each polity: secular and temporal; natural; written; customary; and so forth.1 Second, the common idea of law, notwithstanding local laws, was also to a large degree the perception of an immobile, universal, and hierarchical – even an objective – structure, including divine law, natural law, Roman law and canon law. In a very real sense, Western Europe had a single common law system based especially on Roman and canon laws that were taught in the universities (Bellomo 1995). In this system, the conception of the king was largely as a judge. Law was already there; the king needed to discover and enforce it.

The modern paradigm of the state as the sole author of law gradually replaced this medieval paradigm. Law gradually became particular to a specific state instead of

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1 For a legal tract describing the law in this manner from the 1390s, see Jean Boutilier, Somme rurale (Lyon: 1494), I., ff. 1-3. Similarly, from around 1416, see Jean de Mâcon, Summa juris civilis, BnF. MS. Arsenal 695, ff. 2-8.
universal. At first, European empires (Spanish, English, French, etc.) practiced legal pluralism within their empires. The English legal regime, for instance, included competing court systems and jurisdictions, and several sources of law, such as ecclesiastical law, Roman law, common law and equity. The Spanish empire was based on separate conceptions of ecclesiastic and secular laws, and also several separate religious systems (Muslim, Jewish and Christian) (Benton and Ross 2013; MacMillan 2006: 25-31; Offutt 2005: 160-181; Elliot 2006: 127 and 142; Benton 2002: ch. 2). European states gradually imposed unified coherent legal regimes, especially from the late eighteenth century. The European tendency of trying to rationalize state structures and create a more strictly defined nation state replaced plural legal regimes with state law. The nation state became a stronger source of legitimacy, bringing with it a state bureaucracy, and a more unitary legal regime (Mancke 2002). The modern paradigm culminated in the national codifications of the late eighteenth and nineteenth centuries, in which each state attempted to create a system of law that would be both exhaustive and exclusive (Bellomo 1995; Benton 2002: 6-10).

The implications of these modern features of legal thought are extremely important for an understanding of the modern features of the state of exception. Where there is a ‘civil state’ in the Hobbesian meaning of the term, in which the state is a Leviathan or a ‘commonwealth’ in which the sovereign has the sole power of making law binding all, there can also be a ‘state of exception’, which is the decision of the sovereign in the state to suspend ‘civil law’ (Hobbes: ch. 26). Christoph Schmidt focuses on the process of secularization, when he similarly argues that Carl Schimtt promoted a distinctly modern state of exception in the sense that it was based on a secular (rather than religious) idea of sovereignty, which could only be imagined
in this post-Hobbesian legal order (Schmidt 2009: 31-32). In other words, the medieval sovereign did not have a monopoly on making law, because legal plural systems co-existed and because law was universally conceived to include, for instance, Roman, divine and natural laws. He therefore could not decide upon the state of exception. Such a decision would have been inconceivable (lacking a positivist conception of sovereign legislative powers), not to mention unenforceable, in light of his weak institutional capacities.

III. Pre-State
What does it mean that the law was universal and part of a hierarchy in pre-modern times? How did this generalization take specific form in the context of emergency powers? Of course, ancient and medieval political thought was varied and multifaceted. Generalizing, as I do, involves a distinct process of disregarding some ancient views of the law. In Plato’s Crito, for instance, the emphasis of Socrates on obedience to the particular laws of Athens reveals a particular and non-universal conception of law.

Yet, ancient conceptions of law that remained influential throughout the Middle-Ages somewhat justify our generalization. Cicero’s treatment of the institution of the Roman dictator, for instance, emphasizes its role as subject to higher laws of the common good, justice and the republic. In a passage from his On the Republic, well known in the Middle-Ages as Scipio’s Dream (most of The Republic was rediscovered only much later), Cicero argues that the duty of the dictator is to ‘restore order in the commonwealth’. His emphasis is on the commonwealth (rem publicam or civitas), and on the supreme duty of defending such an association of
men ‘in justice’ (Cicero, *On the Republic*: 265). Similarly in Cicero’s *On the Laws*, he writes against ‘the most foolish notion of all’ that all laws enacted are just. Specifically discussing emergency powers usurped by a dictator, such as ‘to put to death with impunity any citizen he wished, even without a trial’, Cicero argues that ‘justice is one; it binds all human society, and is based on one Law, which is right reason applied to command and prohibition’ (Cicero, *On the Laws*: 343).

Cicero promoted not only a material idea of the rule of law, but also a universal, objective and supreme law. Cicero appreciated the usefulness of emergency powers, even elsewhere articulating the rule of the Roman dictator, in which ‘when a serious war or civil dissensions arise, one man shall hold, for not longer than six months, the power which ordinarily belongs to the two consuls, if the Senate shall so decree’ (Cicero, *On the Laws*: 467). Yet Cicero clearly describes a very different institution than the modern state of exception. The dictator is not only constitutionally bound (by the authorization of the Senate), but is also bound by the supreme and universal laws of justice. Cicero appreciates the contradiction inherent in granting dictatorial emergency powers infringing on liberties of citizens in order to preserve the republic and the liberty of its citizens. His solution to this contradiction is through the supreme law of justice.

Cicero’s idea of universal supreme justice is of course neither unique nor original (see, e.g., Plato’s discussion of the idea of justice in his *Republic*: 123). Aristotle’s views on the matter would become especially important in medieval times. For Aristotle, laws may be just or unjust just as regimes may be good or bad. The end of the good regime and its laws, according to Aristotle, is the common good and justice (Aristotle, *The Politics*: 103). It is in light of this Aristotelian understanding of
law and its subordination to the common good, that we can understand Thomas Aquinas’ well-known discussion of acting outside the letter of the law in emergencies.

Aquinas’ discussion (written in the 1260s and 70s) is of course important due to the influence that his work had on contemporaries in the Middle-Ages. In two separate articles, Aquinas discusses the questions of whether a person under the law may act outside the letter of that law and when a ruler may ignore the law. Both discussions envision emergency situations of peril, referencing the Roman law principle that ‘necessity knows no law’. In both cases, Aquinas’ rational is Aristotelian: the end of the law is the common good. If in some particular event following the letter of the law would hurt the common good, a ruler (and in urgent extreme cases of peril even not a ruler) may act outside the letter of the law (Aquinas, *Summa Theologica*, I-II, Q 96, A. 6 and Q 97 A. 4).

As Agamben notes, Aquinas’ notion of necessity was far from a modern state of exception, but rather a particular dispensation from acting according to the law (Agamben 2005: 24-26). Aquinas described more a principle of equity than a state of exception. Especially in the conception of law that Aquinas promoted, all laws are part of one hierarchy, and the end of all laws (again, explicitly following Aristotle) is the common good: eternal divine law, natural law, and human law (Aquinas, *Summa Theologica*, I-II, Q 90, A2, and Q 91).

For modern jurists the state of exception may typically be justified, if by stepping outside the legal order one would save the regime. Yet for Aquinas, stepping outside the legal order was simply impossible. The legal order was universal, hierarchal, and divine. Except for stepping outside the letter of a specific human law in order to prevent injustice, the ruler could not be justified in putting aside the whole
legal order. For Aquinas (as for Aristotle), that step would mean the regime’s destruction.

IV. The State Enters the Stage
Aquinas’ conception of law and emergency powers resonated in many writings in the West. Even relatively innovative writers, such as Marsilius of Padua, who promoted a more positivist and consent-based understanding of law in his Defender of Peace (1324), saw, following Aquinas, the monarch as limited by the letter of the law except for instances such as equity. Marsilius, the former rector of the University of Paris, even specifically wrote against the French king’s usage of what he saw as illegal emergency powers in 1314 in order to raise taxes (Marsilius of Padua [1324] 1956: 43). Other influential writers also followed Aquinas’ version of the singular event dispensation. The important conciliar theologian Pierre d’Ailly, in a letter to the council of Pisa (1409), followed the justification of a necessity based singular event exception for the common good, when the community (rather than the Pope) may call a general council of the Church (Pierre d’Ailly [1409] 1706).\(^2\) And of course most writers shared Aquinas’ universal and hierarchical conception of law and justice (see, e.g., Jean Gerson [1408] 1968).

At the same time, during the late Middle-Ages, some conceptions of emergency powers began to depart from Aquinas’ all important scholastic doctrine. In fact, legal practice was already diverting from Aquinas’ doctrine while he articulated it. Monarchies in the West developed legal concepts that would allow them to disregard property rights during emergencies. As already mentioned, these legal

concepts came hand in hand with a centralization of power. Monarchies, including England and France, increasingly used in the late thirteenth century, feudal and Roman law formulas of necessity (‘necessity knows no law’), such as a ‘case of necessity’, ‘necessity of the realm’, and ‘defense of the realm’ to raise funds when revenues did not suffice to fight their wars (Kantorowicz 1957: 284; Post 1964: 8-22; Strayer 1971: 292-298; Rigaudière 2003: 537-545; Lurie 2015).

Theoretical legal tracts and redactions of customary laws began to include these emergency powers, based on the principle of necessity, and turned them into a field of the law (Cf. Krynen 1993: 270). The jurist Philippe de Beaumanoir, for instance, wrote circa 1283 a redaction of the customs of his district, *Coutumes de Beauvaisis*, which was also a theoretical treatise on law. In this treatise he widens the singular event of necessity and turns it into ‘times of necessity’, governed by ‘laws’, explaining that ‘some times are exceptional’, in which one cannot follow regular usage and customs. Such are ‘times of war or fear of war’, in which rulers may act in ways that otherwise would have been wrongful. The importance of his discussion is not only in turning the singular event into a period of time governed by a field of the law, but also in its details. He discusses various emergencies (such as famine) and what measures authorities may take, which they otherwise cannot take. He mentions that even a low-level ruler (such as a baron) may create in such times new customs or laws (Philippe de Beaumanoir [1283] 1900: § 1510-1514). In short, Beaumanoir describes what he sees as the legal norms governing the projection of public power in times of emergency, a significant stretch of Aquinas’ singular dispensation.

The theoretical conception of emergency was thus in a process of change. William of Ockham is another example. In the context of discussing the people’s
ability to renounce a jurisdiction, he distinguishes between regular times and times of necessity. In an emergency (necessity), the people may not renounce the ruler’s jurisdiction. Similarly, he differentiates between regular times, in which no one is to be deprived of his rights without fault, and occasions in which the ruler may do so (Ockham [1340s] 1992: 91 and 112).

In other words, during the late Middle-Ages, the development of central authorities also saw the development of new conceptions that distinguished between powers in regular times and powers in times of necessity. The changing idea of emergency powers was also connected to the changing ideas of law and human authority, as already mentioned.

Niccolo Machiavelli’s conception of emergency powers is the epitome of this change. In his idyllic, unhistorical and ideological portrayal of the Roman dictator, he claims that the office of dictator was created in order to prevent someone from usurping such powers illegally by force, and that this office was always beneficial to Rome. The dictator only acted for a specific purpose, and could not change the constitution. Most significantly, Machiavelli argues that a republic should always have laws to deal with emergencies, in order to maintain its republican regime (Machiavelli [c. 1517] 1950: 204). It should be mentioned, that Machiavelli’s focus is on the particular republic, but in many ways his conceptions of justice (at least in the Discourses) are still very universal. He almost takes it for granted, that the best regime allows for stability in a form of government that takes care of the common good and the liberty of the citizens. He takes it for granted, that a city is formed and the laws of the city are legislated for justice (Machiavelli [c. 1517] 1950: 112). Still,
his focus is on the laws and the regime of the specific republic, and he also thinks that such a regime should intrinsically allow for special emergency powers.

Machiavelli’s views on emergency powers turned out to have lasting influence. Montesquieu in the eighteenth century, for instance, explicitly refers to Machiavelli in a similar passage on emergency powers, stating that ‘when a citizen takes excess powers in a republic […] the abuse is greater, because the laws that had not thought of such an appearance have done nothing to prevent it’. To prevent such a corruption of the regime, Montesquieu also mentions constitutional emergency powers, or as he calls them ‘an exorbitant power’ (*un pouvoir exorbitant*), as Rome had through its dictators (Montesquieu 1748: book 2, chapter 3).

While for Machiavelli the end of emergency powers was ultimately the common good and the liberty of the citizens, the course of the sixteenth century saw a shift. As the early modern state grew stronger, and eventually as the term ‘state’ itself began to be used (in the modern sense), so did conceptions of *raison d’État*. The idea of *raison d’État* was considered necessary for the preservation of the state and the law; a decision that was itself outside the law. Maurizio Viroli aptly describes this important conceptual shift as a transformation of the language of politics. Various writers, such as Giovanni Botero (1589), turned ‘reason of state’ into the ruling concept that defines politics. The language of politics, according to Viroli, changed from a noble science devoted to promoting human virtue, to an ignoble cynical art focused simply on staying in power (Viroli 1992: 331).

The rise of the bureaucratic state, with its increasingly greater public functions, was important in this context. This model of the state put a greater emphasis on public order as having an intrinsic value, especially against the
background of the religious wars of the sixteenth century and the wars of the seventeenth century. For writers such as Justus Lipsius, for instance, writing at the end of the sixteenth century, the end of the state was not only the public good, but also security and order; for him the state was truly based on order and power (Oestreich 1982: 70-71). Thus it was perceived by more and more writers in the early seventeenth century that in times of necessity, the ruler may act outside the law in order to maintain public order.

Legislative sovereignty was a key feature of this new state, in which the sovereign could step outside the letter of the law in times of emergency. Yet one should stress that for the most part, the sovereign was still deemed limited by supreme types of law. For Bodin, for instance, while the sovereign was above the law (as the author of the law), he was still limited by such things as fundamental laws, natural law and consent to taxation (Keohane 1980). In the French context (in a relatively traditional tract) he added the courts of law, equity and truth, as limitations of the monarch (Bodin 1566: 301-303).

Thomas Hobbes is pivotal in giving the complete theoretical construct of the new state model of the seventeenth century. Hobbes too saw security as the ultimate end of the state. Without this power to keep all in awe, he argued, people live in a state of nature (as he termed it). Through a covenant of everyone with everyone people institute a commonwealth. The sovereign power in this commonwealth (or state) is the sole legislator. According to Hobbes, even the law of nature (including justice) is part of civil law, and the legislator controls it. The law of nature is part of the civil law because only when the commonwealth is established, the law of nature becomes a law that people obey (Hobbes: ch. 26).
Hobbes’ type of sovereign supremacy is underscored by his treatment of emergency powers. In essence, all sovereign power, according to Hobbes, is focused, truly, on the anticipation of emergency. As he argues: ‘[sovereign governors] draw from them [their subjects] what they can in time of peace, that they may have means on any emergent occasion, or sudden need, to resist or take advantage on their enemies’ (Hobbes: ch. 18).

Hobbes version of legislative sovereignty is such, that emergency powers and regular powers are one and the same, since the sovereign can disregard the regular civil laws in time of need: ‘The sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him and making of new’ (Hobbes: ch. 26). For Hobbes, the only relevant issue in times of emergency is for sovereign assemblies who need ‘in all great dangers and troubles’ to appoint ‘custodes libertatis’ or ‘dictators or protectors of their authority, which are as much as temporary monarchs’ (Hobbes: ch. 19). In other words, the temporary constitutional dictatorship was for Hobbes the regular sovereign power.

V. The Growing State
The Hobbesian conception of sovereignty resounds to this day in practice and in theory. Political theory was greatly influenced by his ideas. Spinoza, for instance, writing two decades later in 1675-7, also saw the goal of the state as security. He described sovereignty in terms of sole legislative powers, thought that justice was contingent on the existence of civil laws, and that the state must do all it can to
survive (Spinoza [c. 1677] 1982: ch. 2-4). The Hobbesian sovereign who may decide whenever he wishes to disregard the law or to create a dictatorship remains to a large degree the prototype of the sovereign in Schmitt’s version of the state of exception. Yet as Nomi Claire Lazar rightly points out, Machiavelli’s version of emergency powers also had lasting effects. Lazar calls these two traditions the ‘republican’ exceptionalism (of Machiavelli) and ‘decisionist’ exceptionalism (of Hobbes) (Lazar 2006).

In practical terms, one could relate the two traditions that Lazar traces to two different kinds of emergency powers. The first is the exception outside the law, i.e. emergency powers that the law did not provide for. The second type is the exception within the law, i.e. emergency powers that the law did provide for. Hobbes and Carl Schmitt point to the first type. Machiavelli and Montesquieu point to the second type. These two types of exceptions are in a dialectical relationship. The exception outside the law, which to a large extent creates the legal system (revolutions and emergencies often may result in new constitutions and legal systems), is also its biggest threat (Cf. Agamben 2005). The exception within the law exists in order to prevent the use of the exception outside the law.

John Locke tried to argue against the extent of Hobbesian sovereign powers. Locke’s sovereign was limited by the natural rights of life, liberty and property. Locke’s sovereign, like Hobbes’, had sole supreme legislative powers, but he had to execute these powers for the public good of the people, and they were limited and bounded. He could not rule by ‘extemporary arbitrary decrees’, and therefore emergency powers or the exception outside the law was not possible (Locke [1690] 1924: 185-7). Locke’s well-known idea of prerogative power is a different thing
altogether. Prerogative power is, according to Locke, the power ‘to act according to discretion for the public good, without the prescription of the law and sometimes even against it’ (Locke [1690] 1924: 199). The prerogative power is not the power of the sovereign, but of the executive, which is a fiduciary of the sovereign power. Locke’s ‘prerogative power’ is almost the same as Aquinas’ necessity doctrine, i.e. the discretion to act outside the letter of the law (or without the letter of the law in cases not foreseen by the law), for the common good. Indeed, Locke, unlike Aquinas, promoted the sole legislative sovereign state. Yet, Locke’s version of prerogative power was a very limited and traditional exception within the law (or the supreme law of the public good).

Locke’s purpose was generally to maintain the freedom of the citizens of the commonwealth even within the stronger modern state. Rousseau saw things similarly when he defined the problem in the *Contrat social* as to ‘find a form of association which will defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before’ (Rousseau [1762] 1994: I-6, 54-55).

However, while emergency powers serve for Rousseau the same higher purpose of republican freedom (cf. Lazar 2006), his discussion of the exception is strikingly different than Locke’s treatment of the subject. Though Rousseau also begins, like Locke and Aquinas, from the inflexibility of law, he goes beyond them. Through an analysis of the office of the Roman dictator, Rousseau differentiates between the exception within the law and the exception outside the law. In the first type of exception, the emergency is such that only increased and more concentrated government activity is necessary, while ‘the authority of the laws is not affected’. In
the second type of exception, a supreme chief is appointed who silences all laws and suspends sovereign authority (Rousseau [1762] 1994: IV-6, 153).

Rousseau thus was part of both traditions of the exceptions within the law and outside it. He retained the Hobbesian model of a sovereign power that always includes the potential constitutional dictatorship. From a modern positivist understanding of law, everything which is part of the constitutional order—including emergency powers—is constitutional in the “material sense”, as Hans Kelsen called it (Kelsen 1945: 123-131). While the Hobbesian model of sovereign power, which includes the potential constitutional dictatorship, echoes to the present, the basic problem of the exception in the twentieth century in fact resonates Locke’s legacy. The question debated focuses on the issue of the contradiction that is created by giving tyrannical emergency powers to the executive branch in a democratic-liberal regime, whose purpose is the protection of rights infringed by these powers. Hobbes would not have acknowledged the problem. In contrast, Carl Schmitt, the early twentieth century (Fascist) scholar, saw this problem and highlighted it at the core of his political theory. Curiously, his solution was also to place the sovereign outside the law, which in essence is not such a different solution from that of Hobbes’. It only demonstrates more awareness on his part of the intrinsic contradiction in this solution.

Schmitt in his books on Dictatorship and on Political Theology based all his theory of sovereignty on emergencies or the exception, stating that the sovereign is whoever decides that a state of exception exists. The sovereign decides to stop the normal legal processes and norms. Decision is an important aspect of Schmitt’s ideas, comprising one of two elements of the legal order: decisions and norms. The sovereign stands outside the legal order, and constitutes the connecting link between
the decision element and the normative element (Agamben 2005: 33-36). By placing the sovereign outside the legal order, Schmitt sought to solve the contradiction inherent in the very idea of a state of exception. The sovereign serves as a link between the state of exception and regular civic norms.

Both Walter Benjamin and Giorgio Agamben tried to eradicate this same connection between the legal order and the government’s violent acts during a state of emergency (Agamben 2005: 55-63). Agamben disagrees with Schmitt with regard to his major thesis. The state of exception, in Agamben’s view, is not one of the constitutive elements of the legal order. Agamben thinks that the state of exception reveals a basic dialectic relation between the two different fundamental elements of potestas and auctoritas. Potestas is the legal element of the state manifested in acts of parliament, the king and so forth. Auctoritas in Agamben’s view is the meta-legal element of the state, the thing that gives authority to the legal order. It is outside the legal order but it provides the source of its power. The state of exception is the meeting of these two elements, the way both of them are balanced. Agamben’s main argument is that the problem with current western regimes is that they have started to use the fiction of the state of exception as a regular means of government instead of as an unused legal fiction (Agamben 2005: 85-87).

VI. Conclusion
Agamben’s critique does not go against the Hobbesian model of the sovereign as always holding the potential powers of constitutional dictatorship: it embraces it while arguing that these potential powers should never be realized. This model of sovereignty is one of the distinctly modern features of the state of exception. As
shown above, the rise of strong central state institutions, the transformation of conceptions of authority into what we know of as the modern state, and the growth of the modern positivist conception of law – all contributed to this modern feature of the state of exception. Other modern features of the state of exception, mentioned in this paper, include the distinction between powers in regular times and powers in times of emergencies, as well as the modern emphasis on security and order as the end of the regime in such situations, to the exclusion of the common good.

The realization that the issue of the exception includes an inherent contradiction is not exclusively modern, although the rise of democratic regimes in the past two centuries accentuated this contradiction (non-democratic measures used for the preservation of the democracy). What is more important for an appreciation of the modernity of the state of exception is its close connection with the rise of the bureaucratic state with its corresponding positivist understanding of the law. During the past two centuries, the modern model of the state as the sole, exclusive and all-encompassing legislative authority has resulted in national codifications of emergency powers. Combined with the growing range of issues with which the bureaucratic state came to engage, this process has resulted in a larger set of regulated emergencies (such as economic emergencies): a modern feature of the state of exception to be dealt with in a future paper.
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