Locke and the State of Exception

Towards a Modern Understanding of Emergency Government

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Post 9/11 debate – John Locke important reference – Modern notion, transformation of sovereignty – From legal to political nature of the exception – From temporary to permanent – From preservation of realm to defense of life – Change of the experience of time – Locke ambivalent, transition to modern understanding – Necessity, trust and resistance – Logic of exceptionality – Locke's remaining relevance

Introduction

Modern states have almost without exception developed constitutional arrangements to protect themselves from threats to their continued existence. The most common of these arrangements is the state of exception. The state of exception is proclaimed when the constitutional order as such is at stake, for example, at the threat of foreign invasion, civil strife, or a large-scale terrorist attack. The proclamation of the state of exception leads to a suspension of rights and a concentration of power in the executive, enabling it to respond quickly and effectively to the threat. Although the state of exception may sometimes be necessary, a problem is that those invested with emergency powers may themselves become a threat to the constitutional order meant to be defended. In fact, modern history shows numerous examples of governments using the state of exception as a pretext for violating rights or even for establishing a more authoritarian regime.

The extensive emergency measures adopted in the United States and other countries after the terrorist attacks of 11 September 2001 have sparked a debate on how emergency powers can be effectively regulated and constrained. Whereas some authors put their faith in legal constraints on emergency powers, others are convinced that 'hard cases make bad law' and that legal regulation of emergency

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powers might inadvertently contribute to their normalisation.[1] Oren Gross, for instance, argues that the executive's emergency powers should remain extra-legal, because, as he puts it, 'going outside the law in appropriate cases may preserve, rather than undermine, the rule of law in ways that constantly bending the law to accommodate emergencies and crises will not.'[2] By contrast, David Dyzenhaus proposes a rule-of-law model for dealing with emergencies, based on the prospective legalisation of measures that are considered normatively appropriate responses to emergencies. He criticises Gross for undermining the law's claim to authority and parting with a central assumption of legal theory, i.e., that public officials can only act with authority when they act within the limits of the law.[3]

A key reference in this debate is John Locke's theory of prerogative power. This is not surprising, as it testifies to the tension between a commitment to the rule of law and the awareness that the executive might be forced to deviate from the law in exceptional cases – a tension that also characterises the current debate on emergency powers. Thus, Locke's theory proves to be one of the main intellectual sources for Gross's 'extra-legal measures model': 'It is (…) precisely because of Locke's attachment to the rule of law that he is willing to recognize the possibility of going outside the law in extreme cases and acting, in such circumstances, extra-constitutionally.'[4] In turn, Dyzenhaus recognises a 'profound normative instability' in Locke's account of prerogative power, because he does not explain whether it is part of the executive's natural or constitutional authority. This ambiguity, Dyzenhaus claims, is reproduced by Gross, who, despite his extra-legalism, remains under the 'compulsion of legality', focused on restoring the rule of law and legal accountability once the emergency has been suppressed.[5]

[1] Among those representing the legalist position are David Dyzenhaus, Bruce Ackerman, Pasquale Pasquino and John Ferejohn. The extra-legalist position is defended by Oren Gross, Fionnuala Ní Aoláin, Mark Tushnet, Giorgio Agamben, and others. Of course, despite their shared legalism or extra-legalism, there are also important theoretical differences between the authors mentioned. An overview of the debate can be found in: William E. Scheuerman, 'Emergency Powers and the Rule of Law After 9/11', *The Journal of Political Philosophy* 14, No. 1 (2006), p. 61-84.

[2] Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility,' in V.V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: UK, Cambridge University Press 2008), p. 62; *idem*, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?', *The Yale Law Journal* 112, No. 5 (2003), p. 1011-1134, and Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: UK, Cambridge University Press 2006).

[3] David Dyzenhaus, 'The State of Emergency in Legal Theory', in V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: UK, Cambridge University Press 2005), p. 65; *idem*, 'The Compulsion of Legality', in *Emergencies and the Limits of Legality* (Cambridge: UK, Cambridge University Press 2008), p. 33-59.

[4] Gross and Ní Aoláin, *supra* n. 2, p. 123.

[5] Dyzenhaus, *supra* n. 3, p. 42-43; *idem*, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: UK, Cambridge University Press, 2006), p. 52.

In this article, I argue that Locke's theory does indeed testify to a certain ambiguity with regard to the legality of emergency powers. This ambiguity, however, can be explained historically; it is caused by the fact that Locke's theory marks the historical transition to the modern notion of emergency government. Thus, to a certain extent, Locke still follows traditional medieval ideas about the legality of emergency powers. Yet, he simultaneously proposes the more modern view that exceptional circumstances may force the executive to act without prior legal authorisation or even contrary to the law. Doing justice to Locke's account of the prerogative requires that both aspects – the awareness that the executive, when faced with an emergency, might have to go outside the law, and the attempt to bring his emergency powers under the aegis of the law – are taken into account. This may help to understand the original complexity of Locke's theory, and also to critically asses some of the historical and theoretical claims made in the current debate on emergency powers.

A modern notion of emergency government

In what sense, then, does Locke's theory mark the transition to the modern notion of emergency government? I believe that it anticipates three aspects of this notion: (1) a tendency to understand the state of exception as an ambivalent space between law and fact, in which even fundamental rights can be suspended; (2) a tendency to define the end and purpose of the state of exception in terms of security and the preservation of life; and (3) a tendency to normalise the state of exception, so that it loses its temporal limits and specific field of application, and threatens to become 'indefinite'.

Traditionally, the state of exception has been regarded as a *legal* space that was governed by either man-made or natural law. Thus, from Antiquity onward, lawyers tried to develop objective criteria that enabled them to determine the legality of the executive's emergency actions. For instance, in the Roman Republic, the state of exception would cause an unprecedented concentration of power in the dictator, yet his emergency actions could still be judged according to legal criteria, such as the six-month term of the office, the 'sacred trust' with which he was to maintain the constitutional order, or the prohibition on starting an offensive war without the people's explicit consent.[6] This notion of the state of exception as a *legal* space remained dominant throughout the Middle Ages. It would not change until early modernity. As late as the sixteenth century, the idea that the state of exception was governed by law was still considered self-evident.[7] Yet, half a cen-

[6] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York, Harcourt 1963), p. 23-24.

[7] Jean Bodin, for example, suggests that the state of exception, though outside the scope of positive law, is still governed by natural law, more particularly, by the sovereign's obligation to pre-

tury later, authors had started to question its legality, arguing that exceptional circumstances could justify even the suspension of natural rights.[8]

This new understanding of the state of exception seems to have been related to a transformation of sovereign power. As Michel Foucault has argued, the classical age witnessed the emergence of new ideas and practices of sovereign power; whereas traditionally one of the characteristic privileges of the sovereign had been the right to decide life and death, from the seventeenth century onward it was replaced by the sovereign's task to take care of life, i.e., to administer, optimise, and regulate the biological existence of the population.[9] This transformation of sovereign power had important consequences for the state of exception: its end and purpose were redefined, such that it was no longer justified to defend the realm, but the security and preservation of the population. Yet, this did not mean that, from now on, the sovereign had lost the power over life and death. Rather, it implied that he could henceforth only demand the sacrifice of life if this was necessary for the security and preservation of all. In other words, in the state of exception, the sacrifice of life had become vital.[10]

This transformation of sovereign power was apparently accompanied and informed by a new experience of time. As Ernst Kantorowicz has shown, during the Middle Ages a specific kind of temporality had been attributed to the political order that stemmed from theology, the so-called *aevum*; it showed the political order to be neither transitory, nor eternal, but 'continuous despite change'.[11] This experience of time implied that the sovereign's task was to integrate new events into the tradition, deciding state affairs on the basis of established rights and customs. Yet, from early modernity onward, the experience of time slowly started to change: time transformed into a chain of events that seemed truly new, in the

serve the state (*l'estat*) and to serve the public good. Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, Julian H. Franklin (trans. and ed.) (Cambridge: UK, Cambridge University Press 1992), p. 156-157 (book I, chapter 8, 39-40).

[8] For instance, Gabriel Naudé, in his *Considérations Politiques sur les Coups d'État* (1639), argues that the prince, in case of 'accidents and necessities', is often obliged to do 'several things, which natural justice would absolutely refute and condemn.' Gabriel Naudé, *Political Considerations*, dr. King (tans.) (London, Half-Moon 1711), p. 188.

[9] Michel Foucault, 'Right of Death and Power over Life', in Paul Rabinow (ed.), *The Foucault Reader* (London, Penguin Books 1991), p. 259.

[10] Cf. ibid., p. 260. In a 1978 lecture at the Collège de France, Foucault discusses the sovereign task to take care of the biological existence of the population in relation with the notion of the state of exception as it was understood within the 17th-century tradition of *Raison d'État*, observing that authors like Gabriel Naudé employed a concept of 'necessity' that was thought to 'suspend' the laws, and even natural law itself. Michel Foucault, *Sécurité, Territoire, Population: Cours au Collège de France, 1977-1978* (Paris, Gallimard/ Seuil 2004), p. 268.

[11] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, Princeton University Press 1981), p. 279.

sense that they could no longer be anticipated in light of past experiences. This shift had important consequences for (the understanding of) the state of exception. As the sovereign was increasingly confronted with occurrences that were not – and could not have been – foreseen in the law, the state of exception and the emergency powers it entailed tended to become part of the *normal* instruments of government. In other words, from early modernity onward, a new experience of time contributed to the 'normalisation of the state of exception'.[12]

These three historical developments – that from early modernity onward, the legality of the state of exception is no longer self-evident, that its end and purpose are increasingly defined in terms of security and the preservation of life, and that it shows a tendency toward normalisation – constitute what I consider the modern notion of emergency government. As I will show in the next sections, Locke anticipates this modern understanding of emergency government. Thus, he is one of the first to suggest that the state of exception can result even in a suspension of fundamental or natural rights. Moreover, he differs from the tradition by arguing that the purpose of the state of exception is not only to defend political society, but also to secure and preserve the lives of its members. Finally, Locke tends to normalise the state of exception, regarding it as a more or less regular instrument of government that has no limits in time and potentially affects every domain of society.

A traditional view: The legality of the exception

In his *Second Treatise of Government* (1689), Locke discusses 'unforeseen and uncertain occurrences' that make the 'strict and rigid observation of the laws' impossible.[13] Among the examples he gives is the decision to pull down an innocent man's house to prevent the spread of a city fire. In this case, a strict and rigid application of the law would be harmful to the public good, i.e., the safety of all. Therefore, the authorities are temporarily released from their normal legal obligations; they may temporarily disregard the innocent man's property rights in order to secure public safety. As Locke writes, in such cases, 'the laws themselves (...)

[12] Several authors have noticed this normalisation of the state of exception, though without relating it to a new experience of time. For instance, François Saint-Bonnet suggests that 'the theory of the state of exception follows from and contributes to the creation of the modern state by a constant tendency, from the thirteenth century onward, to the normalization of the exceptional.' François Saint-Bonnet, *L'État d'Exception* (Paris, Presses Universitaires de France 2001), p. 145; cf. Giorgio Agamben, *State of Exception*, Kevin Attell (trans.) (Chicago, Chicago University Press 2005), p. 2.

[13] John Locke, *Two Treatises of Government*, Peter Laslett (ed.) (Cambridge: UK, Cambridge University Press 2005), §158 and 159. All parenthetic citations are from this edition and refer to the section number of the *Second Treatise*.

give way to the executive power, or rather to this fundamental law of nature and government, *viz.*, that as much as may be, *all* the members of the society are to be *preserved*' (§159).

The expression of the 'laws giving way to the executive power' may be read as a reference to the state of exception. Yet, the example of the burning house does not fit in well, for traditionally the state of exception was associated rather with national emergencies, such as (the threat of) foreign invasion, civil war, or natural disasters. Moreover, contrary to the given example, such large-scale emergencies were believed to result not in the inapplicability of a single law (for example, the prohibition on damaging another's property), but rather in the temporary suspension of (part of) the legal system. It is therefore uncertain whether Locke, when citing the example of the burning house, is actually referring to the state of exception. He may also intend the more or less ordinary situation in which an exception is made to a law because of circumstances that may be regarded as the day-to-day risks of early-modern society, like a city fire.

Still, although Locke does not mention the state of exception explicitly, he employs the language in which it has traditionally been described: he thus refers to 'accidents and necessities' that prevent the laws from being normally applied, and suggests that, in these circumstances, derogation from the laws is justified to preserve society and its members. It is clear that not every exception made to the laws can be justified as required by the preservation of society. This would be feasible only in circumstances that constitute a genuine threat to the existence of society, such as (the threat of) military invasion or civil war. In fact, the risk of a spreading city fire does not seem to endanger the existence of society, though it certainly threatens the lives of its members. Locke does not make a clear distinction between these cases: for him, the derogation from a law in order to protect members of society, and the suspension of the laws to protect society as a whole, fall in the same category of necessary and justified deviations from the law in instances that have not been anticipated by the legislator.

This inability to distinguish between, on the one hand, the more or less ordinary situation in which an exception is made to a law because of unforeseen circumstances, and, on the other, the extraordinary situation of an existential threat to society proves to be an important aspect of the Lockean understanding of the state of exception. It prevents him from setting clear limits to the state of exception, both with regard to its duration (time limits) and its field of application (what counts as an emergency allowing for the suspension of (part of) the legal system, and what counts as a 'normal' risk justifying derogation from but a single law). Here, the stakes are high, because lacking an understanding of the specific nature of the state of exception, i.e., its particular logic of exceptionality, it becomes equally impossible to set strict limits to the executive's emergency powers. In Locke's

case, this danger turns out to be very real, since, as we will see, he fails to provide for institutional guarantees against an abuse of emergency powers.

In Locke's understanding of the state of exception, the executive acquires an unspecified and far-reaching power to derogate from the law to protect society and its members. Locke considers this power to be part of the executive's 'prerogative'; it is the 'latitude' the executive has 'to do many things of choice, which the laws do not prescribe' (§160). As Locke defines it, 'prerogative can be nothing, but the peoples permitting their rulers, to do several things of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good' (§164). In an alternative formulation, he argues that the executive's 'power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* that what is called prerogative' (§160). Each of these formulations emphasises the executive's freedom to act at will, without prior legal authorisation, and even contrary to the law. Therefore, Locke's notion of the prerogative seems to imply that, *in positive law*, there are no restrictions whatsoever to the executive's emergency powers.

Pasquale Pasquino's observation that the Lockean prerogative is 'a concept and a chapter that most interpreters pass over in silence' appears to have been surpassed, as a large body of literature has been devoted to the subject in recent years.[14] The main debate is between those who argue that the prerogative is constitutional and those who deem it extra-constitutional. David Weaver and Lee Ward advance the first view, arguing that the executive has been authorised by the constitution to step outside of the law, whereas Clement Fatovic and Ross Corbett defend the second, calling the prerogative a 'natural power' and emphasising Locke's refusal to subject the executive to constitutional restraints that would prevent him from protecting the public good.[15] In an attempt to overcome the conflict in these readings, Leonard Feldman has proposed to understand the Lockean prerogative as 'occurring at the threshold of the constitutional order', in the sense that it extends beyond the existing constitution while remaining entwined with legal norms.[16] At stake in the discussion is the question as to whether it is possible to constrain the executive's prerogative. I believe that this question cannot be decided by determining the prerogative's constitutional or extra-constitutional na-

[14] Pasquale Pasquino, 'Locke on the King's Prerogative', *Political Theory* 26, No. 2 (1998), p. 199.

[15] David Weaver, 'Locke, Leadership, and the Federalist', *American Journal of Political Science* 41, No. 2 (1997), p. 435; Lee Ward, 'Locke on Executive Power and Liberal Constitutionalism' *Canadian Journal of Political Science* 38, No. 3 (2005), p. 739; Clement Fatovic, 'Constitutionalism and, Contingency: Locke's Theory of the Prerogative', *History of Political Thought* 25, No. 2 (2004), p. 295-296; R.J. Corbett, 'The Extraconstitutionality of Lockean Prerogative', 68 *Review of Politics* (2006), p. 428-448 at p. 447.

[16] Leonard C. Feldman, 'Judging Necessity: Democracy and Extra-Legalism', *Political Theory* 36, No. 4 (2008), p. 553 and p. 562.

ture, because Locke himself seeks its constraints not primarily in the constitution, but in the natural law it is intended to guarantee. Therefore, the decisive question is not whether the prerogative is part of the constitution, but whether it is subject to natural law.

Locke suggests that, in the laws of political society, there are no restrictions to the executive's prerogative. However, the Lockean prerogative is not unlimited. It is conditioned by its purpose, to prevent harm to the public good. Therefore, the executive is allowed to derogate from the laws only if the strict and rigid application of these laws would be harmful to the good of the people. Locke gives the example of a military commander, who, in case of an emergency, has the authority to punish a soldier's disobedience with death, yet is not allowed to demand that soldier's money or goods. The reason is that the 'blind disobedience [of the soldier] is necessary to that end for which the commander has its power', that is, 'the preservation of [all]', whereas 'the disposing of his goods has nothing to do with it' (§139). In other words, the exercise of emergency powers is justified only in so far as it is necessary to protect the public good. Thus, according to Locke, the executive is not allowed to derogate from laws that do not impede his ability to respond effectively to emergency situations.

By arguing that the executive's prerogative is conditioned by its purpose, the preservation of society and its members, Locke follows the traditional interpretation of emergency government. Throughout the Middle Ages, writers had argued that the state of exception was governed by law, if not by man-made, then by divine or natural law. As François Saint-Bonnet has shown in his unsurpassed monograph on the history of the state of exception, their aim was to develop a specific *legality of the exception*, i.e., a set of objective criteria that were used to determine the lawfulness of the executive's emergency actions.[17] Thomas Aquinas, for example, argued that the king's task was to preserve the political community, such that it could strive towards the public good, even if this meant that, in extraordinary circumstances, he was bound to commit injustices. In Aquinas's view, the transgression of the law could appear as an injustice only from the perspective of man-made law, yet it was justified by natural law, i.e., the necessity of human beings living together in communities.[18]

In a similar vein, Locke advocates the legality of the state of exception. He suggests that the state of exception, though outside the scope of positive law, is still a *legal space*, because it is governed by natural law, i.e., by the law that, as much as possible, political society and its members should be preserved. Locke calls this a 'fundamental law of nature and government', thereby implying that the executive's

[17] Saint-Bonnet, *supra* n. 12, p.124.

[18] Thomas Aquinas, 'Summa theologiae', in R.W. Dyson (ed.), *Political Writings* (Cambridge: UK, Cambridge University Press 2004), p. 148 (pars II, q. 96, art. 6).

prerogative, though unrestricted by positive law, is limited by the law of nature. This becomes explicit in his formulation: 'the laws themselves (..) give way to the executive power, *or rather to this fundamental law of nature and government*, *viz.*, that as much as may be, *all* the members of the society are to be *preserved*' (§159) (italics added). At first, Locke seems to argue that the laws make room for an executive power that is legally unrestricted, yet he immediately nuances the thought, suggesting that the laws are but replaced by another law, i.e., the 'fundamental law of nature and government' that prescribes that, as much as may be, all the members of political society are to be preserved.

For Locke, then, the legality of the exception is still self-evident. Thinking the state of exception as an extra-legal space, in which political considerations prevail over legal obligations – a line of thought that can be considered typically modern – has not become possible yet. In this respect, Gross's claim that Locke 'is willing to recognize the possibility of going outside the law'[19] seems unfounded. Instead, for Locke, the state of exception appears as an ambivalent space, in which positive law is temporarily suspended in favour of the natural law it is meant to guarantee. In it, the executive is allowed to act according to discretion, without an explicit legal authorisation, or even contrary to the law, in order to be able to fulfil his obligations under natural law, i.e., that he has to do anything in his power to preserve political society as well as the lives of its members. This means that, for Locke, the state of exception itself is still governed by law, and that the executive's prerogative can be judged according to legal criteria.[20]

Modern aspects: Normalisation and the preservation of life

Yet in other respects, Locke differs from the tradition, suggesting a more modern understanding of the state of exception instead. The meaning and consequences

[19] Gross and Ní Aoláin, *supra* n. 2, p. 123.

[20] In this respect, I disagree with Mark Neocleous's otherwise persuasive reading of Locke's *Second Treatise*. Neocleous argues that Locke's text inaugurates a liberal discourse in which liberty is defined in terms of security – particularly, the security of private property – and which prioritises security over law. According to Neocleous, this is especially true of Locke's account of the prerogative: 'In his moves surrounding prerogative Locke essentially identifies the function of the sovereign as the production of security, for which the main criterion is necessity rather than the rule of law' (21). Thus, as long as the prerogative is exercised in the name of security, the executive is allowed to act in ways that 'appear to be beyond the law' (22). Neocleous is right that Locke's understanding of prerogative betrays a preoccupation with security. However, the Lockean prerogative does not allow the executive to act in ways that are beyond the law; although the executive may act without legal prescription, and even contrary to man-made law, he remains subject to the 'fundamental law of nature' (§159). In fact, as we will see, the very criterion of necessity which is said to replace the rule of law is developed in accordance with the requirements of natural law, as a an objectivized 'evident' or 'manifest' necessity (*see* the final section of this article). Mark Neocleous, *Critique of Security* (Montreal and Kingston, McGill-Queen's University Press 2008).

of this shift have not been sufficiently examined. Saint-Bonnet, for example, emphasises the continuity between the tradition and Locke, while downplaying the modern aspects of his doctrine. By contrast, I will argue that Locke's doctrine can be seen as marking the transition to the modern notion of emergency government. There are two aspects of his doctrine that testify to this transition: his tendency to view the state of exception as a permanent possibility, and his inclination to justify it in terms of security and the preservation of life. Both may be regarded as decisive steps toward a modern understanding of the state of exception.

The first aspect is related to a changing experience of time. Thus, the chapter on the prerogative is preceded by a short section on temporality: 'Things in this world are in so constant a flux that nothing remains long in the same state. Thus people, riches, trade, power, change their stations; flourishing mighty cities come to ruin, and prove in time neglected desolate corners, whilst other unfrequented places grow into populous countries filled with wealth and inhabitants' (§157). While the latter phrase may still suggest a traditional understanding of time as a continuously repeating pattern of growth and decline, the former seems to point at a new experience of time as a 'flux', in which 'nothing remains long in the same state', people, riches, trade, and power constantly 'changing stations', thereby suggesting the emergence of new forms of social mobility. In this essentially modern experience of time, history is perceived as a succession of events that are truly new, 'unforeseen and uncertain', as they can no longer be anticipated in light of past experiences.

This modern experience of time has important consequences for Locke's understanding of the prerogative. In Locke's view, the legal-political order has become exposed to 'accidents and necessities' that cannot be decided on the basis of established laws and customs. From this perspective, politics turns into an art of dealing with what might happen, a kind of perpetual crisis management. Locke thus emphasises the inability of the legislators to 'foresee, and to provide for, all accidents and necessities, that may concern the public' (§160). He not only doubts that positive law can provide solutions for everything that may happen; more fundamentally, he suggests that, as a rule, a 'strict and rigid' application of the law will prove damaging to the public good. This is a returning motif in his argument; as Locke repeatedly claims, it is impossible 'to make such laws, as will do no harm, if they are executed with an inflexible rigor, on all occasions, and upon all persons, that may come in their way' (§160). In other words, according to Locke, every law has to be applied with a certain flexibility to do justice to circumstances that have not been, and could not have been, foreseen by the legislator.

The notion of time as a succession of events that are truly new causes Locke to understand the prerogative as a more or less normal instrument of government. If the executive is constantly confronted with situations that have not been

foreseen by the legislator and that may turn out to be 'accidents and necessities' in need of quick and decisive emergency action, it follows that his prerogative must become a permanent possibility as well. The example Locke gives of the prerogative illustrates this tendency: the prince is said to have the prerogative to change the precise number of representatives in parliament in disregard of old custom, while seeking to restore its 'true proportion' in accordance with the public good. Here, the prince's prerogative is explicitly related to an experience of time, for it is depicted as a '[rectification of] the disorders, which succession of time has insensibly, as well as inevitably introduced' (§158). Yet, the prince's prerogative to change the number of representatives, though perhaps unusual, hardly seems extraordinary. Instead, Locke proposes a kind of *normalisation of the exception*, for, each time the prince seeks to repair the 'disorders which time has insensibly, as well as inevitably introduced', he is believed to have the prerogative, i.e., the power to act in disregard of law and custom, such that he can effectively deal with situations that were not anticipated by the legislator.

This normalisation of the exception may also explain a shift in Locke's language: where first he refers to 'accidents and necessities', he later uses the word 'occasions'. Apparently, the unforeseen and uncertain occurrences characteristic of a modern experience of time can also turn out to be mere 'occasions' for the exercise of prerogative power without there being a necessity to act. Thus, toward the end of the chapter, Locke returns to the example of the executive's prerogative to convoke the legislative, arguing that 'the power of calling parliaments in England, as to precise time, place, and duration, is certainly a *prerogative* of the king, but still with this trust, that it shall be made use of for the good of the nation, as the exigencies of the times, and the variety of occasions shall require' (§167). In this passage, the prerogative is justified not only by the 'exigencies of the times', but also by a 'variety of occasions' in which it may be useful for the public good. More importantly, Locke no longer refers to an unusual measure, but to the normal practice of calling parliaments in England. His notion of the prerogative that stemmed from a consideration of the exceptional thus seems to have become a normal instrument of government.

The second aspect of Locke's doctrine that suggests a modern understanding of the state of exception is related to his notion of the public good. Locke follows the medieval tradition in arguing that the purpose of the state of exception is to guarantee the public good; if, in case of an emergency, a strict and rigid application of the laws proves harmful to the public good, the executive is allowed to deviate from those laws for the good of the people. Yet, there is an important difference between the traditional understanding of the public good and Locke's. Whereas medieval writers had interpreted the public good in terms of moral perfection, Locke understands it in terms of 'security and preservation' (§155). At

first, Locke defines the content of natural law as the rights each individual has to life, liberty, and property. Protection of these rights is the very purpose of political society and government, in the sense that the reason for individuals to give up their 'perfect freedom' in the state of nature (§4) is to obtain positive guarantees of these rights, so that they are no longer threatened by others. In Locke's original definition, the reference to liberty still leaves room for a moral interpretation of the public good. Yet, in the chapter on the prerogative, the reference to liberty is remarkably absent. Instead, the public good is consequently defined in terms of 'security and preservation'.

In Locke's interpretation, then, the state of exception seems to articulate a certain priority among natural rights. In it, the right of life prevails over other rights, such as those of liberty and property. As Kathleen Arnold has forcefully argued, Locke's notion of the state of exception testifies to a fascination with life and its preservation.[21] The result is that, in the state of exception, the notion of the public good is de-moralised, or, to put it more precisely, *life itself is moralised* as the ultimate end of political society and government. Thus, as Locke argues, 'it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, *viz.* that as much as may be, *all* the members of the society are to be preserved.' According to Locke, this entails that 'even the guilty are to be spared, where it can prove no prejudice to the innocent' (§159). The latter phrase is revealing, since it shows Locke to value the right of life even over justice itself: if possible, even the lives of the guilty should be preserved.

With the idea that the preservation of life is the ultimate public good justifying the suspension of positive law in cases of emergency, Locke seems to differ sharply from the traditional understanding of the state of exception. Traditionally, authors had tended to value not life itself, but its possible righteousness, i.e., the moral task invested in life. From this perspective, the guilty deserved death, for life was of no value had it failed to fulfil its moral task. In Locke's interpretation, the state of exception causes a reversal of this scheme: the right of life is no longer dependent on the fulfilment of its moral task, but the moral task (not only of the individual, but also of political society as a whole) is conditioned by the attempt to preserve life. For Locke, this seems to come down to the belief that, *in the state of exception, the right of life is prioritised over other rights*, becoming the decisive criterion to determine whether emergency action – the prince's prerogative – serves the purpose of protecting the public good.

The priority of the right of life implies that, in the Lockean state of exception, other parts of natural law can be temporarily suspended. Thus, the task of pre-

[21] Kathleen Arnold, 'Domestic War: Locke's Concept of Prerogative and Implications for U.S. 'Wars' Today', *Polity* 39, No. 1 (2007), p. 17.

serving life in case of an emergency can justify temporary restrictions of liberty as well as the seizure of property by the executive. As Locke suggests, it may even justify a seizure of life itself, for it is the executive's prerogative to expose the life of his subjects to death if necessary to save political society and the life it guarantees. Locke thus argues that it is 'justly death' to disobey military orders necessary to the preservation of society and its members, even if a man is ordered to 'march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish' (§139).[22] Thus, according to Locke, in the state of exception, natural rights and even the right of life itself can be temporarily suspended, if this is necessary for the security and preservation of all.

Guarantees: Necessity, trust, and the right of resistance

Aware of the risks involved in the possible suspension of natural rights, Locke seeks to develop objective criteria that can prevent the state of exception from becoming the occasion for a lawless abuse of power. In formulating these criteria, he draws on the medieval tradition. Following the Roman rule that 'necessity has no law' (*necessitas non habet legem*), which had been collected in Gratian's *Decretum*,[23] authors such as John of Salisbury and Thomas Aquinas had argued that, in case of a 'necessity', the ruler was exempted from his normal legal obligations.[24] For example, he was believed to have the right to demand extraordinary taxes that were not based on law or custom, on the condition that these were necessary for the defense of the realm. Yet, his authority did not reach beyond what was necessary, such that, for instance, those taxes that had not in fact served the purpose of defense had to be duly repaid.[25] Moreover, the necessity had to be 'evident', in the

[22] Cf. Ruth W. Grant, *John Locke's Liberalism* (Chicago, Chicago University Press, 1987), p. 131.

[23] Cf. Gratianus, *Decretum* in *Corpus Iuris Canonici*, Emil A. Friedberg (ed.) (Graz, Akademische Druck- und Verlagsanstalt 1959), p. 1297 (pars III, dist. 1, c. 11).

[24] Aquinas, *supra* n. 18, p. 148 (pars II, q. 96, art. 6); John of Salisbury argues that, in a case of emergency, the 'reason of necessity or utility' (*ratio necessitatis aut utilitatis*) can even justify torture. John of Salisbury, *Policraticus*, Cary J. Nederman (ed. and trans.) (Cambridge: UK, Cambridge University Press 1990), p. 138 (pars VI, c.. 26).

[25] Authors such as Pierre Dubois used the criterion of necessity to argue that the ruler's decisions in the state of exception were governed by a norm of proportionality. The legal basis for this idea was found in the rule that an 'ending cause ends the effect' (*cessante causa cessat effectus*); this was interpreted as a prohibition for the king to demand more of his subjects than what was absolutely necessary for the defense of the realm. For instance, Pierre Dubois argued that the king, in a case of 'evident necessity of defense' (*evidens necessitas defensionis*), could raise extraordinary taxes. 'But suppose that, for that defense, 100.000 marks would have sufficed, and the king had demanded 200.000, could he have done so without committing a deadly sin? It is commonly held that he could not have done so. For, all of our knowledge being unanimous and say so, *cessante causa, cessat effectus.*' Pierre Dubois, *De recuperatione terre sancte*, Charles-Victor Langlois (ed.) (Paris, Picard, 1891), p. 116 (c.

sense that it had to be beyond dispute and universally acknowledged.[26] This criterion of an 'evident necessity' (*necessitas evidens*) was meant to serve as a guarantee against an abuse of power, which had become possible once the laws had been suspended; its function was, among other things, to prevent the ruler from falsely proclaiming a state of exception in order to ignore the established rights of his subjects with impunity.

As François Saint-Bonnet has convincingly shown, Locke endorses the double criterion of an 'evident necessity' that had been developed by the medieval authors.[27] Locke thus emphasises that, in the state of exception, the members of political society are prepared to accept only 'whatsoever shall be done *manifestly* for the good of the people' (§158) (italics added). What Locke proposes is that, in order to be justified, the executive's prerogative must not only be necessary, but its necessity must be indisputable, which will only be the case when it is *manifestly* employed for the good of the people; only then, the people will be prepared to accept it. As Locke puts it, only the power that is *manifestly* used for the benefit of the people will be an 'undoubted prerogative' that is 'never questioned' (§161). By relating the prerogative to those instances in which its necessity is both manifest and indisputable, Locke seeks to bind it to an objective norm, thereby making it independent of the executive's personal judgments and interests. He thus seeks to prevent the state of exception from becoming an occasion for the worst, a lawless abuse of power.

Apart from the double requirement of 'evident necessity', Locke proposes another criterion, one that does not stem from the medieval tradition: the prince's prerogative is made dependent on the 'trust' and 'sincerity' with which he seeks to fulfil his task. Locke thus points out that 'a good prince, who is mindful of the *trust* put into his hands, and careful of the good of his people, cannot have too much prerogative' (§164) (italics added). He suggests that, whenever the prince acts in accordance with the trust put into his hands, the people are inclined to 'tacitly allow' his prerogative, and to 'acquiesce' in his emergency actions. Locke frequently refers to the notion of trust, in order to embed the prince's unlimited emergency powers in a responsibility that is equally unlimited. Thus, as long as the prince uses his emergency powers in accordance with the trust the people have invested in him, they are expected to accept whatever he does, even if he acts contrary to positive law.

LXXVII, §14); cf. Elisabeth A.R. Brown, "Cessante causa' and the Taxes of the Last Capetians: The Political Applications of a Philosophical Maxim', in Joseph R. Strayer and Donald E. Queller (eds.), *Post Scripta: Essays on Medieval Law and the Emergence of the European State* (Rome, Studia Gratiana 1972), p.567-587.

[26] Saint-Bonnet, *supra* n. 12, p. 140-141; cf. Aquinas, *supra* n. 18, p. 152 (pars II, q. 97, art. 2).

[27] Ibid., p. 265.

Locke's notion of 'trust' is generally understood as referring to the legal institution that is characteristic of the common law: in this reading, the right to execute natural rights is conferred on the government by way of a trust that can be revoked if the government harms the people's interests.[28] I believe that Locke's notion of 'trust' can also be interpreted in a different way, namely as a translation of the *fides publica* of Roman law.[29] In Roman Antiquity, the *fides* was regarded as a general norm governing both private and public law; it had several meanings, and was commonly associated with values like trust, sincerity, the keeping of one's word, loyalty, honesty, and credibility.[30] The *fides* was thought to be of particular importance in those cases in which the Roman authorities had to deal with non-citizens who had come into their full power, for example, nations that had been defeated by Roman legions. In those cases, the military commanders were thought to be bound not by ordinary law, but by the *fides* only: it served as a fundamental legal standard, the breaches of which could be legally punished.[31] In medieval literature, the notion of the *fides publica* (in contrast to the *bona fides* of private law) seems to have fallen into oblivion.[32] It was apparently rediscovered by Hugo Grotius, who gave it a central place, first in his *Parallelon* (ca. 1601-1602), then in his famous *De iure belli ac pacis* (1625). Yet, for Grotius, the meaning of the *fides* had become limited to the trust required in the observation of treaty obligations.[33] By contrast, Locke appears to be the first to recognise the *fides* again as a *general* standard of public law that remains applicable whenever positive law falls silent.

Yet, despite the criteria of trust and necessity, Locke emphasises that there is no legal remedy if the prince fails to comply with his obligations. For example, it is the executive's prerogative to call the parliaments and to determine the precise time, place, and duration of their convening, yet there is no independent third party who can decide whether the prince acts in accordance with the trust put in his hands. As Locke observes, 'between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no *judge on earth*' (§168). This does not mean that, by invoking the preroga-

[28] Cf. John M. Kelly, *A Short History of Western Legal Theory* (Oxford, Clarendon Press 1992), p. 217.

[29] These readings do not exclude each other, and I believe it is most likely that Locke by referring to the notion of 'trust' adopted elements from both traditions. He was probably familiar with Hugo Grotius' account of the *fides publica* in *De iure belli ac pacis*.

[30] Dieter Nörr, *Die Fides im römischen Völkerrecht* (Heidelberg, C.F. Müller 1991), p. 4.

[31] Ibid., p. 34.

[32] This might be explained from the fact that the medieval jurists tended to focus on the *Corpus iuris civilis*, which contained only references to the *bona fides of* private law, whereas the *fides publica* was to be found mainly in literary sources. From the fifteenth century onward, legal humanism would rediscover these other sources.

[33] Nörr, *supra* n. 30, p. 46.

tive, the prince is able to escape his obligations, for the trust he is invested with is still a legally binding norm, a standard of behaviour, even though it is not legally enforceable. As Ruth Grant rightly suggests, 'to say that there is no judge on earth with authority is not to say that there is no right and wrong.'[34] Rather, it is to say that there is no legal remedy, such that the prince can only be held accountable before god himself. Hence, Locke argues that, in case the prince violates the public trust, the people, while having no legal remedy in this world, may 'appeal to heaven': 'the people have no other remedy in this, as in all other cases where they have no judge on earth, but to *appeal to heaven*' (§168).

With his notion of an 'appeal to heaven' Locke seems to follow the tradition of Roman law that tended to attach not legal, but religious sanctions to violations of the *fides publica*. As Dieter Nörr has shown, for the Romans, a violation of the *fides* entailed the risk of provoking the wrath of the gods. Yet, in their eyes, the risk was not merely symbolic, but very real; it could mean, for example, that Roman legions were in danger of losing important battles, or that the city of Rome itself could become exposed to catastrophe. Apart from the wrath of the gods, there were other sanctions for breaches of the *fides*, for example, a condemnation by public opinion, or sanctions under the priestly law (*ius fetiale*), but these equally suggested that the nature of the obligation was religious, in the sense that the violator's responsibility was thought to be primarily before the gods, and not before a legal court.[35] Locke seems to endorse this traditional view in arguing that the people, in case of an abuse of the prerogative, can only 'appeal to heaven'. He thereby suggests that, though the norm itself is legal, its sanctions are religious.[36]

Although Locke argues that there can be no judge on earth to decide whether the use of prerogative is right or wrong, this does not imply that, in case of an abuse, he expects the people to passively wait for god himself to intervene. Instead, in the final chapter of the *Treatise*, Locke returns to the question of trust, arguing that the violation of trust is one of the main reasons for dissolving a government. As he writes, there is a way, 'whereby governments are dissolved, and that is; when the legislative, or the prince, either of them act contrary to their trust' (§221). As Locke points out, both the legislative and the prince can violate the trust invested in them. Yet, he suggests that the danger is greater in case of the prince, since he has 'a double trust put in him, both to have part in the legislative, and the supreme execution of the law.' According to Locke, he is bound to violate

[34] Grant, *supra* n. 22, p. 172.

[35] Cf. Nörr, *supra* n. 30, p. 34, 38-39.

[36] In this context, Locke's claim that the 'tendency of the exercise of such prerogative' will show of itself whether its use is right or wrong (§161) can perhaps be interpreted as a sign of god's (dis)approval, comparable to the Roman expectation that the success or failure of their policies depended on the gods' consent which in turn was conditioned by their observation of the *fides*.

this double trust, when 'he goes about to set up his own arbitrary will, as the law of society' (§221). This is the case, when the prince abuses the prerogative and starts to promote his own interests at the expense of the security and preservation of the people.

According to Locke, if the prince abuses his prerogative, violating the trust put in his hands, the people have a right of resistance. In Locke's view, the right of resistance is not to be confused with a license to rebel, for the prince, by breaching the trust, has forfeited his rights as an executor of the law. His actions can henceforth be regarded as illegal, i.e., contrary to both positive and natural law, such that the people have a *right* to resist. As Locke writes, 'whosoever uses *force without right*, as every one does in society, who does it without law, puts himself into a *state of war* with those, against whom he so uses it, and in that state all former ties are cancelled, all other rights cease, and every one has a *right* to defend himself, and *to resist the aggressor*' (§232). For Locke, then, the right to resist is essentially a right to defend oneself against the illegal actions of an executive, who, by abusing his prerogative and violating his trust, has placed himself outside of the law, cancelling the ties of society and the security it guarantees. The state of exception thereby transforms into a state of war, which is governed no longer by positive law, but only by the natural right everyone has to defend his own life, liberty, and property.

Locke's doctrine of resistance can be regarded as the counterpart of his theory of the prerogative, in that the first serves to set legal limits to an abuse of the second.[37] Hence, both bear witness to the same *logic of exceptionality*. While the prince, in exceptional circumstances, has the right to use the prerogative to repair the defects of the law, the people, on equally exceptional occasions, have the right to resist, that is, to defend themselves against the prince's illegal intrusions of their rights. In both cases, extraordinary circumstances justify a temporary suspension of the established laws and customs, such that an authority emerges that can be limited only by the law of nature. While the prince's authority is limited by the trust put in his hands, his subjects are forced to obey as long as he 'sincerely' seeks to advance the security and preservation of society and its members. Only if he fails to do so, the people have a right to resist, deriving from their natural right to defend themselves.

Being governed by the same logic of exceptionality, not only the prince's prerogative, but his subjects' right to resist too is made dependent on the criteria of 'trust' and 'evident necessity'. While the prince is believed to have the prerogative only if it is *necessary* to prevent harm from the public good, and *manifestly* used for the good of the people, his subjects, in turn, are believed to have the right to resist '*not*, until the inconvenience is so great, that the majority *feel it*, and are weary of it,

[37] Cf. Grant, *supra* n. 22, p. 170.

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and find a *necessity* to have it amended' (§168) (italics added). Moreover, as Locke suggests, not only the prince, but the people's representatives too can violate the trust put in them: 'either of them [can] act contrary to their trust' (§221). Thus, the prince's prerogative and the people's right to resist are justified not only by the same logic of exceptionality, but they are also conditioned by the same criteria of trust and evident necessity. In case of the prince, the appeal to necessity and trust is meant to serve as a guarantee against illegal abuses of the prerogative; in case of the people, its purpose is to prevent illegal acts of rebellion.

Conclusion

As I have tried to show in this article, Locke's *Second Treatise of Government* can be read as marking the transition to the modern understanding of emergency government. Although Locke does not question the legality of the state of exception, he is one of the first to claim that it can justify even derogation from natural or fundamental rights. Moreover, by defining the purpose of emergency government in terms of security and the preservation of life, Locke tends to prioritise the right of life over other natural rights, and to accept restrictions of these rights to protect the population as a whole. Finally, as Locke does not make a clear distinction between the state of exception and the normal situation, he is inclined to regard the executive's emergency powers as a regular instrument of government. He thus proposes a kind of normalisation of the exception: each time the executive is confronted with 'unforeseen and uncertain occurrences', he is believed to have the prerogative, that is, the power to act in disregard of the laws to protect the public good.

However, as I have also suggested, in Locke's theory, the transition to the modern notion of emergency politics remains incomplete. Thus, for Locke, the legality of the exception is still self-evident. Although he believes that the executive, when faced with a threat to the public good, has far-reaching emergency powers, he does not consider the possibility that these powers extend beyond the scope of law. Instead, he seeks to develop objective criteria to determine the legality of the executive's emergency actions. In line with the medieval tradition, he proposes to bind the executive in the state of exception to the criterion of evident necessity: thus, if the executive's emergency actions are contrary to the law, they are thought to be justified only if they are necessary for protecting the public good, and if their necessity is manifest and indisputable. Moreover, reviving a criterion of Roman law, Locke proposes to regard 'trust' (*fides*) as a general standard of public law that remains applicable whenever the positive laws have been suspended. Thus, in the state of exception, the executive, though authorised to act contrary to positive law, remains under the obligation to employ his emergency powers in accordance

with the trust put in his hands. Should he fail to do so, the people are believed to have a right of resistance.

In the current debate on emergency powers, Locke's theory is much referred to, but its transitional nature is not well understood. Thus, Gross's claim that the Lockean prerogative is extra-legal[38] seems unjustified in view of Locke's attempt to subject it to legal criteria such as evident necessity and public trust. Moreover, his criticism that Locke's theory lacks a 'crucial accountability concept'[39] seems unfounded, as Locke considers the violation of trust one of the main reasons for dissolving a government and acknowledges a right to resist. Likewise, Dyzenhaus's observation that Locke's theory suffers from a 'profound normative instability'[40] fails to convince, as it does not take into account the fact that, for Locke, the legality of the exception remains self-evident, even though he believes that natural rights can be temporarily suspended. There is no uncertainty, then, as to whether the Lockean emergency powers are legal or extra-legal: the exercise of these powers is subject to legal norms and thus potentially cause for legal accountability.

Still, Gross is not entirely wrong to suspect a legal deficit in Locke's theory. Nor is Dyzenhaus, when he emphasises its ambiguity. For the legal criteria Locke proposes are but soft guarantees. They do not translate into legal remedies: thus, the violation of trust and necessity cannot be reviewed by the judges. Of course, Locke allows for a right to resist in case the executive structurally violates his trust, but in the context of modern democracies this hardly seems a practical solution. More problematically, the requirement of public trust can also become a trump card in the hand of the executive; it can be invoked to demand loyalty – for trust is not only given, it is also demanded – and to delegitimise dissent. Thus, in the wake of the terror attacks of 9/11, the phrase 'just trust us' became one of the most effective slogans of the Bush administration.[41] It was used to avoid accountability and to ignore legal objections to emergency measures. The same is true of the criterion of evident necessity. After 9/11 it was frequently invoked to suggest that there were no alternatives to the government's emergency measures: that these measures were inevitable and therefore, from a legal and political point of view, indisputable. This shows that both the justification of the state of exception and its problems have not fundamentally changed since Locke.

[38] Gross and Ní Aoláin, *supra* n. 2, p. 122.

[39] Ibid., p. 123.

[40] Dyzenhaus, *supra* n. 3, p. 42.

[41] Cf. Paul Krugman, 'Just Trust Us,' *New York Times*, 11 May 2004. The article can be read on: <http://www.nytimes.com/2004/05/11/opinion/11KRUG.html>.