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# GIGANTOMACHY CONCERNING A VOID: PHILIPPINE MARTIAL LAW, FICTIVE EXCEPTION, AND SOVEREIGN INDECISION[i]

## *Dambuhalang Away Tungkol sa Wala: Batas Militar sa Pilipinas, Kathang Eksepsyon, Soberanong 'di Makapagpasya*

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**Abstract:** What went right in the Philippine EDSA Revolution of 1986? A protracted martial law was ended. What went subsequently wrong? Normalised emergency has come to define Philippine political society, tragically demonstrated by the continuing drug war and the recent Anti-Terrorism Law-sanctioned slaughters. The transition from permanent martial law to a normalised emergency is driven by the liberal fear of the Schmittian challenge of the absolute sovereign—thus pushing the encodement of emergency powers within the law and, as such, normalising them. But Carl Schmitt was primarily correcting a perceived weakness of the Weimar Republic by preserving the potential for exceptional powers within the law, and as such, within its liberal system. Instead, his real opponent was Walter Benjamin, the other protagonist in what Giorgio Agamben describes as a "gigantomachy concerning a void." At stake was the theoretical appropriation of the concept of exception. Is its decision the monopoly of the sovereign as Schmitt claimed? Or is it outside the law and the sovereign can only exclude it as Benjamin maintained? But, for us trapped in a state of exception that is the rule, the more important question is: How does this debate resolve the theoretical and practical puzzles raised by the ruinous practice of an after-martial law experienced as normalised emergency?

**Keywords**: martial law/exception/emergency, Philippines, Agamben, Schmitt, Benjamin.

**Abstract in a second language:** Ano ang tama sa rebolusyon ng EDSA noong 1986? Nawakasan ang napakahabang batas militar. Ano ang mali sa kinalaunan? Ang normalisadong emergency o eksepsyon ay siyang naging istruktura ng lipunang pampulitika sa Pilipinas, na ipinapakita sa patuloy na drug war at ng mga pinatay sa ilalim ng bagong Anti-Terrorism Law. Ang takot ng mga liberal sa hamon ni Schmitt patungkol sa absolutong soberanya ang siyang dahilan ng transisyon mula sa permanenteng batas militar patungo sa

isang normalisadong emergency—ito ang nagbunsod sa pagsasa-batas ng mga kapangyarihang pang-emergency sa loob ng normal na batas at sa normalisasyon nito. Ngunit tinatama lamang ni Carl Schmitt ang isang inaakalang kahinaan ng Weimar Republic sa pamamagitan ng pagpapanatili ng potensyal para sa eksepsyonal na mga kapangyarihan sa loob ng batas, at sa gayon, sa loob ng sistema nitong liberal. Sa halip, ang tunay na kalaban niya ay si Walter Benjamin, ang isa pang pangunahing tauhan sa sinasabi ni Giorgio Agamben na dambuhalang away tungkol sa wala. Ang nakataya dito ay ang teoretikal na pag-angkin sa konsepto ng eksepsyon. Ang pagpapasya ba nito ay monopolyo ng soberano ayon kay Schmitt? O ito ba ay nasa labas ng batas at ang soberano ay maaari lamang itong ibukod ayon kay Benjamin? Ngunit, para sa atin na nabubuhay sa isang estado ng eksepsyong naging kalakaran, ang mas mahalagang tanong ay: Paano nireresolba ng debateng ito ang mga teoretikal at praktikal na problema ng mapaminsalang praktika ng normalisadong emergency pagkatapos ng permanenteng batas militar?

**Keywords in a second language**: batas militar; Pilipinas; Agamben; Schmitt; Benjamin

## INTRODUCTION

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In this year, in this month, of the dead Marcos' hundredth birthdate and the forty-fifth year after he declared Martial Law in 1972, it has become clear that the post-EDSA[iii] rallying cry of 'never again,' which Filipinos believed to have put in check any form of authoritarianism in the succession of governments after the dictatorship, has failed. Not that it has ever stopped the plunder of the nation's wealth; not that it has put an end to political persecutions, to impunity and the collateral slaughter of innocents; not that it has blocked the Marcoses' return to politics or that it has banned the elite control of the political. But it tided Filipinos over these horrors and more. It reassured and comforted us after its every passionate utterance. It unfailingly dispelled our anxiety and made us hopeful. If we can freely say it, then things are still okay; and if we say it dutifully, then things are going to be okay.

Not anymore.

'Never again' is muted when Proclamation No. 310 mandated the celebration of the late dictator's birth centennial in his home province now, as before, ruled by the Marcoses. It is stifled as martial law, declared through Proclamation No. 216 on 23 May

2017, is the rule in Mindanao. And it is cowed as the exceptional powers of martial law are normalised and its logic rationalises the everyday reality of state violence in the country. Critical newspapers are stifled or taken over by presidential friends, opposition politicians are silenced with lawsuits or threatened with ouster and the critical public quieted with terror. But all these pales in comparison to the thousands killed, the young dying so horribly—casualties of an unrelenting and increasingly indiscriminate state terror—13000 (Gavilan, 2017; Sambalud, 2017) dead in a war against drugs that sees no end, only more deaths. How long will it take to kill three million people, the number of suspected drug addicts President Duterte is willing to slaughter? (Villamor, 2016).

At the resplendent gates of democracy erected through EDSA, shouldn't 'never again' have barred all these outrages, and not ever allowed them to come to pass? Shouldn't we have left them behind as reprehensible incidents never to be repeated or as past lessons never to be forgotten?

Marcos' martial law powers killed 3257 individuals, tortured 35000 and incarcerated 75000 more (McCoy, 1999). Marcos, his family and his cronies plundered the nation, illegally amassing an estimated ten billion dollars. During their escape to the United States, they filled two transport planes with jewellery, gold bricks, and freshly printed money amounting to 15 million dollars (Davies, 2016). They left the nation grieving for its young, destitute, and gravely in debt. What could be more terrible?

Marcos deserves the nation's unrelenting anger. As his equally culpable family, his cronies and enablers and his torturers and killers. Only justice should be able to quell this rage. Instead, his cronies held on to their wealth, his enablers to their positions in state institutions and martial law's torturers and executioners to their lives. Imelda Marcos escaped Supreme Court upheld convictions. And the Marcos children have again inscribed their names on Philippine politics.

What accounts for this disaster? Is it because the same faces, families, and class continued to populate post-martial law politics? Is it that in the three constitutions that birthed, conserved, and ended the Marcos dictatorship martial law is sanctioned and enshrined? Did EDSA's promise of a break in the oppressively enduring Philippine realpolitik bring only continuity?

Martial law is an aporia for democracy. Ostensibly, in an emergency, it suspends the [rule of] law to protect the law [full order]. But here, even with the explanatory brackets, the logic is twisted. What is democracy when it allows the law that protects citizens' rights to be swept aside? However, Marcos invoked its declaration as democratic

self-defence (Marcos, 1978, p. 134, 316). It follows from martial law's logic that it is only declared where there are laws and rights that it can derogate. Thus, the 1972 martial law declaration supposedly removed rule of law restrictions on its enforcers who consequently acquired blanket powers. But in keeping with martial law's asserted democratic origin, Marcos maintained the appearance of legality through Presidential Decrees and Proclamations, whilst he imagined his martial law-based rule as constitutionally authorized—and indeed, it was. Wielding all powers of government, state agents—from the ordinary soldier and policeman to Marcos as commander-in-chief—were arbitrary but also legal authorities over properties, relations, and lives. Martial law is an absolute rule. This can be understood from the martial origins of the term, where the organization of command and obedience is total.[iv] It can also be realised from the concept and practice of prerogative—the power that is external to and functions in opposition to the rule of existing law (Locke, 1988 [1689], Ch. XIV). Or, more directly, the connection is shown in the sovereign authority that arrogates all state powers to decide the exception (Schmitt, 2010 [1922], 5). Martial law was the means for what became the Marcos dictatorial regime, and dictatorship seemed to have followed inexorably from martial rule.

Martial law set Marcos, and his henchmen un/bound from/to the law: the law did not obligate them/they were the law. Here, the question of whether martial law is law seems to miss the point. It is a law that appears to bring into the legal norm the violence of the law's founding. We say "appears" as these instances of violence are not lawless — they are the long-standing normal for the large segments of Philippine society who are poor, marginal, or non-governable. What martial law accomplished was the widening of the application of state violence to the middle class and the elite. This was untenable for the national oligarchy, from whose privileged ranks Marcos entered and then emerged to violate its venerable national political value of *di tayo talo*[v] and through martial law transformed it into the *talo-talo* of thuggish local politics—also a norm of elite politics, but the underside of a long-standing doubled political.

But martial law is more than Marcos. After all, Marcos, the president was just a run-of-the-mill clever, albeit more daring, traditional politician who wanted to cling to power before 1972 (Joaquin, 1981). By American colonial design, martial law power was in the 1935 Constitution for declaring and Marcos declared it.[vi] A dictatorship and two other constitutions later, the martial law provision is still there.

It is there because we adopted it thoughtlessly from the central edict of American colonization, an easy and ready method to invoke the logic and means of colonial war

within the restive normal of foreign occupation. Did not Marcos, in one of his speeches, acknowledge the American colonizers for this (Marcos, 1978, p. 317)? Who does Duterte need to thank now?

But currently, in the Anglo-American tradition, martial law recalls more a "banana republic" or a failed-state vibe than a sophisticated liberal democratic response to the unrest, despite a history of impositions that includes Abraham Lincoln's.[vii] In the Anglo-American legal tradition where martial law (a particular version of the state of emergency or exception) emerged and built a tarnished reputation because of its necessarily violent application, martial law evolved into the more acceptable and thus more easily invoked emergency powers deployed in the war on terror and in other crises usually given the image of war. This transformation, which normalised previously exceptional state powers, has seen the proliferation of states of emergency that became the standard response after each mishap—as if normal government capacities are always wanting. Or is it that contemporary state capacities always have resorted to or have been permanently buttressed with emergency powers?

Meanwhile, at home, we have conflated our experience of martial law into the "Marcos Martial Law,"[viii] the "Marcos dictatorship," or, worse, just "Marcos" —and, as such, we have missed the opportunity to understand the role that exceptional powers play in our political life. We failed to consider, for example, that the Philippine State itself, which has always been violent towards dissent and the struggle of the poor and marginalized, has always been structured by the rationality of martial law: the state of normalised exception. Even after EDSA, repression and extra-judicial killings continued in all the governments that followed, culminating in the current carnage. These are justified by the constant threat of crises—the failing economy, incompetence and cronyism, corruption, narco-politics, etc., and their combinations—to which every new government is believed to be the answer and deliverer. These perennial crises are attended by persistent demands for emergency powers, escalating in the present government's declaration of martial law in Mindanao.

And thus, in these dark foreboding times overseen by a distressingly belligerent authoritarian president and haunted by the ghoul of a dead dictator, we are left helpless despite our "never again." In this place of terror ruled directly and indirectly by the ghost past and present reality of martial law, we find that our horizon of freedom has receded and that our future has become bleak. In this here-and-now of the post-EDSA political, we confront our unresolved oppressive past in a present despotism.

But in this very same perilous place and time, we can also grasp and force an opening for the historical articulation of our past as an "appropriating [of] memory as it flashes up in [this, our] moment of danger." (Benjamin, 2003 [1940], p. 391).

## 1.0. The sovereign and the exception

What is martial law? What is its relation to the exception? What do we need to understand at the level of concepts to grasp martial law's current practice? Is resistance enough to keep martial law at bay?

At this instant, it behoves us to start with Carl Schmitt and clarify two of his most relevant but paradoxical assertions.

First, let us look at what liberals consider as the Schmittian challenge: the spectre of the absolute sovereign. David Dyzenhaus (2006, 2005) clarifies this challenge with a quote from Schmitt: "There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists". This is made extreme by the following paragraph in Schmitt's cited work, clarifying that the sovereign's power is not the monopoly of force but the monopoly of decision: "The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law" (Schmitt, 2010 [1922], p. 13). This decision that makes law is the sovereign power to decide the exception.

This claimed absolute fullness of power is affirmed repeatedly by Schmitt: "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order" (Schmitt, 2010 [1922], p. 12). Further: "The decision frees itself from all normative ties and becomes in the true sense absolute" (Schmitt, 2010 [1922], p. 12). And again: "The condition as well as the content of jurisdictional competence in such a case must necessarily be unlimited" (Schmitt, 2010 [1922], p. 7).[ix] We know that what Schmitt intends in these assertions is precisely the assurance of a unified power that is available to the state in the event of an exception. Writing in the early 1920s, he accepted the liberal constitutionalist arrangement of the Weimar Republic but saw in it a debilitating weakness—state power is divided and set against itself. According to George Schwab (2010, xlii), Schmitt "was determined to reinstate the personal element in sovereignty [that unites all power of government in one person or entity] and make it indivisible once more" as he considers such restoration as "vital for

the preservation of the modern constitutional state." We also know that an analogous unity is desired for the legal order by the liberal position. One point in which this parallel of unities fails is that Schmitt desires it in the case of the state of exception, while liberals want it to be the case all the time. The dynamics of these differing unities drive what Mark Neocleous (2006, 2007b) documents as the liberalization or normalisation of emergency powers (200-204, 13). Liberals fear the exceptional powers of the state during martial law or state of emergency[x] and thus work to encode these same powers within the law and as such put them, ideally, under judicial oversight. For Schmitt, the unity of power is absolute and the ultimate and only case in which this is demonstrated is through the exception: "The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is to be eliminated" (Schmitt, 2010 [1922], p. 6-7). In other words, we do not know the exception, and we do not know the appropriate measures to eliminate it. To respond to such an untenable *absence* of knowledge, we are enjoined to prepare and answer with the absolute fullness of state power. It is here in the exception where the norm or the law fails. This is what he means when he asserts that the norm is abolished in the exception. For Schmitt, the exception is where the law is *absent*.

Schmitt defines the sovereign as "he who decides on the exception" (Schmitt, 2010 [1922], p. 5). This decision is the *state of exception* that suspends the law. It begs the question: how can the sovereign suspend the law in the state of exception? For Schmitt, this is possible because the sovereign is both outside and inside the law: "Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety" (Schmitt, 2010 [1922], p. 7). The exception is when the sovereign decision, through the declaration of a state of exception, suspends the law to gain the fullness of power that, in theory, contains the required measures to eliminate the exception[xi]. And what happens when the exception disappears? In Schmitt, the state of exception then disappears. A normal situation is produced and the law applicable to this normal situation is restored[xii].

This leads us to Schmitt's second paradoxical assertion: "The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception" (Schmitt, 2010 [1922], p. 15). The exception is an interruption of the normal situation, and as such, invalidates the rule that applies to this situation. The state of exception is a decision of the sovereign that designates the current situation as exceptional, suspends the law (or validates the inapplicability of the law) as

not applicable to the situation, and this frees the unlimited power needed to deal with the exception. It is in this sense that Schmitt's assertion that the rule derives from the exception gains meaning. The state's exceptional powers banish the exceptional condition and establish a normal situation in which the rule applies, and since the rule applies to this returned normal situation, it is confirmed or validated. But here, what appears to validate the rule is not really the exception—the exceptional situation, but the state of exception—the decision that confirms that there is an exceptional situation and that suspends the normal application of the law.

It is important here to insist on the difference between the exception and the state of exception. This is because Schmitt, at times, *appear* to deliberately confuse and conflate the two—and says *exception* (*Ausnahmezustand*—exceptional situation) when he means *state of exception* (also *Ausnahmezustand*—the sovereign declared situation of exception that suspends the law)—as a strategy.[xiii] All this to make the claim that the sovereign decides the exception tenable. This is clearer when we use the Anglo-American terms "martial law" and "emergency," which are the official terms used in the Philippines. Marcos declared *martial law* (the *state of exception*) in 1972 because there was an alleged *emergency* (an *exception*) that gripped the whole nation. Here, it is clear that Marcos cannot decide the emergency (unless the emergency is fictive, as we shall see) but he did decide that martial law is to be imposed. Thus, the sovereign *cannot decide* the exception—the exception happens, and the most that the sovereign can do about the exception is to recognise and indicate that such as situation or status indeed exists. What the sovereign *decides*, we can tentatively agree, is the state of exception: the declaration that confirms the abnormal situation, the suspension of the law that applies to the normal, the invoking of powers needed to address a recognised abnormality, and the eventual return to the normal situation.

But is this all there is to the conundrum of martial law?

## 2.0. The state of exception and the suspension of law

Giorgio Agamben (1998), in *Homo Sacer*, points out that "what is at issue in the sovereign exception is…the very condition of possibility of juridical rule and, along with it, the very meaning of State authority…the sovereign 'creates and guarantees the situation' that the law needs for its own validity" (17). Here, a different logic applies; for the "situation" that the law requires for its validity is not the restored normal situation but

the law's very suspension: *"The rule applies to the exception in no longer applying, in withdrawing from it"* (Agamben, 1998, p. 18).[xiv] More than the mere inclusion of what is at the same time forced outside, an interiorising, or a confinement, that which is outside is included

> …by means of the suspension of the juridical order's validity—by letting the juridical order, that is, withdraw from the exception and abandon it…exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule (Agamben, 1998, p. 18).

As in Schmitt, the exception and the state of exception appear to be conflated here. But Agamben only highlights the theoretically obvious doubt, already noted above, about the sovereign's ability to decide on the exception. Here, the uncertainty is raised to a more complex degree: can the sovereign even recognise the exception and, much more, decide it? Thus, the "exception" supposedly indicated and decided by the sovereign is not a real exception but one that is fictive. It is created precisely by the state of exception, by the suspension of the law—the law is withdrawn, and the fabricated exception takes the place of the normal. This is why Schmitt appear to move conceptually unhindered between exception and state of exception: there is a third hidden term! First, there is the *real exception* that is, strictly speaking, undecidable because it is unknowable—an absence. Second, there is the *state of exception* which is a decision by the sovereign to designate an exceptional situation. Third, there is the *fictive exception* that takes the place of the normal as the exceptional situation—characterized by the absence of law precisely because it has been suspended by the state of exception. The state of exception and the resulting exceptional situation are attempts by the sovereign to inscribe the absence that is the real exception within the juridical. It is an inscription that is more than interiorizing or confinement, but an inclusion by way of the law's exclusion. Its perverse logic is: *The law does not apply, it is excluded; therefore, there is an exception*. Was this not the case in the 1972 declaration of martial law in the Philippines? The fictive emergency that replaced the normal was carefully planned by Marcos and his close aides. An article in the Official Gazette of the Philippine government traces a timeline that started in 1969 when Marcos "hinted the declaration of Martial Law [in an address to] the Philippine Military Academy Alumni Association."

> By the end of January 1970, Enrile, with the help of Efren Plana and Minerva Gonzaga Reyes, submitted the only copy of the confidential report on the legal nature and extent of Martial Law to Marcos. A week later, Marcos summoned Enrile and instructed him to prepare the documents to implement Martial Law in the Philippines.
> In his January 1971 diary entries, Marcos discussed how he met with business leaders, intellectuals from the University of the Philippines, and the military to lay the groundwork that extreme measures would be needed in the future. On May 8, 1972, Marcos confided in his diary that he had instructed the military to update its plans, including the list of personalities to be arrested, and had met with Enrile to finalize the legal paperwork required.
> On August 1, 1972, Marcos met with Enrile and a few of his most trusted military commanders to discuss tentative dates for the declaration of Martial Law—to fall within the next two months. All of the dates they considered either ended in seven or were divisible by seven, as Marcos considered seven his lucky number. (Government of the Philippines, n.d.).

Proclamation 1081 cited lawless elements that threatened Philippine democracy—in the militant student demonstrations, the communist insurgency, and the Muslim separatist movement—as reasons for martial law (Government of the Philippines, 1972). And on September 22, 1972, an ambush on Enrile was staged and became the immediate excuse for martial law (Government of the Philippines, n.d.). These support the fictive character of the emergency/exception that replaces the normal situation upon the declaration of martial law/state of exception. On the one hand, justifications for martial law were fabricated or made to appear worse than they were. On the other hand, the emergency situation made "real" by martial law's suspension of normal law was carefully planned and prepared for three years. Thus, there was a possible emergency/exception (student protests, communist insurgency, Muslim separatists) that was out of Marcos' control (much less decision), then there was the martial law/state of emergency that was declared and as suspended the application of normal law, and there was the fictive emergency/exception situation that became the normal until Marcos was deposed in 1986.

Another way to approach this Schmittian theoretical sleight of hand is to ask what the status of each of these different exceptions is vis-a-vis the juridical order. The real exception as an absence is, of course, outside the juridical order—the juridical does not and cannot know it. Meanwhile, the sovereign belongs to the juridical order and, putatively, is also simultaneously outside of it. Its decision, like the norm, belongs to the legal order as Schmitt asserts; and in proclaiming the state of exception, the sovereign theoretically locates itself outside the law. But we already know that this supposed outside—this exceptional situation—is fictive. This casts doubt on the Schmittian

assertion that the sovereign is both inside and outside the juridical order. But Schmitt does want us to think so and, as such, the assertion also prompts a question: why? The exceptional situation that the state of exception creates is a threshold between outside and inside that attempts to inscribe the exception (that absence, that *void*) in the juridical order in the form of a mirrored presence—the suspension of the law, a fictive exception. This mirror of the real exception is neither inside nor outside the law but is a threshold. For Agamben, this threshold is a "zone of indistinction between…violence and law" (Agamben, 1998, p. 64). It conflates the violence that regulates and constitutes law. It posits a new law as violence, which holds in suspension the content of the suspended law and applies it as terror. For the state, this force-of-[law] is crucial[xv].

In the Philippines, Marcos assumed full control of all state forces without oversight. He delegated judicial powers to these forces through military tribunals to the detriment of civil courts. He abolished the legislature and declared his power to legislate under martial rule, while he asserted the legitimacy the legal framework he eventually constructed through Proclamations and General Orders (Marcos, 1978, p. 314-323). But for the victims of martial law, force-of-[law][xvi] was a disaster. Amnesty International and the Task Force Detainees of the Philippines count 3257 extrajudicial killings, 35000 tortures, 737 disappearances, and 70000 incarcerations during the Marcos reign of terror (Reyes, 2016). Fictive exception, and its fabrication, has real life catastrophic effects.

Agamben frequently asserts an equivalence with language in explaining the power of the state of exception. He asserts, for example, that as in actual speech when "a word acquires its ability to denote a segment of reality only insofar as it is also meaningful in its own not-denoting…so the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference" (Agamben, 1998, p. 20). Further, in a straightforward undisguised conflation:

> Language is the sovereign who, in a permanent state of exception, declares that there is nothing outside language and that language is always beyond itself. The particular structure of law has its foundation in this presuppositional structure of human language. It expresses the bond of inclusive exclusion to which a thing is subject because of the fact of being in language, of being named. To speak [*dire]* is, in this sense, always to speak the law [*ius dicere*]." (Agamben, 1998, p. 21).

Slavoj Zizek (1991, xx-xxi) asserts the same function to the concept of the *empty signifier* in the structure of language. It is essentially a hollow container within the symbolic that anticipates all that it cannot, at the moment, represent. It can function in

this manner precisely because it is emptied of all rules and particular meanings—language is suspended in the empty signifier, but it is because of the empty signifier that language works. Is this not also the case in the concept of the state of the situation's excrescent representation in Alain Badiou?[xvii] In the situation, "there does in fact exist a set of nothing, or a set possessing no multiple as an element." Here, "the 'there is' is presupposed under the name of the void alone, in the empty set… [in it] the only relation is that of belonging" (Badiou, 2004, p. 46 and 81). Also, for Badiou, the metastructuring of the state of the situation through its confirming second count bans the founding hazard of the empty set and excludes such void from the encompassing All. Its excrescent representation within the situation is precisely the suspension of presentation within its second count. This then allows a surfeit of errant power for the state of the situation (Badiou, 2006, p. 81-111). Is not the empty set simply the mark or inscription of the unpresentable—the exception? And is not the power of excrescent representation a way for the state of the situation to deny an outside and assert its unity?

Thus, when all these are laid out in the schema of Zizek: the law is the symbolic fiction that fails to represent the appearance of the real as an exception. Formulated another way: the exception stopgaps the failure of the law to encompass the real. But here, the exception is already fictive or, in Zizek's terms, fantasy: "the empty point of formal 'decision' without any concrete weight." "The monarch," for example, "is the One who—as the exception, the 'irrational' apex of the amorphous mass ('not-all') of the people—makes the totality of customs concrete (Zizek, 2005a, p. 113 and 112). Elsewhere, Zizek asserts that there are two kinds of fantasy. Symbolic fiction or f1 explains away any gap in our knowledge through master signifiers that cohere diverse and contradictory representations into a coherent understanding. The *fastasmatic* spectre or f2, meanwhile, is the designated obstruction or impasse that explains the failure of f1. For example: the Philippines cannot be democratic because of the ignorant masses, or the country fails to be progressive or modern because of narco-politics and corruption.[xviii] Interestingly, the spectre is usually an enemy that forges us into unity (Zizek, 2005b, p. 241-245). Thus, the law's failed symbolic representation then returns as the fantasmatic spectre of sovereign absolute power that conceals the void of the real exception in the symbolic order. The reality that these two fantasies structure is nothing other than the fictive exceptional situation.

To answer, then, the persistent questions of our time—What is Schmitt's absolute sovereign trying to exclude? What was hidden by Duterte's authoritarian stance? What

did Marcos' martial law suppress? —we must return to Walter Benjamin, the real[xix] nemesis of Schmitt in their battle concerning a void.

### 3.0. The state of exception redux

Before Agamben (2005) provides an account of the dispute between Benjamin and Schmitt in *State of Exception*, he summarizes four tentative conclusions from his investigation of the concept. First, "the state of exception is not a dictatorship" that conserves law nor establishes new law (Agamben, 2005, p. 51-55). These are what Schmitt hopes for in the declaration of the state of exception—a return to the old normal of the old law or the creation of a new normal situation by a new law. These were the conflated rationalisation behind Marcos's 1972 declaration of martial law—a return to order within a new society (Marcos, 1973). These were also the reasons that Duterte gave for the extended martial law in Mindanao—the suppression of lawlessness and the development of the devastated region. In the reason of the state, the state of exception is annexed immediately to law—thus Marcos's edifice of legality and his assertion that martial law was democratic self-defence. The state of exception is asserted as the founding law of full absolute power—thus Marcos's insistence on a unitary power reminiscent of Schmitt's prescription. These are all versions of the fantasy that connect the real exception back to the law as a fictive/mirrored exception. We must be careful here to separate fantasy—which together with symbolic fiction structures our experience of reality—from reality. We know that the 1973 Philippine Constitution, which legally rationalised the Marcos dictatorship was a sham—what we experienced was an enduring martial law that lasted until its overturning through the 1986 EDSA revolution. But this is not to say that martial law during the Marcos dictatorship is the same as Schmitt's state of exception. Rather, it was Benjamin's exception or emergency as a rule (Benjamin, 2003 [1940], p. 392)—it was an institutionalized and normalised[xx] emergency wherein the exceptional situation that was supposed to be temporary was made normal for more than a decade.

Second, according to Agamben (2005, 51), Schmitt's state of exception is "a zone of anomie in which all legal determinations…are deactivated." This space of no law appears to be fundamental to the juridical order so that it maintains a relationship with it: "the juridical void at issue in the state of exception seems absolutely unthinkable for the

law" and "this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost." It is with this inference that we must interpret Schmitt's assertion of the sovereign as the one that decides the exception. This concept must attach and ground the state's power over the exception—that it is precisely through the exception that the state is a state and that the law applies, paradoxes (and double meanings) be damned. Was this not the motivation behind Marcos's insistence that the power to declare martial law is that of the president alone (Marcos, 1978, p. 267)? Did this not result in the suspension of all legal protection on the ground resulting in military and police operations that incarcerated, tortured, killed, and disappeared thousands? And was this not what was achieved in the 2017 Supreme Court decision that affirmed the legality of Duterte's martial law declaration by arguing that the 1987 Constitution that ended the legal structure of the Marcos dictatorship "grants him the *prerogative* whether to put the entire Philippines or any part thereof under martial law" (Supreme Court of the Philippines, 2017). The decision is an escalation of the accepted interpretation and is highlighted by the use of "prerogative" to describe the power of the President to declare martial law; that is, it is not merely authorized by law but a prerogative of the position.

Third, Agamben calls our attention to the "acts committed during the *iustitium*" whose nature "escapes all legal definition" in the sense that "they are neither transgressive, executive, nor legislative." These acts "seem to be situated in an absolute non-place with respect to the law" (Agamben 2005, 51). Here, he asserts an analogy between the state of exception and *iustitium* in the ancient Roman Republic. When the republic was endangered, its Senate would declare a "*senatus consultum ultimum"* (final decree of the Senate) that called upon the consuls, the praetor, the tribunes and "in extreme cases, *all citizens*, to take whatever measures they considered necessary for the salvation of the state." This follows "a decree declaring a *tumultus* (that is, an emergency situation in Rome resulting from a foreign war, insurrection, or civil war), which usually led to the proclamation of an *iustitium*—literally…'standstill' or 'suspension of the law'" (Agamben, 2005, p. 41). He notes that both ancient and modern scholars are confused by the status of the acts committed by anyone within this anomic space that suddenly coincides with the space that is the Roman city. While confusion attends the judgment of these acts after the fact, within *iustitium* itself they are "undecidable." Is this confusion not the same as the liberal ambivalence concerning martial law? For example, Dyzenhaus cites A.V. Dicey, a 19th-century British liberal jurist and prominent constitutional

theorist, as believing that "the English constitution recognizes martial law only in two…very different senses" — the law that applies only to the military and the "common law defence of necessity, which can be invoked by any citizen who responds appropriately to an immediate threat to peace and order" (Dyzenhaus, 2009, p. 4)[xxi]. He explains that the acts committed under this common law must be defended in court once the necessity passes, but this confuses the status of the acts after the fact (in a restored normal situation) with the status of the acts during the necessity (the fictive exception). It also ignores the reality that such exceptional situations sometimes last many years as a normalised emergency. Thus, in the Philippine situation of a normalised emergency that is the post-EDSA political, the legality of martial law acts is still to be decided by the courts. We decry martial law atrocities, but the law has not held anyone accountable. Does not this mark the limit of the law? Are martial law acts during the Marcos dictatorship largely undecidable?

Finally, Agamben affirms that the "idea of a *force*-of-[law][xxii] is a response to this undefinability and this non-place" (Agamben, 2005, p. 39 and 51). He then lists different versions of this force borne out of the absence of law, among which we can add the fullness of power in the state of exception, the laws that normalise exceptional powers, the force borne from "democratic self-defence," and the violence and fear necessitated by a war against drugs—"*all these are fictions* [or fantasies] through which law attempts to encompass its own absence and to appropriate the state of exception, or at least to assure itself a relation with it" (Agamben, 2005, p. 51)[xxiii].

## 4.0. Gigantomachy concerning a void

These four summations preface Agamben's interpretation of what he calls the "gigantomachy concerning a void" (Agamben, 2005, p. 52), and it is good to bear these in mind in the following account. In this clash between philosophical giants, there exists an exoteric record "in various forms and at differing levels of intensity" starting in 1925. This collection of material, which is sometimes deemed scandalous because of the obvious interest and admiration Benjamin shows for the yet-to-be-notorious Schmitt, is more widely acknowledged. But Agamben identifies an esoteric record that dates their initial encounter to earlier texts, more specifically to Benjamin's 1921 "Critique of Violence"[xxiv]. Agamben asserts that this essay aims "to ensure the possibility of a violence

(the German term *Gewalt* also means simply "power") that lies absolutely 'outside'…and 'beyond'…the law and that, as such, could shatter the dialectic between lawmaking violence and law-preserving violence" (Agamben, 2005, p. 53). Indeed, Benjamin argues that "if the existence of violence outside the law, as pure immediate violence, is assured, this furnishes proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible, and shows by what means" (Benjamin, 1996 [1921], p. 252). For Benjamin, the dynamics of lawmaking and law-preserving violence are adversarial and eventually fatal, but this fatality is not final and is just another stage in a cycle of new laws destined to decay and be replaced. The breaking of the cycle is the suspension of law and the destruction of all the forces on which it depends and that it enables, thus birthing the entirely new:

> A gaze directed only at what is close at hand can at most perceive a dialectical rising and falling in the lawmaking and law-preserving forms of violence. The law governing their oscillation rests on the circumstance that all law-preserving violence, in its duration, indirectly weakens the lawmaking violence it represents, by suppressing hostile counterviolence…This lasts until either new forces or those earlier suppressed triumph over the hitherto lawmaking violence and thus found a new law, destined in its turn to decay. On the breaking of this cycle maintained by mythic forms of law, on the suspension of law with all the forces on which it depends as they depend on it, finally therefore on the abolition of state power, a new historical epoch is founded (Benjamin, 1996 [1921], p. 251-252).

We can read Benjamin's analysis of the cyclical fatality in the two kinds of law-bound violence as a response to Schmitt's opposition to commissarial and sovereign dictatorships that conserve law and that constitute new law, the subject of the 1921 *Dictatorship*. But it is, in turn, Benjamin's account of pure violence outside the law that Schmitt counters with what we already discussed as his notions of the sovereign decision and the state of exception that involves the fabrication of a fictitious exception. This pure violence, as Benjamin asserts, "when not in the hands of the law, threatens it not by the ends that it may pursue but *by its mere existence outside the law*" (Benjamin, 1996 [1921], p. 239). According to Agamben, the power of the sovereign to suspend the law in the state of exception presents Schmitt with the countermove of the power that neither preserves nor makes law but that suspends the law in his 1922 *Political Theology* (Agamben, 2005, p. 54). In this suspension, the outside is pulled in an act of inclusion within the state of exception. Thus, the sovereign occupying this threshold of outside and inside can proclaim that there is no such thing as an *exception* that is outside the law—there is only

the state of exception that suspends the law, and that the sovereign decides (as fictive exception). Consequently, there is no such thing as Benjamin's pure violence.

Or so the sovereign and Schmitt argue. In a letter to Schmitt dated December 1930, Benjamin expressed his "joy" in being able to send his new book, showing how much he owed Schmitt for its "presentation of the seventeenth-century doctrine of sovereignty." The book is Benjamin's 1928 *Origin of the German Mourning Play*. Sigrid Weigel (2004, 110) explains the importance of the text via that status of the baroque theatre in the 17th century "at a time when the name 'tragic drama' (*Trauerspiel*) came to apply equally to both the historical events and the dramatic form." To Benjamin, baroque theatre is "the drama of the tyrant and the martyr…not only because of its central figures (the sovereign, the tyrant, and the martyr) and their places (frequently in locations in the Orient, as the dramas of eastern rulers)." Weigel also asserts the book "provides quite interesting framework for the present situation." While our concern here only tangentially touches on Weigel's primary concern, Benjamin's work does theoretically resolve the challenges raised by Schmitt on the sovereign and its power over the exception.

Samuel Weber (2008) identifies the relevant passage in the text:

> The sovereign represents history. He holds historical happening in his hand like a scepter. This attitude is anything but a privilege of the theatre. Considerations of political theory underlie it. In a final confrontation with the legal lessons of the Middle Ages, a new concept of sovereignty was formed . . . If the modern concept of sovereignty amounts ultimately to a supreme, princely executive power, the Baroque develops out of a discussion of the state of exception and makes the most important function of the prince that of excluding it (Weber, 2008, p. 186; Benjamin, 1998 [1928], p. 65).

Agamben cites another work by Weber (1992) to highlight that Benjamin departs ever so slightly, but suggestively, from its avowed theoretical debt to Schmitt. Benjamin substitutes "excluding" for "deciding" and, as such, alters Schmitt's definition of the sovereign from he who decides the exception to he who excludes it. For Agamben, this must be read with Benjamin's theory of "sovereign indecision" (Agamben, 2005, p. 55). But before we get to this, we turn back to Weber as he attributes an important significance to Benjamin's alteration: "For Schmitt…the state of exception must be removed…done away with, but only in each particular case, never as such: that is precisely what Schmitt criticizes modern political theory for trying to accomplish by excluding consideration of the state of exception from the determination of sovereignty" (Weber, 2008, p. 186). Here, what is excluded are the singular appearances of the exception. But the state of exception is retained and insisted as something that the sovereign can decide. Outside of the

Schmitt-Benjamin back and forth, the ascendant political theory during the time was liberal constitutionalism—and the point of this theory is to exclude the state of exception as such by subsuming it fully within the law; that is, by making it codified, limited, and overseen. The state of exception treated this way is no longer the state of exception strictly speaking but normalised emergency, as we shall see. Agamben sees this, in combination with what Benjamin asserts as the sovereign incapacity to decide, as a further shift in the paradigm of the state of exception in Schmitt. Here, Benjamin separates sovereign power from its application and shows that the baroque sovereign[xxv] is incapable of deciding:

> The antithesis between the might of the ruler and his capacity to rule led…to a distinctive trait that is only apparently generic, and whose illumination is only possible against the background of the theory of the sovereign. This is the incapacity of the tyrant to decide. The Prince, in whose hands the decision on the state of exception reposes, shows himself at the earliest opportunity to be unequal to his task: a decision is practically impossible for him. (Weber, 2008, p. 188; Benjamin, 1998 [1928], p. 70-71).

Moreover, for Benjamin, this baroque sovereign act of indecision, of excluding what is already excluded—that is, in what was already discussed above as the sovereign's attempt to mirror the real exception in a fictive exception created through the suspension of the law—amounts to transcending what is transcendent by declaring it immanent and designating itself as true transcendence. In Schmitt as we have seen, this means appearing to decide the undecidable exception through the fabrication of a fictive exception made possible through the suspension of the normal application of law in the declaration of a state of exception. The fabricated exception replaces what is outside of the sovereign's power and is declared the object of his full power that is attained through the suspension of normal law. As such the sovereign appears to be inside and outside the law as such—as a being that transcends the law. As such, what the sovereign "rejects is any admission of the limitation of immanence and it does so by emptying transcendence of all possible representable content" (Weber, 2008, p. 187). This has equivalents in both the liberal and Schmitt's versions of the unity of power: For liberalism, there is no outside to the law, not even the state—law and state are unified. For Schmitt, there is no outside to the power of the sovereign exercised as force-of-[law] and if there is an entity that can be outside of the law, it is the sovereign through its power to declare the state of exception. But it is precisely these assertions, liberal or Schmittian, that Benjamin counters. The liberal unity of power leads to the normalisation of exceptional powers as these encoded into law and become part of the normal. Schmitt's unity of power follows the tradition of divine

mandate and the replacement concept of the mortal god: "[i]n the theory of the state of the seventeenth century, the monarch is identified with God and has in the state a position exactly analogous to that attributed to God in the Cartesian system of the world" (Schmitt quoted in Weigel, 2004, p. 113; Schmitt, 2010 [1922], p. 46). The sovereign's transcendence is that of a god. What Benjamin does is to undermine this equation in Schmitt: "The level of the state of creation, the ground on which the Mourning Play unfolds, determines unmistakably the sovereign as well. However high above subject and state he may reign, his rank includes him in the world of creation: he is the Lord of creatures, but he remains a creature." (Weber, 2008, p. 187-188; Benjamin, 1998 [1928], p. 85).

Thus, the sovereign cannot decide precisely because for the sovereign—in its attempt to pull the real exception within the confines of law through the law's suspension—there is no outside of the law, even itself—however powerful a creature it is:

> There is no/(a?)[xxvi] Baroque eschatology, and precisely for that reason, a mechanism that heaps up and exalts everything born on earth before it delivers it over to the end. The beyond is emptied of everything wherein even the slightest breath of world weaves and from it, the Baroque extracts a plenitude of things that tend to avoid all shaping and reveals it at its height in a drastic form, in order to evacuate a last heaven and as a vacuum to put him into service, to annihilate the world with catastrophic force (Weber, 2008, p. 187; Benjamin, 1998 [1928], p. 66).

## 5.0. The real state of exception

Hence, the state of exception is no longer Schmitt's miracle[xxvii] but a catastrophe. The state of exception is not the real exception. The real exception is always beyond the sovereign's reach and, as such, beyond its decision. It can only be excluded. The state of exception, being in practice still law (as normalised emergency powers)—is ultimately not decided since it is from the beginning law-bound. It seeks a return to a lawful order. The sovereign indecision is borne out of both impossibility and definition. Both Weber and Agamben point to Schmitt's equation of the sovereign to God, but what Benjamin does is make the sovereign the leader of creatures but still a creature. Benjamin denies the transcendence that Schmitt gave the sovereign and subjects it to an inescapable but powerful immanence. And the exception is forever foreclosed from its power. For Weber, "[t]he undoing of the sovereign results from the sense that in a creation left entirely to its

own devices, without any other place to go, the state of exception [as Benjamin asserts] has become the rule." (Weber, 2008, p.188).

This leaves us with the more important question raised by Benjamin's theoretical triumph over Schmitt: What is this catastrophe that has replaced Schmitt's miracle?

*The catastrophe is the undoing of the absolute sovereign as fantasy. It is the exposing of the liberal symbolic fiction as presiding over the devastation of normalised emergency. It is the state of exception that has become the rule.*

> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about *a real state of emergency*, and this will improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm.—The current amazement that the things we are experiencing are "still" possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge—unless it is the knowledge that the view of history which gives rise to it is untenable (Benjamin, 2003 [1940], p. 392).

The state of emergency is the rule—a fabricated exception that bit back and undermined Schmitt's schema—his philosophical endeavour to ground state power in the exception. In 1922, the Reich Chancellor noted that Article 48 of the Weimar Constitution "proved to be very useful in cases of extreme urgency when economic measures—and especially the imposition of taxes—had to be carried out" (Neocleous, 2006, p. 196). This observation, now ubiquitous, was then ominous. It gave way to the disaster of the Nazi permanent state of emergency declared in 1933 that was never lifted. Was this not sovereign indecision at its most disastrous? Schmitt, in his collaboration with the Nazi party, anticipated a dictatorship that would have restored the normal or founded a new constitution. Instead, he witnessed a worldwide conflagration. For Benjamin, the Nazi permanent state of exception was tragic. He ended his life in 1940 at the Spanish border trying to escape German-occupied France.

And was not Marcos's martial law, which effectively lasted fourteen years, also a state of emergency that was the rule? It was the exclusion of real exception expressed as a fictive exception—a protracted state of exception—and, as such, an exemplar of sovereign indecision. And were not Duterte's drug war, martial law in Mindanao, and escalated emergency measures—a hit list of alleged terrorists (Mogato, 2018), secret surveillances (Tomacruz and Gavilan, 2018), the revived martial law era PNP subpoena power (Dalangin-Fernandez, 2018), the Anti-Terrorism Law (Torres-Tupas, 2021),[xxviii]

etc.—normalised emergency? Despite the Supreme Court support and enshrinement of Duterte's supposed prerogative as president, he did not decide any exception. The exception/emergency is already normalised as encoded emergency powers. This made fictive exception the rule and there was nothing for Duterte to decide. Meanwhile, the real exception will always be outside of and beyond any Philippine president's power.

However, are not both the paradigmatic tragedies of our time? Marcos and Duterte are catastrophes the left thousands dead, government coffers looted, Philippine democracy muddled and without direction. Is there a practical hope from Benjamin's theoretical win? What is to be done?

Benjamin won his philosophical debate with Schmitt but fell victim to a conquering fascism in a world at war. Schmitt became irrelevant within a fascism that ignited the global war and that made the state of exception permanent. Meanwhile, we ended our version of "the state of emergency…[that] is the rule" in EDSA 1986 only to see it revived in the succession of administrations post-EDSA. Something must have been right in EDSA 1986, and something went wrong thereafter.

But there is still Benjamin's final nail in his theoretical arsenal that was formulated right before his death, in the above quoted thesis VIII of the "On the Concept of History." If the point of his protracted arguments is to deny the sovereign's power to decide the exception, this power is now ours as we are tasked "to bring about *a real state of emergency*" that is hoped to end the catastrophes of our time.

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[i] This paper is the third of three standalone essays on martial law and state of emergency. The first asserts that colonialism is martial law. This is true not only in the sense of Ferdinand Marcos Sr.'s tracing of its origins in colonial law. But also, it is shown in the practices of two rules of empire, the colonial application of terror and the suspension of law in colonial wars, including the Philippine-American War. The second essay tracks the expansion and development of what Mark Neocleous asserted as the normalisation or liberalisation of emergency in the Philippines and the world. It makes the assertion that Duterte's drug war, continuously waged by the current Marcos administration, is a normalised emergency. This third essay traces the lineage of the theoretical debate surrounding the meaning of martial law or state of emergency in what Agamben dubs the "gigantomachy concerning a void"—the philosophical debate between Carl Schmitt and Walter Benjamin on the concept and practice of exception. All three essays appear as parts of a dissertation chapter uploaded in ResearGate and Academia.

[ii] University of the Philippines. Diliman and Los Baños are constituent universities and two of UP's biggest campuses.

[iii] EDSA, the name of the long stretch of road where millions of people gathered, also became a name for the 1986 revolution that toppled the Marcos dictatorship.

[iv] For the evolution of the term and its use in the British and American governments, see Mark Neocleous (2007a).

[v] 'Di tayo talo' means we should not prey on each other. 'Talo-talo' means free-for-all or fair-game.

[vi] Marcos credited the American colonial government for the martial law provision in the 1935 Philippine Constitution, which he traces to the 1916 Jones Law. (Marcos, 1978, p. 263-69)

[vii] Exemplified and appealed to by Marcos in several of his Martial Law speeches. (Marcos, 1978, p.314-323).

[viii] Also, the title of a definitive book on the Marcos dictatorship written for students. See Robles (2016).

[ix] Schmitt identifies this unlimited jurisdictional competence as that of the sovereign. Ironically, while denying that such unlimited competence does not exist, liberals do designate who can act in emergency situations. The liberal democratic Philippine Constitution, for example, identifies it as the president.

[x] Here, "martial law," "state of emergency," and "state of exception" mean the same thing: the suspension of law (usually its protection of rights) to restore exceptional or full powers for the state to deal with the emergency.

[xi] In discussing Giorgio Agamben's analysis of Schmitt, Judith Butler clarifies this process in the contemporary setting of the US War on Terror and its practice of indefinite detention: "The state *produces,* through the act of withdrawal, a law that is no law, a court that is no court, a process that is no process. The state of emergency returns the operation of power from a set of laws (juridical) to a set of rules (governmental), and the rules reinstate sovereign power: rules that are not binding by virtue of established law or modes of legitimation, but fully discretionary, even arbitrary, wielded by officials who interpret them unilaterally and decide the condition and form of their invocation." (Butler, 2004, p. 62).

[xii] See Schmitt's concept of commissarial and sovereign dictatorship in his 1921 book *Dictatorship*. Here, both versions of dictatorship return to law: the first to the suspended constitution, the second to a new constitution (Schmitt, 2014 [1921]).

[xiii] This is while using exception in what appears to be double meaning in the German original of a claim already quoted earlier: "Die Ausnahme ist interessanter als der Normalfall. Das Normale beweist nichts, die Ausnahme beweist alles; sie bestätigt nicht nur die Regel, die Regel lebt überhaupt nur von der Ausnahme" (quoted in Wikipedia 2006). This is Google translated as "The exception is more interesting than the normal case. The normal proves nothing, the exception proves everything; It not only confirms the rule, the rule only thrives on the exception." This closely resembles the usual English translation already quoted in the text. We will notice here, however, that "exception" (*Ausnahme*) changes meaning from the first deployment (as exceptional situation undecided by the sovereign) to the last deployment (as state of exception decided by the sovereign and as such in Schmitt's theory, the basis of normal law).

[xiv] Emphasis is Agamben's.

[xv] "Law" is bracketed here to mean inclusion-exclusion/outside-inside. As a desired effect of the declaration of a state of exception, it is the full force of the state that is unlimited by law. This does not mean that there is no law. It is suspended, and its suspension allows the full force of state powers.

[xvi] In the "Force of Law: The 'Mystical Foundation of Authority,'" Jacques Derrida (1992, p. 6) asks "How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal—or, others would quickly say, neither just nor unjust?" Here Derrida is also concerned with the "exception" that is, in Schmitt, the basis of law, and the force of law under the state of exception that, in Benjamin (1998 [1928]), is catastrophe or terror. As such, the sovereign is at the same time tyrant (see Weigel, 2004, p. 116-117).

[xvii] Agamben asserts that the concept of membership and inclusion in Badiou's philosophical treatment of the theory of sets, as ontology adequate to the situation, is analogous to the dynamics of exclusion/inclusion in the state of the exception. And the event in Badiou corresponds to the exception. (Agamben 1998, 24-25)

[xviii] These are common refrains from Philippine politicians seeking positions during elections.

[xix] The liberals, it turns out, are only Schmitt's frenemies. Together, they complete the dynamics that drives the normalisation of emergency.

[xx] This is exactly what Butler argues in the case of indefinite detention in the US: "'Indefinite detention' is an illegitimate exercise of power, but it is, significantly, part of a broader tactic to neutralize the rule of law in the name of security. 'Indefinite detention' does not signify an exceptional circumstance, but, rather, the means by which the exceptional becomes established as a naturalized norm. It becomes the occasion and the means by which the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life in the US." (Butler, 2004, p. 67).

[xxi] Or more precisely: "Dicey's claim that 'martial law comes into existence in times…of urgent and paramount necessity' and that '[t]his power to maintain the peace by the exertion of any amount of force…is sometimes described as the prerogative of the Crown'…Dicey is sceptical about the description of this power as a prerogative one. It is, he says, 'more correctly' described as the power that every citizen has to use force to preserve or restore the King's peace, and since every citizen has it, so too does the Crown…[Dicey] is clear that, once the emergency has passed, the exercise of this power will have to be shown to meet the test of necessity if the person who wielded it is to escape punishment for having committed an illegal act." (Dyzenhaus, 2006, 2008-2009).

[xxii] "Law" is crossed out in Agamben, which leaves us with just "force" that is brought about by the suspension of law. Here, the word is bracketed. But as already said in footnote 14, the law is not erased but only suspended to allow, theoretically and practically, the full force of state power without limits and oversight.

[xxiii] Emphasis mine.

[xxiv] Agamben presents a convincing chronology and context. And the texts, though not citing each other, also make the case (Agamben, 2005, p. 52).

[xxv] Weber explains that the "the function of the sovereign to exclude the state of exception conforms fully to the attempt of the German baroque to exclude transcendence *by incorporating it*" (emphasis in Weber, 2008, p. 187).

[xxvi] Agamben argues that it should be "There is *a* Baroque eschatology…" (Agamben, 2005, p. 57) while Weber, in an endnote, affirms the meaningfulness of the passage in both possibilities (Weber, 2008, p. 238n24).

[xxvii] "The state of exception has for jurisprudence a significance similar to that of the miracle in theology. Only when this analogous position becomes conscious can the development that the ideas concerning the philosophy of the state have followed over the past centuries be recognized." (Schmitt, 2010 [1922], p. 49).

[xxviii] Republic Act 11479 or the Anti-Terrorism Act of 2020.