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Elements for a debate on the judicial decision in "difficult cases"[1]: the state of exception in the shadow of the law

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ABSTRACT

This paper aims to explore and work the theory of Herbert L. A. Hart, regarding the interpretation of hard cases, taking as basis the statement of David Dyzenhaus that there is a "mini" state of exception in judicial decisions executed in the shadows of the law. From this context, it explores the concept of the state of exception and its characteristics through the work of Giorgio Agamben, when it prepares the ground for the main hypothesis is that its connection to the theory of law Hartiana the penumbra. After it is with the basics of his theory about the discretion that aims substantiate the hypothesis Dyzenhaus until finally working hypothesis raised by David Dyzenhaus, in order to verify the feasibility of the decision in the shadows of the law being an exception environment and, further, if this can really lead to what might be called the dictatorship of the judge. Developed by theory, with emphasis on literature, the research, as will be seen, revealed in dialectical relation to the objectives and the method of deductive approach.

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[1] This work not will step into the debate about the existence or not of easy cases and hard cases, critique of Ronald Dworkin, and in the case of Brazil, Luiz Streck Lênio. Will adopt the terminology used by Herbert L. A. Hart to facilitate the understanding of the reader, without, however, be a concern to join the dilemma, this classification is correct or not, since this is not the purpose of the study. This article was translated by Juliana Luiz and autorized for publication by the author in 30/06/2013. Version in portuguese received in02/02/2013, acepted in 01/04/2013.

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Elementos para um debate sobre a decisão judicial nos "casos difíceis": O estado de exceção na penumbra da Lei

RESUMO

O presente trabalho tem por objetivo explorar e trabalhar a teoria de Herbert L. A. Hart, no que se refere à interpretação dos *hard cases*, tomando-se como base a afirmação de David Dyzenhaus de que há um "mini" estado de exceção nas decisões judiciais executadas na penumbra da lei. A partir deste contexto, explora-se o conceito do estado de exceção e suas características através da obra de Giorgio Agamben, momento em que se prepara o terreno para a hipótese principal que é a sua vinculação à teoria Hartiana da penumbra do direito. Após, é com os conceitos básicos de sua teoria sobre a discricionariedade que visa fundamentar a hipótese de Dyzenhaus até, finalmente,trabalhar a hipótese levantada por David Dyzenhaus, no sentido de se verificar a viabilidade da decisão na penumbra da lei ser um ambiente de exceção e, mais, se essa situação pode, realmente, levar ao que se poderia chamar de ditadura do julgador. Desenvolvido por meio teórico, com ênfase na bibliografia indicada, a pesquisa, como se verá, revela-se em relação aos objetivos dialética e quanto ao método de abordagem dedutiva.

PALAVRAS-CHAVE: Decisão Judicial, Casos Difíceis, Estado de Exceção, Penumbra da Lei.

1. INTRODUCTION

This paper aims to explore and work the Herbert L. A. Hart's Theory about the *hard cases* and its interpretation according David Dyzenhaus's Theory, that there is a *mini* state of exception during court decisions taken under the shadow of law. Dyzenhaus's hypothesis has its perspective considering the recovery, with Hart vs. Dworkin, of the debate during Weimar's Republic, between Schmitt and Kelsen, concerning who guards the Constitution.

Through Dyzenhaus point of view, there is a resemblance between the German debate – emphasizing judger's decision when the positivist system didn't offer direct rules – and the Hart's classification of hard cases, as both deals with decision under an exception's character.

This paper does not intend to explore those debates, but, exclusively, investigate the correlation between hard cases and state of exception. Furthermore, it seeks to reveal if this creation of law by the judger emerges from this unclear zone as a sovereign decision or emergency court.

Considering this context, as a first step, it will be presented and developed the conception of state of exception created by Giorgio Agamben. This description will be necessary to establish the basic notions that link Hart's Theory with the arguments of the shadows of the law.

Secondly, the idea of shadow of the law and the concept of state of exception will be analyzed conjointly according Hart's Theory of hard cases. For this, Hart's elaboration about discretionary will be explored, intending to justify Dyzenhaus's hypothesis.

Al last, Dyzenhaus's Hypothesis will be used to verify if decisions taken under the shadow of the law are similar to decisions taken under state of exception, and if they may lead to the so called judger's dictatorship. Developed by theoretical elements, this text pursuit to be dialectical forward its objectives and deductive to its methods.

2. STATE OF EXCEPTION'S ELEMENTS

> "Weimar's situation was, clearly, very different of U.S. or England's situation after the World War II, when the debates between Hart vs. Fuller and Hart vs. Dworkin took place. However, there are echoes that allow us to recognize the shadow of uncertainty as a kind of mini state of emergence for the positivist theory" (DYZENHAUS, 1999, p.15)

By this, David Dyzenhaus starts his theory, recovering the debate between Carl Schmitt and Hans Kelsen, when they argue who should guard the Constitution during exception's environments.

The search for this crossover is difficult, once there isn't even a clear theory about the state of exception and its connection to Law, as long as this state is considered by the authors a problem based on facts and not on Law (AGAMBEN, 2004, p.11).

Consequentially, it must be investigated what it is, effectively, this state of exception and its characteristics. For so, it will be presented the Giorgio Agamben's work, one of the best references regarding this subject, focusing on historical[4] and conceptual elements.

It's considered a hard task to search for connection between state of exception and politics/law, because the exception doesn't have a legal form, it occurs under a zone of indifference between chaos and legal order. It is, then, a paradox, as long as the exceptional measures are species of legal measures not taken under the state of law; they are legal forms that can't have a legal form (AGAMBEN, 2004, p.11-12).

It should be taken in to consideration the fact that the act performed under exception is an act outside the legal system – if it wasn't like that, this act would be recognized as a normal one, not an exceptional one – nonetheless, in *contrario sensu*, this act doesn't belong to a chaotic situation, because there is some order, even if it is not a legal one. The paradox exists because the decision, despite being at the fringe of the law, have a legal authority, even being outside normality.

Agamben even compares the state of exception with a "no man's land", that would only be better understood by lifting the veil of uncertainty of this "uncertainty zone" (AGAMBEN, 2004, p.12). Perhaps, that's why the author says that:

> "Between the elements that disturb the creation of a state of exception's definition, there is, for sure, its straight connection with civil war, insurrection and resistance. These are states directly opposed from regular state, as civil war exists under a zone of indecision about the state

[4] The historical aspect will not be analyzed on the present paper. It will be emphasized only the conceptual elements of the state of exception.

> of exception itself, as it is an immediately response of the state force to the most extremist internal conflicts" (AGAMBEN, 2004, p.12)

It seems clearly that, when abnormal facts occur, they take decision to abnormal paths, in a pursuit to protect the order. These are the aspects that could be defined as the state emerged into exception.

Maybe, the main example about this topic is Adolf Hitler's measure, when he took control of the Nazi State – or, it could be said – he received it. Under the allegation that this measure would protect the people and the State, it was promulgated an act suspending the articles referring to individual and fundamental freedoms at Weimar's Constitution. As this situation existed for 12 years, it can be said that the Third Reich was a permanent state of exception, becoming, in this perspective, as a threshold of indeterminacy between democracy and absolutism (AGAMBEN, 2004, p.12-13). This case clearly shows that there is a fine line between protecting the democratic state and reaching totalitarianism - in the grounds of the use of exception – by the response of the state power to an extreme conflict.

Next to this concept, the terminological indetermination is also a current discussion on the topic. Therefore, "the state of exception is not a special right, but, as suspension of legal order itself, it sets a threshold or a limit-concept" (AGAMBEN, 2004, p. 15). Thus, the state of exception is directly attached to the term "suspension". This argument will help to connect this concept with Hart's theory.

The connection of the *state of exception* to the term *suspension* demonstrates a natural consequence towards the convergence between the extent of the civil powers (that are a military sphere in time of war) and the suspension of fundamental rights. Importantly, the exceptional measures have been applied in history based on belligerent periods, state of emergency, and war itself, using military authority to guarantee general authority[5].

[5] Giorgio Agamben makes a remarkable analysis about the State of Peace, State of War and State of Emergency, from the historical point and its convergence with the contemporary state of exception.

Currently, there is a modification of the guarantor's power, as it passed from the military sphere to governmental powers sphere, leading to an original pleromatic state[6]. Executive power takes control of the legislative powers, i.e., takes full power to govern and legislate in an emergency situation, or, by the fringe of normality.

The question is, however, how far the use of full power is compatible with a democratic state?

It seems evident that its controlled use, although contradicting the hierarchy of rules and regulations by the use of emergency rules, would be compatible with democracy. However, its systematic and regular use, pursuing governance by this rules and acts, *contrario sensu*, would lead to its liquidation.

In practice, it has been shown historically that - especially with Weimar's example - the use of exceptional measures with the intention to protect the democratic system was, paradoxically, the cause that led to its ruin (AGAMBEN, 2004, p. 20). That's the danger of the use of exceptional measures without moral restraints, leading to Dyzenhaus's hypothesis.

Adding to the conceptual difficulties, Agamben brings another point: the state of exception in relation to the legal system. To the author:

> In fact, the state of exception is neither inside nor outside the legal system. The problem of its definition concerns to a threshold or a zone of indifference, where inside and outside are not mutually exclusive, but indeterminate. The suspension of the norm does not mean its abolition, and, its zone of anomie is not devoid of relation with the legal system. (...) The conflict about the state of exception presents itself essentially as a dispute about its deserving *locus* (AGAMBEN, 2004, p. 38-39).

By this view, Agamben raises by the foundation of state of exception the concept of necessity. The adage *necessitas legem non habet* - necessity has no law - has a twofold

[6] State in which there has been no separation of powers.

understanding: the necessity knows no law and necessity creates its own law. However, in both cases, the theory of the state of exception can be solved entirely through the *status necessitatis*, so the subsistence judgment of the first exhausts the legitimacy problem of the second (AGAMBEN, 2004, p. 40).

Thus, despite the discussion of its definition, its connection with the legal system, its invasion of powers and its respect to the democratic state, are entered into a state of necessity in which the decision maker reaches the legitimacy towards his actions.

When a particular case eludes the need to follow the law, it creates an approximation of the necessity's theory with exception's theory. The necessity, therefore, "is not source of law and it doesn't, in the strict sense, suspend it; but merely subtracts the particular case from a literal application of the rule" (AGAMBEN, 2004, p. 41). As a result, one can say that the modern state of exception is an attempt to include in the legal system the very exception, creating a zone of indifference in which fact and law overlap.

Only with modern thinking that the state of necessity tends to be included in the legal system and present itself as the true "state" of law. The necessity goes from a particular situation - where the law does not obligate - to the foundation and source of law itself.

The state of exception presents itself, therefore, as a paradoxical model that, although illegal, is perfectly juridical and constitutional (AGAMBEN, 2004, p. 44).

According to Agamben, however, the utmost aporia by which fails all the state of necessity's theory refers to the very nature of the need, if considered as an objective situation. What happens is just the opposite, i.e., instead of presenting itself as an objective fact, it clearly implies a subjective judgment, so "necessary and exceptional" are only circumstances declared as such, according to the goals they intend to achieve (Agamben, 2004, p. 46).

Here is the point, the tone, left by Agamben to analyze the Hart's theory (of decision taken under the shadow of the law) and Dyzenhaus's assertion (about the existence of a positivist state of exception).

3. HART AND THE DECISION TAKEN AT THE FRINGE OF THE LAW

For Herbert L. A. Hart, the Law is a union of primary and secondary rules[7] that differ from other social rules based on an ultimate criterion of validity, the recognition rule, conventionally assumed by a particular community. It is by this recognition rule that will be determined the pillars of his theory interpretation.

Important to consider that, "in any large group, the general rules, standards and principles should be the main instrument of social control, and not the particular directives given separately to each individual" (HART, 2007, p. 137). Without these standards of conduct wouldn't exist what we understand as Law. There are two different ways of communicating such standards: legislation and precedent (HART, 2007, p. 137). With that, if the legislation does not demand greater difficulties, the precedent is understood as common sense acquired through traditional patterns of behavior.

In Hart's theory of law, "there will be, actually, simple cases that are always occurring in similar contexts with general expressions that are clearly applicable, but, there will also be cases where it is unclear if they apply or not" (HART, 2007, p. 139). To the last ones, we give the name of *de facto* situation. In these ones, "the general language endowed with the rule authority can only lead to uncertain ways, as occurs with the example endowed with authority". Thus, "the discretionary power left by the language can be very broad" (HART, 2007, p. 140)

This situation is justified by the impossibility to produce a complete set of rules that could embrace all concrete cases, by then, preventing the possibility of double standards. After all, this is not the world we live in. The legislators, human beings, cannot have such knowledge of all possible combinations of circumstances that the future may bring (HART, 2007). Consequently,

[7] Primary rules are those that guarantee rights or impose obligations upon members of the community. The rules of criminal law prohibiting theft, homicide or driving a vehicle with excessive speed are good examples of primary rules. Secondary rules are those that stipulate how and by whom these primary rules may be formed, recognized, modified or extinguished. The rules stipulating how Congress is composed and their legislative procedures are examples of secondary rules. Rules about the formation of contracts and preparation of wills are also secondary rules, as they stipulate how private rules that drive individuals obligations (ie, the terms of a contract or will) arise and are modified (Dworkin, 2001. P. 123).

the author recognizes the possibility to solve the question in uncovered situations by choosing between competing interests, according to the decision maker's conception of the case.

These are known as the hard cases, that, due to the shadow of uncertainty, there is the possibility to exercise discretionary power. It is not possible to have one single correct answer, but only a reasonable compromise between the many conflicting interests. So, "the open texture of law means that there are areas where many things should be left to be developed by courts or officials" (Hart, 2007, p. 148) - Judges - exercising, ultimately, its discretionary from case to case.

Hart justifies this point according to the argument defended by Hoadly that "whoever has an absolute authority to interpret any written or oral rule, it is the real legislator for all intents and purposes, and not the person who first wrote it or made it verbally "(HART, 2007, p. 154). It is clear, therefore, that the judge acts as an effective legislator and decides it by his own conviction, i.e., discretionarily.

By then, it is possibly to say that the courts do not decide, as it is known, always bounded by rules: "the law (or the Constitution) is what the courts say it is" (HART, 2007, p. 155). The open texture of law gives to the courts a power of creation, because, regardless their decisions, the rules will remain the same until changed by legislation, and this rule may be re-interpreted, giving the courts the same position of authority.

Despite this, the author recognizes that the predictions have an important role in law and, as matter of fact, they occur even to the open texture ones, but he recognizes that they would be restrictors of the discretionary, without, however, excluding it.

Thus, it is clear that Hart notwithstanding believes that law is a system of rules and that the judgers owe it obedience, he argues, likewise, that there is a place of discretionary, and it is beneficial to the law, when refers to "shadows" cases.

Another difficulty comes up when the operator faces the "uncertainty - not of the concrete legal rules - but the uncertainty of the recognition rules, therefore, prejudice the ultimate criteria

used by the courts to identify the validity of law rules." In these cases the courts could resolve the(s) doubt(s)?

To answer this question, Hart uses aspects of the Parliament sovereignty, which, according to him, is a power that has permanent omnipotence, i.e., a sovereignty that cannot protect their laws from future repeals, constituting part of the last rule of recognition used by the courts to identify valid rules (HART, 2007).

However, the fact that the parliamentary sovereignty as a rule of recognition can determine one point, does not mean it does to all points, too. "They can rise up questions about it, but there is no answer that is clearly right or wrong. These issues can only be resolved by a choice made by someone whose choices in this matter have, eventually, receipt the authority "(Hart, 2007, p. 163). There is the discretionary as element to solve the gap, and, due to this point, the court may (should) be asked to decide the issue.

Although it may seem paradoxical that the judges are testing the very laws that give them authority – How the Constitution can assign authority to say what is the Constitution itself? - The paradox disappears when one remembers that while each rule may have shady spots, there is a possibility at the legal system that not every rule is subject to doubts at all points.

On the other hand, it is a formalistic error to think that there is an *a priori* prediction of all steps followed by the court, as if his creational powers were always a form of delegated legislative power (HART, 2007). At this point, Hart accepts the discretionary of the court when, at the fringe of these very fundamental issues, considers it also elementary and welcome.

A theory that accepts the discretionary under the terms above can be correlated to the theory of the state of exception, since many similar elements are found between them. Therefore, when analyzing the theories of Herbert Hart and Giorgio Agamben, it seems possible to receive Dyzenhaus's assumption, that the discretionary decision takes place in a sort of state of exception.

4. POSITIVIST STATE OF EXCEPTION?

Reflecting about Agamben's theory of state of exception and the need for the judge to decide cases that are not covered up by law or, at least, are not easy to interpret, Hart creates his definition of hard cases. Because of them, there is a new discussion about this new field that's called by Dyzenhaus as "mini" state of exception. The question is if there are characteristics between the sovereign, in Schmittian's sense (MACCORMICK, 2008. P. 158), as the ones who decide on the state of emergency, and a sovereign judge, who, likewise, decide on a sort of state of emergency created by the shadow of the law?

Perhaps the best way to come up with an answer is bringing the Neil MacCormick's conclusion about Hart's theory:

> In the legal opinion, it has become a more or less common place that when judges decide such problematic cases [hard cases] and they do not simply apply the law, they create it. Hart shares this view (MACCORMICK, 2008. P. 158).

This passage demonstrates the fundamental characteristic of Hart's theory, i.e., the creation of law by the judge as if was the legislator itself, returning to the pleromatic state. By this, one can build the argument to confirm David Dyzenhaus's thesis.

The initial convergence occurs by the difficulty to conceptualize the state of exception, as it is in an ambiguous and uncertain "fringe", at the intersection between the legal and the political (AGAMBEN, 2004, p. 11). The conceptualization as an ambiguous fringe, removing the conceptual formality of exception, approaches the theory of the state of exception to Hart's theory of discretionary, since, while there is the normal interpretation by subsumption, there is no need to discuss about discretionary, after all, these cases [easy cases] are easily resolved and decided by the judge. When the positivization or the Constitution does not define a "correct" answer[8], it can be said that the existing limbo is an emergency moment, and, as such, it should be solved by imponderable creation.

[8] This paper do not intend to analyze the existence of the *correct answer* as the debate promoted by Ronald Dworkin. The term will be used metaphorically to describe a constitutionally adequate response to the case.

This emergency limbo could be called no man's land (AGAMBEN, 2004, p.12), a term used by Agamben referring to the uncertainty zone at decisions during the state of exception. The place where the hard cases belongs is a land where positivization do not reach, or, at least, not in the normal way. In it, who decides is the judge, with no need to have any connection with moral criterion, but only their own subjective criteria.

Here, we must be especially careful, since the legitimacy of a decision based on subjective criteria, by receiving an indiscriminate discretionary in hard cases, it will certainly lead to the decisions where democracy and decisionism are approximate, perhaps separated by faint lines, however, without any crucial difference. Therefore, the discretionary defended by Hart can, indeed, lead to decisionism and activism, and, consequently, to a decision as the Schmitt's sovereign concept.

What occurred in history[9] was the indiscriminate use of a situation that was linked to war time and the military use to guarantee the sovereignty by governmental powers - especially the executive - as an expression of full power, sometimes working as the executive and legislative together. The dangers to extent full powers to the judiciary in hard cases are clear, and it can make the same mistake that, *mutatis mutandis*, take (or took) the legal system to a judger's dictatorship.

Just as the state of exception argued by Schmitt, the paradigm of the exception has become the rule much more as a technique of government than as an exceptional measure. Now, in another historical paradigm, regarding the judicialization of politics, the judiciary appears as a transformer, and history repeats itself, with the judger's dictatorship running the risk to became the rule.

The decision, in such cases, although it does not mean the abolition of the rule, achieves its legitimacy by deciding at the shadows. The essentialness of judger's decision makes his creation

[9] By the idea of full powers given to the executive, under the allegation of constitutional guard, it means the indiscriminate use of art. 48, § 2 of the Weimar's Constitution by the German government, when, on several occasions, have suspended fundamental rights and ruled by acts. The result we all know: the rise of Nazism and the consolidation of the dictatorship.

rightful, even if sometimes invade other powers competence, when the necessity appears as an "original and primary source of law" (AGAMBEN , 2004, 43-44).

For Agamben, some authors argue that, at the state of necessity "the judge prepares a positive law of crisis, as well as in normal times, he fills the gaps of the law" (AGAMBEN, 2004, 48). Once more, the theory of the exception approaches to the theory of legal gap, or, more precisely, with the Hart's theory of discretionary. At the time the judge is obliged to pronounce a judgment, in front of a gap in the law, if he decides without a binding moral, but only by his preconceptions and subjectivities, it will lead naturally to decisionism and discretionary.

The author believes that "the state of exception is not a dictatorship, but a void of law, a zone of anomie in which all legal determinations are disabled, as the *"iustitium"* doesn't execute law" (AGAMBEN, 2004, p.78). The state of exception is, therefore, an empty state of law, since its non-performance and its nature escapes from any legal definition and it appear to be located in a non-absolute place.

This situation is paradoxical, as it is inconceivable the existence of a legal vacuum at the law, but this vacuum is also decisive for the occurrence of the state of exception. Likewise, the decision that judges by a strong discretionary belongs to this non-place, outside any legal definition, because it does not subsume the case to a positivist rule, or because it depends on a difficult analysis, laying down at the subjective criteria of the judiciary.

Anyway, when investigating the commonplaces between Agamben's theory and Hart's theory, it comes to the conclusion that the decision in the shadows can, indeed, be considered a decision in a state of emergency, or, as Dyzenhaus says, a "mini" state of exception. To the author:

> The order may be ensured when the central cases of law are large enough. But, if the boundary between the core and the shadows cannot be clearly established, the essence seems to disappear and, to the positivists, the state of exception cannot be controlled (DYZENHAUS, 1999, p. 15).

This lack of control - that should be avoided – will continue to occur whilst it remains to the judger's - subjective - criteria. As yore - at the cases covert by shadows, where the exception prevails - the decision will be taken as the sovereign who decides on a state of exception; arbitrarily.

Here is the risk of maintaining a positivist's state of exception, the need to modify the paradigms in legal theory and absolute need to work with a law's theory that ties itself in a moral insight.

5. CONCLUSION

This paper have worked upon the statement made by David Dyzenhaus that Hart's uncertainty shadows is some kind of "mini" state of exception to the positivist theory of law. From this assertion, it was analyzed the work of Giorgio Agamben and his theory of the state of exception, and also the work of Herbert L. A. Hart regarding the zone of shadow and the possibility of discretionary decision by the judge. In the end, was presented an effort to bring them together, confirming the Dyzenhaus's thesis.

By the research, the endeavor concludes towards a positive direction, i.e., the aspects that support the state of exception are found - if not directly, analogically - in hard cases decisions.

Faced with this panorama, the concern with judger's behavior in such cases increases, since it has been shown that the indiscriminate use of the decision at uncertainty zones leads to a detachment of democracy and an approximation to authoritarianism, and, in the case of judicial decisions, leads to decisionism and activism.

Therefore, it is impossible to disconnect the decision took by the emergency – or, in the case of Hart's theory, the fringes of the law - to the sovereign's decision who decides under the state of exception, which certainly corroborates the thesis of David Dyzenhaus of a positivist state uncontrolled and undemocratic.

That's why we must overcome the positivist skepticism and elaborate a theory that ties itself to a moral insight of the law, to avoid the error to decide discretionary in emergency situations and, at the end, achieves democracy itself.

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