La morte come pena: Law, Death Penalty, and State of Exception

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My paper deals with a peculiar form of the State of Exception, namely the one that came to light with the death penalty, when this punishment first appeared in Italy during the Middle Ages. In his book *La morte come pena. Saggio sulla violenza legale*, Italo Mereu analyzes the main reasons that led to its introduction into the Italian penal system up to the moment in which, some six centuries later, it was banned. The point I will make is that a state punishment, such as the death penalty is possible only if the law opens up a space that has been defined as a “state of exception,” which is “a borderline concept.” (Schmitt 1985, 5) That the space at issue inherently belongs to law or is opened by law is an argument I will discuss as well. Vagueness or indefiniteness, makes these topics interesting to be examined and, at the same time, hard to firmly pinpoint. In order to better grasp these concepts, I have decided to first follow roughly the historical description of the death penalty Mereu provides in his work, and then to accompany it with theoretical and critical analyses. If my assumption is correct, at the end of my paper the reader will have a clearer idea of the intangible state of exception mentioned above.
To begin with, I would like to recall what Mereu states about the Medieval, and therefore, as common sense maintains, barbarian, penal code. First of all he asks in which part of the Middle Ages the death penalty was introduced as a legal punishment. “È un fatto che per tutto il periodo del Medioevo ‘germanico’ o ‘barbarico’ […] e cioè nel ‘profondo e buio alto Medioevo,’ la pena di morte, per l'omicidio, non esiste. […] C'è, al suo posto, il guidrigildo.” [It is a fact that all along the ‘German’ or ‘Barbarian’ Middle Ages […] that is the so-called ‘dark and deep early Middle Ages’, the death penalty does not punish homicide. Guidrigildo is used instead.]¹ (12) The guidrigildo was an amount of money supposed to restore the damage that the culprit had caused. Albeit inadequate and highly arguable, the guidrigildo was many steps ahead, as far as the humanity of punishment is concerned, the death penalty, or, say, the Lex Talionis, in acknowledging the worthiness of life. Surprisingly enough (or perhaps not), the Sacred Scriptures and the Roman law, according to nineteenth century scholar Antonio Pertile, team up to change this state of being and usher in the entry of the capital punishment in the penal code as opposed to the alleged inadequacy of guidrigildo. Being the main Institutions, the Church with its Fathers and Popes, and the Roman law, could wield the necessary power to modify the previous situation. In order to support this point, it seems trivial—although necessary—to refer to the infamous Holy Inquisition, which comes to light at the end of the twelfth century. However, there are many points Mereu makes on this issue, if I will mention just a few, and not all of them to detriment of the Inquisition: 1) the Church justified the death penalty, in spite of the Gospels, through some rhetorical ruses that aimed at emphasizing the distinction between what Ideology must teach, and what,

¹ Unfortunately, Mereu’s book has not been translated in English. Hence, all the translations, provided between square parentheses, will be mine.
instead, must be effectively done (the motto of old that priests used to say was “do what I say, do not do what I do…”); it aimed, basically, at putting in charge the secular power of the lethal function to restore the supposedly subverted order (Mereu, 14-15). 2) The machine of the Inquisition began to work efficiently, (namely) the way (that) common knowledge recalls, only after the Council of Trent, in 1563. 3) More crucial and relevant to the purpose of my paper, is to describe the inquisitorial method to collect evidence of the alleged crime. To highlight the importance of the point, Mereu states:

è questo il momento in cui ha inizio e troverà piena attuazione quella profonda rivoluzione giuridica nel campo del diritto penale e processuale che, con la legittimazione del sospetto, con la creazione del sistema inquisitorio [...] cambierà aspetto a tutta la legislazione penale e processuale d'Europa, con effetti che durano ancora" (19) [this is the moment in which begins and will become fully effective that deep juridical revolution in the field of penal and trial law that, through the legitimization of the suspect, and the creation of the inquisitorial system [...] will modify the whole European penal and trial law, whose effects are still lasting].

The prevalence of the Medieval Inquisitorial system over the prior Roman Adversary proceeding heavily modifies the balance of power between the actors at the trial, by dint of the inversion of the burden of proof. The Inquisitor accuses you, with or without evidence, and you must prove your innocence. This meant that the Inquisitor could put you in prison in total absence of evidence, using the whole range of means and devices at his disposal in order to make you “confess.” Nowadays, in Italy, they justify long detention before trial on the basis of the existence of “prove indiziarie,” - a formula hard to translate, a sort of collection of clues that might point to illegal behavior. The adoption of this neological code most often, merely reveals a way to corrupt the language and to
justify the inquisitorial method. It also gives an inkling of the violent and powerful character law still displays and deploys.

Mereu suggests that the principles informing the fearful law are few, but very successful in accomplishing their function: 1) ‘consenso o repressione’ [consent or repression], which can be extrapolated from Saint Augustine’s teachings; 2) ‘normativa rinnegante;’ [reneging norm] 3) ‘teoria organica’ (organic or synecdochic theory, as I prefer to name it). The ground upon which they all rest is *utilitas*, sometimes also differently labeled as *necessitas*. It is worth noting that, having utility and necessity as polar stars, the legislator conceives the law according to principles awkwardly intertwined—if they are presented with concepts such as, justice and truth, as I will show later on. One of these principles is evoked by Jacques Derrida in quoting the seventeenth century French philosopher Blaise Pascal, where the latter reminds us that custom, *coutume*, has the power of Authority. “Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority.” (Derrida, 12) Despite Pascal's thought and Derrida's support, we nonetheless have to account for changes in ‘custom,’ as I have mentioned at the beginning of my paper, for instance the one that takes place when we witness the switch from *guidrigildo* to the death penalty. Mereu's principles shed light precisely on the point of intersection between custom and change. In fact: “consent or repression” is a principle describing an enforcement of law through violence. Consent to my new idea, or I will repress you. New, in this case, is the idea of the State and its juridical-political dimension (these are the centuries in which the concept of sovereignty will attract the interest of political thinkers, which they will borrow from law, since “per il Medio Evo si può parlare di Stato di diritto nel senso di
Stato che prende autorità e forza dal diritto e da esso è dominato e sorretto. [...] Sovranità non è un concetto politico, ma giuridico, nel senso che rappresenta il modo tipicamente medievale di esprimere l’idea che il princeps fonda il diritto perché occupa la posizione sovrana.” (Quaglioni, 24, 26); in addition, as we have seen, new is also the Church’s reaction against what it considered heresy. New is, consequently, the punishment. Walter Benjamin put forward a similar theory in his Critique of Violence, in which he explained his theory of the double character of violence, defined as lawmaking and law-preserving violence. For example, he maintained that the “death penalty in primitive legal systems is imposed even for such crimes as offenses against property [because] its purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself.” (Benjamin, 242) Not only does the law reaffirm itself through violence; Benjamin adds that “one might perhaps consider the possibility that the law’s interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself” (239). This provides us with a valuable insight about the very need of the existence of the capital penalty in the first place, regardless of the crimes it is bound to punish. Does this mean that Benjamin is in favor of the death penalty? Derrida’s elaboration will help to clarify this point:

The violence that conserves (“law-preserving violence”), this threat which is not intimidation, is a threat of droit. Double genitive: it both comes from and threatens droit. [...] Benjamin seems to think that the arguments against the droit de punir and notably against the death penalty are superficial, and not by accident. For they do not admit an

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2 “As for Middle Age, one can define State of Law in the sense that the State receives strength and authority from the Law and it is sustained and dominated by it. [...] Sovereignty is not a political but a juridical concept, and represents the typical medieval idea that the princeps founds the Law because he occupies the sovereign position.” (my translation)
axiom essential to the definition of law. Which? Well, when one tackles the death penalty, one doesn’t dispute one penalty among the others but law itself in its origin, in its very order. If the origin of law is a violent positioning, the latter manifests itself in the purest fashion when violence is absolute, that is to say when it touches the right to life and to death. (Derrida, 42)

Therefore, the question as to whether Benjamin was in favor of the death penalty is simply (an) erroneously posed (one). Given the inherent double character of law, the relationship between death penalty and law can be portrayed as a relationship between means (a pure one, Benjamin said) and an end, where the aim is the preservation of the latter by dint of the former. The conclusion one can reach, after these considerations, is extremely stunning, namely that to live in a State of Right (État de Droit) constantly puts one’s life at stake, as though one is living in a topsy-turvy Hobbesean world where the Covenant shields you from external foe while threatening you at any given moment.

The analysis becomes more and more intriguing when we consider Mereu’s “reneging norm,” according to which the general law (for instance, the divine commandment 'Thou shalt not kill’) can be violated if the specific law, ruled by utility or necessity, as we know, grants it. The effectiveness of the reneging of the norm depends on how profoundly the “organic theory” has become part of the collective imaginary, and this closes the vicious circle. In Benjamin’s words, the commandment exists in order to prevent the deed, but “the injunction becomes inapplicable, incommensurable, once the deed is accomplished. […] [The commandment] exists not as a criterion of judgment, but as a guideline for the actions of persons or communities who have to wrestle with it in solitude and, in exceptional cases, to take on themselves the responsibility of ignoring it.” (Benjamin, 250) This deliberate ignorance of the commandment can be considered as the
prelude to the violent reaffirmation of law mentioned earlier, an act that finally Benjamin
calls “divine violence, which is the sign and seal but never the means of sacred dispatch,
[and it] may be called “sovereign” violence.” (252) The ambiguous, “divine” and at the
same time violent and constituting power of law (somewhat beyond good and evil, one
may say) is once again rephrased by Derrida. Says the French scholar:

The very emergence of justice and law implies a
performative force, which is always an interpretative force
[here the original has it: “et un appel á la croyance:” it is
clearly unclear to me why the British translator has
deleted this part of the sentence. MV]: […] in the sense of
law that would maintain a more internal, more complex
relation with what one calls force, power or violence. […]
Its very moment of foundation or institution […], the
operation that amounts to founding, inaugurating, justifying
law (droit), making law, would consist of a coup de force,
of a performative and therefore interpretative violence that
in itself is neither just nor unjust and that no justice and no
previous law with its founding anterior moment could
guarantee or contradict or invalidate. (Derrida, 13)

Derrida’s quotation lingers around two very important points that imply and determine
each other, one we have already met and a second one merely evoked but has remained
unexplored thus far: the inherent violence of law and the belief. To begin with, what sort
of croyance, belief, is evoked by Derrida? A mystic belief, he says. At any rate, it is not
just a question involving religious topics, an issue that remains inside the legitimate
spiritual sphere. Once again, we are dealing with a borderline concept, better said, a
bridging one, since it creates a connection-if undefined and, we will see in short,
describable only through negations-between two originally heterogeneous realms.
Because “The precise details of an emergency cannot be anticipated, nor can one spell
out what may take place in such a case […] from the liberal constitutional point of view,
there would be no competence at all” (Schmitt 1985, 6-7). The lack of “competence,” so
to say, is an aspect that Benjamin underscores as well, when he states that one cannot rule out the death penalty relying on the divine commandment: “No judgment of the deed can be derived from the commandment. And so neither the divine judgment nor the grounds for this judgment can be known in advance. Those who base a condemnation of all violent killing of one person by another on the commandment are therefore mistaken.” (Benjamin, 250) Divine commandments work as guidelines, as we saw above, but they do not prevent infringements that need to be restored, afterward, mostly through violent acts. Therefore, (to begin with) one may say that Schmitt, Benjamin, and Derrida agree on the fact that law finds its foundation outside the legal field, above all in violence. It is precisely at this point that mystical proves necessary to strengthen law with authority so that the latter makes the former heard and abode by. Authority is all law needs to achieve its goals, given that “autoritas [sic], non veritas facit legem” (“authority makes law, not truth,” Schmitt 1985, 33, quoting Thomas Hobbes), but it also holds true the other way around, since “Auctoritas is not sufficient in itself; whether it authorizes or ratifies, it implies an extraneous activity that it validates” (Agamben 2005, 76, quoting Andrè Magdelain). Hence, in order to be effective, law and authority need to shore each other up, and yet the mechanism seems to perfectly work only if their heterogeneity is mystified and thereby made acceptable to those who are ruled by them. The “mystic halo” (and, again, a sort of lack of competence) of law is emphasized by Derrida, when he quotes what Michel de Montaigne-and Pascal after him-said about law, namely that “laws were not in themselves just but rather were just only because they were laws.” (Derrida, 11) In other words, this mystic halo covers up and implements both law and authority, enforcing the legal system in a violent way while it obnubilates its elusive
double structure. In so far as this earthly power represents the state body, it also, and at
the same time, according to medieval political thought, stands for the celestial *corpus mysticum*, so that the latter, higher, order has to be reflected in the former, lower. The sinners, who are the infected part, need to be punished as well and sent to Hell or Purgatory so that they cannot corrupt the whole mystical body, correspondingly the criminals need to be severed from the healthy body of the state. The synecdochic theory, in fact, the third of Mereu's principles, works precisely when it supposedly preserves the State through the elimination of its alleged rotten parts. According to the principle, then, the State, not only can, but must destroy its elected enemy in order to prosper and improve. One can claim, hence, that when sovereignty installs as the mystic foundation of the political entity (through a rhetoric of utility and necessity that in its final and accomplished stage becomes *law*), the road to any form of *state of emergency*, or *exception*, with all that comes along with them including all its consequences, has just been paved. It is precisely when rhetoric and sovereignty meet, having as a goal to fuel and protect each other, that we come across the most effective-and dreadfully lethal-products of Politics.

Plato, writing his *Republic*, mainly aimed at providing his audience with an uplifting sample of engaged literature, as the critic would have said in the 70's. Certainly, he did not conceive of himself as the legislator of Athens, and violence played no role in his game. In other words, the idea of a sovereignty to be protected and defended against some endemic or foreign enemy was *not* his main concern. He wrote as an educator, perhaps just making up the *Socratic* midwife that fills all his pages. But when you read an article of law (the Article 48 of the Weimar Constitution) stating that:
If security and public order are seriously [erheblich] disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights [Grundrechte] established in Articles 114, 115, 117, 118, 123, 124, and 153 (Agamben 2005, 14)

then you suddenly realize the inherent ambiguity of rhetoric in its foremost function of means towards an end. The discrepancy lies between rhetoric as a means to embody an educative factor (as in Plato), and rhetoric as a means to achieve political ends. Here, once again, we face the mystic and performative power of the discourse, as Derrida defines it: “the mystical. Here a silence is walled up in the violent structure of the founding act.” (Derrida, 14) The founding act just mentioned, is the sanction-in its two contradictory meanings, namely encouragement and coercive measure-of the State of Exception, the juridical entity that founds, as Agamben reminds us, on a void (“What the ‘ark’ of power contains at its center is the state of exception-but this is essentially an empty space, in which a human action with no relation to law stands before a norm with no relation to life,” Agamben 2005, 86) created through the very means of the Rhetoric of Fear, a discourse that claims to defend us against an ineffable and often surreptitious peril while it takes away our fundamental civil rights; one might define it the cunning of rhetoric, as in the Article 48 mentioned earlier. Carl Schmitt, in his Political Theology, is crystal clear about the exception at issue: “What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.” (Schmitt, 12) We are again dealing with the power of life and death over the citizens, in the upside down Hobbesean realm. From the platonic ruler of a symmetric and balanced political body to the violent suspender of the existing order via the death penalty, we have thus
covered the entire distance between Chaos and Cosmos: backward, unfortunately. Schmitt, Benjamin, Derrida, and Agamben among others, have been describing this trajectory to our benefit. They have been providing us with words and theories to better grasp the phenomenon concerning the precariousness of our status as citizens. However, I set out my paper with Italo Mereu and his detailed history of *La morte come pena* because I was trying to make the point that law determines exceptions each and every time it exerts what the Roman Law, as Foucault and Agamben remind us, named *Vitae necisque potestas*, the power of life and death. As Benjamin said in his eighth Thesis *On the Concept of History*, “The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule.” It is a lethal, and by definition fascist rule, because: a) all the rights are suspended, and b) it tends to become an institution, rather than a sporadic resource, which keeps harping on the “river of biopolitics that gave *homo sacer* his life [and] runs its course in a hidden but continuous fashion” (Agamben 1998, 121). Accordingly, we, all of us, are constantly at the mercy of the sovereign power, whatever shape it possesses. Carlo Cattaneo wrote that “da una feroce reazione politica nessuno, nessuno, è sicuro. La guillottina non conobbe amici o nemici; non conobbe né sudditi né re.” (“From a ferocious political reaction nobody, nobody, is safe. The guillotine spared neither friends nor foes; it spared neither servants nor kings,” Cattaneo, vol. 1, 400) That is why the death penalty, in my view, is simply one among manifold signs that our society has still to rise from the Kantian “state of minority” in which it has been immersed thus far. The legal violence nourishes of *Rhetoric and Fear*: perhaps, the task we are left with nowadays is to tie the knot between
what Rhetoric evokes and Fear accomplishes, by dint of a different political relationship between human beings and institutions.
Bibliography


