

Ancilla Iuris

De justitio: Giorgio Agamben
and the Suspension of Law in the Modern Era

Benjamin Lahusen*

The Justitium plays a central role in the work of the Italian philosopher Giorgio Agamben. In his 2004 “State of Exception”, Agamben declared the Justitium the “archetype of the modern Ausnahmezustand”. The article tries to show how and why this interpretation is wrong. A look at the history of Roman law in the modern era reveals that the Justitium is in fact not the anomic space Agamben dreams of, but quite the contrary, the moment of the greatest normative consolidation.

I.

THE JUSTITIUM: AN ANOMIC SPACE?

The Justitium plays a central role in the work of Italian philosopher Giorgio Agamben. Derived from the Latin terms *ius* and *stare*, this Roman-era measure was imposed during special circumstances – usually the threat of war or public mourning – and resulted not only in the closure of taverns, shops, markets and the treasury, but also in a temporary suspension of legal proceedings. In his *State of Exception*, published in 2004, Agamben argues that the Justitium is the “archetype of the modern Ausnahmezustand”. Agamben reaches this conclusion, however, by summarily equating the suspension of forensic activity – which a Justitium undeniably entailed – with the suspension of the entire law: according to Agamben, in times of the greatest internal or external danger, such as wartime or during a civil war, Rome purportedly instituted a kind of Machiavellian precursor to the state of emergency (*Notstandslehre*), preferring to repeal the entirety of the law than to break individual laws. In other words, the argument goes, where the public interest could not be maintained by traditional legal means, the entire legal system was simply pushed aside and replaced by acts of expediency. Hence, the Justitium was actually a suspension of the law itself. Furthermore, as the old Justitium was the prototype for everything that came after, it follows that the state of exception (*Ausnahmezustand*) as a whole was not a “pleromatic” but a “kenomatic state”, not a moment of dictatorial “fullness of powers”, but on the contrary, an “emptiness and standstill of the law”.¹

It may well be that one of Livius’s formulations inspired Agamben’s thinking. Livius writes in his report on the defeat in the battle with Veius in the year 426 B.C. that great terror reigned in Rome; armed men were stationed on the walls and a Jus-

titium closed taverns and forums, so that finally “omnia castris quam urbi similiora”.² In a state of emergency, Rome resembled more a camp than a city: this choice of words must have exerted an irresistible power of suggestion over Agamben, the great camp theorist. In any case, Agamben sees in the Justitium a total state of emergency, a completely anomic space that is not polluted by any legal agenda and therefore permits a truly political act – a moment that Agamben, with a certain tendency towards histrionics, calls “*life itself*”.

With this reconstruction, Agamben essentially rejects all Romance literature on the subject, with one exception. He has found one source to support his interpretation: Adolph Nissen, a Professor of Criminal Law who joined the Kaiser Wilhelm University in Strasbourg in 1873. In 1877, Nissen published a treatise on the Justitium in which he ultimately argues – in literary terms, of course, just as isolated – that the Justitium was a suspension of the entire legal system, used during the times of the Republic to effectively counter internal turmoil without conflicting with the rights of its citizens to be protected from the state (*Abwehrrecht*). Because the citizens in the empire had seen their right of defense (*Abwehrrecht*) becoming more and more pared down, the scope of application of the Justitium had also continuously narrowed until only a few insignificant regulatory measures remained. This tapering, however, was the one that later generations had anachronistically projected back to the Roman Republic;³ a misunderstanding that, one may add, found its much needed correction only in Nissens’s own work.

II.

THE JUSTITIUM AT THE
REICHSKAMMERGERICHT

There is not much to suggest that this interpretation of Roman law is correct.⁴ But that is beside the point. Furthermore, it should not be about Roman law, but about the history of Roman law; specifically: about the way in which the Justitium was received and shaped in modern times. This process is epitomized by a Justitium that occurred at the *Reichskammergericht* in 1688.

² Livius, *Ab urbe condita*, 4, 31, 9.

³ Adolph Nissen, *Das Justitium. Eine Studie aus der römischen Rechtsgeschichte* (Leipzig 1877).

⁴ Cf.: Theodor Mommsen, *Römisches Staatsrecht*, Volume 1. 2nd edition (Leipzig 1876), 250–253; Wolfgang Kunkel/Roland Wittmann, *Staatsordnung und Staatspraxis der römischen Republik, Zweiter Abschnitt* (München 1995), 225ff.; finally – but not accorded preference over Mommsen and Kunkel – Gregory Golden, *Crisis Management During the Roman Republic. The Role of Political Institutions* (Cambridge 2013), 87–103.

* Dr. Benjamin Lahusen is junior research group leader at the faculty of law of the Humboldt-Universität zu Berlin. The author is deeply indebted to Randi Goring, Paris, for her benevolent reading, her meticulous improvements and her empathic translation.

¹ Giorgio Agamben, *State of Exception*. Translated by Kevin Attell (Chicago 2004). All quotes from Chapter 3 *Iustitium*, 41–51.

During the course of the Nine Years' War, the French came to occupy large parts of the Lower Palatinate (*Unterpfalz*) in September 1688, then finally made their way to Speyer.⁵ On 19 October 1688, the French sealed off the *Reichskammergericht* and in the months that followed they packed up about 3,000 hundredweight files and brought them to Strasbourg, together with the maintenance and other funds they came across – amounting to more than 13,000 guilders.⁶ At the beginning of 1689 the walls and towers were razed and, despite all protestations to the contrary, on the Tuesday after Pentecost the entire city was destroyed by a firestorm. The inhabitants had been granted a mere six days to save their belongings and themselves.⁷ The horror of what had happened still echoes clearly in the first report, issued almost immediately after the events; in a deliberately apocalyptic tone, the citizens attempted to equate the threat of the French on a par with the contemporaneous *Kulturkampf* with the Turks: the fire, they wrote, had “*raged this / and over the following days to such an extent / and to devour itself [...] / that of all the buildings (sic) in the city nothing remains / [...] Thus all reasonable God- and honor-loving people will have to admit and confess / that the French's treatment of this city ... sprouted out of desperate rage and fury / ungodly / unreasonable / wild and barbaric [...] that they [...] should be hated and cursed for all eternity / by all Christian people*”.⁸

It is generally known that the *Ratshof*, in which the *Reichskammergericht* resided, was almost completely destroyed as well; the scarce ruins that survived the firestorm were demolished in the 18th century.⁹ The Speyer period had thus come to an end after 161 years. In full awareness of the threat of

war, the court itself had already in the years prior repeatedly asked to be relocated, and it transferred portions of the files and the court treasury to Frankfurt. After the destruction of Speyer, the judges were also able to provisionally move to Frankfurt, but without resuming operations there. They were expressly prohibited from any judicial activity and it was not until the Peace of Rijswijk in 1697 that the files requisitioned by the French were returned.¹⁰ The transfer to Wetzlar was agreed to in October 1689. Certainly, numerous necessary negotiations and compromises remained before the court was fully established, which is why it did not reopen its doors until 25 May 1693. It took more than four years from the expulsion from Speyer for the Justitium to officially come to an end.¹¹

III.

THE DISCOVERY OF THE JUSTITIUM: HEINRICH VON HUYSSSEN

The destruction of the court first paved its way into centuries of legal history debate in 1689. In the autumn of 1688 the young Heinrich van Huyssen had come to Speyer.¹² Huyssen came from a wealthy noble family who had moved from Alsace to the Netherlands in the late 15th century. He himself was born in Essen in 1666, received a first-rate education, studied law in Duisburg, Cologne, Halle and Leipzig, at the same time learned history, rhetoric and geography, and then made the usual *grand tour*, which took him across Germany. In the south he entered the service of Saxon noblemen, who sent him from Strasbourg with a letter on unspecified matters to the Dauphin Louis in Speyer. He arrived

5 For this and the following, see the collection of sources by Anton Faber, *Europäische Staats-Cantzley 2* (1697), in particular 516–521, 521–524, 554–556 as well as the Gemeine Bescheide No. 217–221 and 223 (1688–1690), reproduced in Peter Oestmann (ed.), *Gemeine Bescheide. Teil 1: Reichskammergericht 1497–1805* (Cologne 2013). See also Damian Ferdinand Haas, *Geschichte der Verlegung des Cammergerichts ...* (n.p., 1770); Georg Melchior von Ludolf, *Historia sustentationis iudicii supremi camerae imperialis* (Frankfurt 1721), § XIII and Annex I, 428ff.; Johann Heinrich von Harpprecht, *Urkundliche Nachrichten von des Kayserlichen und Reichs-Cammergerichts Schicksaalen in Kriegszeiten* (Frankfurt 1759), §§ 95–101; Egid Joseph Karl von Fahnenberg, *Schicksale des Kaiserlichen Reichskammergerichts vorzüglich in Kriegszeiten* (Wetzlar 1793); Rudolf Smend, *Das Reichskammergericht. Erster Teil* (Wetzlar 1911), 212–226; also Wilhelm Friedrich Kuhlmann, *Geschichte der Zerstörung der Reichsstadt Speyer durch die französischen Kriegsvölker im Jahr 1689* (Speyer 1789); C. Weiss, *Geschichte der Stadt Speyer* (Speyer 1876), 92–98. Contradictions between sources, if irrelevant here, were implicitly resolved.

6 For comparison, the destroyed building was later estimated at 80,000 guilders (Faber, see note 5 above, pp. 566).

7 An eyewitness reported: “They left their apartments with an unnamable melancholy, and their walk out of the city resembled the walk of those condemned to death” (quoted from Hans Ammerich, *Kleine Geschichte der Stadt Speyer*, Karlsruhe 2008, 93).

8 Wahrhafte und umständliche Geschichts-Erzählung, Welchergestalt des Heiligen Reichs Freie Stadt Speyer ... überfallen und besetzt worden ... (1689), unpaginated (the hardly modified, but paginated reprint of 1709 is quoted more frequently).

9 Anja Rasche, *Das Reichskammergericht in Speyer (1527–1689). Ein kunsthistorischer Blick auf die bauliche Überlieferung des höchsten Gerichts*, in: Baumann/Kempner (ed.), *Speyer als Hauptstadt des Reiches. Politik und Justiz zwischen Reich und Territorium im 16. und 17. Jahrhundert* (Berlin 2016), 114–135.

10 See in particular Hans Oberseider, *Das Archiv der Stadt Speyer zur Zeit der Zerstörung der Stadt durch die Franzosen (1689), dessen Fluchtung und Wiederheimführung (1698/99)*, *Archivalische Zeitschrift XVIII* (1906), 160–218.

11 In Wetzlar, too, the institution was initially severely weakened and came to a halt again in 1704 owing to internal conflicts, this time for a full seven years. At several points during this period it was under consideration to hand over the pending but as yet unprocessed cases to the *Reichshofrat*, of course “without arousing more harmful confusion and disagreements” between both courts (Kaiserliche Commissions-Decret of 23 July 1689, reproduced in Ludolf, see note 5 above, Annex I, 447ff.). Not until 1711 did the *Reichskammergericht* gradually consolidate itself again. For this whole interim period, see Caspar Wolde, *Dissertatio juris publici universalis de eo quod iustum est durante justitio* (Halle 1705), and Anton Faber, *Ob dem Keyserl. Reichs-Hofrath zustehende / Zeit wehrender Hemmung der Cameral-Justiz in Proceß-Sachen / welche am Cammer-Gericht anhängig / Rescripta oder Mandata &c. zu erkennen?*, *Europäische Staats-Cantzley 12* (1708), 158–258.

12 Peter Petschauer made the seminal discovery into Huyssen, see *idem*: *In Search of Competent Aides: Heinrich van Huyssen and Peter the Great*, *Jahrbücher für Geschichte Osteuropas 26* (1978), 481–502, with numerous references to sources and literature and a brief description of his own thoroughly adventurous research. The account here is predominantly based on Petschauer's work; occasionally, the following was consulted as a supplementary source: Svetlana Korzun, *Heinrich van Huyssen (1666–1739). Prinzenerzieher, Diplomat und Publizist in den Diensten Zar Peters I., des Großen* (Wiesbaden 2013), and specifically 19ff. as to aristocratic descent.

there in October 1688 and stayed for some time to observe the French court and military practices, before finally returning to Strasbourg via various stations.

Huyssen was a dazzling figure. From Strasbourg he travelled to Italy, then back to Leipzig, became a private teacher in Utrecht, went to Geneva, then to Paris, to Waldeck, Königsberg and finally, in 1702, to Moscow, where he worked as a lawyer and educator for the Grand Duke Aleksei. He became the emissary of the Tsar in Vienna and soon the court historiographer under Peter the Great, until he fell out of favor in 1732, left Russia a few years later and died during his return journey. Huyssen left behind numerous writings, travelogues, pamphlets and propaganda contributions on account of his career – although by no means only for this reason – but he also left an unpublished “autobiography” (*Selbstbiographie*), which he wrote when he was about forty years old.¹³ This ego-document falls somewhere on the continuum between chronicle and hot air; it is teeming with important places, eminent persons and great deeds, all presented in a shall we say comparatively casual relationship to the historical truth – he even shifts his birthyear forward by two years; it is a bit windy and a bit ponderous, nevertheless the wealth of goings-on is impressive.

Huyssen describes in this autohagiography how in Speyer he had witnessed “*the destruction of the Kammer-Gericht*” and, in addition, “*how all files were packed up there by the French [...] and routed to Strasbourg*” and “*the Assessores cameralis were expelled*”. This led him to reflect on what exactly would happen with the pending court proceedings and who would pay the salaries of the judges, also in comparable situations, whether triggered by war, plague or other *calamitates publicae*, and in general: “*quid justum sit in tam notabili Justitio*”.¹⁴ Undoubtedly with this so-called personal experience in the forefront of his mind, Huyssen was hardly back in Strasbourg when he penned a legal dissertation on this problem: *De Justitio. Vom Gerichts-Stillstande*, a work whose subject is immodestly described as “*a nemine hucusque pertracta*”. Yet the current times in which a Justitium prevailed over the *Kammergericht* and, as was added unspecifically, “*other courts*”, would demand such an enquiry.¹⁵ He also proudly announced that he had defended his work “for 4 hours [...] *sine praeside*”, and because it had found favor with Ulrich

Obrecht – at the time certainly the most famous lawyer and historian in Strasbourg – it had been “*printed twice*”.¹⁶

All this was not exactly wrong, but also not quite correct either: the four hours without anyone chairing his defense corresponded quite simply to the Strasbourg Statutes of 1634,¹⁷ the double printing is explained by the fact that the work was published before and after the defense – a practice not entirely unusual – and, incidentally, the title page to the defense invited the public to witness this solemn occasion of the public defense on 23 May 1689, in other words, exactly two days after the destruction of Speyer.¹⁸ So Huyssen was definitely no eyewitness. As seen before with Huyssen, real life was a little less dramatic than he claimed. He had probably witnessed the sealing off of the court in October 1688, perhaps the removal of the files and possibly even the demolition of the city wall in the spring of 1689.¹⁹ Certainly nothing more. On 15 February 1689, he was enrolled in Strasbourg;²⁰ consequently, his dissertation on the closure of the *Reichskammergericht* merely states that it offered an “*evidens ac momentosum Justitii exemplum*”,²¹ while further events were not mentioned at all. However, in Strasbourg he was in contact with an intimate expert on the subject: the lawyer Johann Deckherr (ca. 1650–ca. 1708),²² who himself had had to flee from the *Reichskammergericht*.²³ With Deckherr, Huyssen benefitted from an intellectu-

16 Huyssen, *Selbstbiographie* (see note 13 above), 17ff.

17 Julius Rathgeber (ed.), *Statuta Academiae Argentiniensis, das ist Die Gesetze und Ordnung der alten Universität Strassburg um die Mitte des siebzehnten Jahrhunderts* (Karlsruhe 1876); Ewald Horn, *Die Disputationen und Promotionen an den Deutschen Universitäten vornehmlich seit dem 16. Jahrhundert*, in: Hartwig (ed.), *Beihefte zum Centralblatt für Bibliothekswesen* 4 (Leipzig: 1893-1894), 1–126, esp. 8–13.

18 The destruction of Speyer on the Tuesday after Pentecost is well documented. The first sources refer to May 21 as the date of destruction, such as *Geschichts-Erzählung* (see note 8 above, unpaginated) or *Christoph Lehmann, Chronica der Freyen ReichsStadt Speier* [...] (Frankfurt am Mayn 1711), preface unpaginated. Today's accounts, on the other hand, consider 31 May to be the correct date. This discrepancy is explained by the fact that the Gregorian calendar reform was first adopted in 1699 in the Protestant territories at the Reichstag in Regensburg (*Johann Georg August Galletti, Geschichte von Deutschland. Volume 7: Bis zum Tode Kaiser Josephs I. Halle 1793, 216–218*). The occasional juxtaposition of the two calendars can be seen, for example, in a report on the destruction by the *Reichskammergericht* for the emperor dated “7 June (28 May) 1689” (reproduced in *Ludolf, Historia sustentationis* (see note 5 above), Annex I, 434ff).

19 Oestmann, *Gemeine Bescheide* (see note 5 above), the explanatory note to No. 217, considers the date of the destruction to be unclear and refers to *Ingrid Scheuermann* (ed.), *Frieden durch Recht. Das Reichskammergericht von 1495 bis 1806* (Mainz 1994), 196ff., no. 148, where in fact February 1689 is mentioned. Likely it was *Rudolf Smend* who first came up with this date (*Reichskammergericht*, see note 5 above, 215ff.), although he might have been laboring under a misunderstanding. In the Imperial Commissions Decree of 16 February 1689, the *Reichskammergericht* was called upon to seek a new home, but the demolition of the city wall had already provided sufficient cause for this (reproduced in *Haas, Geschichte der Verlegung des Kammergerichts* (see note 5 above), § 46).

20 *Gustav C. Knod, Die alten Matrikeln der Universität Straßburg 1621–1793, Volume 3* (Straßburg 1897), 540.

21 Huyssen, *De Justitio* (see note 15 above), *Caput I*, § 14.

22 Huyssen's *Selbstbiographie* (see note 13 above, 18) states: “also with Herr Decker [sic], who retired himself from Speyer there as a refugee, and who has written such a *Cameralia*, learned much through multiple conversations...”

23 See e.g. *Fahnenberg, Schicksale* (see note 15 above), 43, who expressly mentions Deckherr; Deckherr had lost his library while fleeing.

13 Peter Petschauer tracked down this autobiography, which he safeguarded in his Huisiana collection Inventory Group III. I would like to express my sincere gratitude for the kind permission accorded me to use this fascinating source. I have not looked into any references to a possible parallel tradition in the archive of the Petersburg Academy of Sciences.

14 Huyssen, *Selbstbiographie* (see note 13 above), 17

15 *Heinrich van Huyssen, De Justitio. Vom Gerichts-Stillstande* (Straßburg 1689).

ally (clearly) superior and literarily well-proven mentor at his side, likely a major factor as to how Huyssen's literary debut grew from a blank sheet of paper to a print-ready manuscript within a matter of weeks.²⁴ *Honi soit qui mal y pense*.

Be that as it may, this work had it all.²⁵ Over 95 pages the author unfolded a sort of compendium of justice, etymology, history, philosophy, rhetoric and poetry, plus a huge literary apparatus including Livius, Varro, Cicero, Cassius Dio, Tacitus, Sueton, grammarians, church fathers, many glossators and even more postglossators, Grotius, as well as Ovid and Horace, who wrote of the *forum litibus orbum*. The dissertation offered a collection of meticulous, often almost agonizing legal distinctions about the facts and legal consequences of the Justitium – public Justitium vs. private Justitium, arranged vs. spontaneous, accidental vs. necessary, form, content, time extensions, whether wills could be effectively established, the state of donations, whether voluntary jurisdiction is to be treated differently from contested jurisdiction, who owes default interest and for what period, whether there are special termination rights for lease agreements, which court employees are to be remunerated and in what manner, who may leave their place of work and when, and the list goes on and on. Of course, war and plague could trigger a Justitium, but Huyssen introduced a severability clause for “other incidental events”, which he also discussed in detail: famines, fire – whether resulting from accident or arson –, poisoned air, storms, earthquakes, floods – a panorama of horrors, sharing the common denominator that the courts ceased, that the de facto circumstances obstructed the normative apparatus, that judicial decisions became impossible.

Huyssen's treatment of the statute of limitations took up a great deal of space. Of course, this tactic only further conveys the impression that the brazen “*a nemine hucusque pertractata*” that Huyssen had prefixed to his work was formulated as truthfully as his autobiography. Canon law already cited “*Tempore hostilitatis non currit praescriptio*” since the 12th century,²⁶ and the secular legislation as well had taken up these notions long before Huyssen, for example in the Prussian General Land Law of

1620.²⁷ But nevertheless Huyssen's study *de iustitio* signaled a change, the beginning of a new era. His encyclopedic compilation fell into an epoch in which experiences of lawlessness – mainly caused by war – were not only on the increase, but were to be eliminated precisely by means of law. In other words, in the event that the law could no longer function properly, even more law was enacted.

IV.

THE OMNIPRESENCE OF LAW

Some examples from Prussian legislation may serve to support this thesis. From 1671, the Great Elector Friedrich Wilhelm issued a series of rescripts by which an – also expressly so-called – Justitium was imposed retroactively over the years 1626 to 1648 to render irrelevant any disputes as to the exact effects of war. “*These years*”, it was declared in sweeping terms, shall “*not be detrimental to anyone's rights*”.²⁸ Initially this was intended only to acknowledge the known problems with the statutes of limitations. But in Prussia, where a certain routine in military matters met with a strong love of order, there was much more to be regulated. Particularly in the 18th century, a wealth of rescripts, circulars and other instructions were issued to contain the consequences of war via recourse to orderly legal action. In chronological order, they: suspended proceedings against active officers and soldiers,²⁹ freed lawyers from the advance payment of court fees,³⁰ protected descendants from fief sales,³¹ declared real estate foreclosures inadmissible,³² created the rudiments of a

24 The general problems of authorship in early modern dissertations are known, just see the summary in *Hanspeter Marti*, Article “Disputation”, in *Ueding* (ed.), *Historisches Wörterbuch der Rhetorik*. Volume 2 (Tübingen 1994), column 866–880, *idem.*, Article “Dissertation”, *ibidem.*, column 880–884. For more a detailed account, see *Getrud Schubart-Fikentscher*, *Untersuchungen zur Autorschaft von Dissertationen im Zeitalter der Aufklärung* (Berlin 1970), esp. columns 50ff. and 57ff.

25 Anders als viele andere Dissertationen der Zeit. Siehe *Filippo Ranieri* (ed.), *Juristische Dissertationen deutscher Universitäten 17–18. Jh.* (Frankfurt am Main 1986), Introduction, 2: “As a general rule, these are not treatises that occupy an important position in the history of legal dogmas and ideas. The majority offer nothing new, only compiled material.”

26 Dekretale im Liber Extra Gregors IX 2, 26, 10, reproduced in *Emil Friedberg/Emil Ludwig Richter* (ed.), *Corpus Iuris Canonici*, Volume 2 (Leipzig 1881), esp. 385.

27 Das Ander Buch/Des Allgemeinen Land-Rechtens des Hertzogthumbs Preussen (Rostock 1620), Book 3, Titulus IV, Art. II § 3.

28 Rescripts of 28 January 1671, 5 April 1671 and 24 March 1674, published as no. XL, XLI and XLVI in: *Des Corpus Constitutionum Marchicarum Anderer Theil. Erste Abtheilung* (Berlin 1737).

29 Circular of 31 August 1756, to all Governments and Justitz-Collegia, that proceedings against officers during the campaign should be suspended, in: *Novum Corpus Constitutionum [NCC] 2* (1756) No. LXXX; see also the Rescript of 22 September 1756, in: *NCC 2* (1756) No. XCI; Resolution of 11 December 1756 in: *NCC 2* (1756) No. CXV; Rescript of 5 February 1757, in: *NCC 2* (1757) No. X; Resolution of 16 February 1757 in *NCC 2* (1757) No. XII; Resolution of 28 October 1757, in: *NCC 2* (1757) No. LI; Rescript of 9 April 1778, in: *NCC 6* (1778), No. XII; Rescript of 15 October 1778, in: *NCC 6* (1778), No. XXXVIII; Circular of 29 May 1779, in *NCC 6* (1779) No. XV; Rescript of 30 August 1790, in: *NCC 8* (1790) No. LV; Enactment of 3 September 1792, in: *NCC 9* (1792), No. LXVI; Rescript of 1 June 1795, in: *NCC 9* (1795), No. XXIV; Circular of 29 June 1795, in: *NCC 9* (1795), No. XXXII; Circular of 19 October 1795, in: *NCC 9* (1795), No. LXV.

30 Order of 20 October 1757 to the Magdeburg government, to restrict the advance of court fees of lawyers during wartime and to introduce the “*Cammer-Gerichte*” under the 31 December 1756 mandated regulations, in: *NCC 2* (1757) No. XLIX.

31 Resolution of 21 October 1756 to the Pomeranian government, that in the course of the current war a “*praeclusionio*” shall stop the sale of a fief of those “*Agnatorum*” who are involved in the war, in: *NCC 2* (1756), No. XCVI.

32 Decision of 22 September 1757 to Magdeburg, that the foreclosures of real estate in process shall be put on a waitlist pending the end of the war, in: *NCC 2* (1757) No. XLVIII; see the not dissimilar Resolution of 30 July 1758, in: *NCC 2* (1758) No. XXXV; also Circular of 31 March 1759, in: *NCC 2* (1759) No. XIX; Resolution of 22 April 1759, in *NCC 2* (1759) No. XXI; Rescript of 30 July 1761, in: *NCC 3* (1761) No. 37; Rescript of 6 October 1761, in: *NCC 3* (1761) No. 50; Rescript of 2 October 1762, in: *NCC 3* (1762) No. 38; Resolution of 22 August 1763, in: *NCC 3* (1763) No. 55.

martial law,³³ gave preferential treatment to the wills of soldiers,³⁴ granted returning vassals a moratorium on payment,³⁵ facilitated the remarriage of women who had been married to and then abandoned by the enemy³⁶ and simplified the subpoenaing of absentees³⁷ during wartime.

The external difficulties that a court case could encounter during wartime were thus packed into an increasingly dense network of normative countermeasures. The state of exception (*Ausnahmezustand*) that the war so often brought with it was further and further contained in its functional and social implications, reduced to details, legalized, until the fighting army was relegated to a problem of postal delivery and the destruction of the country to a problem of statute of limitations. What Huyssen set in motion with his *de iustitio* observations was therefore nothing less than the legal domestication of the state of exception (*Ausnahmezustand*), a development that was completed some 100 years later. On 18 July 1780, the Justitium assumed a legal definition, finally ensured a place in the modern legal lexicon. On this day Carl Gottlieb Svarez handed over a draft for a new code of procedure to his supervisor, Johann Heinrich von Carmer: “If, in the courts where a lawsuit is pending,” it says, “a complete halt to business (*Justitium*) arises because of the present dangers of war or for other reasons, or if the communication between the party’s place of residence and the court’s seat is completely interrupted for a time by such wars or other troubles, then the proceedings must be suspended.” Judicial proceedings were to resume upon the return to normal conditions, with the judges themselves pushing the proceedings forward, if necessary, via official means.³⁸ Almost one year later, the Justitium was enacted in the *Corpus Iuris Fridericianum*.

Subsequently it was adopted by every Prussian court order, entering into the Reichs Code of Civil Procedure (*Civilprozeßordnung*) via the North German Confederation, where it has remained unchanged since 1877 – interestingly enough, prac-

tically without ever having been used or at least discussed. The Justitium is self-evident; according to the unanimous opinion of current literature, “a purely effective obstruction of the courts” – whatever that may be in contrast to war – is no more likely to lead to a Justitium as the “death of all judges”. Even a mass death in the judiciary does not disrupt operations. And that is not enough: “Regarding the Justitium,” one is further instructed, “the judge decides”.³⁹

V. ANOMIC FANTASY

And so, we have come full circle. The judicial system itself is called upon to decide on its own existence. Ironically, it becomes evident precisely in the Justitium that modern law never comes to a halt. The destruction of Speyer is a last reminiscence of a bygone era when the facts could actually control the norms.⁴⁰ Successive generations quickly became accustomed to making normative adjustments whenever there was a threat, until a standstill was ruled out and the uninterrupted decision-making process of the courts could be ensured. According to Niklas Luhmann, all law is based on decisions – this is the hallmark of positive law,⁴¹ and seen in this light, the Justitium is a paradigmatic positive phenomenon. When facing the risk of a breakdown of legal applications, one responds with a typical paradox: by producing more law. By such emerging functional differentiation, lawlessness itself was gradually transformed into a legal state; even if the judiciary was to remain silent from time to time, this silence was only conceivable as a declarative.

With the Justitium, the legal system received its own *praesumptio aeternitatis*, a cross-fading mechanism that can be interpreted technically as a kind of legal cryogenics, or more whimsically as a self-prescribed Sleeping Beauty-esque slumber. In the Justitium, law anticipates itself; what interruptions it permits necessarily depends on the return

33 Patent of 20 October 1760 to all court authorities, magistrates and sheriffs (*Schultzen*) concerning the objects taken by the enemy, in: NCC 2 (1760) No. 31; see also the Extended Patent of 27 October 1760, in: NCC 2 (1760) No. 32; Patent of 14 November 1760, in: NCC 2 (1760) No. 34; Regulation of 24 October 1763, in: NCC 3 (1763) No. 76.

34 Rescript of 7 November 1763 to the rural court of Halle (*Berg-Gericht*), that the testament of a war prisoner shall be accorded special rights, in: NCC 3 (1763) No. 78.

35 Edict of 21 April 1763, that in Pomerania and the Neumarck a five-year period of forbearance shall be granted to vassals and established residents (*Eingessenen*), in NCC 3 (1763), No. 21; Edict of 28 January 1765, in: NCC 3 (1765) No. 7.

36 Rescript of 14 October 1765 to the Pomeranian Consistorium, concerning the other marriage of such persons, who during the war married people from the enemy army and were subsequently abandoned by them, in: NCC 3 (1765), No. 95.

37 Rescript of 12 November 1778 to the Pomeranian government, due to the subpoenaing of absentees during war, in NCC 6 (1778) No. XLII; especially in the Marriage Law Rescript of January 3, 1793, in: NCC 9 (1793), No. III.

38 The draft can be found in the Preußisches GStA, I. HA Rep. 84 XVI No. 15, Volume 5, Part I Titel 20 § 8ff, 91–92.

39 Adolf Baumbach, *Zivilprozeßordnung mit Gerichtsverfassungsgesetz*, 11th edition (München 1936), § 245 Note 1. The passage has since been repeated verbatim in all editions, see the most recent 78th edition, 2018, § 245 marginal number 2. This corresponds with the overwhelming view among lawyers, see Münchener Kommentar zur Zivilprozessordnung, 5th edition (München 2016), § 245 marginal number 2 (edited by Nikolaus Stackmann); Richard Zöller (ed.), *Zivilprozessordnung*, 31st edition (Köln 2016), § 245 (edited by Reinhard Greger); Hans-Joachim Musielak/Wolfgang Voit (Hg.), *Zivilprozessordnung*, 14th edition (München 2017), § 245 (edited by Astrid Stadler). The court that was lethally impeded is replaced by another court according to § 36 ZPO.

40 This is the case when, in the 18th century, literature still consigned the Justitium close to the state of nature, i.e. effectively identified it with a moment of lawlessness. See eg. Wolde, *De eo quod iustum est durante iustitio* (see note 11 above), especially Chapter II, § 5, and after *Justus Claproth*, *Einleitung in den ordentlichen bürgerlichen Proceß*. Zum Gebrauche der practischen Vorlesungen. Erster Teil, 2nd edition (Göttingen 1786), 19.

41 Niklas Luhmann, *Rechtssoziologie*, 3rd edition (Opladen 1987), 208ff.

to the normal state.⁴² Already the *Landrecht* of 1620 expressed this legal equanimity in a beautiful formulation: “*But when the war/and dying cease/so time returns*”.⁴³ Even more flowery is the euphemism utilized by Philipp Eduard Huschke, the fundamentalist Romance scholar, who expressed it in his devotional figurative language as follows: “The expression *iustitium* itself, compared for example with *solstitium*, obviously also expresses the idea that the *iuris dictio* runs through all working days like the sun in the sky”.⁴⁴

Agamben’s anomic space is thus a fantasy, a philosophical reverie. The law of the modern age would never allow itself such a time-out.⁴⁵ It is strange that Agamben, despite all claims of philological conscientiousness, does not know Huyssen’s work. It is even stranger that Nissen, the Strasbourg professor, did not know the Strasbourg dissertation. And finally, it is not without irony that someone like Heinrich van Huyssen, a man whose official industriousness may have needed to compensate for what he lacked in intellectual subtlety,⁴⁶ embodies the entry into the age of legal omnipresence. The Justitium – the moment without legal decisions – is not an anomic space, but quite the opposite: it is the moment of the greatest normative consolidation. And – who knows? – perhaps this convergence is much closer to “life itself” than the fantasies of philosophers.

42 For the merely temporary duration of the Justitium, see *Huyssen*, *De Justitio* (see note 15 above), *Caput I*, § 32.

43 *Das Ander Buch/Des Allgemeinen Land-Rechtens des Hertzogthumbs Preussen*, 3rd Book (Rostock 1620), *Titulus IV*, *Art. II* § 3.

44 *Philipp Eduard Huschke*, *Römische Studien. Eine Sammlung wissenschaftlicher Monographien im Gebiete der Römischen Geschichte, Alterthümer und Rechtsgeschichte. In zwangsloser Folge. Erster Theil. Das alte Römische Jahr und seine Tage* (Breslau 1869), 281 Note 174; preliminary clarification of concepts; see also *Huyssen*, *De Justitio* (see note 15 above), *Caput I*, § 1.

45 This also means that Agamben’s hopes for a messianic time cannot be fulfilled with the Justitium. For Agamben’s ideas of time, see the particularly impressive reconstruction in *Vivian Liska*, *Giorgio Agambens leerer Messianismus* (Vienna 2008). Also: *Eva Geulen*, *Giorgio Agamben zur Einführung* (Hamburg 2016), 83-92; *Leland de la Durantaye*, *Giorgio Agamben. A Critical Introduction* (Stanford 2009), 366-382.

46 Notwithstanding that his dissertation *de justitio* ended up on the *Roman Index*. See *Catalogue des ouvrages mis à l’index* (Paris 1825), 161.