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Of Habits and Lived Rules: Agamben's Political Theology and the End of Law

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ABSTRACT

By taking the cue from Agamben's re-conceptualization of monasticism and putting it in relation to his broader critique of normativity, this article will try to retrace his vision of the renewed use and form of the law that his political theology of redemption purports. Without explicitly formulating a strategy for political actions, the ideas Agamben has developed by looking at the monastic rules point toward the idea of law as a form of non-coercive rule akin to a habit or custom. Rather than consisting of a series of commands supplemented by the usual sanctions the renewed use of the law, Agamben has in mind, entails the idea of a norm that speaks but does not command anything, a rule that is lived but not obeyed. However, such a new form of law, far from being a renewed use of legal categories and norms, represents a radical abandonment of law as such.

KEYWORDS

Agamben; law use inoperativity monasticism rules

Introduction

In the current phase of late capitalist modernity, the status of the law, as a technique for the regulation/organization of social reality, acquired an ironic guise. The triumph of the legal form, of the language of human rights, and the growing juridification of virtually all particles of human life, go hand in hand with the consciousness that, far from being a neutral, rational and beneficial element in the process of civilization, the law seems to be a constitutive part of the mechanisms sustaining the catastrophe of the present. Indeed, all those practices driving human and environmental depletion are typically lawful exercises of individual abstract rights over resources. Hence, the seemingly endless expansion of law's grip over reality is accompanied by a substantial loss of regulative power of that very same law, which seems to have abandoned its supposed purpose of constituting the common good. In such a situation, going beyond the veil of legal ideology and rethinking the law, its scope, operations and form has become urgent.[1]

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[1]Criticising the law in its form and function and attempting to develop normative strategies alternative to the juridical tradition was the hallmark of leftist radical political thought, see in this regard: Dardot and Laval, *Common*; Newman and La Torre, *The Anarchist Before the Law*. On rethinking the concept of right see: Menke, *Critique of Right*; Douzinas,

Within contemporary philosophy and political thought, Giorgio Agamben's work is undoubtedly significant for such a rethinking. With his *Homo Sacer* project, he has elaborated a radical critique of the legal tradition, according to which the law is a core part of the "thanatopolitical" operations of sovereign power. For Agamben, the sovereign "decides not the licit and illicit but the originary inclusion of the living in the sphere of law",[2] which, in turn, produces an inclusive exclusion of bare life from the politically and legally qualified forms of life. This form of splitting and re-articulation represents a strategic operation, according to which what is separated and divided (the mere biological fact of living) is what permits to constitute human subjectivity as the union of opposite spheres: bare life (*zoē*) and the forms of life socially and legally classified and protected (*bios*). The fundamental activity of sovereign power, in this perspective, is the production of bare life – that is the natural bodily life exposed to the absolute power of the sovereign – as the "ultimate subject."[3] To put it in other words, for Agamben, the Western political mind envisaged political communities as composed of subjectivities owning rights, duties and social identities, who to be such, exchange their legally formalized freedoms, protected by the law and sovereign power, with the possibility of having what makes their very existence revoked, and in the extreme case destroyed. In this picture, the law is part of the core biopolitical mechanism, as that instrument that allows for the determination/identification of what counts as bare life.

Despite his gloomy consideration of the law, Agamben's philosophy is nevertheless traversed by something like a vision of the law's futurability. As he writes in an oft-cited passage from the book *State of Exception* "One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good."[4] Such a renewed use of the law is the one that emerges out of the deposition of the law from its sacred authoritative throne and the severance of the functional link between the legal text and sovereign power. The "question of a possible use of law," for Agamben, can only be effectively posed only by thinking of the eventual severance of the "nexus between violence and law."[5] But this amount, to use the Agambenian vocabulary, as to making the sovereign command of the law inoperative.

What does it mean for the law to be made inoperative? And, from our point of view more importantly, what form does a law made inoperative possess? Although admittedly in a metaphorical/anti-normative way, Agamben engages with these questions by making an original use of messianic theology, and the history and philosophy of the Judaeo-Christian tradition.[6] For Agamben, messianic thought constitutes a vital instrument to theorize radical political practices and to rethink the law anew. Informed by the reading of Paul's epistles, for Agamben the theology of the messianic event represents

The Radical Philosophy of Rights. Along these works, it must be noted the growing body of literature on the concept of 'institution' as an alternative to legal normativity; see in this regard, Esposito, *Institution*. On the materialist critique of the law, in its function as part of relations of exchange and accummulation, we remand to the now classic Pashukanis, General Theory of Law and Marxism. *See also* Cercel, Fusco, Tacik, *Legal Form. Pashukanis and the Marxist Critique of Law;* id. *Legal Form and the End of Law. Pashukanis's Legacy*.

[2]Agamben, *Homo Sacer*, 26.

[3]Agamben, *The Use of Bodies*, 209.

[4]Agamben, *State of Exception*, 63.

[5]Ibid., 88.

[6]Agamben has developed a rather structured theory about political theology, especially in: Agamben, *The Time that Remains* and the *Kingdome and the Glory*.

the "limit concept" through which "religion confronts the problem of the law,"[7] which turns out to be a helpful instrument to think towards the end of law and its potential renewed use. As we read in *Romans* 10:4, Christ – the messiah – is "*telos nomou*, end and fulfilment of the law"[8] – he is what "will render inoperative every power, every authority, and every potential."[9] The coming of the Messiah produces a qualitative transformation of the law that is not abolished, but it is rendered inoperative, "destitute of its power to command."[10]

Messianism, for Agamben, involves a significant paradoxical tension stemming from combining the concepts of transforming the "current" world and the imminent emergence of a new one. For the messianic, "another world" and "another time" exist within this world and this time.[11] It must be stressed, however, that Agamben's reading of messianism, in a sense, passes over "the specificity of any particular religious tradition" to bring to the fore "the conditions of a messianism implicit in any historical formulation of a Messiah figure"[12] for then delineating the contours of general redemptive forces. In this sense, the messianic tradition offers paradigmatically the underlying logic of revolutionary events.

The Highest Poverty: Monastic Rules and Form-of-Life is the work in which Agamben has thought about how to practically implement a messianic abandonment/fulfillment of the law with more intensity. In this volume, monasticism (considered from the early stages up to the Franciscan order) is viewed as a paradigmatic attempt to live a proper messianic life, liberated from the law's ruling. Agamben conceptualizes the experience of monasticism as a prime example of a communal life lived without the recurs to a system of laws. Its essential social and political significance must be considered within the messianic framework in which it has been developed and practised. Indeed, to the extent that Christ represents the fulfillment (and the end) of all laws, and life lived according to Christ's example – as the one lived in monasteries – cannot be government by legal principles; its nature and structure must be fundamentally different from any established law.

By taking the cue from Agamben's re-conceptualisation of monasticism and putting it in relation to his broader critique of normativity, this article will try to retrace his vision of the renewed use and form of the law that his political theology of redemption purports. The argument that will be advanced is that although without explicitly formulating a strategy for political actions, the ideas he has developed by looking at the monastic rules are helpful points towards the idea of law as a form of non-coercive, non-violent regulation of life akin to a habit or custom. Rather than consisting of a series of commands supplemented by the usual sanctions, that limit and constrain human behavior, the renewed use of the law, Agamben has in mind, entails the idea of a norm that speaks but does not command anything, a rule that is lived but not obeyed. However, as it will be argued, such new form of law, far from being a renewed use of legal categories

[7]Agamben, *Potentialities*, 163.
[8]Agamben, *Highest Poverty*, 46.
[9]Agamben, *The Use of Bodies*, 273 – Agamben here translates *Corinthians* 15:25.
[10]Ibid., 274.
[11]Zartaloudis, *Giorgio Agamben*, 292.
[12]Dickinson, *Agamben and Theology*, 87.

and norms, cannot but represent a radical abandonment of law as such. Agamben engagement with the law, is, therefore, eminently a discourse over the "end of the law."

Vita vel Regula

In the economy of Agamben's *Homo Sacer* series, *The Highest Poverty* represents a crucial step in the delineation of his critique of law and sovereign power, and of his political proposition. With a gesture typical of his style and philosophical method, monasticism becomes an interesting paradigm of the refusal "to produce on top of a common life" a "legal framework that purports to protect, stabilise and defend it"[13]; as Steven DeCaroli argues, "Agamben finds in monasticism a community characterised by a refusal of authority, a refusal to recognise and thereby make operative the work of law and sovereignty."[14] Monastic rules are example of a life lived outside the traditional structures of power, through the abolition of private ownership and the implementation of a non-juridical conception of community belonging, which for Agamben, produces a radical alteration of the normal/traditional relationship between law (norms) and life. At stake in monastic rules, he sustains, is not much the application of the rule to the life of the monks, not even the obedience to the rule itself, but the opening up of a space in which rules and life merge and become indistinguishable.[15]

Although it has emerged as a form of individual exile, monasticism, Agamben writes, became "a model of total communitarian life,"[16] characterized by tight and somehow hypertrophic regulation of almost every aspect of the life of its members – from the vests to the temporal scansion of the monks' daily life. The founding element of the monastic life is the cenoby [*koinos bios*], "life in common", which represents the "necessary foundation of monasticism."[17] Crucial in this regard is the role played by the narration of the life of the apostles as in the *Book of Acts*, which was "described in terms of unanimity and communism"[18]: "the multitude of believers – we read in the *Book of Acts* – had one heart and soul, and none of them claimed any of his property as his own: they held everything in common."[19] By being the foundational element of the monastic community the cenoby – the living "in common"– has an eminent political character; it is a pre-requisite: neither something established by the rule itself nor something the rule must govern or institute.[20] This life in common operates for Agamben as a proper constituent power. But here, differently from the vocabulary and practice of modern public law – according to which the constituent power belongs to the people as a political subject with a specific consciousness of itself,[21] tradition, language etc – the *koinos bios* grounding the monastic rule is the simple living together a life in common. And here, Agamben identifies one of the more radical elements of the monastic rule: the

[13]DeCaroli, 'What is a Form-of-Life?' 214.
[14]Ibid.
[15]On Agamben's reading of monasticism and the Franciscan rule see the recent: de Boer *Agamben's Ethics of the Happy Life*
[16]Agamben, *Highest Poverty*, 9.
[17]Ibid., 13.
[18]Ibid., 10.
[19]Book of Acts, 100.
[20]Agamben, *Highest Poverty*, 58.
[21]This definition of constituent power is taken from Schmitt, *Constitutional Theory*.

strict rules, which scanned somehow rigidly the life of the monks, have as their presupposition and objective, the act of living a general, unspecified life together.

Decisive, in Agamben's engagement with monasticism, is the distinctive character of the rules and their otherness with respect to the law. The conflation of life and rules, which is at stake in the monks' form of life, reshuffle radically the common understanding of the "relationship between human action and norm, 'life' and 'rule'," [22] as it has been traditionally understood in the juridical tradition. The difficulty of categorizing monastic rules in juridical terms was already clear to medieval jurists. Agamben in this regard, refer to Bartolus' *Liber Minoriticarum*, where the jurist claimed that the novelty of monastic order is so great that "the *corpus iuris civilis* does not seem capable of being applied to their form of life." [23] The expressions with which monastic life has been defined, such as *vita vel regula*, *regula et vita*, *forma vivendi*, *forma vitae*, are indeed indicative of a substantial difference in scope and function with respect to legal categories. To the extent that rights and legal imputation normally refer to the legal person and to its actions, and not to the biological or biographical existence of the subject, formulae like "life and rule" and "form of life" are essentially alien to the juridical tradition. [24] As Agamben puts it, in monasticism, the rule

> enters in this way into a zone of undecidability with respect to life. A norm that does not refer to single acts and events, but to the entire existence of an individual, to his *forma vivendi*, is no longer easily recognizable as a law, just as a life that is founded in its totality in the form of a rule is no longer truly life. [25]

A rule that is followed without application to specific situations, and thus cannot be distinguished from the life it governs, is bound to dissolve into the flow of a form of life. For the monks, the rule doesn't pertain to particular actions or events needing regulation; instead, it encompasses their entire way of life. And this, for Agamben, put into question the categories of obligation, observance, application and transgression, which are fundamental to juridical normativity.

If from the point of view of the law, the form of monastic rules remains somehow enigmatic, when placed in the theological context, that is the relationship between the gospels (the life of Christ) and the law, they acquire their proper raison d'être. Indeed, as Adam Kotsko rightly suggests, Agamben looks at monasticism as "an authentically messianic movement." [26] To the extent that Christ constitutes the end of the law, the life of the Christian believers enters into a particular relationship with the worldly laws. The messianic event institutes a new law, which cannot possess the traditional legal form: "The Christian," Agamben writes, "is 'dead to the law' and lives in the freedom of the spirit." [27] Therefore, it would be a contradiction in terms to model the messages of the Gospels in the form of the law. It follows, then, the peculiar resistance of monastic orders to the juridical sphere and the legal form.

The specificity of the monastic rules is that, differently from the law, which is structured on the obligation of defined acts, it calls into question the whole of the life of

[22] Agamben, *Highest Poverty*, 4.
[23] Bartolus, *Tractatus minoriticarum*, 190.
[24] Yan Thomas, "Le sujet concret et sa personne", 136.
[25] Agamben, *Highest Poverty*, 26.
[26] Kotsko and Dickinson, *Agamben's Coming Philosophy*, 193.
[27] Agamben, *Highest Poverty*, 46. Here the reference is to Galatians 2:19.

the members of the community. The vow a monk takes does not concern the execution of individual actions, but it produces in a sense a *habitus* that goes to define the whole of a form of life. Moreover, the "rule," here, is not applied to the life of the monks as an external authority: on the contrary, the "rule" coincides with a life, and remains immanent to it. Accepting the rule, and living according to it, involves a process of performative production of a form of life and logical/consequential vivification of the rule itself. The conflation of life and norm, in Agamben terms, deactivates the disjunction between rule and life, upon which legal normativity is structured, interrupting in this sense law's grips over life.

The highest poverty

The tension between the legal form and the rules of the medieval Christian religious movements finds its most explicit expression with the emergence of the Franciscan order, which for Agamben represents the most intense paradigm of a reformulation of the relationship between human living and law's normativity. Differently to the other monastic orders, the rule of the Friars Minor is rather brief, simple and concise, to the extent that more than following a rule, they seem to simply live it. For the Franciscans, therefore, the rule lean more to a form of living, rather than to the merging of the rule and life through the hypertrophic regulation of a life (as in earlier monastic experiences). As Agamben writes, for the Franciscans,

> the traditional juridical idea of the observance of a precept is … reversed. Not only is it the case that the friar minor does not obey the rule, but lives it with an even more extreme reversal, it is life that is to be applied to the norm and not the norm to life.[28]

The fundamental text for the Friars Minor, the Regola Bollata (1223), makes it clear immediately in the first chapter that the "rule and life of the Minor Brothers is this, namely, to observe the holy Gospel of our Lord Jesus Christ by living in obedience, in chastity and without property" [*Regula et vita Minorum Fratrum haec est, scilicet Domini Nostri Jesu Christi sanctum Evangelium observare vivendo in obedientia, sine proprio et in castitate*]. The rule's decisive and perhaps more characteristic element is the total renunciation of all legal property rights, a rejection of the law, which Francis and his followers sustained as essential for living according to the Gospels. And this in many ways represents the most significant legacy of Francis's Rule: the effort to establish a way of life completely free from legal restrictions and worldly authorities.[29]

The renunciation of all forms of property and the law as such placed the Franciscans in conflict with the Papacy, which at that time – facing a growing number of religious movements – tried to normalize and consequently control the novelty of monastic orders bringing them into its juridical ranks. In the debate that sparked between the Church and the Franciscans, what seems to be of most interest to Agamben is the strategy that the Friars Minor has adopted to lay claim to the renunciation of living according to law. To justify the choice of absolute poverty and the logical consequence of the renunciation of law, the Franciscans adopted an economic and

[28]Ibid., 61.
[29]See: Coccia, 'Regula et Vita'.

legalistic argument, delineating a theory of the "use of things" in opposition to property rights, taking the cue from the doctrine of the originary communion of goods, for which property and mundane laws are established with and because the "Fall of Man." As Agamben puts it,

> just as in the state of innocence human beings had the use of things, but not ownership, so also the Franciscans, following the example of Christ and the Apostles can renounce all property rights maintaining, however, the *de facto* use of things.[30]

The highest poverty [*altissima paupertas*], which is the logical consequence of the of a generalisation of the principle of the "use of things," implies the renunciation of all human laws, through the radical affirmation of a pre or post-juridical form of life, akin to that of the state of innocence.[31] However, Agamben notes, this justification is essentially developed by making use of juridical terminology and reasoning, the outcome of which is the paradoxical legal establishment of an extra-juridical life. As a matter of fact, "what the Franciscans [were] never tired of confirming … is the lawfulness for the brothers of making use of goods without having any right to them (neither of the property nor use)."[32]

A fundamental contribution to this debate is the one brought forward by William of Ockham, who implemented the decisive distinction between the "right to use" [*ius utendi naturale*] – possessed by all humans in case of necessity – and the positive or posited right to use [*ius utendi positivum*] – established through a pact or human laws. The absolute poverty characterizing the life of the Friars Minor places them in a state of necessity, and this allows them, to access (legally) the things necessary for living via the natural right to use that necessity grants.[33] As Agamben puts it for Ockham the Friars Minor "have renounced all property and every faculty of appropriating, but not the natural right of use, which is insofar as it is natural right, not renounceable."[34] But, this means that to justify their lawless life, the

> Friars Minor work a reversal and at the same time an absolutization of the state of exception. In the normal state, in which positive law applies to human beings, they have no right, but only a license to use. In the state of extreme necessity, they recover a relationship with the law (natural, not positive) … Necessity, which gives the Friars Minor a dispensation from the rule, restores (natural) law to them; outside the state of necessity, they have no relationship with the law. What for others is normal thus becomes the exception for them; what for others is an exception becomes for them a form of life.[35]

The argument adopted by Ockham – making use of the category of necessity to affirm the liceity of the use of things outside and against the right to property – was not entirely a novel one; it is in fact largely based on a reworking of the principles *in necessitate omnia sunt communia* [in the case of necessity everything is in common], with which medieval jurisprudence used to sustain the permissibility of the violation of property right in specific circumstances (of necessity). Included by Gratian in his *Decretum* – where it

[30]Ibid., 113.
[31]Fusco, *Form of Life*, 37.
[32]Agamben, *Highest Poverty*, 110.
[33]Ockham, *Opus nonaginta dierum*, as cited in Agamben, *Highest Poverty*, 114.
[34]Agamben, *Highest Poverty*, 114-115.
[35]Ibid., 115.

was formulated in this way: *in casu necessitatis omnia sunt communia, id est communicanda* [In the case of necessity all things are common, that means are to be made common] – such a maxim had been used to justify the breach of private property by the poor. Aquinas in this regard could claim that it is not a sin to take something from another in a state of necessity, as "in a condition of necessity, all things are in common"[36] and this is because, in the words of Albertus Magnus, "what is given to the poor it is ours and it is theirs: ours because of *dominium* [positive right] theirs because of a natural law [*iuris naturalis*], which put in common all good in case of necessity."[37]

As Agamben has poignantly noted, here necessity – similarly to a state of exception, of which it is a predecessor – acted as a legal mechanism that allows for the breach of the property right, as sanctioned by positive law, by affirming a natural right to use.[38] Consequently, Agamben argues that by justifying their renunciation of law and embrace of poverty based on necessity, the Franciscans remained embroiled in a legal framework. And this, in his perspective, constitutes the main limitation of the Franciscan proposal (and its eventual failure): by framing and legitimizing their renunciation of law in legal terms, they turned the pursuit of the highest poverty into the result of a juridical strategy.

What kind of rules?

The Franciscan rule implies a substantial normative reversal, from the usual norm – defined in the negative through prohibition and sanctions, to a legal form predicated in the positive to produce a determined form of life. Indeed, as Emanuele Coccia sustained, this rule, rather than merely being prohibitive, is intended to be generative of some good: a way of life modeled on the Gospels, not rooted in the fear of punishment, but in the genuine establishment of a way of life.[39]

As we have seen so far, for Agamben, monastic rules and the Franciscan order in particular "by shifting the ethical problem from the level of the relationship between norm and action to that of a form of life, seems to call into question the very dichotomy of rule and life,"[40] which characterizes the common understanding of legal normativity. In the end, we can think of the law as a "thing" in itself only in its difference from facts, from the life that it must regulate. The juridical sphere is composed of formulae, categories and discourses that, to find efficacy, must be separated and protected – physically and symbolically – as something that *ought to be*. Monastic rules, on the contrary, do not aim at producing obligations or duties to be applied to a fragment of reality: the purpose of their normative content is to produce a *habitus*, or in Agamben's words they "performatively realise the life that they must regulate."[41]

[36] *… in necessitate sunt omnia communia, et ita non videtur esse peccatum, si alicuis rem alterius accipiat propter necessitate sibi factam commune*: Aquinas, *Summa Theologie,* q.66 art. 7

[37] *Illud quod exhibemus miseris, et nostrum est, et suum est: nostrum per dominium, et suum per rationem debiti iuris naturalis, quod in necessitate communicat bona*. Albertus Magnus, *Atisbonensis Episcopi,* 611.

[38] On Agamben's theory of exception see: Fusco, 'Exception, Ficiton, Perfomrativity'; Watkin 'Exceptions there are that are not the Case'.

[39] Coccia, "Regula et Vita".

[40] Agamben, *Highest Poverty*, 72.

[41] Ibid., 69.

How could we make sense of a rule that cannot be distinguished from what it is meant to rule? A potential answer to this question, for Agamben, is offered by what is known in the philosophy of language as "constitutive rule," which is a norm that "[does] not prescribe a certain act or regulate a pre-existing state of things," but "bring[s] into being the action or state of things"[42] by itself. John Searle – the author who developed the more articulated theory of constitutive rules – opposes constitutive rules to regulative rules: the latter regulates "antecendently or independently existing forms of behaviour; for example, many rules of etiquette regulate inter-personal relationships which exist independently of the rules" (i.e., a contract is the legal form of exchange relationships that could happen independently from their legal recognition); the former, on the contrary, "do not merely regulate, they create or define new forms of behaviour."[43] Agamben takes as an example of constitutive rules, the game of chess, for which the pieces we move on the chessboard are not such by their form: they consist of the rules delimiting their possible moves. Here, the rule of chess does not simply prescribe a mandatory conduct but produces specific entities: "a pawn is the sum of the rules for its moves: thus, the pawn does not follow the rule but is the rule."[44] In this sense, the idea of a constitutive rule applies perfectly to the indeterminacy between being and norm that defines monasticism: the fact that the "rule is resolved without remainder into a vital praxis, and this coincides at every point with the rule."[45]

However, Agamben claims that the concept of constitutive rule, "hides a difficulty"[46] that renders it unfit to make sense of the specific relation of immanence between rule and life that is at stake in monastic rules. In the end, it is always possible to formulate constitutive rules as a command, as instructions of use, separated from the actual sphere of existence of what they constitute. As Agamben, in *The Use of Bodies*, puts it:

> the oft-invoked distinction between constitutive rule and pragmatic rule has no raison d'être. Every constitutive rule – the bishop moves in this or that way – can be formulated as a pragmatic rule – 'one cannot move the bishop except diagonally' – and vice versa. The same happens with grammatical rules: the syntactic rule 'in French the subject normally precedes the verb' can be formulated pragmatically as 'you cannot say *pars je*; you can only say *je pars*.' In truth, it is a matter of two different ways of considering the game – or language: one as a formal system that exists in itself (namely, as a langue) and another as a use or praxis (namely, as a parole).[47]

What distinguishes constitutive rules from regulative (or pragmatic) rules and mere commands is in the end their grammatical form, that is their formal existence. It is always possible to make a constitutive rule into a regulative rule by changing their form. True is that constitutive rules "constitute" new realities, but they can do so only by transcending and separating themselves from the relationship they constitute and inform. In the end, rules and norms are such only when they can be identified independently from the praxis they originate from and regulate.

[42]Ibid., 71.
[43]Searle, *Speech Acts*, 33.
[44]Agamben, *The Use of Bodies*, 241.
[45]Ibid.
[46]Ibid.
[47]Ibid., 242.

The normative status of monastic rules and the Franciscan order, in particular, is rendered even more complicated by the absence of a specific related set of sanctions. True is, Agamben notes, that certain monastic rules included penalties, among which the *excomunicatio* [ex-communication] is the most severe, however, he claims "in an epoch when punishments had an […] afflictive character" the monastic rule seems "to suggest that the punishment of the monks had an essentially moral and amendatory meaning, comparable to therapy prescribed by a doctor."[48] Monasticism, in this regard, reverses the relationship between the subject and the norm, which is not anymore defined by fear, but by the desire to follow the rule.[49] While for the traditional juridical model, the law applies to life imposing sanctions, here is the life that applies to the norm in a self-constitutive modality.

Perhaps, it is the sidelining of a proper system of sanctions what characterizes the most the history of the Christian religious orders Agamben retraces in *The Highest Poverty*. This becomes extremely clear in the Franciscan order. In this resepect, he refers to an episode of the life of Francis that from our point of view is particularly indicative: a companion once asked the saint why he did not intervene to correct and amend the decadence of the order, Francis answered firmly that:

> If I cannot convince them and correct their vices with preaching and example, I do not want to become a persecutor to pursue and frustrate them, like the power of this world [*nolo carnifex fieri ad percutiendum et flagellandum, sicut potestas huius seculi*].[50]

This episode is, for Agamben, evidence that "in the tension that Franciscanism installed between rule and life, there is no place for anything like an application of the law to life, according to the paradigm of worldly powers."[51]

Up to this point, we have seen how for Agamben the theory and history of monastic rules, and Franciscanism in particular, offered a series of paradigmatic examples of how to live a lawless life, and according to an unenforceable/inapplicable rule that is lived through and not lived under, that is followed but not imposed. Such rules are alien to the juridical tradition, as they are not coercive, not supported by an articulated system of sanctions and punishment for the infringement of individual acts, and not arranged on a hierarchical sovereign principle or command. True is that they require obedience, which however is not produced under the banner of fear but is accepted as a habit and a form of life. It could be argued, that in the context of the *Homo Sacer* series, the monastic form of life represents paradigmatically the possibility of a renewed form of normativity, which can be fully understood only when placed in relation to Agamben's critique/analysis of the legal tradition.

Force of law

Agamben considers the law pretty much in line with the kind of positivism that qualifies legal normativity as structured upon imperatives and commands supported by a system of sanctions and violent means. As we read in the final section of his *Opus Dei: An Archaeology of Duty* law and religion share the constitutive verbal mode: the

[48]Agamben, *The Highest Poverty*, 31.
[49]Coccia, *Regula et Vita*, 23.
[50]Francesco d'Assisi, *La letteratura francescana*, 109.
[51]Agamben, *The Highest Poverty*, 102

imperative.[52] Such a verbal mode is usually classified among those categories of speech expressing a sense of "obligation or permission, emanating from an external source," from an "authority such as rules or the law."[53] The imperative verbal form – that of commands and rules – implies a dual structure, according to which a given behavior is expected to follow the utterance of the external authority. We could think of a legal norm, thus, as a composition of two elements: a "pattern of conduct represented in imagination and put forward in a text" and the imperative, that is "the impression that this action must or shall be performed" and "the means used to convey this purpose."[54]

Commands, imperatives, and ultimately law's norms, can be defined as such only when possessing an actual force and effect of the reality they are supposed to regulate. As Agamben claims: the imperative form of the command (the "you shall") that defines the "decree of the norm," has a proper sense "only insofar as it takes as its object and assumes onto itself the action of another (who is assumed to have to obey, that is, to execute the command)."[55] A norm without a concrete effectuality, without a correspondence in the actual behavior of its subjects, is in itself void. Indeed, without the presence of a real effect, commands, imperatives and norms, cannot be distinguished from other linguistic formations. "There is in fact no substantial difference," Agamben maintains.

> Between the action expressed on the constative level (" he walks") and the same action carried out in the execution of an order ("walk!"). And moreover, the goal of an action carried out in order to execute an order is not only that which results from the nature of the act, but it is (or claims to be) also and above all the execution of the order.[56]

What makes a command, and a rule is the fact that a corresponding intended behavior is usually and normally followed: their specific coercive nature, which in the case of the law is also independent by the consequences and virtue of the action commanded.

As banal as it seems, a law in the potential, with no coercive force, is an invalid/ineffective law at best, or not law at all at worst. "Coercion in law is so ubiquitous" that, Frederick Schauer argues "may be the feature that, probabilistically even if not logically, distinguishes law from other norms, systems and numerous other mechanisms of social organisation."[57] What differentiates a legal system from other sources of normativity is in the end the existence of institutional instruments enforcing its dictates. As Jacques Derrida puts it, "there is no such thing as law (*droit*) that doesn't imply in itself, a priori, in the analytic structure of its concept, the possibility of being 'enforced,' applied by force"; obviously not all the laws are enforced in the same way or enforced at all, but "there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative."[58]

[52]Agamben, *Opus Dei*, 119.
[53]Palmer, *Mood and Modality*, 10.
[54]Olivecrona, "The Imperative Element in the Law", 794.
[55]Agamben, *Opus Dei*, 84.
[56]Ibid.
[57]Schauer, *The Force of Law*, 98.
[58]Derrida, 'Force of Law', 5–6.

Force is what makes the law something that *must be*; it is what produces the law's authority as something real and effective. However, this essential requirement of enforceability is paradoxically grounded upon the awareness of the radical impotence of law's predicaments. In Rudolph von Jhering's words, the "law without force is an empty name, a thing without reality, for it is the force, in realising the norms of law, which makes law what it is and ought to be."[59] A logical consequence of this is that the force of the law is not embedded in the law's formulations, but is dependent on something external to the text, that is on all those institutions appointed to enforce and apply the law. Legal form and legal force cannot be deduced one from the other. Indeed, Agamben claims, "'force of law,' as a technical legal term, defines a separation of the norm's *vis obligandi,* or applicability, from its formal essence," to the extent that it is formally correct for provisions that do not possess the guise of the law – as in the state of exception – to acquire the force of law.[60] In the same guise, when the legal text is voided of any meaning, what is left of the law's words is nothing other than force: an imperative commanding nothing but obedience. And to the extent that it is force what makes the real effectuality of the law, its ultimate status, to use Agamben's fortunate definition, is that of being "in force without significance."[61]

Sanctions

Systems of law, Agamben states at the end of his *State of Exception* is structurally composed of two fundamental elements: "one that is normative and juridical in the strict sense" – which he calls *potestas* – and "one that is anomic and metajuridical" – defined as *auctoritas*. In this bipolar formation the "normative element needs the anomic element in order to be applied."[62] Although the two elements are substantially heterogeneous, at the moment of the practical (and performative) application of the law (i.e., enforcement, adjudication, law-making, etc.) they enter into a zone of indistinction, without however merging or coinciding perfectly.

However, the concept and practice of law's application, when a decision over a fact is made following the dictates of a pre-established general rule, are for Agamben, the moment in which the irreconcilability of law's force and form becomes explicit. The concept of law's application, he writes, has been put on a

> false track by being related to Kant's theory of judgment as a faculty of thinking the particular as contained in the general. The application of a norm would thus be a case of determinant judgment, in which the general (the rule) is given, and the particular case is to be subsumed under it … the mistake here is that the relation between the particular case and the norm appears as a merely logical operation.

But far from being merely a logical operation, in the juridical sphere, the application of norms involves the passage from two ontologically different sphere: from form to praxis.' A decision on "the concrete case," he goes on "entails a trial that always involves a plurality of subjects and ultimately culminates in the pronunciation of a sentence, that is, an

[59]von Jhering, *Law as a Means to an End*, 190.
[60]Agamben, *State of Exception*, 37–8.
[61]Agamben, *Homo Sacer*, 55.
[62]Agamben, *State of Exception*, 86.

enunciation whose operative reference to reality is guaranteed by the institutional powers."[63] The practical implementation of legal norms is not inherently part of the norms themselves; instead, it relies on external factors, specifically the institutions and mechanisms designated to grant its force. It is the institutional framework responsible for enforcing, applying, and administering the law, through coercive methods, that transform the law's powerless text into authoritative commands. But this means, according to what have seen so far, that what makes a norm into a "norm of law" is its application/enforcement: the decisions and sanctions by authoritative institutions granting law's force and effectivity.

In the book *Karman. A Brief Treaty on Action, Guilt and Gesture*, Agamben expands such arguments through a rather articulated reading of the concept of sanction, as commonly understood in legal theory. "Sanction," he writes "is that part of the text of the law that contains the pronouncement of the punishment that strikes the transgressor."[64] The sanction is the formulation of the legal outcome of a guilty action, which, according to the traditional culpability principle *nulla poena sine culpa* [there is no punishment without guilt], constitutes the necessary presupposition for a sanction to be legally legitimate. But the relationship between "guilt" and "punishment," is a rather complicated and dialectical one. Implicit in the idea that a sanction is applicable only in the presence of guilt, means also "that punishment can be inflicted only in consequence of a certain act, but the fault exists as such only in virtue of the punishment that sanctions it."[65] A more effective phrasing of the culpability principle would be, for Agamben: "there is no guilt without punishment."[66]

The logical but also practical outcome of this argument is that being at fault, and guilt do not exist in themselves but are the primary product of the law: with no law, humans would live in a state of absolute innocence. And this means in turn that the possibility of delivering punishments and sanctions is what determines guilt and crimes, delimiting positively the sphere of the law: "only by presupposing the negative element of the punishment can a norm be sustained positively; but in the end this means that the law consists ultimately of its sanctions."[67] As Agamben puts it, what makes a deed guilty or illicit, therefore, is not a "quality immanent to the act,"[68] but is the existence of a system of norms that makes such a deed sanctionable. It follows then that the criminal act is not, as in its customary view, a breach of the law: to the contrary, "the illicit appears as a condition and not as a negation of the law."[69] However, Agamben, goes on,

> It is not sufficient to say, however, that the law, by means of the sanction, produces crime. It is necessary to add that the sanction does not create only the illicit, but at the same time, by determining its own condition, above all affirms and produces itself as what must be. And since the sanction generally has the form of a coercive act, one can say … that the law consists essentially in the production of a permitted violence, which is to say, in a justification of violence.[70]

[63]Ibid., 39–40.
[64]Agamben, *Karman*, 14.
[65]Ibid., 13.
[66]Ibid.
[67]Fusco, *Form of Life*, 102.
[68]Agamben, *Karman*, 21.
[69]Ibid.,
[70]Ibid., 22.

From this perspective, the law assumes the function of a system of signs whose purpose is the categorization of individual acts as punishable, empowering specific agents and institutions with the authority to coerce others into complying with the law's dictates, via the threat of punishment – which turns out to be nothing other than a form of legal (that is unsanctionable) violence. The subject of law – to be such – remains exposed to legal violence, which to make the law in force cannot but produce bare life.

The end of law

Agamben's more politically oriented works and his critical engagement with the law try to delineate paradigmatically (that is to say, allegorically and not normative) ways of thinking about redemptive/emancipatory practices to deactivate the biopolitical machinery of Western power that is leading humanity towards the catastrophe. A central part of this strategy is the invitation to consider a renewed use of the law detached from violence and sanctions. "The only truly political action," Agamben writes.

> is that which severs the nexus between violence and law. And only beginning from the space thus opened will it be possible to pose the question of a possible use of law … We will then have before us a "pure" law … a word that does not bind, that neither commands nor prohibits anything, but says only itself.[71]

But to the extent that sanctions, violence and coercion are so fundamental for the sustenance of the whole edifice of the law, the image of a law that does not command represents the limit that legal thinking cannot pass. However, as Agamben notes, the fabric of Roman Jurisprudence envisaged a norm without a sanction as a possibility. He refers to the classification offered by Ulpian, according to which the rules of the law can be classified as assuming three main forms:

> A law is perfect that forbids something to be done, and if it has been done rescinds it [*perfecta lex est, quae vetat aliquid fieri et si factum sit, rescindit*]. … A law is imperfect that forbids something to be done, and if it has been done does not rescind it, and imposes no penalty upon him who breaks the law [*nec rescindit nec poenaminiungit ei qui contra legem fecit*] … *A law is less than perfect [minus quam perfecta] that forbids something to be done, and if it is done, does not rescind it, but imposes a penalty upon him who violates the law [non rescindit, sed poenam iniungit ei qui contra legem fecit].*[72]

While admittedly a law without a penalty has hardly existed, Agamben claims recognizing its potential existence is a rather interesting move. "It is significant that Jurists," he writes

> by situating them at the opposite extreme from perfect laws, felt the demand to conceive them as a limit-zone of the juridical sphere, yet still within it. Between these two extremes is situated the greater part of the laws that are less than perfect, because they are not in a position to annul the transgressive act and must for that reason have recourse to a sanction … But it is striking that the culture that transmitted to us the fundamental principles of law linked the sanction, if not to an imperfection, then at least to a lesser perfection of the law. What a law entirely without sanction could be is a problem with which jurists and philosophers should not fail to contend.[73]

[71] Agamben, *State of Exception*, 88.
[72] Agamben, *Karman*, 22–23.
[73] Ibid., 23.

The Highest Poverty and his reading of messianic theology are indeed Agamben's attempt to engage with the idea of law without sanction. The history, philosophy and theology of monasticism, illustrate in this perspective a very particular and structured attempt at living a life according to a transfigured law composed of rules that are lived and not enforced. However, to the extent that sanctions are so fundamental to the law, thinking about the possibility of law without them amounts to crossing the extreme limit of the legal sphere and engaging with the very question of the end of the law. If, as we have seen so far, the real effectiveness of the law is determined by what stands outside of the law's text, in the application of sanctions and the violence through which the law is rendered manifest, what is left after the severance of the nexus of law and violence is an inoperative law that however looks like no law at all. The form of a law made destitute of its violent means is that of words that do "not bind, that neither commands nor prohibits anything, but says only itself"[74]; pure enunciations, to be lived and not followed; habits of a regenerated relationship between language and practice. And in Agamben's vision of this inoperative law, it is the practical sphere of life that become the source of a normativity that cannot be expressed and articulated into an external source of authority: it is the living 'a' life the source of a rule with no actual subject.

The renewed use of the law, for Agamben, thus, is principally a discourse on how to bring the law to its end. In line with his reluctance to offer political recipes and strategies, Agamben carefully avoids discussing how to practically approach such an alternative form of the law. However, a lesson can be drawn from his reading of the Franciscan example: the law is never a neutral technique. Affirming a life outside of the law through legal means and language, as the Franciscans did, cannot but reproduce the same form of legal determinations they tried to escape. The possession of a right to use, although natural and not positive or posited, which places the Friars minor against and outside the law, makes the supposed extra-legality of their condition of use a legal artifice. The *abdicatio iuris* that the condition of use would produce, is a legal operation that helped in the end develop a theory of the use as a natural right, which anticipated and paved the way for the development of the modern theory of rights.[75]

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[74]Agamben, *State of Exception*, p. 88

[75]As famously argued by Villey in *La formation de la pensée juridique modern*. Implicit in Agamben's position is a rejection of all those attempts at rethinking normativity inside the boundaries of the legal tradition and language, such as those developed under the banner of the concept of 'institution' such as: Dardot and Laval, *Common*; Newman and La Torre, *The Anarchist Before the Law;* Esposito, *Institution*.

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